

A Rule of Law Agenda for Central Asia

GERALD STABEROCK*

Abstract

The article analyses the state of the rule of law in the five former Soviet Republics of Central Asia. The author sets out the *rule of law* as a *rule of rights* contrasted by the lack of checks and balances in the constitutional, legal and judicial framework. The need for reform includes criminal proceedings and an overhaul of the Soviet-style Prokuratura. Penitentiary reform and attempts to establish human rights institutions confirm that progress is possible only so long as it is not perceived as a threat to presidential or executive power.

The analysis concludes that Central Asia still carries most insignia of the Soviet legal legacy. This is both an expression of the missing democratic transition in the region and an impediment to future transition. Political will is required to set an agenda for reform of the rule of law for Central Asia. Otherwise it risks losing contact with law reforms in other parts of the Commonwealth of Independent States as well. A reform agenda should be based on clear benchmarks and politically embedded in a strong international process under the leadership of the Organization for Security and Co-operation in Europe (OSCE). While the challenges are similar, the author warns against treating all Central Asian states identically. The pervasive, systematic and gross human rights violations in Turkmenistan and Uzbekistan require urgent attention by the international community. Finally, the author warns against tendencies to compromise human rights in the fight against terrorism and to accept the security rhetoric of the leaders of the region.

1. The Context of Rule of Law Transition

When the Soviet Union collapsed and released its five Central Asian Republics¹ into independence in December 1991, they constituted for many international observers *terra incognita*. Largely unnoticed by the international community, they gained not only independence, but also became *states in transition*. As with other countries in Central and Eastern Europe this raised expectations of a process of political and economic liberalization with pluralist democracy, the rule of law and the respect for human rights at its heart. Accession to the then Conference on Security and Co-operation in Europe (CSCE) in 1992² brought the formal acceptance of these standards, confirming this common aspiration.

* The author is Co-ordinator of the National Implementation Programme at the International Commission of Jurists (ICJ). The views expressed in this article are in the author's individual capacity and do not necessarily reflect the views of the International Committee of Jurists. This article is based on an earlier conference contribution entitled: 'Transition without the rule of law and human rights?' in *The Illusions of Transition – Which Perspectives for Central Asia and the South Caucasus?*, Graduate Institute of International Studies (IUHEI), CIMERA, Geneva, June 2004, 138-51.

¹ The five Central Asian Republics referred to in this article are Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Turkmenistan.

² The Conference for Security and Cooperation in Europe (CSCE) became the Organization for Security and Cooperation in Europe (OSCE) on 1 Jan. 1995.

However, with the dissolution of the Soviet Union statehood arrived virtually overnight, and therefore, without strong independence or civil rights movements in the region, there has been limited if any overhaul of old institutions, structures and elites.³ Unlike other transition states in Central and Eastern Europe, societal consensus and vision about pluralist democracy and a viable rule of law seem to have been limited. The accession to international processes, such as the then CSCE, have been driven more by the quest for international recognition than by the desire to belong to a group of like-minded states.⁴

Fourteen years into independence it is time to take a closer look at the five Central Asian states and to enquire into their status of transition. In fact, this article argues that the notion of *transition* should be used with great care for Central Asia, as it is likely to create an illusion of transition⁵ which may even trivialize human rights violations if it is used to describe authoritarian states. Transition presumes that the best path to success may be subject to debate, but not its goal and end result. Human rights violations appear less as the result of an intentional policy, and more as *collateral damage* within an imperfect and maybe slow transition process, at the end of which 'everything will be fine'.

Even the most cursory reading of the situation in Central Asia indicates that genuine progress is lacking. The human rights record is generally poor in all five Republics. Democratic structures reach at best a formal level of democracy, with pluralism permitted only so long as it does not reach the threshold of a threat to presidential authority. At the same time, it is important to realize that the five Central Asian states face similar but not identical challenges. The situation is most precarious in the dictatorships of Turkmenistan⁶ – with severe repression of any dissent and an absurd personality cult surrounding its president – and Uzbekistan, with its pervasive and systematic human rights violations which are largely committed under the guise of fighting religious extremism or terrorism.⁷ In these cases the notion of transition sounds like a cynical euphemism for totalitarianism. Tajikistan, on the other hand, has to cope with the specific challenge of two transitions, overcoming communism as well as a subsequent civil war. This has brought the country to the brink of becoming a *failed state*, and the lack of accountability for severe human rights atrocities committed by all sides during the war is an additional burden. As in other conflicts, there has been a considerable brain drain, which has also had a negative effect on the reconstruction and transformation of the rule of law in Tajikistan today. In comparison, Kazakhstan and Kyrgyzstan have seen relative stability and are comparatively more advanced, as witnessed by the numerous legal changes that have been introduced in both countries. On the other hand, it also holds true that just because some countries are relatively more advanced does not mean that they are truly on a path of transition to the rule of law.

³ It may be argued, however, that independence has led to a considerable redistribution of power and positions along ethnic lines.

⁴ Andrei V. Zagorski, 'The new republics of the CIS in the CSCE' in Michael R. Lucas (ed.), *The CSCE in the 1990s: Constructing European Security and Cooperation*, (Baden-Baden: Institute for Peace Research and Security Policy, 1993) 279-90.

⁵ See 'Transition without the rule of law and human rights?' in *The Illusions of Transition – Which Perspectives for Central Asia and the South Caucasus?*, Graduate Institute of International Studies (IUHEI), CIMERA, Geneva, June 2004, 138-51.

⁶ Gerard Stoudmann, 'Turkmenistan, a human rights "black hole"' (2003) 14:2 *Helsinki Monitor* 117-124.

⁷ See Human Rights Watch, 'Uzbekistan, Creating Enemies of the State, Religious Persecution in Uzbekistan' (New York: Human Rights Watch, 2004).

One of the most fundamental elements for successful transition processes in Central and Eastern Europe as well as in those former Soviet Republics that joined the Council of Europe has been the reform of the legal and judicial system.⁸ This article will seek to analyse the key impediments to rule of law reforms in Central Asia. It will do so in particular against the background of other successful transition processes in Central and Eastern Europe. It will try to identify the most important components for a long overdue rule of law agenda for Central Asia.

2. The Rule of Law and Legal Traditions in Central Asia

2.1 The Legal Heritage of Central Asia

Among the most important commonalities shared by the Commonwealth of Independent States (CIS) members are the remnants of their Soviet legal legacy.⁹ While differing in extent and degree, it is true to say that this common heritage strongly affects human rights performance today in each of the five Republics. This legal tradition and culture constitutes a major stumbling block to be overcome in the establishment of the rule of law and the respect for human rights in Central Asia.

As in many authoritarian countries, the function of law in the former Soviet Union was to allow the Government to rule. Law constituted a tool for the Communist Party to implement its policies, but could also be set aside if needed. The extent to which this understanding of a *rule by law* is entrenched in the institutional, legal and judicial system marks the particular challenge affecting legal reform today.

This legal legacy left a positivist legal culture and a legal system dominated by the Prosecutor's Office (Prokuratura), exercising not only traditional criminal law functions, but also 'overall legal oversight' over the whole legal system, overshadowing the judiciary as well.¹⁰ The judiciary was largely dependent, with little prestige, and advocates were weak and state-controlled through a Collegium of Advocates. The criminal justice system followed the principle of being 'effective' with little regard to 'legitimacy'. As a consequence, rights during an investigation and the principle of equality of arms were limited. Convictions were preferably based on confessions as the 'queen of evidence'. Generally, criminal justice and the penitentiary system, in which pre-trial detention was used to *facilitate* the investigation, were considerably militarised. International law, let alone human rights, was considered to be distinct from domestic law. While constitutional freedoms existed under the Constitutions, they were not applied and were largely seen as declaratory principles with little or no bearing on legal reality. Finally, the legal community itself was part of the nomenclature, which may in turn explain some of the opposition to legal reform from within the legal community.

2.2 The Rule of Law as a Rule of Rights

The above understanding of law stands in striking contrast to the modern notion of the rule of law. Internationally, the *rule of law* has been defined in particular by the International Commission of Jurists (ICJ) through a series of congresses of jurists representing various

⁸ All former Soviet Republics except Belarus and the five Central Asian states have joined the Council of Europe. Membership in the Council of Europe required substantial legal and institutional reform.

⁹ See also A. Gerrits and G. van den Berg, 'Human rights and legal change in the Russian Federation', (2003) 3 *Helsinki Monitor* at 6 et seq.

