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Abuse of pretrial detention in States Parties to the European Convention on Human Rights

Report¹

Committee on Legal Affairs and Human Rights

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Summary

Pretrial detention has multiple negative effects both on the detainee and on society as a whole. The European Convention on Human Rights establishes limits for the use of pretrial detention and rules applying to the treatment of pretrial detainees.

The high number of pretrial detainees in Europe is an indication that the permissible grounds for pretrial detention, notably to prevent a suspect from absconding or interfering with witnesses and/or other evidence, are – in a number of instances – interpreted too widely or invoked pro forma in order to justify pretrial detention for other, abusive purposes. These abusive grounds for pretrial detention aim to put pressure on detainees in order to coerce them into confessing to a crime or testifying against a third person; to discredit or otherwise neutralise political competitors or to promote other political objectives; to put pressure on detainees in order to compel them to sell their businesses or to extort bribes from them, and to intimidate civil society and silence critical voices.

The Committee on Legal Affairs and Human Rights, noting a certain number of root causes for the abusive use of pretrial detention, calls on States Parties to the European Convention on Human Rights to implement specific measures aimed at reducing pretrial detention and stamping out its abuse.

1. Reference to committee: [Doc. 12844](#), Reference 3839 of 9 March 2012.

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A. Draft resolution²

1. The Parliamentary Assembly stresses the importance of the presumption of innocence in criminal proceedings. Pretrial detention (detention on remand) should be used only exceptionally, as a last resort, when alternative measures of restraint are insufficient to safeguard the integrity of the proceedings.
2. The Assembly notes the multiple negative effects of pretrial detention, both on the detainee and on society as a whole, most of which also occur when the detainee is subsequently acquitted:
 - 2.1. negative effects of pretrial detention on detainees:
 - 2.1.1. risk of job loss or bankruptcy; their families suffer economic hardship in addition to the human consequences of prolonged separation;
 - 2.1.2. in many instances, exposure to violence by other inmates and officials, the nefarious influence of hardened criminals, contagious diseases and difficult detention conditions, which are often worse for pretrial detainees than for convicted criminals serving their prison term;
 - 2.1.3. threat to the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights (ETS No. 5, "the Convention") due to the psycho-social consequences of pretrial detention, which is often accompanied by severe isolation and undermines the detainees' ability to defend themselves effectively;
 - 2.2. negative effects of pretrial detention on society as a whole:
 - 2.2.1. the high budgetary cost of detention in comparison with other measures of restraint, such as bail, house arrest, curfews or restraining orders, with or without electronic supervision. The resources spent on pretrial detention could be put to better use for crime prevention, increasing the rate of elucidation of crimes, and the re-socialisation of offenders;
 - 2.2.2. the loss of the economic contribution of pretrial detainees, the de-socialising effect of detention on the detainees' family and the negative effects of detention on the spread of infectious diseases;
 - 2.2.3. the fact that pretrial detention without effective controls creates opportunities for corruption and generally undermines the public's trust in the proper functioning of the criminal justice system.
3. The European Convention on Human Rights, as interpreted by the European Court of Human Rights, has established clear limits for the use of pretrial detention and rules applying to the treatment of pretrial detainees.
4. The Assembly notes that the laws of most member States are generally in line with Convention standards, but their application by the prosecutorial authorities and the courts is frequently not.
5. As the different practices in this respect, even among member States of the European Union, threaten the effectiveness of international legal cooperation, the European Union has commissioned extensive comparative research to identify problems and possible solutions.
6. The high number of pretrial detainees (in absolute terms and in relation to the total prison population), almost 425 000 (25% of all prisoners) in Europe (2013), is an indication that the permissible grounds for pretrial detention, notably to prevent a suspect from absconding or interfering with witnesses and other evidence, are generally interpreted too widely or invoked pro forma in order to justify pretrial detention for other, abusive purposes.
7. The following abusive grounds for pretrial detention have been observed in a number of States Parties to the European Convention on Human Rights, namely to:
 - 7.1. put pressure on detainees in order to coerce them into confessing to a crime or otherwise co-operating with the prosecution, including by testifying against a third person (for example the case of Sergey Magnitsky, in the Russian Federation);
 - 7.2. discredit or otherwise neutralise political competitors (for example certain cases of United National Movement (UNM) leaders in Georgia);

