Achieving Justice for Gross Human Rights Violations in Tajikistan

Baseline Study, October 2017

ICJ Global Redress and Accountability Initiative

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BASELINE ASSESSMENT

Despite the fact that Tajikistan's criminal procedure is in law often in line with international fair trial and other relevant guarantees, in practice it does not lead to effective protection of human rights and the system is unable to remedy serious violations such as torture and other ill-treatment which occur systematically in cases of detention of a person. In cases where complaints of torture are submitted, it appears that very few such complaints lead to investigation and prosecution. This impunity for crimes of torture established in national law reinforces the prevalence of torture as a feature of the criminal process. The institutional framework and procedures in the criminal justice system remain largely insufficient to protect the human rights of suspects and defendants. An effective system of prevention of torture and other ill-treatment in detention and remedying violations when they occur is needed to tackle the systematic recourse to their use.

There appear to be a number of contributing factors behind the use of torture and other ill-treatment and the low rates of prosecutions and convictions for such serious violations of human rights. One of these may be the insufficiency of institutional incentives to combat torture and ill-treatment. In particular, the focus on crime clearance rates as the sole most important institutional performance metric and individual performance indicator for prosecutors may impede success in torture investigations and prosecutions, although further research would be needed to confirm or disprove the possible link between the existing performance metric system and the success of investigation and prosecution of ill-treatment. Underreporting of torture allegations (including due to fear of reprisals) may constitute another contributing factor.

The key areas of concern identified in this report, with regard to the combating of impunity, may be summarized as follows:

Lack of a strong legal profession and limited access to a lawyer for alleged torture victims

A lack of unimpeded access to defence counsel of an individual's own choice and to quality legal assistance is conducive to the use of torture especially in the first hours and days of detention. A lack of guarantees for confidential lawyer-detainee meetings does not allow a person to effectively exercise his/her right for qualified legal assistance and to complain about ill-treatment if necessary. Furthermore, institutional weakness of the profession due to various factors including executive interference in the internal affairs of the bar, instances of intimidation of lawyers, as well as the overall low attorney-population ratio are of serious concern in this regard.

Lack of an independent judiciary

The judiciary in Tajikistan lacks independence and often fails to ensure the equality of arms between the defence and State Prosecution. Courts often accord greater value to prosecution statements as compared to submissions of the defence and fail to duly exclude tainted evidence. With heavy reliance by judges on self-incriminating statements made in the first hours of detention, the presumption of innocence remains to a large extent illusory. Besides, courts often demonstrate a lack of interest in inquiring into allegations of torture by defendants and are prone to accept without sufficient scrutiny denial of allegations of torture and ill-treatment by law enforcement agents.

Frequent reliance on torture and ill-treatment

There is a systemic problem of reliance on evidence obtained while a person is held in detention. Courts seem to favour statements made by suspects in detention over those made in an open hearing in court and rely on those

statements in their decisions. A defendant may be convicted entirely on these pre-trial confessions. A lack of mandatory and through inquiry into allegations of torture related to such confessions puts the burden of proof of the use of torture on the victim, who lacks the means and procedures to initiate an inquiry into the allegations. At the same time, any denial of the use of torture is easily taken as true and often no further inquiry is conducted. Such a response to an allegation of torture falls far below the threshold of a prompt and effective investigation into allegations of torture or other serious violations of human rights.

Lack of effective mechanisms for investigation of torture

Complaints of rights violations at the pre-trial stage, including, first and foremost, allegations of torture or ill-treatment are often left un-investigated. This is partly due to a lack of an independent mechanism authorized to effectively enquire into such allegations and conduct an investigation where the allegations are confirmed. Under the current institutional framework, the bodies allegedly responsible for the commission of torture are authorized to conduct an investigation which does not lead to any meaningful investigation of the allegation in practice.

Inadequate punishment

The penalties under the Criminal Code are not commensurate to the seriousness of the crime of torture, with "non-aggravated torture" classed as a medium-gravity offence. In particular, disciplinary sanctions or fines for the use of torture raise concerns as lacking a deterrent effect. Moreover, the applicability of amnesties and pardons to the crime of torture does not properly reflect the absolute nature of the prohibition of torture and opens door to lack of accountability.

Lack of effective remedies for the crime of torture

No effective remedies exist for victims of torture or other serious violations of their rights in detention. While some legal procedures to obtain redress for torture or other violations of human rights by State agents are available in law, in practice they appear to be rarely used. While the law provides for the possibility of awarding compensatory damages, in practice civil actions concerning torture remain extremely rare. Victims are eligible for compensatory damages, but punitive damages and other forms of reparation do not exist under the extant law and therefore cannot be awarded even in cases as egregious as torture or ill-treatment.

Lack of safeguards to prevent the use of evidence obtained through torture or ill-treatment

Despite the presence of provisions prohibiting the use of tainted evidence, these provisions are rarely respected in practice. While in part this is due to the lack of judicial independence, attention also needs to be given to developing better legal safeguards against the use of tainted evidence. In addition, the introduction in the Criminal Procedure Code (CPC) of an absolute prohibition against finding guilt solely based on confessions would likewise serve to strengthen the mechanism against the use of torture and ill-treatment for obtaining confessions.

Absence of judicial appeal from a decision refusing to initiate (or terminating) a prosecution

Precluding access to judicial appeal by allowing prosecutorial appeal only in certain circumstances impedes a judicial review of decisions refusing to initiate or terminating a prosecution. A victim's right of judicial appeal of any decision refusing to initiate or terminating the criminal proceedings, regardless of the decision-making authority, would be required to address the issue.

1 General human rights situation in Tajikistan

The Republic of Tajikistan is a State party to the International Covenant on Civil and Political Rights (ICCPR) and to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1] International law takes priority over domestic law in Tajikistan[2] and international treaties are recognized as "an integral part" of the domestic legal system.[3] Furthermore, the Code of Criminal Procedure of the Republic of Tajikistan (CPC) provides that international treaties shall prevail in case of conflict between the CPC and an international treaty provision.[4]

Institutional problems in the justice system stemming from the Soviet past and the internal armed conflict marked Tajikistan's early years of independence. Soon after the collapse of the former Union of Soviet Socialist Republics (USSR) in 1991, Tajikistan plunged into a civil war,[5] which lasted from 1992 to 1993.[6] After several years of negotiations, including with the involvement of the United Nations Mission of Observers in Tajikistan (UNMOT), on 27 June 1997 a peace agreement was signed in Moscow between the Government of Tajikistan and the United Tajik Opposition.[7] Established in 1994,[8] the UNMOT was said to have completed its mission by May 2000.[9] The official number of losses as a result of hostilities is 57,000 people.[10]

The armed conflict was a factor in impeding establishment of an effective justice system capable of protecting human rights and of providing effective remedies and reparation for their violation. The conflict and its legacy compounded the problems of weak rule of law and of systemic violations of human rights in the justice system, inherited from the Soviet Union and shared by other post-Soviet countries in the region. Together, these factors have led to a situation where the justice system cannot be relied upon to protect against or remedy violations of human rights. The European Court of Human Rights (ECtHR), in *Khodzhayev v Russia*, noted that "the evidence…. undoubtedly illustrates that the overall human-rights situation in Tajikistan gives rise to serious concerns".[11]

In this context, there is a problem of systemic torture and ill-treatment in pre-trial detention, which undermines the integrity of the justice system as a whole. Reliance on torture is entrenched by the tolerance within the justice system for these violations of human rights, and the failure to hold perpetrators accountable. Addressing impunity and lack of effective remedies for torture and other

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[1] Acceded to, respectively, on 4 January 19999 and 11 January 1995.
[2] Constitution of Tajikistan, Article 10.
[3] Ibid, Article 10: "[…] International legal instruments recognized by Tajikistan shall form an integral part of the legal system of the republic. In the event that a national law is incompatible with a recognized [by Tajikistan] international legal instrument, the norm of the international legal instrument shall prevail".
[4] Code of Criminal Procedure of the Republic of Tajikistan (Code of Criminal Procedure), Article 1(3).
[5] National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1*, UN Doc A/HRC/WG.6/12/TJK/1 (2011), para. 3; Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial report submitted by the States parties, Tajikistan, UN Doc E/C.12/TJK/1 (2006), para. 3.
[6] United Nations Mission of Observers in Tajikistan, at URL http://www.un.org/en/peacekeeping/missions/past/unmot/UnmotB.htm.
[7] Core Document Forming Part of the Reports of States Parties Tajikistan, UN Doc HRI/CORE/1/Add.128 (2004), para. 27.
[8] Security Council Resolution 968 (1994).
[9] United Nations Mission of Observers in Tajikistan, at URL http://www.un.org/en/peacekeeping/missions/past/unmot/Unmot.htm.
[10] National UPR report, above note 5, para. 4.
[11] *Khodzhayev v. Russia* (2010) ECHR 659, para. 97.

violations of human rights in pre-trial detention is critical to ending these violations and establishing the basis for an understanding of the need for perpetrators of gross human rights violations to be held to account.

1.1 Torture in Tajikistan

Law and practice in regard to use of torture differ significantly in Tajikistan. While torture constitutes a crime under the Criminal Code of Tajikistan, there exists a "widespread practice of torture of persons deprived of their liberty, including minors" in Tajikistan.[12] The Human Rights Committee recommended "to close gap between practice and law concerning torture".[13] Similarly, the UN Committee against Torture expressed concerns "about numerous and consistent allegations, corroborated by various sources, of routine use of torture and ill-treatment of suspects, principally to extract confessions to be used in criminal proceedings, primarily during the first hours of interrogation in police custody as well as in temporary and pretrial detention facilities".[14]

In a follow up report of 2015 to his mission to Tajikistan, the Special Rapporteur on torture found that torture and ill-treatment continued to be a problem in Tajikistan.[15] He noted that little progress had been made since his previous visit of 2012 and that "torture and ill-treatment continue to take place under similar circumstances to those observed in 2012, particularly during the first hours of detention and interrogation in police custody, in pre-trial detention facilities (SIZO), including those run by the State Committee of National Security and the Department (GKNB), in a number of temporary detention centres (IVS), and in units of the Department of Fight Against Organized Crime (UBOP), which operates under the Ministry of Internal Affairs". [16] In *Dzhurayev*, the ECtHR said in regard to the use of torture that "nothing indicates that the situation has radically improved in Tajikistan over the last two years. On the contrary, the recent reports dating from 2011 and 2012 tend to corroborate a continued practice of torture and other ill-treatment by law-enforcement officers."[17]

Moreover, serious issues exist in seeking remedies when torture is used or in attempts to hold perpetrators accountable. Victims may suffer retaliation for reporting torture and ill-treatment, and as a result often prefer to not report or seek justice. It has been reported that: "Those who do lodge complaints with the prosecutor's office frequently report reprisals and harassment from law enforcement officials to 'persuade' them to withdraw their allegations. This continues to occur despite the 2010 Law 'On State Protection of Participants in Criminal Proceedings' and the State Programme for Protection of the Participants of Criminal Proceedings."[18] The Special Rapporteur welcomed the adoption of the 'Law On State Protection of Participants in Criminal Proceedings' and the 'State Programme for Protection of the Participants of Criminal Proceedings' in November 2012, which aim to protect those who report allegations from reprisals. However, he remained "deeply concerned by reliable reports from civil society

[12] Human Rights Committee, Concluding Observations on the second periodic report of Tajikistan, UN Doc CCPR/C/TJK/CO/2 (2013), para 14.
[13] Ibid.
[14] Ibid, para 9.
[15] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/28/68/Add.2 (2015), p. 10.
[16] Ibid, p. 10. See also p. 2.
[17] *Savriddin Dzhurayev v Russia* (2013) ECHR 375, para. 168.
[18] Amnesty International and Coalition against Torture of Tajikistan, Tajikistan: Torture and other ill-treatment of people deprived of their liberty and deaths in custody, Joint submission to the United Nations Human Rights Committee, for the 108th session, July 8-26, 2013, p. 5, at URL http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TJK/INT_CCPR_NGO_TJK_14620_E.pdf.

that victims of torture typically decide against seeking redress due to fear of reprisals".[19]

The significance of the problem is illustrated by the fact that even discussions with the Special Rapporteur led to retaliation against his interlocutors, which led him to express "deep concern about allegations of reprisals that took place after his visit in 2012 against people who spoke with him or complained about mistreatment. Reprisals constitute an important issue of concern".[20]

As torture and other serious violations of human rights occur in the first hours and days of detention, as noted by the Special Rapporteur,[21] it is important to examine the guarantees which are afforded to persons in this key stage of the criminal proceedings, examined next.