¹⁰ See also Stephen C. Thamans, 'Reform of the Procuracy and Bar in Russia', (1996) 3 *Parker School Journal of East European Law* 1, 3-16.

legal systems.¹¹ It describes the basic requirement that the State should be subject to the law and that Government should respect the rights of the individual and provide effective means for their enforcement.¹²

The Organization for Security and Co-operation in Europe (OSCE) Copenhagen document adopted in 1990 reflects this notion and indicates the fundamental importance attributed to the rule of law in the aftermath of the cold war. It reads:

The participating States are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not merely mean a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.¹³

The standard to be achieved is thus not legal formalism or positivism. Rule of law is a qualitative concept based on human rights and not formal legality. Consequently, laws manifestly violating human rights cannot be considered to form a part of this notion of the *rule of law*. In striking contrast to the legacy of Central Asia, it means a rule of law as a *rule of rights*. The legal system provides the framework, procedures, and remedies accessible to those in need to ensure that rights are respected ('the supreme value of the human person').

3. International Rule of Law and Human Rights Standards

3.1 OSCE Process

The five Central Asian Republics acceded to the Organization for Security and Co-operation in Europe (OSCE) in 1992. As participating States of the OSCE, they are bound by the detailed rule of law obligations under the OSCE Copenhagen document mentioned above, but also by various other important OSCE human dimension commitments. These standards are considered to be *politically* rather than *legally* binding.¹⁴ However, this should not be mistaken as an indication that the OSCE commitments lack binding force. The distinction to be drawn is between '*legal*' and '*political*', rather than between '*binding*' and '*non-binding*'.¹⁵ In joining the OSCE the Central Asian governments also agreed that pluralist democracy based on the rule of law was the only permissible system of government.¹⁶ The unequivocal commitment to pluralist democracy in the OSCE is an expression of the conviction in Europe that only a democratic state is truly able to effectively guarantee human rights.

¹¹ See in particular International Commission of Jurists, 'The Rule of Law and Human Rights, Principles and Definitions', Geneva 1956.

¹² *Ibid.*, at 11.

¹³ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, reprinted in the *OSCE Human Dimension Commitments – A Reference Guide*, Warsaw, 2001, at 206.

¹⁴ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, reprinted in *OSCE Human Dimension Commitments – A Reference Guide* Warsaw 2001 at 206.

¹⁵ See OSCE ODIHR, 'The Human Dimension of the OSCE: An Introduction', in *OSCE Human Dimension Commitments – A Reference Guide*, Warsaw, 2001, n. 13 above, at XV.

¹⁶ *Ibid.*, at XV. See also Merja Pentikäinen, 'Human Rights Commitments within the CSCE Process: nature, contents and application', 2nd revised edition, Publications of the Advisory Board for International Human Rights Affairs, Helsinki, 1994, at 51.

¹⁶ This is best reflected in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, and the Charter of Paris for a New Europe, 21 November 1991, reprinted in *OSCE Human Dimension Commitments – A Reference Guide*, Warsaw 2001, n. 13 above, at 205 and 221.

Participation in the OSCE entails the important recognition of the concept of comprehensive security, especially for Central Asia, where Governments try to invoke security considerations as justification for human rights violations. According to this concept, human rights, the rule of law and pluralist democracy are an integral part of the understanding of security, i.e. the 'human (rights) dimension' of security.¹⁷ Within the OSCE framework, states cannot legitimately argue a hierarchy between 'security' and 'human rights'.¹⁸ The OSCE has also been a crucial player in the implementation of these commitments as each of the five Republics hosts OSCE field missions on its soil, which, in partnership with the OSCE Office for Democratic Institutions and Human Rights (ODIHR), provide important support for rule of law reforms.¹⁹ The ODIHR is moreover the principal election monitoring body in the region.²⁰ More broadly, the OSCE process constitutes the most important international mechanism to address the human rights crisis in Central Asia on a regular basis.

3.2 United Nations

Moreover, most Central Asian Republics are parties to various United Nations (UN) human rights treaties. By 1999, all Central Asian republics with the exception of Kazakhstan had formally acceded to the major six UN human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²¹

Kazakhstan finally signed both Covenants in December 2003, but has yet to ratify them. In this regard it is important to recall that the UN human rights treaty bodies, including the UN Human Rights Committee, repeatedly took the position that all human rights treaties ratified by the Soviet Union automatically bound all other CIS Republics, including those in Central Asia, as from the date of their independence.²² This view reflects the special nature of international human rights treaties, granting rights primarily to

¹⁷ The comprehensive concept of security is based on the understanding that security is more than the absence of war (negative notion of peace), but is a broader concept that provides a framework of security and the prevention of conflict. The three OSCE dimensions of security include the 'politico/military dimension', the 'economic/environmental dimension' and the 'human dimension'. See OSCE ODIHR, 'The Human Dimension of the OSCE: An Introduction', n. 13 above, at XIII.

¹⁸ This is already reflected in the Helsinki Final Act, the founding document of the then CSCE, which stipulated in its Decalogue the respect for fundamental freedoms and human rights.

¹⁹ For more information see <http://www.osce.org/odihr/>.

²⁰ Important election standards are contained in particular in the OSCE Copenhagen document. The OSCE Istanbul Document complements these standards with a commitment to follow up on the reports of the ODIHR, see n. 13 above at 84-6. As an autonomous institution of the OSCE the ODIHR has developed a standard methodology in observing and assessing elections under the OSCE commitments. See Hrair Balian, 'Ten Years of International Election Assistance and Observation' (2001) 3 *Helsinki Monitor* 197-209.

²¹ For the status of ratification, see <http://www.ohchr.org/english/bodies/treaty/index.htm>. The six treaties include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Convention of the Elimination of Racial Discrimination (CERD), UN Convention on All Forms of Discrimination Against Women (CEDAW) and the UN Convention Against Torture (CAT).

²² For the Human Rights Committee, see UN Doc. E/CN.4/1996/76 at 2: '(...) all the people within the territory of a former state party to the Covenant remained entitled to the guarantees of the Covenant' and that, in particular the former entities of the Soviet Union 'were bound by the obligations under the Covenant as from the date of their independence'. See on the question of state succession to human rights treaties, R. Mullerson, 'The continuity of and succession of States', (1993) 42 *International and Comparative Law Quarterly* at 490, 491; For further references: S. Joseph, J. Sarah, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000), at 5 et seq.

individuals against their own state rather than formulating reciprocal rights between nation states. State practice emerging after the end of the cold war supports this position.²³ In this light, Kazakhstan is to be considered already bound by the obligations under the ICCPR.

Unlike other CIS Republics, the Central Asian Republics are not eligible to accede to the Council of Europe. They cannot become State parties to the European Convention on Human Rights (ECHR) and lack therefore the important enforcement mechanism provided by the European Court of Human Rights. It is therefore even more central that the countries of Central Asia allow individual communications under UN human rights treaties. Kyrgyzstan, Tajikistan, Uzbekistan and even Turkmenistan have already recognised the jurisdiction of the UN Human Rights Committee by also acceding to the Optional Protocol to the ICCPR.²⁴

The future formal accession of Kazakhstan to the ICCPR may raise interesting legal questions in this regard, as the Soviet Union also ratified the Optional Protocol before its dissolution in 1991. Politically, it is difficult to justify why Kazakhstan should provide fewer remedies than have been internationally recognized by the USSR, and fewer than have been accepted by all other CIS Republics. Legally, it raises the question of the scope of the continuous application of the ICCPR to Kazakhstan. The question would be as to whether the substantive right alone is 'acquired' and remains applicable, or whether the continuous obligations of Kazakhstan would also extend to its international remedy, i.e. the Optional Protocol. In this case, Kazakhstan would have to be considered bound by the obligations under the Optional Protocol, unless it makes use of Article 12 of the Protocol to denounce its application.²⁵

A similar problem exists with regard to the possibility that Kazakhstan may add reservations to its document of accession – an issue apparently under consideration at present. The legal validity of such reservations would be extremely doubtful, as it would allow Kazakhstan to modify, *ratione materiae*, the scope of protection under the ICCPR. The introduction of such new substantive reservations cannot be reconciled with the clear and consistent position taken by the UN Human Rights Committee, that persons under the jurisdiction of former Soviet Republics remain entitled to the guarantees of the ICCPR. It is noteworthy that the ICCPR does not – unlike Article 12 of the Optional Protocol – contain a provision which would allow a state party to denounce the Covenant. In this regard it is also significant that none of the CIS Republics has introduced a new reservation on the substantive provisions of the ICCPR following accession.²⁶

²³ Relevant state practice includes the dissolution of Czechoslovakia, the former Yugoslavia and the dissolution of the Soviet Union. China, too, accepted the continuous applicability of the ICCPR and the jurisdiction of the UN Human Rights Committee regarding Hong Kong and Macau.