2. Draft resolution adopted by the committee on 25 June 2015.

- 7.3. promote other, including foreign policy-related, political objectives (for example the case of Ms Nadiia Savchenko, the Ukrainian pilot and member of the Ukrainian delegation to the Parliamentary Assembly, in the Russian Federation);
 - 7.4. put pressure on detainees in order to compel them to sell their businesses (for example the Gusinsky case in the Russian Federation) or in order to extort bribes;
 - 7.5. intimidate civil society and silence critical voices (for example the case in Turkey of a 16-year-old placed in pretrial detention for allegedly insulting the President via social media, the cases of prominent human rights defenders and lawyers in Azerbaijan, and the lengthy pretrial detention of peaceful protesters in the “Bolotnaya” and other cases in the Russian Federation).
8. The over-representation of foreign nationals among pretrial detainees gives rise to concerns that the legal grounds for detention are applied in a discriminatory way.
 9. Some countries, such as Poland, have made considerable progress in reducing pretrial detention, by implementing substantial reforms to execute relevant judgments of the European Court of Human Rights.
 10. Other countries, such as the Russian Federation, Turkey and Georgia, have adopted legal reforms accompanied by practical measures which have led to a clear reduction in the number of pretrial detainees and considerable improvements in the treatment of the majority of detainees, even though abuses of pretrial detention, as mentioned above, continue to occur.
 11. The root causes of the abusive use of pretrial detention include:
 - 11.1. a political and legal culture which rewards those who are perceived as tough on crime, at the expense of the presumption of innocence;
 - 11.2. a structural imbalance between the prosecution and the defence in terms of power and available resources (access to relevant information, time, funding);
 - 11.3. the fact that decisions on pretrial detention are frequently taken by more junior judges, who tend to be overworked and reticent to assert their authority vis-à-vis the prosecution. The result is, in a number of instances, a widespread practice of rubber-stamping of the prosecution’s requests by judges, without taking into account the circumstances of the individual case;
 - 11.4. the possibility of “forum shopping” by the prosecution, which may be tempted to develop different strategies to ensure that requests for pretrial detention in certain cases are decided by a judge who, for various reasons, is expected to be “accommodating” (for example in Georgia, the Russian Federation and Turkey);
 - 11.5. the possibility for the prosecution to circumvent statutory time limits imposed on pretrial detention by modifying or staggering indictments (for example in Georgia).
 12. The Assembly therefore calls on:
 - 12.1. all States Parties to the European Convention on Human Rights to implement measures aimed at reducing pretrial detention, including by:
 - 12.1.1. raising awareness among judges and prosecutors of the legal limits placed on pretrial detention by national law and the European Convention on Human Rights and of the negative consequences of pretrial detention on the detainees and their families and on society as a whole;
 - 12.1.2. ensuring that decisions on pretrial detention are taken by more senior judges or by collegiate courts and that judges do not suffer negative consequences for refusing pretrial detention in accordance with the law;

12.1.3. ensuring greater equality of arms between the prosecution and the defence, including by allowing defence lawyers unfettered access to detainees, by granting them access to the investigation file ahead of the decision imposing or prolonging pretrial detention, and by providing sufficient funding for legal aid, and also for proceedings related to pretrial detention;

12.1.4. taking appropriate action to redress any discriminatory application of the rules governing pretrial detention with regard to foreign nationals, in particular by clarifying that being a foreigner does not per se constitute an increased risk of absconding;

12.2. the Russian Federation, Turkey and Georgia, in particular, to:

12.2.1. take appropriate measures to prevent “forum shopping” by prosecutors;

12.2.2. refrain from using pretrial detention for purposes other than the administration of justice and to release all detainees currently held for any abusive purposes.