1.2 Rights of persons under arrest or in detention

a) *Rights of persons in detention*

The CPC of the Republic of Tajikistan accords a criminal suspect and an accused a set of rights, including the right to defence[22] and to consult a lawyer[23] from the moment of arrest, which covers the right to private meetings with defence counsel, including before interrogation.[24] This right is echoed by the Law on the Legal Profession, which provides for a lawyer's right "to freely meet his or her client one-on-one, including from the moment of actual arrest, detention in police holding cell, pretrial detention facility or a correctional institution, confidentially without a limit on the number or duration of meetings".[25]

In addition, the accused/defendant has the right to defend him/herself through "all means not deemed illegal" pursuant to the CPC and the law and to have sufficient time to prepare his/her defence;[26] to be assigned defecse counsel free of charge if eligible;[27] to participate in investigative actions conducted at his/her request or that of his/her defence counsel;[28] to have access to records of investigative actions and to submit remarks thereto;[29] and to participate in the judicial hearing to authorize pre-trial detention.[30] The Law of the Republic of Tajikistan on the Procedure and Conditions of Detention of Suspects, Accused Persons and Defendants (Law on the Conditions of Detention) provides for the detained suspect's or accused person's right to "keep on his or her person documents and records of relevance to his or her criminal case or to the exercise of his or her rights and lawful interests, save for documents and records that may be used for illicit purposes or contain classified information".[31]

While these guarantees, though not sufficiently precise or without an effective implementation procedure, might serve as a safeguard against abuse and guarantee a certain degree of participation in the investigation, in practice violations of these safeguards regularly occur. The Human Rights Committee in its Concluding Observations on the second periodic report of Tajikistan under the

[19] Report of the Special Rapporteur on torture, above note 15, p. 13.
[20] Ibid, p. 12.
[21] Ibid, p. 10. See also p. 2.
[22] Code of Criminal Procedure, Article 46(3).
[23] Ibid, Article 46(4).
[24] Ibid, Article 46(4).
[25] Law of the Republic of Tajikistan on the Legal Profession, Article 9.
[26] Code of Criminal Procedure, Article 47(3).
[27] Ibid, Article 47(4).
[28] Ibid, Article 47(4).
[29] Ibid, Article 47(4).
[30] Ibid, Article 47(4).
[31] Law on Procedure and Conditions of Detention of Suspects, Accused Persons and Defendants (Law on the Conditions of Detention), Article 17(1).

ICCPR in 2013 expressed concern at "the failure to apply procedural safeguards immediately after arrest despite the law in place, including access to a lawyer, family members and medical personnel. It was moreover concerned at the lack of systematic oversight of places of detention by organizations independent of the prosecution (arts. 7, 9, 10 and 14)."[32] In addition, the ICJ noted a number of other problems that occur in practice, such as an almost complete denial of confidential meetings between lawyers and their clients,[33] absence of medical examination, [34] as well as others. Moreover, the Human Rights Committee observed that "arrested persons may routinely be detained up to 72 hours prior to being brought before a court".[35]

b) *Pre-trial detention*

Under the current law specific to pre-trial detention, the CPC provides that pre-trial detention must be judicially imposed as a measure to secure the appearance of the accused individual at trial where the minimum custodial sentence following conviction would be two years or longer.[36] In exceptional cases, such as where the person in question is not habitually resident in the Republic of Tajikistan, his/her identity is unknown or he/she has absconded or failed to comply with a previously imposed non-custodial measure to secure appearance, pre-trial detention may be imposed for offences with shorter minimum sentences.[37] Where the individual in question is charged with a crime categorized as grave or especially grave, pre-trial detention may be imposed solely on the grounds of gravity of the alleged offence.[38] In this connection, the Human Rights Committee in its Concluding Observations expressed concern "at the excessive use of pre-trial detention, which is imposed solely on the grounds of the gravity of the crime (art. 9)".[39]

The Law on the Conditions of Detention expressly provides for the right of suspects and defendants to receive visits, including legal and family visits, and to maintain correspondence and to have access to writing utensils. [40] Visits by legal counsel are unlimited in number and duration;[41] visits by family members cannot exceed two per month, with each visit limited to up to three hours in duration; and the law does not specify if the visits are contact or non-contact.[42] With respect to juvenile suspects and defendants, the CPC makes it mandatory to inform the parent or legal guardian of the juvenile concerned in the event that the juvenile is arrested or detained.[43]

As regards a detained suspect's or accused person's meetings with their legal counsel, the Law on the Conditions of Detention provides that such meetings cannot be limited in number or duration.[44] Moreover, such meetings "may be" held in facilities within officials' sight but out of their earshot.[45]

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[32] Human Rights Committee Concluding Observations, above note 12, para 17.
[33] ICJ Alternative Report to the UN Human Rights Committee, 108th Session, submitted June 2013, para. 7, at URL https://www.icj.org/wp-content/uploads/2013/06/Tajikistan-HRCttee108-ICJ-AlternativeReport-LegalSubmission-2013-.pdf.
[34] Ibid, para. 9.
[35] Human Rights Committee Concluding Observations, above note 12, para 17.
[36] Code of Criminal Procedure, Article 111(1).
[37] Ibid.
[38] Ibid.
[39] Human Rights Committee Concluding Observations, above note 12, para 17.
[40] Law on the Conditions of Detention, Article 17(1).
[41] Ibid.
[42] Ibid.
[43] Code of Criminal Procedure, Article 427(4).
[44] Law on the Conditions of Detention, Article 18(1).
[45] Ibid, Article 18(3).

However, the practical implementation of these provisions is problematic. The Special Rapporteur on torture noted "the frequent failure to register detention following arrest within the time frame prescribed by the law, which facilitates the use of torture and ill-treatment with the aim of extracting confessions". [46] Indeed, legal and practical safeguards are most needed in the first hours and failure to register a person arrested serves as one of the main mechanisms to overcome legal safeguards. In its alternative report on the second periodic report of Tajikistan under the ICCPR, the ICJ mentioned that "[d]uring detention prior to registration, suspects are held without the application of legal safeguards such as notification of the family, access to a lawyer or to medical examination, and are therefore highly vulnerable to torture and other forms of ill-treatment".[47] Besides, as the ICJ had noted previously, attempts to have access to a person in detention may be frustrated by making investigators themselves unavailable for contact by lawyers or family members who seek an authorization for access to a person detained.[48] This can lead to incommunicado detention, as seen below.

For example, allegations of incommunicado detention were made in *Aliboeva v. Tajikistan*.[49] In the *Boimurodov* case, the Human Rights Committee noted that "the author's son was detained incommunicado for 40 days. In the absence of any explanation from the State party, the Committee considers that the circumstances disclose a violation of article 9, paragraph 3."[50] Furthermore, the Human Rights Committee in its Concluding Observations on Tajikistan noted that "[d]espite information provided during the dialogue, the Committee remains concerned at reports concerning the abduction and illegal return of Tajik citizens from neighbouring countries to the State party, apparently followed by incommunicado detention and other ill-treatment (arts. 2, 7 and 9)",[51] and called on Tajikistan to "investigate all allegations of abductions and illegal returns of Tajik citizens, and avoid any involvement in such renditions. The State party should also investigate all related allegations of torture, ill-treatment and arbitrary detention, bring perpetrators to justice, and compensate victims."[52] In *Dzhurayev*, the ECtHR noted that "[t]he risk of torture appears to be further increased by a common police practice of incommunicado detention before formally opening a criminal case, and confessions extracted under duress were still reported to be used as evidence in court".[53]

c) *Information on the charge and on the rights of the suspect*

Under Tajik law, the suspect or accused person has the right to be informed of the suspicion from the moment of apprehension[54] or charge,[55] respectively, and to obtain copies of the custody record,[56] arrest warrant,[57] act of indictment[58] and/or authorization of detention.[59]

[46] Human Rights Committee Concluding Observations, above note 12, para 17.
[47] ICJ Alternative Report to the UN Human Rights Committee, above note 33, para. 7.
[48] Ibid, para. 8.
[49] *Kholinisso Aliboeva v Tajikistan*, Human Rights Committee Communication 985/2001, UN Doc CCPR/C/85/D/985/2001 (2005), para. 2.4.
[50] *Abdukarim Boimurodov v Tajikistan*, Human Rights Committee Communication 1042/2001, UN Doc CCPR/C/85/D/1042/2001 (2005), para. 7.4.
[51] Human Rights Committee Concluding Observations, above note 12, para 13.
[52] Ibid.
[53] *Savriddin Dzhurayev v Russia* (2013) ECHR 375, para. 168.
[54] Code of Criminal Procedure, Article 46(4).
[55] Ibid, Article 47(4).
[56] Ibid, Article 46(4).
[57] Ibid, Article 46(4).
[58] Ibid, Article 47(4).
[59] Ibid, Article 47(4).

Jurisprudence of the Human Rights Committee demonstrates the extent to which these guarantees are respected in practice. It should be noted that relevant jurisprudence predates the coming into force of the new CPC.[60] However, the old CPC provided for roughly the same rights of the suspect, albeit with the important difference that it did not specify the moment of apprehension as the moment when these rights begin to apply.[61] In the *Ashurov* case, the complainant stated that "[a]t the time of detention, the author's son was not informed of the reasons, nor was the family told where he was being taken".[62] While in *Sattorova*, the author alleged that her son "was not informed of the charges against him for a long period of time and was only charged one month after arrest"-[63]

While there are no relevant Human Rights Committee decisions since 2010, it appears that any improvements that have taken place since the adoption of the new CPC still fall short of the standard of enjoyment of suspect's rights required under international law. In particular, in its Concluding Observations the UN Committee against Torture expressed concern about "numerous allegations regarding the failure of police officials to keep accurate records of all periods of deprivation of liberty; to register suspects within three hours of arrival at the police station; to adhere to the 72-hour time limit for releasing or transferring suspects from a police station to pretrial detention facilities; and to notify family members of transfers of detainees from one place of deprivation of liberty to another".[64] While not expressly mentioned by the Committee against Torture, failure to promptly register the suspect's detention also implies that the precise moment of apprehension is open to debate, which in turn opens the door to abuse of the suspect's right to be informed of the charge against him/her.