²⁴ For the status of ratification, see <http://www.ohchr.org/english/bodies/treaty/index.htm>.

²⁵ Article 12 of the Optional Protocol reads: 'A State Party may denounce the present Protocol at any time by written notification addressed to the Secretary General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary General.' The ICCPR itself does not contain a similar clause.

²⁶ See for the status of ratification and reservations, <http://www.ohchr.org/english/bodies/treaty/index.htm>; moreover, neither the Czech nor Slovak Republics refrained from submitting new reservations to the ICCPR.

4. The Constitutional and Legislative Framework in Central Asia

4.1 Constitutional Framework

Constitutional reform is among the most salient features of any transition from authoritarian rule to pluralist democracy, based on respect for the rule of law and human rights. It signifies the replacement of arbitrary rule with *constitutionalism*. In particular, countries overcoming an authoritarian past and human rights abuse tend to value a system of strong checks and balances, including effective remedies to safeguard against the human rights abuses of the past.

On gaining independence, the five Central Asian states crafted constitutions which were subsequently amended at various points in time. On a formal level they reflect democratic structures with the separation of powers. Free and fair elections are guaranteed, the judiciary is supposedly independent and a Bill of Rights is contained in each of the five constitutions. Moreover, following the emerging universal trend,²⁷ international human rights treaties are made directly applicable as part of domestic law and in some countries they enjoy superiority even over ordinary law.²⁸ The latter is a remarkable departure from old Soviet legal doctrine regarding the relationship between national and international law.

Despite appearances, however, real constitutionalism remains a distant goal in Central Asia. There is a wide perception, even among lawyers and judges, that constitutional freedoms are mere statements of principles without effective means of enforcement – similar to past Soviet constitutions. Most of all, closer scrutiny indicates a considerable lack of separation of powers. This in turn severely impedes the capacity of the legal system to protect human rights. An additional factor is the lack of constitutional practice and culture, illustrated by rigged elections, politically motivated constitutional court decisions or opportunistic constitutional reforms.²⁹ The absence of any serious appearance of democratic

²⁷ For further references, see Gerald Staberock, 'Closing the implementation gap – how to make international human rights treaties work in domestic law', in *Yearbook of the International Commission of Jurists 2004* (Antwerp, Oxford, New York: Insertia, 2004), at 275, 296 et seq.

²⁸ For example Article 4, para. 3 of the Constitution of Kazakhstan, which reads: 'International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law'. See also Tajikistan, Core document forming part of the reports of state parties, HRI/CORE/1/Add. 128, 18 Feb. 2004, para. 63. See also Article 12, para. 3 of the Kyrgyz Constitution, according to which: 'International treaties and agreements, which shall have taken effect in accordance with a procedure prescribed by law, to which the Kyrgyz Republic is a party and generally accepted principles and norms of international law shall be a constituent part of the legislation of the Kyrgyz Republic.' Moreover, Article 8 of the Law on Normative Acts (1996) also affirms the application of international treaties and norms. The Uzbek Constitution is more ambiguous, as it provides in its Preamble for the superiority of recognized norms of international law, but does not specifically mention the role of international treaties in domestic law (Article 15). Even Turkmenistan claims, at least in theory, that 'under Article 6 of the Constitution of Turkmenistan, the legislation of Turkmenistan recognizes the supremacy of generally accepted rules of international law. In that connection, the provisions of international treaties to which Turkmenistan is a party have direct force of law', see for reference OSCE Rapporteur's report on Turkmenistan, ODIHR. GAL/15/03, 12 Mar. 2003, at 11.

²⁹ For relevant reports and statements of elections in Central Asia, see <http://www.osce.org/odihr/?page=elections&div=reports>; See also International Helsinki Federation for Human Rights (hereinafter IHF) 'Report to the OSCE Supplementary Human Dimension Meeting on Electoral Standards and Commitments', Vienna, 15-16 July 2004, at 2-3, available at: <http://www.ihf-hr.org/documents>.

governance in Turkmenistan is in a category of its own, not least following the proclamation that the presidency was for life.³⁰

The dominance of presidential powers is deeply entrenched in the constitutions of the Central Asian states. This is most notable in the vast powers of appointment and dismissal for various major posts.³¹ Amongst other things, it severely impedes the independence of the judiciary, as it is largely within the ambit of presidential power to appoint and dismiss judges or to preside over bodies responsible for key aspects of judicial life. Presidential influence also exists with regard to the powerful prosecutor's office (Prokuratura). Law making (presidential decrees) or veto powers with regard to legislation generally limit the role of Parliament with regard to human rights law-making, and its ability to effectively control and question the executive.

The philosophy of constitutional freedoms in Central Asia is probably best expressed by the common constitutional clause, according to which the president is the 'guarantor of the Constitution and human rights'.³² While a president, too, should be duty bound to protect human rights, the provision reflects a fundamental misconception that human rights are protected by the 'strong but benevolent leader' rather than through a system of checks and balances and an independent judiciary.³³

It is interesting to note that four countries in the region (Kyrgyzstan, Uzbekistan, Tajikistan and Turkmenistan) have recently amended or changed their constitutional framework.³⁴ None of the reforms have contributed to increased checks and balances. Instead, presidential powers have been strengthened and presidential terms of office extended (Uzbekistan and Tajikistan).³⁵ In Turkmenistan, where constitutional reality had already set aside any notion of separation of powers, recent reforms have formally limited the role of Parliament and transferred many functions to the People's Council, a body lacking democratic legitimacy, which had previously declared the presidency to be for life.³⁶ In Kyrgyzstan, a provision of lifetime immunity has been introduced for former Presidents and the role of Parliament has been limited.³⁷ This suggests that the primary goal of constitutional reforms was to safeguard presidential power or, as in the latter case, to

³⁰ Since independence, the former head of the Communist Party of Turkmenistan, Saparmurat Niyazov, has been in power. In 1999 he was made president for life. However, he announced that presidential elections might be held in 2007-2008. See IHF, 'Human Rights in the OSCE region, Europe, Central Asia and North America, Report 2004 (Events of 2003), Turkmenistan', at 1, available at: <http://www.ihf-hr.org/>.

³¹ See for example the illustrative list of presidential competencies in Chapter 20 of the Uzbek Constitution (<http://www.umd.uz/Main/Uzbekistan/Constitution/constitution.html>), in particular Article 93.

³² See Tajikistan, Core document forming part of the reports of state parties, HRI/CORE/1/Add. 128, 18 Feb. 2004, para. 35; Article 42, para. 2, Constitution of Kyrgyzstan; Article 93, para. 1 of the Uzbek Constitution.

³³ Ironically, this argument has been advanced both in the Caucasus and in Central Asia to argue that the Constitution would require a National Human Rights or Ombudsman Institution to be placed under the authority of the president and not parliament.

³⁴ Referenda were held on constitutional reforms in Kyrgyzstan and Tajikistan during 2003 and in Uzbekistan in 2002.

³⁵ In Uzbekistan the presidential term has been extended from 5 to 7 years, whereas in Tajikistan the Constitution now allows for two consecutive terms of office instead of one as previously.

³⁶ See also, IHF, 'Human Rights in the OSCE region, Europe, Central Asia and North America, Report 2004 (Events of 2003), Turkmenistan', at 3, available at: <http://www.ihf-hr.org/>.

³⁷ See OSCE/ODIHR, 'Kyrgyz Republic, Constitutional Referendum, 2 February 2003', Political Assessment Report, 20 Mar. 2003, available at: http://www.osce.org/documents/odihhr/2003/03/1381_en.pdf. See also, IHF, 'Human Rights in the OSCE region, Europe, Central Asia and North America, Report 2004 (Events of 2003), Kyrgyzstan', at 1-3, available at: <http://www.ihf-hr.org/>.

guarantee the option of a safe political handover. It also appears to represent an opportunistic use of constitutional reforms by the leaders of the region. As the referenda adopting the proposed changes were also marked by violations of democratic principles, the changes will not contribute to an improved constitutional culture. Even in Kyrgyzstan, for long considered to be the most liberal of the Central Asian states, the process was flawed. While a new draft constitution was elaborated with civil society input, containing at least some promising improvements, this process was abruptly diverted and a new constitutional text was rushed through a referendum in February 2003.³⁸ The new Constitution – cynically presented in the context of establishing a country of human rights – reduces rather than extends existing human rights protection and in some parts contradicts Kyrgyzstan’s international obligations.³⁹ This marks a missed opportunity, since there was hope that Kyrgyzstan – more than other Central Asian states – would set a positive example by improving the constitutional power balance.