13. The Assembly commends the European Union for the initiatives taken in recent years aimed at reducing pretrial detention in European Union member States and invites the competent bodies of the European Union to continue basing their work on the standards set by the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... (2015) on the abuse of pretrial detention in States Parties to the European Convention on Human Rights and to Committee of Ministers Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.
2. Drawing the attention of the Committee of Ministers to the continuing shortcomings, including over-representation of foreign nationals in pretrial detention, which have been documented in recent research carried out on behalf of the European Union, and to the examples of abuses of pretrial detention in a number of States Parties to the European Convention on Human Rights (ETS No. 5) referred to in Assembly Resolution ... (2015), the Assembly calls on the Committee of Ministers to:
 - 2.1. consider ways and means of reducing recourse to pretrial detention in general and its abuse for specific purposes such as the pursuit of political or corruption-related objectives, in particular in light of recent developments;
 - 2.2. encourage relevant bodies of the Council of Europe to intensify their co-operation with their European Union counterparts in order to ensure that any action to tackle pretrial detention issues is taken in a co-ordinated way, on the basis of the standards laid down by the European Convention on Human Rights as interpreted by the European Court of Human Rights.

3. Draft recommendation adopted by the committee on 25 June 2015.

C. Explanatory memorandum by Mr Agramunt, rapporteur

1. Introduction

1. The motion for a resolution presented by Mr Dick Marty and others⁴ was referred to the Committee on Legal Affairs and Human Rights for report on 9 March 2012. The committee appointed me rapporteur on 24 April 2012. On 1 October 2012, the committee considered an introductory memorandum,⁵ held an exchange of views and authorised fact-finding visits to the Russian Federation, Turkey and Ukraine. On 10 December 2014, the committee authorised me to carry out a fact-finding visit to Georgia in 2015 instead of the previously authorised visit to Ukraine. I carried out the three visits from 11 to 13 November 2013 (Moscow), on 11 and 12 June 2014 (Ankara) and from 15 to 18 February 2015 (Tbilisi). Because of unforeseen delays in my work, the reference was extended several times, lastly until 30 September 2015.

2. I was obliged to be selective due to the limited resources available for the preparation of this report. The selection of one country rather than another for a fact-finding visit – on the basis of a statistical analysis of violations found by the European Court of Human Rights – or the choice of a limited number of examples for analysis in the report was due to practical necessity and not an expression of unfair selective criticism or the use of double standards.

3. In short, the movers of the motion are concerned that in a number of Council of Europe member States, pretrial detention

- is used too frequently;
- is often excessively long;
- detention conditions in pretrial detention are often unacceptable.

4. These are serious worries indeed, given the legal context in which the instrument of pretrial detention is placed under the European Convention on Human Rights (ETS No. 5, “the Convention”), to which all member States of the Council of Europe have acceded:

- the right to liberty is a core human right and its respect a key prerequisite of the rule of law;
- any interference with the right to liberty must be in strict conformity with the limitative list of permissible restrictions in Article 5 of the Convention;
- persons held in pretrial detention are presumed innocent and have the right to be treated as such;
- the use or abuse of pretrial detention has a strong impact on the fairness of the trial, which is guaranteed by Article 6 of the Convention.

5. In light of the facts collected during my three information visits and some jurisprudential and statistical research, I have come to the conclusion that worries about the above-mentioned issues are indeed justified. In a number of countries, another issue must be added, namely that pretrial detention is used for the wrong reasons, including for putting pressure on detainees in order to coerce them into co-operating with law-enforcement authorities, and even to discredit and incapacitate the political opposition by jailing its leading public figures.

6. Contrary to my intention, I no longer intend to cover the issue of police detention (police custody), for the simple reason that taking up the two issues in one report would far exceed the resource limitations imposed on the Assembly’s rapporteurs for one mandate.

7. As regards pretrial detention, I intend to begin by recalling the rules laid down by the European Convention on Human Rights. I will then report on my findings during the three fact-finding visits to the Russian Federation, Turkey and Georgia. In light of these examples, which I had chosen in agreement with the committee, I will finally draw some conclusions on the situation in the member States of the Council of Europe in general.