Furthermore, under the law, the suspect and the accused have the right to remain silent and to be informed of this right before the interrogation;[65] to testify in the language he/she speaks natively or has full command of;[66] to be provided an interpreter free of charge;[67] to present evidence;[68] to file motions, including for recusal;[69] to have access to his/her case file;[70] and to appeal acts by the judge, prosecutor and/or investigating authority.[71]

The CPC provisions on the procedure of arrest expressly require that the detaining officer read the arrestee his/her rights, including the right to place a telephone call to a lawyer or family member, to have defence counsel, to remain silent, as well as inform the arrestee of the reasons for his/her arrest and the fact that any testimony provided may be used as incriminating evidence.[72]

Violations of the mandatory requirement to inform the suspect or accused of their rights have been reported, including to the Human Rights Committee. For instance, in *Saidova v. Tajikistan* the complainant noted that her husband "was not informed of his right to legal representation upon arrest. The author was the only family member who was allowed to see him few times. Her husband's lawyer

[60] The current Code of Criminal Procedure entered into effect in 2010.
[61] Code of Criminal Procedure, Articles 48 and 53.1.
[62] *Rozik Ashurov v. Tajikistan*, Human Rights Committee Communication 1348/2005, UN Doc CCPR/C/89/D/1348/2005 (2007), para 2.2.
[63] *Gulrakat Sattorova v Tajikistan*, Human Rights Committee Communication 1200/2003, UN Doc CCPR/C/95/D/1200/2003 (2009), para. 4.2.
[64] Committee against Torture, Concluding Observations on the second periodic report of Tajikistan, UN Doc CAT/C/TJK/CO/2 (2013), para 8.
[65] Code of Criminal Procedure, Articles 46(4) and 47(4).
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Code of Criminal Procedure, Article 94(1).

was not chosen by the victim but was assigned to him by an investigator and appeared only in about mid-March 1999. According to the author, he only met once with Mr. Saidov, during the investigation."[73] In *Sattorova*, the author alleged that after the arrest of her son, he was not represented by a lawyer and was not informed of his rights.[74]

d) *Judicial authorization of arrest*

The reform of the criminal procedure that culminated in the adoption of a new CPC in 2010 brought about the requirement for judicial authorization of arrest. Prior to the reform, prosecutors had the power to authorize arrest.[75] In *Toshev v. Tajikistan*, the Human Rights Committee noted: "that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention, and that it is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9, paragraph 3, and concludes, therefore, that there has been a violation of this provision".[76]

According to the current procedure, where the prosecutor or investigator seeks detention, he/she must file a motion with the judge to this effect, with the judge being required to review the motion within eight hours from its submission.[77] The reviewing judge may:

- Accept the motion and authorize detention on remand;
- Reject the motion;
- Extend the review period by up to 72 hours in the event that additional time is required "to substantiate the need for detention" (the ruling must specify the exact duration of the extension) to allow the investigative body to collect required supporting evidence for detention.[78]

However, as mentioned above, detention as a restrictive measure is sought and approved in a high number of cases. This has highly negative consequences both for the rights of detainees and their ability to defend themselves before the court at a later stage in the proceedings. In its Concluding Observations on Tajikistan, the Human Rights Committee expressed concern "that arrested persons may routinely be detained up to 72 hours prior to being brought before a court, and at the excessive use of pretrial detention, which is imposed solely on the grounds of the gravity of the crime".[79] It its submission to the Human Rights Committee, the ICJ observed that "pre-trial detention continues to be used in an overwhelming majority of cases as the sole measure of restraint, without consideration of less grave and more proportional measures such as bail or home arrest, in contravention of Article 9(3) of the ICCPR requiring that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody'".[80]

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[73] *Barno Saidova v. Tajikistan*, Human Rights Committee Communication 964/2001, UN Doc CCPR/C/81/D/964/2001 (2004), para 2.5.
[74] *Gulrakat Sattorova v Tajikistan*, above note 63, para. 2.5.
[75] Code of Criminal Procedure, Article 90.
[76] *Toshev v Tajikistan*, Human Rights Committee Communication 1499/2006, UN Doc CCPR/C/101/D/1499/2006 (2011), para. 6.5.
[77] Code of Criminal Procedure, Article 111.
[78] Ibid, Article 111(5).
[79] Human Rights Committee Concluding Observations, above note 12, para 17.
[80] ICJ Alternative Report to the UN Human Rights Committee, above note 33, para. 18 with a reference to Organization for Security and Cooperation in Europe, "III Expert Forum on Criminal Justice for Central Asia Final Report", 18 June 2010, pages 7 and 8.

The CPC provides for the general right to challenge detention.[81] More specifically, the CPC provides for the right to appeal the judicial authorization of pre-trial detention to a higher court, whereby the authorization must be appealed within three days following its issuance, and the higher court must review the appeal within three days following its receipt.[82]

It should be noted that the latter right to challenge detention refers only to detention as understood for the purposes of criminal procedural law. With regard to other kinds of deprivation of liberty not related to criminal proceedings, such as involuntary commitment of psychiatric patients, the applicable safeguards are somewhat less clear. Thus, the Law on Psychiatric Assistance permits involuntary commitment only in the event that the patient is assessed by a medical commission and found to pose an immediate risk of self-harm or harm to others,[83] as well as "harm to others' property".[84] The decision to involuntarily commit is subject to mandatory court review, with the requirement that the relevant decision be filed with the court within 24 hours following its adoption[85] and that the court review the appeal within three days.[86] The court decision may be appealed by the patient, his/her legal representative, the management of the mental health facility or the prosecutor within a ten-day period.[87] However, the law does not provide for a mechanism to protect the patient's rights where the patient is incapable of representing him/herself at the judicial proceeding and the legal representative[88] is seen as not acting in the patient's best interest. In other words, the law does not provide for the possibility of involvement of a guardian *ad litem* where there is a conflict of interest between the patient and his/her family or legal guardian (e.g. where the family seeks to have the patient involuntarily committed with a view to taking control over their property).

e) *Conditions of detention*

The Law on the Conditions of Detention provides for the following rights of the detainee:

- Safety and security of person;[89]
- Visitation, including legal and family visits (note that visits by legal counsel are unlimited in number and duration, as noted above; visits by family members cannot exceed two per month, with each visit of up to three hours duration; the law does not specify if the visits are contact or non-contact);[90]
- Correspondence and the use writing utensils;[91]
- Free access to material facilities and healthcare;[92]
- Eight hours of night's sleep, during which time procedural actions requiring the detainee's participation are prohibited,[93] save in cases of "immediate

[81] Code of Criminal Procedure, Article 11(4).
[82] Ibid, Article 111(9).
[83] Law of the Republic of Tajikistan on Psychiatric Assistance, Articles 28 and 30.
[84] Cp. UN General Assembly Resolution 46/119, Principle 16(1), which does not provide for property harm as a permissible ground for involuntary commitment.
[85] Law of the Republic of Tajikistan on Psychiatric Assistance, Article 30.
[86] Ibid, Article 31.
[87] Ibid.
[88] "Legal representative" is defined by Article 2 of the Law on Psychiatric Assistance as "a person representing the psychiatric patient's interests: parent, child, adoptive parent, or legal guardian".
[89] Law on the Conditions of Detention, Article 17(1).
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.

urgency" pursuant to the CPC,[94] which, however, does not define the concept of "immediate urgency";
- Daily walks of at least one hour in duration;[95]
- Use of own bedding and other personal items as listed in the Internal Regulations;[96]
- Practice one's religion so long as external manifestations comply with the Internal Regulations and do not interfere with other detainees' rights;[97]
- Self-directed learning;[98]
- "Polite treatment" by staff; [99] and
- Participation in civil transactions.[100]

Practical implementation of guarantees concerning the conditions of detention is poor. In particular, in its Concluding Observations the Committee against Torture pointed out reports of "lack of hot water supply; inadequate sanitary conditions; poor ventilation; lack of means to dry clothes, which leads to respiratory infections and sickness; lack of personal hygiene products; and inadequate food and health care", as well as "[u]nnecessarily strict regimes for inmates serving life imprisonment, who are reportedly confined in virtual isolation in their cells for up to 23 hours a day in small, airless cells; do not have access to lawyers; are only permitted visits by family members once a year; and are denied various activities in prison". [101] Moreover, in its Concluding Observations on the implementation of the ICCPR, the Human Rights Committee expressed concern about "the number of violent deaths of persons deprived of liberty" as well as "poor conditions in prison facilities". [102] On a related note, the Concluding Observations of the Committee against Torture stated that "[t]he Committee is concerned at reports from the State party and non-governmental organizations on several instances of deaths in custody, […] and at the lack of effective and impartial investigations into these cases".[103]

1.3 Exclusion of evidence obtained as a result of ill-treatment

Article 88-1 of the CPC of Tajikistan prohibits the use as evidence of information obtained through "torture, cruel treatment, violence, threats, deception or other illegal conduct". [104] Moreover, it requires that, in the event that evidence appears to be tainted, the investigator, prosecutor or court take action within the scope of their respective powers to ensure that the alleged perpetrator is brought to justice. [105] In addition, the provisions of the CPC pertaining to accelerated proceedings (which require admission of guilt as a precondition) impose on the court the obligation to verify that the admission of guilt has not been coerced.[106] These provisions are in line with Article 15 of the CAT.[107]

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[94] Code of Criminal Procedure, Article 171(2).
[95] Law on the Conditions of Detention, Article 17(1).
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Committee against Torture Concluding Observations, above note 64, para 14.
[102] Human Rights Committee Concluding Observations, above note 12, para 9.
[103] Committee against Torture Concluding Observations, above note 64, para 10.
[104] Code of Criminal Procedure, Article 88-1.
[105] Ibid, Article 88-1(3).
[106] Ibid, Article 310(1).
[107] Convention against Torture, Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

In addition, the CPC provides for the possibility of audio- and video recording interrogations and witness interviews both as a result of the investigator's decision or the interrogated/interviewed person's request.[108] In doing so, the CPC requires that the entire interrogation or interview be taped.[109] However, such recording is not mandatory. The Special Rapporteur on torture thus noted in his report on his 2012 mission to Tajikistan that "[a]lthough under article 201 (1) of the Code of Criminal Procedure interrogations may be audio- or video-recorded upon request, the investigator may deny the recording of interrogations if the case is considered confidential"- [110] The Special Rapporteur welcomed the proposal of the Office of the Prosecutor General to install video cameras in all investigators' offices to curb any "illegal action by investigators", though at the time of the visit, the proposal had not been implemented.[111] It is not clear whether measures have been taken to address the Special Rapporteur's recommendation.

Still, in practice, courts routinely fail to exclude evidence obtained by torture and other ill-treatment. The Special Rapporteur mentions that "in practice, judges tend to admit evidence obtained by unlawful means including torture, other ill-treatment, and psychological pressure. The Special Rapporteur has not heard of any case in which courts have excluded unlawful evidence, despite numerous allegations by defendants of torture and ill-treatment. […] It has further been reported that serious inquiries into such allegations, including questioning and investigation of officers, are rarely conducted."[112]

The ICJ has previously reported in regard to Tajikistan that "[j]udges routinely disregard allegations that 'confessions' have been obtained by unlawful means, including under torture, ill-treatment or coercion. The failure to consider these allegations is usually on grounds they were not raised in previous stages of the process, or due to the lack of conclusive evidence to prove that torture or other forms of ill-treatment were committed, such as the absence of medical reports." [113] Moreover, allegations of torture or ill-treatment are sometimes considered by courts as "attempts to avoid responsibility" on the part of an accused or to "discredit law enforcement bodies", a position alluded to by Tajikistan in its Second Periodic Report.[114]

Moreover, while the CPC includes a general prohibition of admissibility of tainted evidence,[115] a mechanism of action in cases where evidence obtained through torture or ill-treatment is presented in court does not exist. In particular, it is unclear what steps should be taken by judges where evidence appears to be tainted beyond the general requirement in Article 88-1(3) of the CPC to take "action within the scope of [the court's] powers". Moreover, the law contains no express provisions enabling defence counsel to seek recourse where the court fails to exclude tainted evidence.

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[108] Code of Criminal Procedure, Article 201(1): "By the investigator's decision the interrogation of the defendant or suspect, or the interview with the witness or victim may be audio- and/or videotaped. Audio- and/or video recording may also be done at the request of the defendant, suspect, witness or victim".

[109] Code of Criminal Procedure, Article 201(3): "Audio and video recording shall include the information provided for by the Article 172(2) and (3) of this Code, as well as the entire interrogation or interview Audio or video recording of a part of the interrogation or interview, or repeat of the statement given specially for record shall not be permitted".

[110] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN Doc A/HRC/22/53/Add.1 (2013), para 21.

[111] Ibid, para 21.

[112] Report of the Special Rapporteur on torture, above note 15, pp. 9-10.

[113] ICJ Alternative Report to the UN Human Rights Committee, above note 33, para. 22.

[114] Second Periodic Report of Tajikistan, UN Doc CCPR/C/TJK/2 (2011), para 112.

[115] Code of Criminal Procedure, Article 88-1.