Setting up a functioning system of constitutional checks and balances must become a priority if the rule of law is to be anchored in the constitutional reality of the five Central Asian Republics. A genuine and complete review and overhaul of the constitutional framework based on a true separation of powers will be required. Unlike in the past, revisions of the constitutional set-up must be based on a broad and genuine public process, so that constitutions can develop into documents representing the fundamental values of society and not the opportunistic will of the countries’ leaders.

4.2 Legislative Framework

Another key priority for the rule of law in Central Asia is the establishment of a legislative framework that complies with its obligations under international human rights law. Despite considerable numbers of legislative initiatives and constant reform debates, there has been no genuine process of adapting legislation to international human rights treaties. In this regard, the Central Asian states are lagging far behind those CIS Republics that joined the Council of Europe.

4.2.1 Legislative Transparency

Perhaps the most important safeguard against the erosion of legislation is an open and transparent lawmaking process that allows for a broad discussion on legal reforms and sufficient input from civil society. Legislative transparency itself is an important component of the rule of law.⁴⁰ In Central Asia such transparency is largely missing. It is often difficult to access draft legislation or to predict which drafts may be proposed or passed, and civil society input is generally limited.

³⁸ The Venice Commission critically reviewed the original draft Constitution. The document is available at <http://www.venice.coe.int/site/interface/english.htm>. The Venice Commission of the Council of Europe is an independent expert body that was set up to provide assistance and high-level authoritative advice in the context of democratic transition.

³⁹ Key concerns include changed language regarding the direct applicability of international human rights norms, a revision of access to the Constitutional Court, an explicit contradiction of the authorization of arrest and detention (Article 9, para. 3, ICCPR) and questionable provisions regarding the positive obligation to protect the honour and reputation of citizens and the role of the Constitutional Court in this respect. See also OSCE ODIHR, ‘Kyrgyz Republic’, n. 37 above, and IHF, n. 37 above.

⁴⁰ See in this context: ‘Legislation will be formulated and adopted as a result of an open process reflecting the will of the people, either directly or through elected representatives (...)’, Document of the Moscow Meeting of the Conference on Security and Cooperation in Europe, 1990, para. 18.1, reprinted in: OSCE ODIHR, ‘OSCE Human Dimension Commitments – A Reference Guide’, n. 13 above, at 63.

The transparency gap is connected to the limited political relevance and democratic legitimacy of Parliaments in some countries of the region. In the reality of Central Asia, the presidential apparatus dominates important legislative developments. It is a common experience for those working on rule of law reforms in Central Asia, that prior presidential approval is the key to any proposed reform. In addition, presidents tend to have considerable powers to issue legally binding executive or presidential decrees or to veto legislation.⁴¹

4.2.2 *Compliance with Human Rights Law*

On a substantive side there is no process that would ensure a consistent screening or auditing of legislation or draft laws for their compliance with international human rights standards. This is problematic, as the legislative framework falls short of international human rights standards. This is particular so with regard to criminal procedural law and with regard to laws limiting key fundamental freedoms.

The legislative framework continues to reflect a *control approach* and severely limits the exercise of key fundamental liberties, such as freedom of association, assembly or expression. Legislation often reflects the implicit assumption that human rights are granted by the state and that the exercise of human rights are a concern for *public order*, and must therefore be subject to prior approval, authorization and other forms of preventative control. In fact, much of the relevant legislation contradicts international human rights standards, or is drafted in a way that opens the door for the administration to use the law as a weapon against legitimate dissent. The general constitutional clauses on the supremacy and applicability of international human rights standards – sometimes even replicated in the general part of ordinary laws⁴² – is too remote and abstract to have any significant impact on the making of laws or their later implementation.

It is thus essential to ensure ordinary legislation complies with the relevant international human rights standards. While those CIS Republics that joined the Council of Europe had to undergo an extensive screening exercise of their judicial and legal systems, no such process has yet been generated in Central Asia. Reporting to UN treaty bodies could provide a useful tool with which to take stock of the compliance of the legal and judicial system with international human rights law.⁴³ Its impact, however, seems to have been limited so far, although the OSCE tried to enhance the domestic impact of treaty reporting through NGO-Government round tables on the implementation of its recommendations.⁴⁴ Some organizations, in particular the OSCE ODIHR, have also provided valuable human rights law advice on a number of key draft laws on an ad hoc basis, and there have been some attempts by United Nations Development Programme (UNDP) and the ODIHR to provide more substantial advice on legislative compliance in Kazakhstan and Kyrgyzstan. The latter two countries especially have the potential to engage in a serious debate about

⁴¹ See for example Article 93, para. 14 of the Uzbek Constitution, according to which the President may submit his own amendments to laws after they have been adopted by Parliament. In this case it would require a two-thirds majority in Parliament to overturn the presidential amendments.

⁴² This practice is known in some legislation in Central Asia, for example in Kyrgyzstan, where laws such as the criminal executive code contain a general reference clause to international human rights standards.

⁴³ See G. Staberock, n. 27 above, at 289 et seq.

⁴⁴ The ODIHR held NGO-Government round tables following the adoption of conclusive observations by the UN Committee Against Torture in Kyrgyzstan in 2000, Kazakhstan in 2001 and Uzbekistan in 2002. Such round tables ensure conclusive observations are debated and address the concrete question about the follow-up needed. Relevant conclusions are on file with the author.

necessary legislative reforms. In the light of the importance of the OSCE process for Central Asia, the ODIHR would probably be best placed, in partnership with the regional representative of the Office of the High Commissioner for Human Rights in Central Asia, to push for a more systematic process of bringing domestic law into compliance with international human rights standards, similar to the role played by the Council of Europe in the Caucasus.

5. Judicial System and Human Rights

In Central Asia the judiciary has not yet assumed its role in protecting human rights. The judicial system is not only lacking in independence and integrity, but has been generally unable or unwilling to assume its responsibility for protecting human rights. Moreover, judicial human rights enforcement is dependent on key reforms of the Soviet-style prosecutor's office, which continues to dominate the legal system in Central Asia.

5.1 Independence and Integrity of the Judiciary

Lack of judicial independence is one of the most fundamental impediments to the enforcement of international human rights standards in Central Asia. In an environment where judicial independence is not sufficiently secured, a culture of critical decision-making and the protection of human rights will remain an illusion.

Recent judicial reform assessments by the American Bar Association (ABA CEELI)⁴⁵ and visits by the UN Special Rapporteur on the Independence of Judges and Lawyers to some countries of the region highlight the failing legal environment for judicial independence. The Judicial Reform Index regarding Kyrgyzstan, which, together with Kazakhstan, is 'relatively' the most advanced country in the region, best reflects the experiences of the author when it summarizes the situation in the region in the following terms:

The President has the unabridged power to determine how many judges the country should have, where they should be posted, and how much they should be paid. He may also remove them from office largely at will (a power he has only rarely exercised). In some important respects, the judiciary has not changed significantly from Soviet times. The use of 'telephone justice', for example, is reported to persist. In addition, procurators as opposed to judges retain the right to issue search and arrest warrants. Finally corruption is believed to be widespread.⁴⁶

Similar ABA CEELI assessments on Uzbekistan and also on Kazakhstan confirm this picture and are a telling example of the fundamental lack of judicial independence in Central Asia.⁴⁷ The most obvious concern is for the appointment and dismissal of judges, which lack clear criteria and transparency and show dependency on presidential and executive powers. This is particularly critical in combination with the limited duration of judicial tenure throughout Central Asia. In Kyrgyzstan, for example, judges are appointed for seven years, subject to reappointment.⁴⁸ It allows executive control or other forms of improper influence on judges and significantly facilitates corruption. There is a general perception that judges are

⁴⁵ American Bar Association and Central Eastern European and Eurasian Law Initiative (hereinafter ABA CEELI), *Judicial Reform Index for Uzbekistan*, Washington DC, May 2002; ABA CEELI, *Judicial Reform Index for Kazakhstan*, Washington DC, Feb. 2004; ABA CEELI, *Judicial Reform Index for Kyrgyzstan*, Washington DC, June 2003; all three reports are also available at: <http://www.abanet.org/ceeli/publications/jri/home.html>.

⁴⁶ ABA CEELI, *Judicial Reform Index for Kyrgyzstan*, n. 45 above, at 2.

⁴⁷ ABA CEELI, *Judicial Reform Index for Uzbekistan*, n. 45 above, Assessment factor 7.