Human Rights Committee jurisprudence refers to instances of courts acting "in an accusatory manner", wilfully ignoring facts such as confessing guilt under duress, as, for instance, was the case in *Toshev v. Tajikistan* where the allegations were not considered by the court and further objections to the content of the transcript of the hearing were ignored by the Supreme Court[116]

1.4 Presumption of innocence

The principle of presumption of innocence is enshrined in Tajikistan law,[117] with the consequent obligation under the CPC for the court to give the defendant the benefit of doubt: "*All doubts about the guilt of the accused, which can not be eliminated in the manner established by this Code, are interpreted in favour of the accused*".[118] In practice, courts often fail to respect the presumption of innocence, as again demonstrated by the jurisprudence of the UN Human Rights Committee. For instance, in *Ashurov v. Tajikistan* the Committee considered that "Ashurov was not afforded the benefit of this doubt in the criminal proceedings against him. In the circumstances, the Committee concludes that his trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2".[119] In particular, the Human Rights Committee pointed out that "Ashurov's presumption of innocence, protected by article 14, paragraph 2, was violated, because during the second trial on 13 October 2003, the presiding judge commented that 'he would be found guilty in any event'. That the main prosecutorial evidence - i.e. the match between the fingerprints collected at the crime scene and those of the author's son - had been forged by the expert upon pressure from the investigator, was recognized by the State party's authorities themselves in February 2004."[120] In this case, the complainant claimed that "his son [was] a victim of violation of his rights under article 7 of the Covenant, as during the first three days following his detention, he was tortured by the MoI officers to make him confess, in violation of article 14, paragraph 3(g)".[121]

Courts do not in general give serious consideration to challenges to the voluntary nature of confessions, despite the formal existence of the exclusionary rule for evidence obtained by torture or other violation of human rights and the provision in the Law on Police that requires that the same weight be given to statements made by police officer witnesses and victims as to statements made by other witnesses and victims.[122] In the above-cited *Ashurov* case, according to the complainant, "[a]ll challenges to the voluntary character of the confessions [the complainant's son Olimzhon Ashurov] and counsel made in court were rejected".[123]

Moreover, the practice of caging defendants during trial runs counter to the presumption of innocence. As noted by the Human Rights Committee in *Karimov et al. v. Tajikistan*, "Mr. Karimov and Mr. Nursatov claim that the alleged victims' presumption of innocence was violated, as in court they were placed in a metal

[116] *Toshev v Tajikistan*, above note 76, para 3.4.
[117] Code of Criminal Procedure, Article 15: "1. Nobody shall be considered guilty of a crime until the convicting judgment by the court has entered into effect.
"2. The prosecuting attorney shall bear the burden of proof.
"3. The suspect, the accused and the defendant shall not be required to prove their innocence.
"4. Any doubt in respect of the defendant's guilt that cannot be eliminated pursuant to the procedure established by this Code, shall be interpreted for the defendant's benefit.
"5. A convicting judgment cannot be based on assumption".
[118] Code of Criminal Procedure, Article 15(4).
[119] *Rozik Ashurov v. Tajikistan*, above note 62, para 6.7.
[120] Ibid, para 3.4.
[121] Ibid, para 3.1.
[122] Law of the Republic of Tajikistan on Police, Article 23.
[123] *Rozik Ashurov v. Tajikistan*, above note 68, para 3.1.

cage and were handcuffed. A high ranked official publicly affirmed at the beginning of the trial that their handcuffs could not be removed because they were all dangerous criminals and could escape. The State party has not presented any observations to refute this part of the authors' claim. In the circumstances, due weight must be given to the authors' allegations. The Committee considers that the facts as presented reveal a violation of the alleged victims' rights under article 14, paragraph 2, of the Covenant."[124]

The *Saidova v. Tajikistan* case also confirms a violation of presumption of innocence. Specifically, the Human Rights Committee cited the applicant's claims that her husband's "right to be presumed innocent until proved guilty has been violated, due to the extensive and adverse pre-trial coverage by state-directed media which designated the author and his co-charged as criminals, thereby negatively influencing the subsequent court proceedings". It found that "due weight must be given to the author's allegations, and concludes that Mr. Saidov's rights under article 14, paragraph 2, have been violated".[125]

2 Accountability of perpetrators of gross human rights violations

Investigating and bringing to justice the perpetrators of gross violations of human rights is an essential element of the State's obligations to protect rights including the freedom from torture and cruel, inhuman or degrading treatment or punishment. Gross violations of human rights do not only affect individuals. They are detrimental to society as a whole and, unless the perpetrators are held accountable, no closure can be achieved and systemic violations of human rights, such as the use of torture to extract confessions, are more likely to be perpetuated. Accountability of perpetrators can therefore be seen not only as a key element of ending impunity, but also as an essential measure to establish trust in the justice system and in the rule of law.

2.1 International law and standards on accountability

With respect to all human rights, whether those applicable to a State under customary international law, or those taken up through party status to international and/or regional human rights instruments, States have both negative and positive obligations: negative duties *not* to interfere with the legitimate enjoyment of rights (e.g. to respect the non-derogable right of all persons not to be arbitrarily deprived of life); and positive duties to protect rights from interference by others (e.g. to take legislative, administrative, judicial, educative and other necessary measures to guarantee the enjoyment of the right to life by all persons within the State's jurisdiction). The latter positive duty to protect includes the requirement to criminalize acts that constitute gross human rights violations (such as torture and ill-treatment, extrajudicial killings, enforced disappearance and sexual violence) in order to ensure that perpetrators are held to account.

A specific feature of the duty to protect is the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity in this regard provides that: "States shall undertake *prompt, thorough, independent and impartial investigations* of violations of human rights and international humanitarian law and take appropriate measures

[124] *Makhmadim Karimov, Aidamir Karimov, Amon Nursatov, Saidabror Askarov, Abdumadzhid Davlatov and Nazar Davlatov v. Tajikistan*, Human Rights Committee Communications 1108/2002 and 1121/2002, UN Doc CCPR/C/89/D/1108 & 1121/2002 (2007), para 7.4.
[125] *Barno Saidova v. Tajikistan*, above note 73, para 6.6.

in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are *prosecuted, tried and duly punished*" (emphasis added).[126] In the transitional justice setting it is important to recall that, while truth commissions or similar mechanisms are an important aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights.[127]

The duty to investigate and hold perpetrators to account requires that investigations be undertaken by independent and impartial investigating authorities: independent of those suspected of being involved, including of any institutions impugned; and impartial, acting without preconceptions, bias or discrimination.[128] For example, investigations into allegations made against security and military forces should be undertaken by an independent commission of inquiry, comprised of members that are independent of any institution, agency or person that may be the subject of investigation.[129] Furthermore, such investigations must be thorough and effective. This requires adequate capacity and resources to be provided to investigating authorities. In the context of extrajudicial killings, and applicable also to other investigations into gross violations of human rights, the revised Minnesota Protocol sets out various recommendations on the practical implications of the need for thorough and effective investigations.[130] The Updated Principles also recall that investigations must be prompt, reflecting the requirement that the duty to investigate is triggered as soon as authorities become aware of allegations of gross human rights violations, regardless of whether a formal complaint has been made.[131]

Where prompt, thorough, independent and impartial investigations conclude that there is a prima facie case that an offence(s) constituting gross human rights violations has been committed, several consequences follow. Alleged perpetrators must be made subject to prosecution, involving all persons allegedly responsible, including superiors, by proceedings that adhere with international fair trial standards.[132] In the context of unlawful killings, the Human Rights Committee has clarified that this means that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".[133] Where a

[126] Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005).
[127] See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.
[128] In the context of the investigation of extrajudicial killings, for example, see ICJ, *Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction* (2015), pp. 134-138. See also ICJ, *Practitioners Guide No 7: International Law and the Fight Against Impunity* (2015), especially Chapter V.
[129] For example, see: Human Rights Committee, Concluding Observations: Sri Lanka, UN Doc CCPR/C/79/Add.56 (1995), para 15; and *Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (United Nations, 2016) – Minnesota Protocol, Principle 11.
[130] Minnesota Protocol, ibid, Principles 12-17. See also: ICJ Practitioners Guides No 7 and 9, above note 128; and the UN Manual on the Effective Investigation and Documentation of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (United Nations, 2004).
[131] See, for example, ICJ Practitioners Guide No 7, above note 128, p. 135.
[132] See, for example: ICJ Practitioners Guide No 7, above note 128, especially Chapter VI; Minnesota Protocol, above note 129, para 1; and UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29.
[133] Draft General Comment No 36, ibid, para 29.

prosecution leads to conviction, the punishment imposed must be commensurate with the seriousness of the crime.[134]

Ensuring the accountability of perpetrators of gross human rights violations also forms key elements of the right of victims to effective remedies and reparation. In the case of extrajudicial killings, for example, the Human Rights Committee has explained that the duty to investigate, prosecute and punish arises from the obligation of States parties to the ICCPR to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.[135] Reparation includes the right to satisfaction and guarantees of non-repetition. In the context of accountability, satisfaction incorporates two key elements: "justice" through prompt, thorough, independent and impartial investigations that lead to judicial and administrative sanctions against perpetrators; and truth, involving the verification and full and public disclosure of facts.[136] Guarantees of non-repetition are likewise geared towards the combatting of impunity and adopting measures to prevent the commission of further acts amounting to gross violations of human rights.[137] Further elements of the right of victims to effective remedies and reparation are considered in part 3.3 of this report.

2.2 Criminalisation of and criminal responsibility for torture and ill-treatment

Torture is specifically criminalized by the Criminal Code of Tajikistan. Article 143(1) defines torture as "intentional infliction of physical and/or mental suffering by or at the instigation of or with the consent or acquiescence of the official conducting criminal inquiry or preliminary investigation, or another public official, for the purpose of obtaining from the tortured individual or a third person information or a confession, punishing him or her for an act he or has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind". Aggravated torture is provided for in cases of repeat commission of torture, commission by a group, in respect of a woman known to be pregnant, an individual known to be juvenile or disabled, or torture that results in serious or extremely serious injury or death of the victim.[138]

Overall, the definition of torture under the Tajik law is consistent with that given in the Convention against Torture, which was welcomed by the UN CAT Committee.[139] Still, there is room for further improvement of the Criminal Code provisions criminalizing torture, specifically insofar as the sentencing norms are concerned, to ensure better deterrence.[140]

Under the Criminal Code, non-aggravated torture is punishable by "a fine of 365 to 912 nominal units or prohibition to hold specified positions or conduct specified activities for up to five years, or deprivation of liberty from two to five years with

[134] See, for example, ICJ Practitioners Guide No 7, above note 128, pp. 217-222.
[135] Draft General Comment 36, above note 132, para 29. See also International Commission of Jurists, *Practitioners Guide No 2: The right to a remedy and to reparation for gross human rights violations* (2007), chapters IV and VIII.
[136] See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its resolution 60/147 (2006), paras 3(b), 4 and 22(b) and (f); and ICJ Practitioners Guide No 2, ibid, chapters V and VII(IV).
[137] See, for example: Draft General Comment 36, above note 132, para 29; Basic Principles and Guidelines on the Right to a Remedy and Reparation, ibid, para 23; and ICJ Practitioners Guide No 2, above note 135, chapter VI.
[138] Criminal Code of the Republic of Tajikistan (Criminal Code), Article 143(1)(2).
[139] Committee against Torture Concluding Observations, above note 64, para. 6.
[140] Ibid.

a prohibition to hold specified positions or conduct specified activities for up to three years".[141] Aggravated torture is punishable by "deprivation of liberty for five to eight years with a prohibition to hold specified positions or conduct specified activities for up to five years",[142] or, in especially egregious cases (i.e. torture that has resulted in grave bodily injury or death), by "deprivation of liberty for ten to fifteen years with a prohibition to hold specified positions or conduct specified activities for up to five years".[143]

Notably, both amnesty[144] and pardon[145] are applicable in cases of torture convictions, since Tajikistan's Criminal Code does not provide for exemptions from the right to amnesty or pardon,[146] essentially making pardon a matter of absolute presidential discretion;[147] while amnesty can be granted to any group of persons provided the legislature secures sufficient votes to pass a law to this effect.[148] Besides, the President of the country has the power with respect to all offences, including torture, to commute the sentence or spare the convicted individual of the sentence in its entirety or of the remaining balance thereof, and by law has the power to wipe out the convicted individual's criminal record.[149]

The practice of granting relief from accountability in this way opens doors for impunity and is irreconcilable with the absolute nature of the prohibition of torture. The Committee against Torture stated it was "deeply concerned that the 2011 Law on Amnesty grants a rather wide discretion to prosecutorial bodies to commute, reduce or suspend sentences of persons convicted of torture".[150] It recommended that Tajikistan "ensure that the Law on Amnesty contain clear provisions stipulating that no person convicted for the crime of torture will be entitled to benefit from amnesties, and that such prohibition is strictly complied with in practice".[151]

2.3 Disciplinary and administrative responsibility of law enforcement actors

In Tajikistan, disciplinary sanctions are often resorted to instead of criminal prosecution for alleged acts of torture and ill-treatment. In this connection, the Special Rapporteur on torture noted that he "heard that police officers and other law enforcement authorities are typically subjected to disciplinary sanctions as a response to allegations of torture and ill-treatment, rather than prosecution".[152]

According to Tajikistan's Law on Police, "[w]here a police officer commits an unlawful act, abuse of office, exceeding official authority or neglect of duty, the said officer shall face disciplinary, pecuniary, administrative or criminal liability".[153] The police disciplinary code does not detail specific disciplinary

[141] Criminal Code, Article 143(1)(1).
[142] Ibid, Article 143(1)(2).
[143] Ibid, Article 143(1)(3).
[144] Ibid, Article 82.
[145] Ibid, Article 83.
[146] Ibid, Articles 82 and 83.
[147] Ibid, Article 83(1): "Pardon is granted by the President of the Republic of Tajikistan in respect of a specific person".
[148] Criminal Code, Article 82(1): "Amnesty is granted on the basis of a law of the Republic of Tajikistan in respect of a group of persons not specified by name".
[149] Criminal Code, Article 83(2): "A decree of pardon may fully or partially remit the main or ancillary penalty, or else remit the remaining balance of the sentence or commute the penalty, or else remove the conviction"; and Article 84(2): "A person shall be deemed to not have a criminal record a) in the event that an amnesty or pardon has been granted in his or her respect, from the day the relevant act becomes effective".
[150] Committee against Torture Concluding Observations, above note 64, para. 7.
[151] Ibid.
[152] Report of the Special Rapporteur on torture, above note 15, p. 12.
[153] Law of the Republic of Tajikistan on Police, Article 36: "Where a police officer commits an unlawful act, abuse of office, exceeding official authority or neglect of duty, the said

misconduct, leaving it largely at the discretion of the superior in command what to consider a disciplinary misconduct.[154] While the types of disciplinary action (reprimand, record of a demerit, record of a major demerit, administrative detention for up to ten days, forfeiture of the badge of honour, demotion, or dishonourable discharge) are listed in the disciplinary code,[155] the code does not include specific guidelines as to the applicability of the listed penalties in specific contexts. The only exception concerns the disciplinary action of dishonourable discharge, the grounds for which (albeit vague, due to the lack of a clear definition of a "disciplinary default") are provided for by the Law on Police.[156] There is no disciplinary sanction of suspension without pay, which may impede the capability of the police bodies to conduct proper and fair investigation in situations where the allegations against a police officer are sufficiently serious to warrant dishonourable discharge or criminal action, and investigation is likely to require substantial time.

Moreover, the code does not spell out any procedural rules and includes no safeguards to protect police officers against undue pressure or retaliation by their superiors. In this context, even though the Law on Police expressly provides that "where the order issued by a superior or an authorized official blatantly contradicts the law, the police officer must follow the law",[157] given the arbitrary nature of the disciplinary liability system and the lack of appropriate safeguards, rank-and-file police officers are unlikely to follow the letter of the law for fear of retaliatory action.

On a positive note, a draft Law on Police[158] spells out in significantly more detail the specific duties of police officers. If the Bill is enacted, the concept of neglect of duty should become clearer. Still, the extant police disciplinary code (Disciplinary Rules and Regulations of the Internal Affairs Bodies of the Republic of Tajikistan) does not include specific provisions detailing disciplinary defaults and applicable disciplinary actions, nor does it include a clear disciplinary procedure with appropriate due process safeguards, and it would need to include specific provisions to this effect to ensure consistent, predictable and fair application in accordance with the principle of legality.[159]

The administrative liability of police officers with respect of administrative offences committed in official capacity is subject to regulation by the legislation and regulations on police.[160] That said, the Code of Administrative Offenses does

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officer shall face disciplinary, pecuniary, administrative or criminal liability pursuant to the procedure established by the legislation of the Republic of Tajikistan.

"Where a police officer encroaches on the rights and/or interests of citizens, businesses, institutions or organizations or causes harm, the relevant police department shall take due measures to vindicate the said right and, if requested by the citizen in question, to give public apology. Financial harm caused shall be compensated in accordance with the civil legislation".

[154] Disciplinary Rules and Regulations of the Internal Affairs Bodies of the Republic of Tajikistan, approved by the Regulation of the Government of Tajikistan No 424 of September 7, 2006.

[155] Ibid, para 20.

[156] Law of the Republic of Tajikistan on Police, Article 19.

[157] Ibid, Article 24.

[158] Draft Law of the Republic of Tajikistan on Police, available (in Russian) at URL http://mvd.tj/index.php/ru/pajomkho/2-uncategorised/11678-proekt-zakon-respubliki-tadzhikistan-o-politsii.

[159] International good practice examples may be used a source of inspiration. For example, the Code of Professional Conduct Regulation of the police in British Columbia, Canada, can be recommended as a source of good practice, available at URL http://www.qp.gov.bc.ca/police/r205_98.htm#5.

[160] Code of Administrative Violations of the Republic of Tajikistan, Article 30(2) ("Officers of the internal affairs bodies, bodies of the Drug Enforcement Agency under the President of the Republic of Tajikistan, law enforcement departments of the bodies of the State

not contain any provisions of specific relevance to rights violations at the pre-trial stage.

2.4 Liability for conduct that does not constitute torture

As far as the liability for violations of the provisions concerning the rights of suspects and the accused at the pre-trial stage, the Law contains a general norm stipulating that "natural and legal persons shall bear liability for violations of this Law in accordance with the legislation of the Republic of Tajikistan".[161] At the same time, the Criminal Code criminalizes a number of acts that may in principle cover certain prohibited conduct as per the Law on the Conditions of Detention.

For instance, unlawful refusal to provide to an individual "documents or other content of direct relevance to his or her rights and freedoms and collected pursuant to an established procedure" constitutes a criminal offence[162] and may potentially apply to cases where a defendant is refused access to his/her case file. Likewise, the crime of unlawful rejection by a State body of an individual complaint or persecution of the complainant in connection with the complaint[163] may apply where a detainee is prevented from reporting human rights violations by the detention facility or suffers retaliation. Though being rather vague and potentially too broad for this purpose, the crimes of abuse of office,[164] failure to perform official duty[165] and exceeding official authority[166] may also be triggered in certain cases involving evidence of criminal suspects' or defendants' human rights violations, as may the crime of forgery of official documentation[167] (e.g. where the suspect or accused person is forced to sign off on a false confession).

2.5 Prosecution of the crime of torture

a) *Initiation of prosecution*

With regard to initiating criminal proceedings, the CPC distinguishes between private, private-public and public prosecution offences depending on the gravity and "character" of the offence.[168] While private and private-public prosecution offences are investigated following a complaint of the victim or his/her representative,[169] in cases involving public prosecution offences the proceedings are initiated by the prosecutor.[170] In the case of private and private-public prosecution offences, the proceedings are subject to termination in the event that the victim and the offender reconcile (not the case in private-public cases),[171] although the prosecutor retains the right to lead public prosecution regardless of the victim's wish in all cases.[172]

Torture is not included in private or private-public prosecution categories (the related provisions in the CPC exhaustively enumerate the offences under each

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Financial Oversight and Anti-Corruption Agency of the Republic of Tajikistan, bodies of the correctional service of the Ministry of Justice of the Republic of Tajikistan, customs bodies and other relevant bodies of the Republic of Tajikistan shall be held administratively liable for administrative offenses committed while in official capacity pursuant to legislation and regulations on service in the respective bodies").

[161] Law on the Conditions of Detention, Article 52.
[162] Criminal Code, Article 148.
[163] Ibid, Article 163.
[164] Ibid, Article 314.
[165] Ibid, Article 315.
[166] Ibid, Article 316.
[167] Ibid, Article 323.
[168] Code of Criminal Procedure, Article 24(1).
[169] Ibid, Article 24(2).
[170] Ibid, Article 24(6).
[171] Ibid, Article 24(3).
[172] Ibid, Article 24(3).

category).[173] Torture is therefore classified as a public prosecution offence and is, as such. subject to mandatory prosecution. This means that prosecutorial bodies are required to institute criminal proceedings when sufficient evidence exists to establish the alleged perpetrator's guilt in court.[174] Prosecutors may receive criminal case files from the police, and are also required to follow up on reports of crimes and other illegalities by natural and legal persons.[175] In *Kirpo v. Tajikistan*, the Human Rights Committee recalled that "once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially. It considers that in the circumstances of the present case, the facts as presented by the author and which are uncontested by the State party reveal a violation, by the State party, of the rights of the author's son under article 7 and article 14, paragraph 3 (g), of the Covenant."[176]

However, criminal investigation and prosecution in response to torture allegations remain infrequent. The Special Rapporteur on torture notes that he "has been unable to obtain exact data on the numbers of completed investigations, prosecutions and convictions from the Government since his previous visit. For instance, the Government reported to the Human Rights Council that in 2012, 22 complaints of torture were registered. It was reported that only seven criminal investigations were concluded and submitted to courts; that one criminal case was suspended, and that investigations were ongoing in another four cases. According to statistics from the Ministry of Internal Affairs, 61 complaints were registered in relation to torture and other ill-treatment in 2012, while the Ombudsman reported that in 2012 he received 11 complaints about torture and other ill treatment. The Prosecutor General's Office stated that 16 complaints were registered in 2013, and 7 in the first half of 2014."[177] The Special Rapporteur noted that civil society typically reported higher number of complaints than the Government.[178] For instance, NGOs and lawyers in Tajikistan report having registered 137 complaints about torture and other ill-treatment between 2011 and 2013 and 26 in 2014, whereas they report that fewer than ten of these allegations appear to have been properly investigated.[179]

According to the annual report of the Ombudsman of Tajikistan for 2015, in 2015 the Prosecutor General's Office received 21 complaints alleging torture or ill-treatment.[180] In 2015, according the Ombudsman's report, the NGO Coalition against Torture received 42 reports alleging torture.[181] The Coalition Against Torture reported of 45 complaints about cases of torture in 2015.[182] At the same time, the Ombudsman's office received a total of five and nine complaints in 2015[183] and in 2016 respectively.[184]

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[173] Ibid, Article 24(6).
[174] Ibid, Article 24(6).
[175] Constitutional Law of the Republic of Tajikistan on Prosecutorial Bodies of the Republic of Tajikistan, Article 12: "Prosecutorial bodies pursuant to the procedure established by the law shall review reports, complaints and other communications by citizens and legal persons concerning alleged violations of the law and take measures to rectify the violations. Decisions made by the prosecutor shall not impede the exercise of the right of the person concerned to seek appropriate remedy through court".
[176] *Nadezhda Kirpo v. Tajikistan*, Human Rights Committee, CCPR/C/97/D/1401/2005 Communication No. 1401/2005, 3 December 2009, para 6.3.
[177] Report of the Special Rapporteur on torture, above note 15, p. 11.
[178] Ibid, pp. 11-12.
[179] Ibid, pp. 11-12.
[180] 2015 Annual Report of the Human Rights Commissioner of Tajikistan, p. 22, at URL http://ombudsman.tj/rus/wp-content/uploads/2015/12/DOKLAD-2015.pdf.
[181] Ibid, p. 23.
[182] Coalition Against Torture, 'Courts must react to torture allegations', 12 May 2016, at URL http://www.notorture.tj/legal/koaliciya-protiv-pytok-sudy-dolzhny-reagirovat-na-zayavleniya-o-pytkah.
[183] 2015 Annual Report of the Tajik Human Rights Commissioner, above note 180, p.23