⁴⁸ ABA CEELI, *Judicial Reform Index for Kyrgyzstan*, n. 45 above, at 3-4.

not appointed based on competence, but on political considerations or some other allegiances. In most countries, there is at least anecdotal evidence that the reappointment process is used to rid the judicial ranks of judges who are too independent minded, do not follow the submissions of the Prokuratura, or for other improper reasons. In a similar vein, jurists in the region mention in private conversations that judicial appointments and reappointments carry a significant and recognised 'price tag'. Even in Kazakhstan, where, following an initial tenure, judges are now said to be able to serve until retirement, there are very broad exceptions to the security of tenure that are subject to abuse.⁴⁹ Other key areas of concern throughout the region include the rules on case assignment, disciplinary procedures and broadly a range of aspects of judicial career advancement that are not based on clear, transparent and objective criteria.

Judicial corruption is said to be endemic and affects all parts of the legal system. While this is far from unique, its endemic nature reflects the general lack of legal culture in Central Asia. The challenge is to ensure judicial accountability without further curtailing judicial independence. In fact, it is the lack of structural independence guarantees, and unclear provisions on appointment or career advancement, which contribute to judicial corruption. Improvements, such as attempts in Kazakhstan to increase transparency through a computerized system of case management, and the debate over the introduction of jury trials, have been rare. More broadly, the level of corruption and lack of good governance within the judiciary must be seen also in the context of the lack of a human rights culture/ethic within the judiciary.

5.2 The Enforcement of Human Rights through the Courts

Human rights enforcement through the judicial system is generally weak. There is a general lack of a culture of human rights within the legal community. Most judges, lawyers and prosecutors perceive human rights norms contained in international treaties as general principles that cannot be applied in practice. Moreover, in some instances the courts have been used as a weapon to silence legitimate democratic dissent.

In successful transition processes, leading courts have taken important human rights decisions and have greatly contributed to an evolving human rights culture within the legal system. It is noteworthy that the Council of Europe obliged accession countries, such as Azerbaijan, to introduce individual complaints procedures to their constitutional courts.⁵⁰ Some courts in the region, such as the Russian constitutional court, have also set positive examples in deciding against state interests and in referring to international standards.⁵¹

The track record of constitutional and supreme courts in Central Asia is rather sinister and an indication of the lack of rule of law. While the Kyrgyz constitutional court enjoys a modestly good reputation, its caseload and its decisions relevant to human rights remain fairly limited.⁵² Moreover, while access by individuals to the Constitutional Court

⁴⁹ ABA CEELI, Judicial Reform Index for Kazakhstan, n. 45 above, at 26-7. Possible reasons include the appointment of a judge to another position, or if a court in which a judge sits is dissolved, or the judge does not accept assignment to another location. The latter criteria have also been used in Kyrgyzstan regarding the removal of the judge who had acquitted the former opposition leader Felix Kulov.

⁵⁰ Parliamentary Assembly of the Council of Europe, Opinion 222 (2000), Azerbaijan's application for Membership in the Council of Europe, para. 15.

⁵¹ See for example, Bill Bowring, 'Russia's Accession to the Council of Europe and Human Rights', (2000) *European Human Rights Law Review*, 362-79.

⁵² Despite a doubtful holding that allowed President Akaev an additional term in office (since his first term was based on the constitution of the Soviet Republic of Kyrgyzstan).

seems possible under narrow conditions, this option seems hardly to have been used and most lawyers seem to be unaware of it. In Kazakhstan, the constitutional court was replaced in 1995 by a weaker constitutional council, over which the President retains considerable control. The recent assessment report of the American Bar Association notes:

Despite these apparent powers, however, the Constitutional Council is largely a creature of the executive: three of the seven members, including the Chair, are appointed by the President (two other members are appointed by the Chair of the Senate, and the final two by the Chair of the Majillis). If a deadlock occurs in any particular case due to the lack of the required majority of votes, the vote of the Council's Chair (i.e. Presidential appointee) becomes decisive. Ex-presidents of the country become lifetime members of the Council (Article 71 of the Constitution).⁵³

The above is also a typical example of a formally representative and pluralist body. A closer look at the appointments procedure often indicates that care has been taken to ensure that presidential interests never go unnoticed. Significantly, the Council's role does not extend to presidential decrees, and unlike under the Constitutional Court that had existed until 1995, there is no individual access to the Court.⁵⁴ The only possible access by individual cases is through the submission of cases by ordinary courts, and is limited to instances where the alleged violation is based on a law or regulatory act, which in itself constitutes a violation of the constitution. The fact that the president retains a right of veto further limits the role of the constitutional council as a credible human rights remedy.⁵⁵

In other Central Asian countries, leading courts have had no visible impact on human rights whatsoever, but rather serve as a legitimizing façade for an authoritarian system. The ABA report on Uzbekistan is an illustration in stating that: 'Neither lawyers nor lower court judges could cite one key Constitutional Court decision with an influence on civil rights or liberties'.⁵⁶ Ironically, former presidents become automatic life members of the constitutional court in Uzbekistan.⁵⁷ This shortfall of leading judicial authority indicates a clear lack of rule of law. Without leading courts taking a responsibility to protect human rights, there is little prospect of lower courts beginning to use and enforce international human rights standards. It should also be noted that, while remedies to the general courts to challenge administrative decisions have been introduced in some parts of Central Asia, it is unclear how frequently they are used. In the legal tradition of the region, complaints are usually directed more to the prosecutors' office in the exercise of its general legal oversight.

5.3 Political Abuse of the Judicial System

A critical feature in many CIS countries, including those in Central Asia, is the arbitrary application of the law. People falling into dissent easily become the target of a selective use of law. This can take the form of resorting to 'neutral provisions', such as tax codes. The problem is not the law, but its arbitrary application, which in the worst scenario, because of its selectiveness, may amount to a *dictatorship of law*. Vague definitions in some laws, and a frequent misconception about the understanding of notions such as public order, state secrets or national security contribute to this abuse.

A fundamental problem for the rule of law in the region remains the use of the legal system against critical social or political dissent. This is true for example in Kyrgyzstan with

⁵³ Judicial Reform Index for Kazakhstan, n. 45 above, at 12.

⁵⁴ *Ibid.*, at 12.

⁵⁵ *Ibid.*, at 13.

⁵⁶ ABA CEELI, Judicial Reform Index for Uzbekistan, n. 45 above, at 11.

⁵⁷ According to Article 97 ex-presidents become lifetime members of the Constitutional Court, a status that will also secure immunity.

regard to the use of libel suits for defamation, often initiated by state officials in their private capacity, leading either to criminal prosecution or to civil damages which threaten the existence of an independent media.⁵⁸ Contrary to international human rights standards, the law seems to provide greater protection for politicians and public figures than for ordinary citizens.

Each Central Asian state has abused its judicial system for the purposes of political persecution.⁵⁹ This not only hampers the rule of law and the independence of the judiciary in the cases concerned, but it has longer term implications, threatening any legitimacy and credibility of the legal system. It thus severely limits the long term prospect for a genuine rule of law. It also illustrates that the lack of sufficient checks and balances allows the authorities to revert to authoritarian patterns whenever they feel that their power is threatened.

5.4 The Judiciary in the Criminal Justice System

Among the most fundamental systematic challenges to the rule of law in Central Asia are the lack of legal safeguards and non-existing checks and balances within its criminal justice systems. This is particularly critical as human rights are nowhere more at risk than in this field.

Human rights abuses are notorious in the investigative process, including the use of torture and ill-treatment, and violations of the principle of equality of arms in criminal trials are commonplace. The main roadblock to improvement is the continued dominance of the Soviet-style Prokuratura within the criminal justice system in Central Asia. Unlike those CIS countries that joined the Council of Europe, there has been little effort to adjust its role to be in compliance with the ICCPR or other international human rights standards. As long as its scope of authority *de jure* and *de facto* remains unchallenged, the legal system will remain largely Soviet in nature.

5.4.1 Judicial Control over Intrusive Investigative Measures

Of particular concern is the continued and unlimited authority of the Prokuratura over all intrusive investigative measures. In the legal structure of Central Asia, it is the prosecutor who authorizes and sanctions all intrusive investigative means, such as house searches, wire-tapping or arrest and detention.⁶⁰ This practice contradicts international human rights standards, in particular Article 9, paragraph 3 of the ICCPR. Like its equivalent under Article 5, paragraph 3 of the European Convention on Human Rights (ECHR), it requires those arrested to be brought promptly before an ‘officer authorized to exercise judicial authority’. Both the European Court of Human Rights and the UN Human Rights Committee have confirmed that the prosecutor does not constitute an officer authorized to exercise judicial authority.⁶¹ Moreover, in practice the prosecutor also fails to comply with the requirement to

⁵⁸ IHF, ‘Human Rights in the OSCE region, Europe, Central Asia and North America, Report 2004 (Events of 2003), Kyrgyzstan’, n. 37 above, at 3-7.

⁵⁹ See for example the case of the independent journalist Sergey Duvanov in Kazakhstan or the Kyrgyz opposition politician Felix Kulov. For more cases regarding Kazakhstan, see ABA CEELI, Judicial Reform Index for Uzbekistan, n. 45 above, at 35.

⁶⁰ See for references ABA CEELI, n. 45 above, Assessment factor 7.

⁶¹ See also UN Human Rights Committee, ‘Concluding observations of the Human Rights Committee, Kyrgyzstan’, 24 July 2000, CCPR/CO/69/KGZ, para. 9, which reads: ‘The State party should ensure that anyone arrested or detained on a criminal charge is brought promptly before a judge (Covenant, Article 9, para. 3), that all other aspects of its law and practice are harmonized with the requirements of Article 9 of the Covenant [...]’; On the European Court, see also *Assenov v. Bulgaria*, Judgment of the European Court of

hear the suspect in person, as the decision is frequently taken on the basis of a written procedure.

The practical impact of the lack of judicial control is that pre-trial detention continues to be used as the standard measure against any criminal suspect. This, too, is contrary to Article 9, paragraph 3 ICCPR, according to which '[it] shall not be the rule that persons awaiting trial shall be detained in custody [...]'.⁶² In some Central Asian countries, such as Kyrgyzstan, there is at least some possibility of appealing the decision of the Prosecutor to a court, but this is apparently not used frequently and the courts rarely reverse the decision of the prosecutor.

The question of the so-called 'sanctioning of arrest' has been highly controversial in all former Soviet Republics, because it signifies a philosophical departure from the legal past. It signifies the recognition that the courts in a democratic country have the obligation to ensure compliance with human rights standards during the investigation and to prevent a culture of abuse and impunity. This reform would also be of crucial importance since conditions in pre-trial detention are generally harsher than those for convicts in prisons, and many prison governors see their role as being 'to facilitate', through various forms of pressure and isolation, the 'success of the investigation', usually through a confession.

Even where legal safeguards exist, such as the right to a lawyer, law enforcement officers and investigators try to circumvent the rights of those under investigation. A well-known practice, common to the CIS, is that investigators and prosecutors interrogate suspects as witnesses in order to circumvent the right to silence or to a lawyer, or to gain time before requesting an arrest warrant. Many suspects are also not made aware of their rights or are requested to waive their right to a lawyer.

5.4.2 *Fair Trial and Equality of Arms*

In the criminal justice systems of Central Asia sufficient general references to a right to a fair trial exist. Yet in the judicial reality of the region an accused – even in non-political cases – can hardly expect a trial in line with international fair trial standards, such as Article 14 ICCPR. At the heart of this problem lies a disregard for the fundamental fair trial principle of 'equality of arms', according to which there must be equality between the prosecution and the defence. Moreover, the simple physical appearance of courtrooms in Central Asia, with a cage for the defendant, already raises doubts about the implementation of the presumption of innocence in practice.⁶² The minimal rate of acquittals of between one and three per cent in the region casts further serious doubts as to whether anybody who is brought to trial is in fact presumed innocent.⁶³

Another remaining problem is the reliance on evidence obtained during the investigation, which is often introduced directly as written evidence (protocol). This is critical, as the preliminary investigation remains mostly unreformed and grants only limited participatory rights to defendants. This limits the possibility of effectively confronting witnesses and challenging evidence, and furthermore opens the door to the fabrication of

Human Rights (1998) 28 *European Human Rights Reports* 652 at 709; *Nikolova v. Bulgaria*, Judgment of the European Court of Human Rights (1999) 31 *European Human Rights Reports* 64 at 69-70. See on the difficulty regarding this reform in Russia, Bill Bowring, 'Russia's accession to the Council of Europe and human rights, four years on' (2000) 3 *Helsinki Monitor* at 53-8.

⁶² The cage not only creates a prejudicial impression of the guilt of the accused, but also hampers the contact between lawyer and client and therefore limits the right to defence. Some countries have started, however, to allow the accused to stay outside the cage if the accused is not under pre-trial detention.

⁶³ ABA CEELI, *Judicial Reform Index for Kazakhstan*, n. 45 above, at 16.

evidence. Confessions remain a key element of any standard criminal case, which encourages the use of pressure to obtain a statement during the investigation.⁶⁴ In some countries, such as Uzbekistan, torture is used systematically to extract confessions, and in the legal reality of Central Asia there is little prospect in challenging confessions during trial.⁶⁵ Investigators and prosecutors in the region tend to refute claims of torture, but prefer to acknowledge 'psychological pressure'. Some countries, such as Kyrgyzstan and Kazakhstan, have taken the first positive steps in introducing specific crimes of torture, applying a definition close to the one employed by Article 1 of the UN Convention Against Torture (CAT). Another critical feature of Soviet law which remains intact in Central Asia, is the principle of re-investigation, which allows a case to be sent back from the trial court for renewed investigation.⁶⁶ As a result, cases bounce back and forth from the courts to the investigation stage on a regular basis – in order to fill the gaps in an insufficient investigation. This is particularly critical if the defendant remains in custody during this period. On a practical side, many lawyers wish to retain this institution, as it provides the only reasonable expectation for their client to go free. On the other hand it is difficult to reconcile with the presumption of innocence under Article 14, paragraph 2 of the ICCPR, if courts, rather than acquitting the accused, send the case back to the investigative stage. While the *ne bis in idem* principle contained in Article 14, paragraph 7 of the ICCPR is limited to cases of final convictions or acquittals, the practice of sending cases back and forth may well violate the right to a trial within reasonable time, since the delay will generally be caused by an inefficient preparation of the case by law enforcement and prosecutorial authorities. In some countries of Central Asia, lawyers report that the institution of re-investigation greatly 'facilitates' corruption and apparently also leads to frivolous and fabricated allegations in order to extract bribes.

Finally, another example of the lack of equality of arms is the automatic right of the Prosecutor in some countries, such as Kazakhstan, to appeal the case to the next instance, whereas the individual must request the granting for a leave to appeal. In Kazakhstan, the Prosecutor General may also suspend the enforcement of a final court decision for up to two months.⁶⁷

5.4.3 *The Abolition of the Death Penalty*

A specific concern is the retention and imposition of the death penalty in Central Asia. Fortunately, recent years have seen considerable improvements, as all Central Asian countries – with the exception of Uzbekistan – have at least moved towards a moratorium on the death penalty.⁶⁸ This raises the hope that Central Asia, too, can become a death penalty free area in the near future. However, at present some concerns remain.

⁶⁴ Investigators and defence lawyers often refer to a 'plan', according to which they are assessed and promoted in line with the success rate in detecting crime. This is said to be an incentive for not immediately registering cases and for the use of ill-treatment and torture.

⁶⁵ For an eye-opening analysis of the legal reality with regard to the standard use of torture in Uzbekistan and the lack of safeguards, see Theo van Boven, 'Report by the Special Rapporteur on the Question of Torture', on his visit to Uzbekistan, UN Doc. E/CN.4/2003/68/Add.2.

⁶⁶ See generally: Stephen C. Thamans, 'Resurrection of Trial by Jury in Russia', (1995) 31 *Stanford Journal of International Law* at 61, 99-10. See also legal opinion provided by Stephen C. Thamans on the draft criminal procedural code in Kyrgyzstan, containing an excellent analysis of the institute of reinvestigation, OSCE ODIHR, Warsaw 2004, at 39-40 (available on file).

⁶⁷ See Article 466 of the Criminal Procedural Code and Article 396 of the Civil Procedure Code, reference from ABA CEELI, Judicial Reform Index for Kazakhstan; n. 45 above, at 16.

⁶⁸ For detailed references, see OSCE ODIHR, 'The death penalty in the OSCE area', Warsaw, 2004, available at <http://www.osce.org/odihhr>. The report contains precise data on all countries that have not *de jure* abolished

In Uzbekistan especially, the imposition and possible execution of the death penalty remains a very serious human rights concern. Even in the absence of the ratification of the Second Optional Protocol to the ICCPR, which prohibits the death penalty, the imposition of the death penalty is likely to be unlawful in Central Asia. The UN Human Rights Committee has consistently held that a violation of the right to a fair trial in cases involving the death penalty may also lead to the violation of the right to life.⁶⁹ In light of the systematic fair trial problems in Central Asia, it is hard to believe that any death penalty case would be in line with the Covenant.