Even where a complaint is registered, the authorities appear to be reluctant to ensure that the competent bodies investigate torture charges in general.[185] The 2015 Ombudsman's report notes that "only in one case [out of 21] the complainant's allegations were positively verified [by the Prosecutor General's Office]".[186]

With respect to criminal cases instituted on charges of torture and other offences applicable to rights violations at the pre-trial stage, it is exceedingly difficult to obtain statistics. Where statistical data is available, discrepancies have been reported between the numbers cited by different governmental agencies. The unofficial statistics compiled by civil society actors tend to show higher numbers.[187] The development of a uniform crime reporting system is in its nascent stage in Tajikistan[188] further complicates statistical analysis. On a related note, it bears mention that the Committee against Torture expressed concern about the fact that "the number, location, capacity, and the number of detainees in penitentiary institutions in Tajikistan are considered as 'state secrets'".[189]

It should also be notes that the Committee against Torture expressed concern about the "lack of a complaints mechanism for detainees", observing that "[d]espite the information provided by the State party that complaints of torture or ill-treatment can be submitted in sealed envelopes, they reportedly do not reach the relevant authorities and prisoners often do not have access to pens and paper".[190]

b) *Cessation of prosecution*

The CPC provides for circumstances with respect to dismissing the case or terminating the proceedings, which among others include:

- Expiration of the statute of limitations;
- Amnesty;
- Victim-offender reconciliation in cases of private prosecution offences;
- Absence of the victim's complaint (where prosecution requires it as a ground for initiating proceedings;
- A valid court judgment or a court ruling terminating the proceedings in respect of the alleged offender in connection with the same case;
- A valid decision to terminate the proceedings or to refuse their initiation by the investigating authority or the prosecutor in respect of the alleged offender in connection with the same case.[191]

Moreover, for crimes classed by the Criminal Code as non-grave or of medium-gravity,[192] the CPC permits the court, prosecutor and/or the investigating

[184] 2016 Annual Report of the Human Rights Commissioner of Tajikistan, p. 23, at URL http://ombudsman.tj/rus/wp-content/uploads/2015/12/DOKLAD-20161.pdf.
[185] Report of the Special Rapporteur on torture, above note 15, p. 11.
[186] 2015 Annual Report of the Tajik Human Rights Commissioner, above note 180, p. 22.
[187] Report of the Special Rapporteur on torture, above note 15, p. 11.
[188] Para 1.4 of the Action Plan on Police Reform for 2014-2020 (annex to Police Reform Strategy 2014-2010) mentions the drafting of the Law on the Uniform Crime Reporting System among the 2014 activities.
[189] Committee against Torture Concluding Observations, above note 64, para 14.
[190] Ibid.
[191] Code of Criminal Procedure, Article 27(1).
[192] Criminal Code, Article 18: "1) Depending on the character and the social seriousness of the offense, the acts criminalized by this Code are categorized into non-grave, medium-gravity, grave and especially grave.
"2) Non-grave crimes are intentional acts punishable under this Code by a maximum custodial sentence of two years or less, as well as reckless acts punishable under this Code by a maximum custodial sentence of five years or less.

authority to refuse to institute or to terminate the proceedings where the suspect or accused demonstrates remorse.[193] Non-aggravated torture would be classed as a medium-gravity offence since it is punishable by a maximum custodial sentence of less than five years, therefore making it possible to refuse to institute or to terminate the proceedings in cases of torture allegations.

The decision to refuse to institute or to terminate proceedings is appealable by the victim to the superior court or to the superior prosecutor within five days,[194] but the appeal does not automatically suspend the decision.[195] At the same time, an objection to the cessation of a case by the suspect or accused overrides the decision to terminate prosecution.[196] Significantly, the law is insufficiently precise on what the right of appeal to "the superior court or the superior prosecutor" involves, specifically if a prosecutorial decision may be appealed to a court. This imprecision, which is at odds with the principle of legality, may result in situations where the victim would be effectively deprived of the right of judicial appeal, which presents a major obstacle in cases involving allegations of torture or other offences allegedly committed by State agents.

The insufficiency of institutional incentives to combat torture should also be mentioned in the context of the accountability of law enforcement actors, as it may explain the above-mentioned preference to resort to disciplinary action rather than pressing criminal charges. A possible contributing factor here may be the focus on crime clearance rates as the sole most important institutional performance metric and individual performance indicator. Faced with relentless pressure to show high performance in solving crimes, law enforcement bodies will resort to the means of securing confessions which often violate human rights of defendants protected by national law and international treaties. Therefore, the lack of sufficient institutional incentives against ill-treatment may mean that the chance of torture and ill-treatment reports being properly investigated remains low. Further research would be needed to confirm or disprove the possible link between the existing performance metric system and the success of investigation and prosecution of ill-treatment.

It should be noted that the Police Reform Strategy for 2013-2020 notes the reform of police performance metrics as a priority.[197] The Police Reform Strategy, which also has some language on torture prevention, does not, however, make a connection between performance metrics and combating torture.

3 Access to effective remedies and reparation for victims of gross human rights violations

3.1 International law and standards on remedies and reparation

Every person who is a victim of a human rights violation, whether amounting to a

"3) Medium-gravity crimes are intentional acts punishable under this Code by a maximum custodial sentence of five years or less, as well as reckless acts punishable under this Code by a custodial sentence of over five years.
"4) Grave crimes are intentional acts punishable under this Code by a maximum custodial sentence of twelve years or less.
"5) Especially grave crimes are intentional acts punishable under this Code by a custodial sentence of over twelve years and capital crimes".
[193] Code of Criminal Procedure, Article 28(1).
[194] Ibid, Article 28(3).
[195] Ibid, Article 121.
[196] Ibid, Article 28(2).
[197] Police Reform Strategy for 2013-2020, section Development of a Uniform Crime Reporting System ("Police should be relieved of the heightened responsibility for the sheer numbers of crimes registered and solved, and its performance should be evaluated, first of all, based on the completeness in crime detention and reporting").

'gross' human rights violation or otherwise, has the right to effective remedies and reparation. Broadly speaking, this entails the right of victims to defend their rights, to obtain recognition of a violation(s), to cessation of any continuing violation(s) and to adequate reparation. It requires that rights-holders have equal and effective access to justice mechanisms, including through access to judicial bodies that have the competence to adjudicate and provide binding decisions as to the remedies and reparation to be granted to victims.[198] It should be recalled that, where appropriate, such as in cases of the unlawful killing of a person, a 'victim' includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".[199]

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing gross human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered.[200] Full and effective reparation entails:[201]

- Restitution, aimed at re-establishing, to the extent possible, a victim's situation as it was before the violation was committed;
- Compensation, calling for fair and adequate monetary compensation (including for medical and rehabilitative expenses, pecuniary and non-pecuniary damage resulting from physical and mental harm caused, loss of earnings and earning potential and for lost opportunities such as employment and education);
- Rehabilitation, aimed at enabling the maximum possible self-sufficiency and functioning of the victim, involving restoring previous functions affected by the violation and the acquisition of new skills that may be required as a result of the changed circumstances of the victim resulting from the violation;
- Satisfaction, including through the cessation of any continuing violation(s), justice in the form of the holding to account of the perpetrator(s) of the violation, and truth in the form, amongst other things, of the verification and full and public disclosure of facts, the search, recovery and identification of direct victims and public apology and commemorations; and
- Guarantees of non-repetition, geared towards the combatting of impunity and adoption of measures to prevent the commission of further acts amounting to gross violations of human rights, including through monitoring of State institutions (including civilian oversight of military and security forces), training of law enforcement and other officials, the adoption and dissemination of codes of conduct for public officials, law, policy and institutional reform, the protection of lawyers and human rights defenders representing the interests and rights of victims, and the strengthening of the independence and effectiveness of judicial mechanisms.

[198] See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 136, paras 3 and 11; and ICJ Practitioners Guide No 2, above note 135, especially chapter III.
[199] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 136, para 8.
[200] Ibid, para 15.
[201] See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 136, paras 15-23; and ICJ Practitioners Guide No 2, above note 135, especially chapters V, VI and VII.

3.2 Remedies under the civil law

Civil liability for harm inflicted by State bodies or local self-government bodies or officials thereof is regulated by the Civil Code of Tajikistan (Civil Code), in particular by Article 16, which provides that "[w]here harm is inflicted upon a natural or legal person due to unlawful action or omission of a state body, local state body or a local self-government body, or officials thereof, including by issuance by the state body or a local self-government body of an act that does not conform to the law, the harm is subject to compensation by the Republic of Tajikistan or a relevant body of the Republic of Tajikistan".[202] The law does not exempt any categories of public officials from civil suit in connection with actions committed in official capacity.

As far as the availability of civil remedies is concerned, under the Civil Code one is entitled to civil damages in the event of harm caused by an act or omission of a State body or a local self-government body.[203] This said, damages are calculated as "losses incurred by the injured party or costs required to be incurred to vindicate the violated right, loss or damage to property (real damages) as well as any lost income that the injured party would have earned under usual circumstances had his or her right not been violated (lost earnings)".[204] In other words, Tajikistan's civil law only allows for compensatory damages, while punitive damages cannot be awarded even in cases as egregious as torture or ill-treatment. However, there is a concept of "moral damages", which intends to compensate injured parties for mental distress and applies in cases involving intangible rights.[205] This concept may be applicable to cases related to ill-treatment, although case law that would positively establish that this has indeed occurred in practice has not been found.

The Civil Code also provides for the right to "restoration of the right", which implies the restoration of the *status quo* that existed prior to the act that violated the right in question.[206] Cessation of action may likewise be ordered.[207]

3.3 Reparation in the criminal justice process

There is no specific legislation addressing the issue of rehabilitation of victims of crime, including torture victims, as part of the criminal justice process or as a specialized act outside of the civil code. Other forms of reparation, including court-ordered restitution and compensation, or rehabilitation for torture, are not addressed by the law beyond a general provision in the CPC that provides for the eligibility of parties to criminal proceedings for compensation for any rights violations suffered in the course of the proceedings.[208] The Law on State Protection of Participants in Criminal Proceedings makes protected persons and/or their families eligible for compensation where death or grave bodily injury is found to have resulted from the said individual's participation in criminal proceedings.[209] However, since the law only refers to those included in the programme, it follows that the individual must be enrolled in the State protection programme at the time of his/her demise or injury in order to be eligible for compensation.

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[202] Civil Code of the Republic of Tajikistan, Article 16.
[203] Ibid, Article 16.
[204] Ibid, Article 15(2).
[205] Ibid, Articles 171 and 172(1).
[206] Ibid, Article 12.
[207] Ibid, Article 12.
[208] Code of Criminal Procedure, Article 12(2). See also Article 42(8): "The state guarantees the victim access to justice and compensation for the harm suffered".
[209] Law of the Republic of Tajikistan on State Protection of Participants in Criminal Proceedings, Article 15.

3.4 Rights of victims in the criminal justice process

The term "victim" is used throughout this text in the procedural meaning in accordance with Tajikistan's CPC, and should not be construed as specifically referring to victims of human rights violations, although it may encompass the latter category of individuals where a human rights violation in question constitutes a criminal offence under Tajik law. The CPC of Tajikistan defines a victim as "a person, regardless of his or age, mental or physical state, who has suffered physical harm, economic loss or emotional harm as a result of a crime, or else as a person whose rights and interests have been directly threatened by an attempted crime. A legal person may also be recognized as a victim where the said legal person has suffered non-pecuniary harm or economic loss as a result of a crime."[210] The CPC provides for the right of the victim in the criminal procedure to:

- Present evidence;
- File motions, including motions for recusal;
- Testify in his/her native language or another language he/she has full command of;
- Be provided an interpreter free of charge;
- Be represented in the proceedings;
- Access records of investigative activities conducted with his/her participation and to present remarks thereto;
- With the investigator's authorization, participate in investigative activities conducted at his/her or his/her representative's motion;
- Access the entire case file following the completion of the investigation;
- Participate in court hearings at the trial level;
- Access court hearing minutes and to present remarks;
- Appeal actions by the investigator, prosecutor or the court;
- Appeal the court judgment and/or rulings;
- Be informed of any appeals in respect of the case and to present objections;
- Participate in the judicial review of appeals.[211]

There is no procedural concept of a victim impact statement in Tajikistan law. Since under Tajikistan's criminal procedural law sentencing hearings are not separate from the rest of the trial, victims do not have a special part to play at the sentencing phase and the sentencing decision is made based on the evidence as a whole.