Moreover, a common practice in Tajikistan or Uzbekistan is to retain the dead body and not to notify the family of the place of execution and burial. This may well raise separate legal issues under Article 7 of the ICCPR, and the prohibition of degrading and inhuman treatment, or as an arbitrary and unreasonable interference into the right to privacy, contained in Article 17 of the ICCPR.⁷⁰ Finally, the death penalty may well be challenged in Central Asia for its discriminatory aspect, as most Central Asian states have abolished the death penalty for women but not for men. While this may be seen as a step towards the progressive realization of the abolition of the death penalty, it seems difficult to find a reasonable ground for justifying the retention of the death penalty only for male offenders.⁷¹ All these questions underline the urgent need to formally abolish the death penalty in Central Asia.

6. Penitentiary System and Reform

Prison conditions are precarious in many parts of the former Soviet Union and this is particularly true in Central Asia. There is an urgent need to improve prison conditions and to overcome the abusive and militarised nature of a penitentiary system sealed off from society. The situation even worsened after independence in most countries, as funds were reduced and the reform of the penitentiary system was not high on any political agenda.⁷² The lack of reform, including punishment policies, has seriously contributed to severe overcrowding. As a result, diseases such as tuberculosis have become a pervasive feature of prison life. Lack of access to the outside world (lawyers, family and doctors), especially in pre-trial detention, has amplified those human rights concerns. As a last resort, the authorities have resorted to arbitrary annual presidential amnesties, in order to avoid the total collapse of the penitentiary system.

As in other countries of the CIS, reform is needed to address not only prison conditions but also major institutional and legal changes. A key element of this approach is

the death penalty. The only country in Central Asia that has formally abolished the death penalty is Turkmenistan.

⁶⁹ For further references: S. Joseph, J. Sarah, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000).

⁷⁰ Theo van Boven, 'Report of the Special Rapporteur on Torture', n. 65 above, at 20, para. 65. He considers that implementation of these rules constitutes cruel and inhuman treatment for the relatives of the victims.

⁷¹ See UN Human Rights Committee, 'Concluding observations of the Human Rights Committee, Kyrgyzstan', 24 July 2000, CCPR/CO/69/KGZ, para. 8, which reads: 'The Committee commends the State party for abolishing the death penalty for women, but points out that retention of the death penalty for men alone is incompatible with its obligations under Articles 2, 3 and 26 of the Covenant. The state party should ensure equality by abolishing the death penalty for all persons.'

⁷² Another factor is the economic ruin of enterprises connected to the other former Soviet Republics following independence. Work during imprisonment followed less a rationale of re-socialisation than of economic gain for the state.

the transfer of authority from the Ministry of Interior to the Ministry of Justice, linking the penitentiary system with the justice sector rather than the law enforcement apparatus.⁷³ In this regard, some positive changes have commenced in Central Asia, largely as result of the work of the Office for Democratic Institutions and Human Rights (ODIHR) and Penal Reform International (PRI). Today, the penitentiary services of Kazakhstan, Kyrgyzstan and Tajikistan have been transferred to the Ministry of Justice. The transfer of authority is particularly important with regard to pre-trial detention facilities (SIZOs), as the reform aims to ensure that those who hold prisoners have no vested interest or involvement in law enforcement tasks or in criminal investigation. The risks associated with a prison system that is actively 'facilitating' or 'supporting' the investigation are well known in the former Soviet Union and also became clear in the light of reports on the abuses at Abu Ghraib prison in Iraq, which highlight this aspect.⁷⁴ The challenge remains to complement this institutional reform with a change in mentality within the penitentiary system. Many practices in the prisons of Central Asia are in fact less a result of lack of resources than of the lack of different approaches and understanding. In this context, other positive reforms include the opening of prison training colleges in Kazakhstan and Kyrgyzstan and a re-training centre in Uzbekistan, adjusted to the needs of penitentiary staff. It remains to be seen, however, whether these institutions live up to expectations and can contribute to a different culture and mentality within the penitentiary system. Certainly, the situation remains precarious all over Central Asia and overcrowding is still persistent. Blatant corruption is another serious problem in the prison systems of Central Asia. However, it should be acknowledged that some progress has commenced towards the rule of law. The reasons for the relative success of these reforms may be threefold: i) The penitentiary system was literally bankrupt; ii) the process was heavily supported by international organizations in terms of know-how, but also in terms of positive acknowledgement in relevant OSCE forums; and iii) the reforms posed less of a threat to presidential power. For the international community on the other hand, prison reform could be a step towards broader, much needed, criminal justice reforms in Central Asia.

7. National Human Rights Institutions

The traditional rule of law approach focuses on the enforcement of human rights through an independent judicial system. While judicial enforcement of human rights is the most important requirement for a state based on the rule of law, judicial relief is largely *ex post facto* and is mainly *inter partes*. Increasingly, international consensus is emerging that the formal justice system needs to be complemented by independent national human rights institutions, with a broader and more preventative human rights mandate.⁷⁵

⁷³ See also OSCE Supplementary Human Dimension Meeting on penitentiary reform, 2001, with a range of specific recommendations regarding the transfer of authority and the demilitarization of prisons, at: http://www.osce.org/documents/odihhr/2002/07/1793_en.pdf.

⁷⁴ See in particular section 3.2 of the Report of the International Committee of the Red Cross (ICRC) on the treatment by the coalition forces of prisoners of war and other persons protected by the Geneva Conventions in Iraq during arrest, internment and interrogations, February 2004, which describes amongst other things the process of humiliation in order to facilitate cooperation with the investigators. The report is available at: http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm.

⁷⁵ See also, for an interesting comparative study, International Council on Human Rights Policy, 'Performance and legitimacy, national human rights institutions', Main report, Geneva 2000.

7.1 Independent Human Rights Institutions in Transition States

The process of establishing independent national human rights institutions has gained universal momentum through the adoption of the UN Vienna Programme of Action in 1993⁷⁶ and the adoption of the UN Paris Principles on National Human Rights Institutions.⁷⁷

The main impetus, however, for the promotion of independent human rights institutions in Central Asia stems from the fact that the establishment of national human rights institutions, usually in the form of a human rights ombudsman, has been a common feature in transition countries around Central and Eastern Europe.⁷⁸ Its most prominent success story has been the Office of the Polish Commissioner for Human Rights, established at the end of communist rule in Poland. The institution has been recognized and credited for its impact on the rule of law transition in Poland. Institutions in other Central and Eastern European countries, such as Slovenia or Hungary, have also left a positive mark on the transition process.

It is thus not surprising that the international community also supported the creation of new institutions in the former Soviet Union. The Council of Europe, for example, made the establishment of human rights ombudsman institutions an explicit requirement for a number of former Soviet Republics on their accession to the Council of Europe.⁷⁹ The rationale is that such institutions contribute to an emerging rule of law. In the presence of a slow, inaccessible, formal justice system that lacks public confidence, an informal institution can be a useful complement. In the former Soviet Union this is amplified by a lack of effective administrative or public law remedies. Human rights institutions can undoubtedly help to root international standards more effectively in the domestic legal system. Importantly for many former Soviet Republics, they may help to overcome an antagonistic approach, which prevents any critical dialogue between government and civil society. The introduction of human rights institution with more informal powers, limited largely to providing recommendations, is a new feature in societies where authority is traditional based on the formal authority to 'order' change.

7.2 The Failure of Human Rights Institutions in Central Asia

From the mid-1990s onwards, the OSCE ODIHR, but also UNDP and the Office of the UN High Commissioner for Human Rights (OHCHR), actively supported the establishment of independent human rights institutions in Central Asia. Unlike the situation in Central Eastern Europe, experiences in Central Asia have been rather negative.

The continued mandate of the Prosecutor's Office in the Central Asian States to exercise overall legal oversight and to receive complaints from citizens about wrongful application of the law is a constant challenge to the authority of an independent human

⁷⁶ Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, Vienna, 25 June 1993, A/Conf.157/24 (Part I), at para. 36.

⁷⁷ Paris Principles Relating to the Status and Functioning of National Human Rights Institutions for the Promotion and Protection of Human Rights, G.A. Res. 134, 48 (20 Dec. 1993), Annex.

⁷⁸ Most Central and Eastern European countries opted for the establishment of a human rights ombudsman institution. Unlike in some Nordic countries, these institutions are not limited to so-called maladministration, but are based on a broad human rights mandate and seek to follow the UN Paris Principles as relevant standards.