The panoply of rights accorded a victim in criminal proceedings by the extant law could therefore in principle secure meaningful participation of a victim, including a victim of a human rights violation, in the criminal process against perpetrators. However, as mentioned earlier in the report, such procedures are barely initiated and these guarantees often remain theoretical rather than practical. This is especially true with regard to compensation to victims' families in cases involving particularly grave crimes. For example, the Human Rights Committee noted in cases involving "violent deaths of persons deprived of liberty… compensation to relatives is rarely provided", calling on Tajikistan to ensure that not only "all deaths in custody are fully and promptly investigated, that the perpetrators are brought to justice", but also that "compensation is provided to the victims' families".[212]

[210] Code of Criminal Procedure, Article 42(1).
[211] Ibid.
[212] Human Rights Committee Concluding Observations, above note 12, para 9.

4 Independence and accountability of justice actors

4.1 The role of justice actors and institutions in the pursuit of redress and accountability

The equal administration of justice for all without fear or favour is essential to the ability of a State to discharge its obligations to hold perpetrators of gross human rights violations to account and to provide effective remedies and reparation to victims.[213] In turn, the equal administration of justice relies on several factors, including:

- The operation of independent judicial mechanisms comprised of judges whose independence is protected from interference by the executive branch or third parties (including, for example, as a result of dismissal or disciplinary action initiated on the basis of judicial decisions that are unfavourable to the executive, or other forms of interference or intimidation, or threats from police, security forces or private actors);
- The impartial adjudication by judges of cases, which may be negatively influenced, for example, by appointment processes for judges, the internal allocation of cases and/or corruption;
- The accountability of judges and prosecutors, including for corruption or lack of adherence with fair trial standards;
- The competence of judges and prosecutors, for example including as a result of adequate training and knowledge of international law and standards, particularly concerning obstacles to redress accountability and the available means to overcome such challenges;
- The knowledge and skills of lawyers and human rights defenders that act to pursue accountability or redress for victims; and
- The ability of such lawyers and other representatives to act free from external interference, undue influence or persecution.

4.2 Independence of lawyers

An independent legal profession is an essential guarantee of due process, and as such is a cornerstone feature of the rule of law. For the equality of arms to be exercised on a practical level, lawyers must be able to advance the interests of their clients without fear or interference. In this respect, both the safeguards provided under the law and the overall political climate are important.

The 2015 Law on the Legal Profession does not include strong safeguards for the independence of the legal profession, since it makes the national bar directly dependent on the central authorities by putting the Ministry of Justice in charge of the Qualification Commission with broad powers in respect of the bar admission and disbarment.[214] The Qualification Commission is chaired by a Deputy Minister of Justice.[215]

Moreover, the Law on the Legal Profession establishes a transitional period of 15 months (which elapsed in 2016), within which all the attorneys practicing in the Republic of Tajikistan and meeting the criteria specified by the Law were required to reapply for the admission to the bar.[216] The law also mandates a so-called

[213] See, for example: Practitioners Guide No 7, above note 128, pp. 318-325; and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 136, para 12.
[214] Law of the Republic of Tajikistan on the Legal Profession, Article 13(1).
[215] Ibid, Article 13(3).
[216] Ibid, Article 45.

"attestation" to take place on a five-yearly basis.[217] While the provision in question does not imply license renewal and can be interpreted as merely imposing on licensed attorneys a continuous legal education requirement, seen in light of the fact that the "attestation" is conducted by the executive-led Qualification Commission, this procedure carries the risk of misuse as a tool to strip "undesirable" lawyers of their licenses.

The Human Rights Committee in its Concluding Observations expressed concern that "lawyers are harassed for carrying out their professional duties and are subject to external interference, particularly from the Ministry of Justice".[218] It urged Tajikistan to "ensure that the procedures and criteria for access to and conditions of membership of the Bar do not compromise the independence of lawyers".[219] This concern is echoed by observations made by the UN Special Rapporteur on independence of judges and lawyers, who expressed concern that "access to the legal profession is conditioned or controlled by the executive branch, with the legal profession having no role or a very limited role in licensing procedures".[220]

In this regard, the ICJ in its Recommendations on the Independence of the Legal Profession in the Republic of Tajikistan, published in 2016, described specific instances of undue pressure on lawyers, in particular at the September 2015 first Congress of Lawyers, where government representatives demanded that the Union of Lawyers elect a President acceptable to the Tajikistan Government, citing this as "an example of interference with the independence of the legal profession contrary to the UN Basic Principles on the Role of Lawyers".[221]

Following its mission to Tajikistan to discuss the reform of the legal profession, the ICJ recommended that:

- The authorities abstain from interference with the free election of office-holders of the self-regulating profession;
- Amendments to the Law on Advokatura enacted in November 2015 that impede the independence of the legal profession be repealed or replaced;
- The independence of the Qualification Commission from the executive be ensured in particular by making it a body of the Union of Lawyers;
- The requirement that already-qualified lawyers re-apply for qualification or lose their right to practice be repealed; and
- No discrimination, direct or indirect, should be permitted as regards entry into the profession.[222]

Access to quality legal assistance rendered by independent legal professionals is a key factor in ensuring access to justice. Quality legal assistance goes beyond independence, encompassing issues such as availability of guaranteed State-funded legal aid where the interests of justice so require, as well as easy access to legal aid.

Tajikistan continues to experience problems in this regard, in particular, due to non-availability of a guaranteed free legal aid system. The Human Rights Committee in its Concluding Observations noted that "a system of State-subsidized legal aid for persons in need facing criminal charges is not

[217] Ibid, Article 35.
[218] Human Rights Committee Concluding Observations, above note 12, para 18.
[219] Ibid.
[220] Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc A/64/181 (2009), para 31.
[221] ICJ Recommendations on the Independence of the Legal Profession in the Republic of Tajikistan, 2016, p. 7.
[222] ICJ, 'Tajikistan: the ICJ recommends measures to ensure the independence of the legal profession', at URL https://www.icj.org/tajikistan-icj-recommends-measures-to-ensure-the-independence-of-the-legal-profession/.

available".[223] In this connection, it called on Tajikistan to "create a State-subsidized legal aid system for persons in need".[224]

Moreover, Tajikistan has severe shortage of lawyers in proportion to the general population. The statistics cited by the United Nations Development Programme report on *Accessing Justice: Legal Aid in Central Asia and the South Caucasus* show that at the time of the report Tajikistan had the lowest number of practicing lawyers (800) as well as the lowest number of practicing lawyers per unit of population (10 for every 100,000 people) out of the six countries surveyed.[225]

Moreover, as discussed above, Tajikistan lacks viable safeguards of independence of the legal profession, which has a direct impact on the quality of legal aid in general and on the victims' access to justice in particular. Several international civil society reports have noted pressure exerted on the legal profession in Tajikistan over the course of recent years. In particular, the ICJ has expressed concern at arrests of lawyers in connection with the defence of their clients,[226] as well as at long prison sentences for lawyers, which endanger the fairness of the justice system.[227] A particular problem that the ICJ pointed out in its report on the independence of lawyers in Central Asia concerns the pattern of identifying lawyers with their clients or their clients' causes.[228] In this connection, the ICJ mentioned that "[l]awyers who take on the role and responsibility of representing people suspected or accused of committing a crime reportedly receive frequent threats on account of what is seen by law enforcement officials as their 'intransigence', in particular where they allege or represent victims of torture or other ill-treatment".[229]

The problem of corruption among members of the legal profession remains serious in Tajikistan. In particular, the so-called "pocket lawyers", those who act against the interests of their clients in favour of the prosecution or other corrupt reasons, are often not brought to disciplinary responsibility for violating their professional duties as lawyers. In its report on the independence of lawyers in Central Asia, the ICJ observed that "the lack of disciplinary bodies in some of the collegia, raises concerns that many lawyers may not be held accountable for actions carried out in the course of their practice of law which are inconsistent with recognized professional standards. […] Such gaps in accountability may foster the existence of lawyers who act contrary to the interests of their clients."[230] In *Sattorova v. Tajikistan*, the Human Rights Committee observed: "Only one month later, the investigators assigned a lawyer to him, who, according to the author, acted in the best interest of the prosecution. The lawyer did not inform the family of any developments in the criminal case. He also allegedly signed records on several procedural acts that were conducted by the

[223] Human Rights Committee Concluding Observations, above note 12, para 18.
[224] Ibid.
[225] UNDP Regional Centre for Europe and the CIS, Accessing Justice: Legal Aid in Central Asia and the South Caucasus, 2013, p.26, at URL http://www.eurasia.undp.org/content/dam/rbec/docs/LegalAid_SouthCaucasus&CentralAsia.pdf.
[226] See URLs: https://www.icj.org/tajikistan-arrest-of-lawyer-raises-concern-over-reprisals-for-defense-of-clients/; https://www.icj.org/tajikistan-arrest-of-lawyer-is-a-threat-to-the-independence-of-the-profession/; https://www.icj.org/tajikistan-icj-concerned-at-arrest-of-lawyer/.
[227] See URL https://www.icj.org/tajikistan-long-prison-sentences-for-lawyers-endangers-the-fairness-of-the-justice-system/.
[228] ICJ, Independence of the Legal Profession in Central Asia, 'Independence of the Legal Profession in Central Asia', p. 78, at URL https://www.icj.org/wp-content/uploads/2013/09/Independence-of-the-Legal-Profession-in-CA-Eng.pdf.
[229] Ibid, p. 78.
[230] Ibid, p. 47.

investigators in his absence. He was allegedly aware that his client was subjected to beatings but did not take any steps to prevent this treatment."[231]

4.3 Independence of the judiciary

Judicial independence is guaranteed by law in Tajikistan, yet significant challenges remain in guaranteeing its independence in practice. Thus the ICJ in its alternative report to the Human Rights Committee concluded that Tajikistan should "[e]nsure the independence of the judiciary and of individual judges".[232]

The Constitutional Law on Courts of the Republic of Tajikistan provides that justices of the Constitutional Court, the Supreme Court and the High Court of Commerce are elected by the national legislature from candidates nominated by the President of Tajikistan, while judges of other courts are appointed by the President from candidates nominated by the Justice Council.[233] Judges may be dismissed, inter alia, on disciplinary grounds,[234] with the following officials vested with the power to initiate disciplinary proceedings:

- Chief Justice of the Supreme Court in respect of all judges save for the Constitutional Court justices and court of commerce judges;
- Chief Justice of the High Court of Commerce in respect of all court of commerce judges;
- President of the Justice Council in respect of all judges save for Constitutional Court, Supreme Court and High Court of Commerce justices; and
- Chief Judges of regional courts in respect of judges within their respective jurisdictions.[235]

Disciplinary proceedings are conducted by the Qualification Commission, which is vested with the power to decide on dismissal.[236] The Qualification Commission members are elected by judges by majority vote.[237]

The judicial governance body is the Justice Council. It is, however, influenced by the executive, since its chief officials, including the President, First Vice-President and the Secretary of the Justice Council, are appointed and dismissed by the President of Tajikistan.[238]

While there are no public perception surveys on the judiciary in Tajikistan, a retired judge is quoted by a report on the independence of the judiciary to concede that "part of the population is of the opinion that judges are not objective, incompetent, corrupt, that they lack the moral right to determine the fate of people. One must decisively get rid of such judges. There is no place for them in the sphere of justice. But that does not mean that we should diminish the role and significance of the judiciary […] Under the conditions, in which the judges of the Republic find themselves, we cannot eradicate corruption, which happens also with the judicial bodies, and as a result, in this stage, it cannot guarantee protection of human rights."[239]

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[231] *Gulrakat Sattorova v Tajikistan*, above note 63, para. 2.5.
[232] ICJ Alternative Report to the UN Human Rights Committee, above note 33, para 3.
[233] Constitutional Law of the Republic of Tajikistan on Courts of the Republic of Tajikistan, Article 14.
[234] Ibid, Article 18.
[235] Ibid, Article 121.
[236] Ibid, Article 107.
[237] Ibid, Article 106.
[238] Ibid, Article 99.
[239] Rule of Law Platform, Timmermans, Wim Albert, Independence of the Judiciary in the Central Asian States, paras 377-378, at URL http://ruleoflaw.eu/wp-content/uploads/2016/12/161209_Study_Dr.Timmermans_second-edition_November2016_e.pdf.

The report of the UN Human Rights Council's Working Group on the Universal Periodic Review on Tajikistan acknowledged that certain progress had been made as regards judicial independence. In particular, it noted the adoption of the "Judicial Reform Programme for 2015-2017, which constituted the third stage of reforms in the Judiciary, aimed at strengthening the Judiciary and increasing the role of courts in protecting human rights and freedoms and interest of the State, and ensuring the rule of law and access to justice. The adversarial system had been in place as a result of the judicial reforms."[240] Still, in practice the independence of the judiciary remains to be achieved, and Tajikistan was reminded during the Universal Period Review (UPR) of "accepted recommendations of the first review to ensure the independence of the body responsible for the appointment of judges".[241] UPR recommendations have also been made to "[e]nsure the full independence of the judiciary"[242] and to "[t]ake all necessary measures to strengthen the independence of the judiciary and respect for the right to a fair trial".[243]

Moreover, the Human Rights Committee in its Concluding Observations expressed "concern that judges lack security of tenure and other guarantees of independence from the executive, and do not operate as effective checks on prosecutors, and at reports that corruption is widespread in the judiciary".[244] In this connection, it urged Tajikistan "to intensify its efforts in reforming the judiciary and take effective measures to guarantee the competence, independence and tenure of judges, including by extending their tenure, providing for adequate salaries, and reducing the excessive powers of the Prosecutor's Office".[245]

4.4 Other venues to complain about violations of human rights

Another complaint mechanism is the office of the Ombudsman of Tajikistan. The Ombudsman admits complaints regarding alleged human rights violations from any natural person regardless of nationality.[246] To meet the admissibility criteria the complaint has to refer to a decision, act or omission in respect of which an appeal to a judicial or administrative body has already been made but has not resolved the matter to the complainant's satisfaction.[247] The statute of limitations on complaints to the Ombudsman is one year.[248] In the course of investigating complaints the Ombudsman is to be granted unimpeded access to closed institutions. However, the provision regulating such access does not specify whether a prior notification is required or whether a visit can take place at any

[240] UN Human Rights Council, Draft report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/33/11 (2016), para 11.
[241] Ibid, para 86.
[242] Ibid, recommendation 115.78.
[243] Ibid, recommendation 118.35.
[244] Human Rights Committee Concluding Observations, above note 12, para 18.
[245] Ibid.
[246] Law of the Republic of Tajikistan on the Human Rights Commissioner, Article 14(1).
[247] Ibid, Article 14(1): "With the purpose of remedying the violations of human and civil rights, the Human Rights Commissioner shall review complaints by nationals of the Republic of Tajikistan, foreign nationals and stateless persons (hereinafter referred to as "complainants") with regard to decisions or actions (omissions) by state bodies, local self-government bodies in towns and villages (jamoates), public servants, management and officials of institutions, organizations and businesses regardless of the organizational and legal status thereof, which violate human and civil rights and freedoms, and on the condition the complainant earlier appealed the decision or action (omission) in question to a judicial or administrative body, but disagrees with the ruling made".
[248] Ibid, Article 14(2): "A complaint shall be submitted to the Human Rights Commissioner in writing within one year following the alleged violation of human rights and freedoms of the complainant or the day when the complainant learned of the violation".

time of the day or night.[249] It therefore creates a loophole whereby the Ombudsman may in principle be precluded from conducting a visit without prior notification. However, there is no information available on whether this has occurred in practice.

The Ombudsman's annual report for 2015 notes a total of five torture-related complaints.[250] In 2016, the number of torture-related complaints to the Ombudsman's institution totalled nine.[251]

[249] Ibid, Article 12(1): "In the course of conducting an investigation of a complaint or during the conduct of other official duties, the Human Rights Commissioner shall have the right to: (a) Unimpeded access to state bodies, local self-government bodies in towns and villages (jamoates), institutions, organizations and businesses regardless of the organizational and legal status thereof, civic organizations, as well as military barracks, correctional institutions, police holding cells, pretrial detention facilities, migrant and asylum seeker holding facilities, social, healthcare and mental health institutions, as well as other closed institutions, military outfits and institutions located in the territory of the Republic of Tajikistan".

[250] 2015 Annual Report of the Tajik Human Rights Commissioner, above note 180, p. 23.

[251] 2016 Annual Report of the Tajik Human Rights Commissioner, above note 184, p. 23.

ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES

The aim of this report is to provide a baseline assessment of the situation in Tajikistan pertaining to the accountability of perpetrators of gross human rights violations and the access to effective remedies and reparation of victims of such violations; alongside an assessment of the independence and accountability of judges and lawyers and the ability of justice mechanisms and justice actors to provide for accountability and redress. The report is part of the ICJ's Global Redress and Accountability Initiative, currently focused on seven countries (Cambodia, Mozambique, Myanmar, Nepal, Tajikistan, Tunisia and Venezuela) with the aim to combat impunity and promote redress for gross human rights violations. It concentrates on the transformative role of the law, justice mechanisms and justice actors, seeking to achieve greater adherence of national legal and institutional frameworks with international law and standards so as to allow for effective redress and accountability; more independent justice mechanisms capable of dealing with challenges of impunity and access to redress; and judges, lawyers, human rights defenders, victims and their representatives that are better equipped to demand and deliver truth, justice and reparation.

In all regions of the world, perpetrators of gross human rights violations enjoy impunity while victims, especially the most vulnerable and marginalized, remain without effective remedies and reparation. Governments of countries in transition and/or experiencing a wider rule of law crisis often seek to provide impunity for perpetrators of gross violations of human rights, or make no effort to hold them to account, or misuse accountability mechanisms to provide arbitrary, politically partial justice. Yet international law requires perpetrators to be held accountable and victims to be provided with effective remedies and reparation, including truth and guarantees of non-recurrence. This is reinforced by the 2030 Sustainable Development Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice, are based on the rule of law and respect for human rights, and provide for accountability.

Impunity and lack of redress dehumanizes victims and acts as an impediment to the cementing of democratic values and the rule of law. Lack of accountability and claims for justice dominate national debates, frequently leading to a paralysis or reduced functioning of the institutions of the State and detracting from the pursuit of other rule of law and development initiatives. Impunity threatens a nascent democracy by rendering its constitution hollow, weakening its judiciary and damaging the political credibility of its executive. Public institutions often act in ways that bring them into disrepute and undermine the public confidence in them that is required for sustainable transition: through the legislature enacting laws providing for impunity; through law enforcement and the judiciary acting on a selective basis or without independence; and/or through the executive ignoring rule of law based judgments by higher courts. A failure to guarantee redress and accountability has too often also resulted in former structures of power, to the extent that they enjoy impunity, transforming into criminal and hostile elements that may perpetuate violence and conflict.

Methodology, partners and stakeholders

This report is prepared as part of the ICJ's Global Redress and Accountability Initiative to inform the activities of the ICJ in Tajikistan which will take place in the later stage of the project implementation. The report reflects findings of desk research based on consultations with partners in the region, including lawyers and independent experts. In this report, the ICJ made use of various UN reports on Tajikistan, which have been published but under-used by the expert community in the country despite being a valuable resource for identifying key

human rights issues. In particular, the ICJ has identified a number of systemic problems which transpire through the reports and views of the Human Rights Committee as well as other UN organs.

The report is based on an analysis of national legislation in light of international law and standards including reports of UN human rights bodies concerning Tajikistan. The research was informed by the ICJ's previous engagement in the country and in the region, which has included missions, roundtable discussions and interventions concerning the independence of the legal profession and attacks on lawyers.

In particular, in 2013, an ICJ mission visited Tajikistan to advocate for compliance with international standards within the reform of the legal profession that was then being debated.[252] The mission, headed by Egbert Myjer, an ICJ Commissioner and former judge of the ECtHR, included a roundtable discussion with lawyers and lawyers' associations of Tajikistan on the role and independence of lawyers, as well as meetings with representatives of the Government, the judiciary, the Ombudsman, and the National Legislative Centre and NGOs.

The mission's advocacy was based on an ICJ report, *The Independence of the Legal Profession in Central Asia,* published earlier in 2013, which assessed the challenges to the independence of lawyers in Central Asia and the barriers lawyers in the region face in providing effective legal assistance to their clients.[253] The report made detailed recommendations on the protection of lawyers and enhancing their role in the protection of human rights in the region, and on the institutional independence of bar associations across Central Asia, including through qualification procedures, disciplinary systems, self-governance and self-regulation of the profession. In regard to Tajikistan, the report concluded among other things that "Tajikistan [was] the only country of Central Asia where lawyers control access to the legal profession without any participation of the state bodies".[254] This was the case with one part of the profession who organised themselves through independent bar associations, whilst other lawyers operated under licence by the Ministry of Justice. The system has subsequently been changed as a result of recent legislation, which unified the profession but also allowed for executive influence in some aspects of its governance (see section 4.2 above).

In 2015, the ICJ held a roundtable seminar in Dushanbe, Tajikistan, on the independence of lawyers after the reform. Justice Tamara Morshakova, an ICJ Commissioner, former Judge of the Constitutional Court of the Russian Federation, chaired the seminar, and a number of other leading lawyers from the Commonwealth of Independent States (CIS) region participated, bringing relevant comparative expertise.[255] As a result of the discussion, the ICJ published recommendations designed to the independence of the newly established Bar Association (see section 4.2 above).

In November 2016, Tajik Bar Association representatives, including its President, took part in a regional ICJ conference on the independence of lawyers which aimed to facilitate exchange of experience on the governance of the legal profession to ensure its independence. Discussion at the seminar addressed, among other topics, recent developments in regard to the legal profession in

[252] ICJ, 'Tajikistan: ICJ warns of risk to independence of lawyers', at URL https://www.icj.org/tajikistan-icj-warns-of-risk-to-independence-of-lawyers/.
[253] ICJ, 'New ICJ report highlights the challenges faced by the legal profession in Central Asia', at URL https://www.icj.org/new-icj-report-highlights-the-challenges-faced-by-the-legal-profession-in-central-asia/.
[254] ICJ, 'Independence of the Legal Profession in Central Asia', p.23, above note 228.
[255] ICJ, 'Tajikistan: the ICJ holds a round table discussion on the independence of the legal profession', at URL https://www.icj.org/tajikistan-the-icj-holds-a-round-table-discussion-on-the-independence-of-the-legal-profession/.

Tajikistan, including cases of harassment of lawyers and the cases of sentencing of lawyers to overly long terms in prison.[256]

Following consultation with lawyers and independent experts in Tajikistan in 2016, the ICJ identified systemic problems in the criminal justice process as crucial to addressing the problem of impunity for violations of human rights, particularly those occurring in the first hours and days of detention. The present report is informed by these consultations as well as by the ICJ's previous engagement in the country and the Central Asian region as a whole.

[256] ICJ, 'Tajikistan: long prison sentences for lawyers endangers the fairness of the justice system', at URL https://www.icj.org/tajikistan-long-prison-sentences-for-lawyers-endangers-the-fairness-of-the-justice-system/.

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