⁷⁹ This is true, for example with regard to Armenia and Azerbaijan, see Parliamentary Assembly, Council of Europe, Opinion No. 221 (2000), Armenia's application for membership of the Council of Europe, 28 June 2000; Parliamentary Assembly, Council of Europe, Opinion No. 222, Azerbaijan's application for membership of the Council of Europe, 28 June 2000.

rights institution. This has led to substantial opposition to the creation of human rights institutions within Central Asia, and to friction for those institutions that were established. For example, the Uzbek, Kazakh and Kyrgyz Ombudsmen are said to refer cases regularly to the Prokuratura, rather than conducting an independent and transparent inquiry into the alleged violation. These conflicts between the Prosecutor's Office and national human rights institutions underline once more the need for an overhaul of the competencies of the Prokuratura. In light of the competencies of the Prosecutor's Office and its past legacy as the 'eye of the Communist Party', the institution is well placed to block the functions of an independent human rights institution. The most important challenge to independent national human rights institutions, however, is the lack of legal or factual independence from presidential powers. Most institutions are presidential in nature and cannot be considered compliant with the requirements under the UN Paris Principles. The attempt to create an independent human rights institution in Kazakhstan may serve as an illustration of these problems. The new institution led to much frustration in the international community, as the OSCE and the UN had been working over a number of years with various working groups on the establishment of a parliamentary institution. Despite considerable technical assistance, the new institution was finally established in 2002 by presidential decree, which can be repealed at any time.⁸⁰ Moreover, it is the President who appoints and dismisses the Ombudsman.⁸¹ No specific reason for dismissal is required under the presidential decree. Ironically, it leaves Kazakhstan with a double structure of a non-independent presidential human rights commission and a non-independent presidential human rights ombudsman.

Attempts in Tajikistan to create an Ombudsman-type institution failed in the second half of the 1990s, due to a presidential reluctance to accept a parliamentary institution. Today, Tajikistan has a weak presidential human rights body, which contributes to the submission of state reports and undertakes some educational activities, but has no significant human rights impact in the country. The absence of any human rights mechanism in Tajikistan is especially troublesome in light of the atrocities committed during the civil war. It is indeed surprising for an outsider that the UN sponsored peace process did not, unlike other UN brokered peace processes in internal conflicts, integrate a viable human rights component into the reconciliation process.

The Human Rights Ombudsman institution in Uzbekistan, established in 1997, illustrates the difficulty of combining personal independence with being influential in Central Asia, as the female Ombudsperson there comes from an extremely influential family background. While the institution has some powers to interfere and to improve conditions in individual cases, it has been created without any significant financial and administrative support. In the authoritarian environment of Uzbekistan it is indeed difficult to see how the institution can function as much more than a governmental excuse.

The only institution in Central Asia that seems to come close to international standards is the Kyrgyz Human Rights Ombudsman Office, established in 2002 by Parliamentary law. It is based on a relatively solid legal mandate, with institutional guarantees of independence and is not subject to direct presidential control. The appointment of a relatively independent personality, not directly connected to the President, may give at least some hope that the institution will prove to be of benefit in the coming years.

⁸⁰ Statute on the Kazakh Commissioner for Human Rights, available at www.omineurope.info/uk/gesetz_kassachstan_uk.htm.

⁸¹ *Ibid.*, Article 2.

In conclusion, the experiences in Central Asia do indeed pose the difficult question of how much independent human rights institutions require democracy and the rule of law in order to make sense. In the absence of a minimum commitment to the principle of separation of powers and checks and balances, they will hardly be able to foster a culture of the rule of law. Looking at the essence of the experiences in Central Asia with regard to national human rights institutions, it seems that, as long as they are not too independent, which might pose a potentially serious challenge to executive powers, progress towards reform of the rule of law is possible. This may explain the greatly limited prospect for such institutions in the region at present.

8. Conclusion

After more than a decade of legal and constitutional changes in the Central Asian Republics the legal systems still carry most of the insignia of the old Soviet legal system. The law remains primarily a tool with which to exercise power and is far from a *rule of law* that would be capable of protecting or be willing to protect individual rights against the state. The above analyses show that the Central Asian countries have failed to address any of the deeper, more systematic underlying problems in their legal systems. This divides Central Asia increasingly from other parts of the former Soviet Union and has placed a considerable gap between them and other countries in Central and Eastern Europe.

The above, however, cannot mean that the international community should keep quiet and 'accept defeat'. On the contrary, a reinforced effort for genuine rule of law reform is required. It should be noted that reforms taking place in the Caucasus or the rest of the former Soviet Union do not go unnoticed. With these legal reforms in sight, a certain momentum for reform can be created in Central Asia as well. Recent positive steps in transferring authority over the prison service to a more civilian institution, which was arguably influenced by similar reforms undertaken within the CIS in the context of Council of Europe accession, illustrate this point.

Kazakhstan and Kyrgyzstan in particular have a critical choice to make, as to whether they commit to genuine rule of law reforms similar to those in other CIS countries. In this context it is essential that the international community sets clear benchmarks for progress towards the rule of law. These should include constitutional reforms, in order to establish a viable system of checks and balances, and a system of constitutional remedies (including independent courts) to enforce human rights. At the same time they should include a systematic overhaul of the legislative framework to ensure compliance with international obligations assumed by the Central Asian Republics. Moreover, it is time to establish a truly independent judiciary. The reform effort must include the introduction of a more adversarial criminal justice system and, importantly, will only succeed if the role of the Prokuratura is reduced to its ordinary functions in the prosecution of crime. Rule of law transition is not a linear process and can include occasional setbacks, but it requires political will and commitment.⁸² The experiences in Central and Eastern Europe and also in other parts of the former Soviet Union confirm the need for a strong international process to support this political will and to give it direction. In this regard it is critical to maintain the relevance of the OSCE for the region. Recent attempts by a group of CIS countries to limit the role of the human dimension of the OSCE and to reduce the OSCE and ODIHR to a purely

⁸² See in this regard also International Council on Human Rights Policy, 'Local Perspectives: foreign aid to the justice sector', Main report, Geneva 2000.

technical assistance provider would be a considerable setback for the region.⁸³ Without a strong OSCE as an engine for reform, there will be much more limited prospect for genuine improvement. A broader process is also required in order to ensure that the different international and bilateral organizations work less in isolation on rule of law issues and with a clear understanding of the benchmarks for such reforms. International human rights treaties, such as the ICCPR, can constitute such a benchmark, similar to the ECHR for legal reform in Central and Eastern Europe. The OSCE ODIHR, the Office of the UN High Commissioner for Human Rights, the European Union and financial institutions such as the European Bank for Reconstruction and Development, could greatly contribute to setting the rule of law agenda on their terms.

Moreover, the international response to Central Asia must differentiate between the situations in the different regions and it should include the full scope of available human rights mechanisms. In particular it must start to address the pervasive nature of human rights violations in Uzbekistan and Turkmenistan more effectively. This also requires the adoption of country specific resolutions by the UN Commission on Human Rights and the establishment of a country-monitoring mandate.⁸⁴ Both countries have escaped international scrutiny for too long. In the light of the experiences following the invocation of the OSCE Moscow Mechanism regarding Turkmenistan, there seems to be a double standard, in the sense that few other OSCE participating states would have been permitted to ignore all relevant OSCE human dimension commitments. It should be recalled that the OSCE has the opportunity to use the so-called ‘consensus minus one principle’,⁸⁵ which allows it to take appropriate steps, including suspension of membership, in ‘cases of clear, gross and uncorrected violations’ of OSCE commitments.

Finally, an additional concern should be mentioned. There will be little prospect for the rule of law in Central Asia if the international community compromises on human rights and the rule of law because of the fight against terrorism. The international community has long advanced the argument of comprehensive security for Central Asia. The new military partnerships with some Central Asian states in the fight against terror contain the risk that the international community could succumb to the rhetoric of authoritarian leaders in the region along the lines of ‘security first and human rights second’. Such an approach – even if only implicit – would not only be a terrible departure from the idea of comprehensive security, but would also threaten any rule of law transition in the region.

⁸³ Statement by CIS Member Countries on the State of Affairs in the OSCE, Moscow, 3 July 2004, available at: http://www.ln.mid.ru/brp_4.nsf/0/3be4758c05585a09c3256ecc00255a52?OpenDocument. See Statement of non-governmental organizations from the CIS, Eastern and Central Europe, ‘No to impunity for human rights violations’, signed by more than 105 non-governmental organizations from the OSCE region, available at: <http://files.csce.gov/451-en-451-eng.pdf>.

⁸⁴ Uzbekistan is presently considered under the confidential 1503 procedure, and a resolution on Turkmenistan was adopted last year by the Commission, ‘Situation of human rights in Turkmenistan’, Resolution 2004/12, available at: <http://www.unhchr.ch>.

⁸⁵ See, OSCE Handbook, Third Edition, Vienna, 1999, at 30.