4. [Doc. 12844](#).

5. Document AS/Jur (2012) 34 dated 28 September 2012.

2. Rules on pretrial detention applicable to States Parties to the European Convention on Human Rights

8. The first and foremost source of inspiration for any rapporteur of the Committee on Legal Affairs and Human Rights, both as regards the problems that arise in a given field and Convention-based approaches to their solution is the case law of the European Court of Human Rights (“the Court”) (section 2.1 below). But as usual, I will also avail myself of other work done within the Council of Europe (section 2.2), and draw lessons to the extent possible from ongoing reform discussions in individual member States of the Council of Europe (section 2.3) and from comparative research carried out by academics (section 2.4).

2.1. Case law of the European Court of Human Rights

9. The basis for determining what constitutes an “abuse” of pretrial detention/detention on remand in member States of the Council of Europe is the European Convention on Human Rights, as interpreted by the European Court of Human Rights. Rules on pretrial detention are found, in particular, in Article 5 of the Convention. But abuses of pretrial detention can also constitute violations of Article 6 (fair trial guarantees), Article 3 (protection against torture and inhuman and degrading treatment), as well as Article 18 (limitation on use of restrictions on rights, prohibiting in particular politically motivated interferences with human rights).⁶

10. The following issues and leading cases appear to be particularly noteworthy.

2.1.1. Purpose of detention

11. Under Article 5.1.c, the purpose of the arrest or detention must be to bring the detainee before the competent legal authority on suspicion of his or her having committed an offence, and detention must be a proportionate measure to achieve the stated aim. This would exclude arrests for petty crimes for which the court is unlikely to impose a custodial sentence even if the suspect's guilt is established.⁷

2.1.2. Requirement of reasonable suspicion

12. Whilst definitive proof of the crime giving rise to the arrest is not required to justify detention, there must be a plausible basis for “reasonable suspicion”, which would satisfy an objective observer that the person concerned may have committed the offence.⁸ This requires also that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code.⁹

2.1.3. Prohibition of the use of excessive force

13. The use of excessive force makes an arrest unlawful and may also constitute violations of other fundamental rights such as the right to life.¹⁰

6. See the Court's own “Guide on Article 5 of the Convention / Right to Liberty and Security”, 2014, available on the Court's website; see also Jeremy McBride (2009), *Human rights and criminal procedure*, Council of Europe Publishing, pp. 35-108; A comprehensive analysis of the Court's case-law is made for example by Stefan Trechsel (2006): *Human Rights in Criminal Proceedings*, Oxford et. al. This study highlights the main lines of the Court's argumentation as well as its shortcomings.

7. See also paragraph 23 below (violation of Article 18 in cases of detention for other purposes).

8. See *Fox, Campbell and Hartley v. United Kingdom*, Applications Nos. 12244/86, 12245/86 and 12383/86, judgment of 30 August 1990: the fact that the applicants had previous convictions for acts of terrorism connected with the IRA cannot form the sole basis of a suspicion justifying their arrest some seven years later; in *Stepuleac v. Moldova*, Application No. 8207/06, judgment of 6 November 2007, a number of factors described in detail in the judgment created “a very troubling impression that the applicant was deliberately targeted”.

9. *Wloch v. Poland*, Application No. 27785/95, judgment of 19 October 2000; *Kandzhov v. Bulgaria*, Application No. 68294/01, judgment of 6 November 2008; in the latter case, the applicant's actions consisted in gathering signatures calling for the resignation of the Minister of Justice and displaying two posters calling him a “top idiot”, in an entirely peaceful manner not obstructing any passers-by. This could in no way constitute the elements of the crime of “hooliganism” for which the applicant had been arrested.

10. *Nachova and others v. Bulgaria*, Applications Nos. 43577 and 43579/1998, judgment of 6 July 2005 [Grand Chamber]: recourse to potentially deadly force cannot be considered as “absolutely necessary” where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.

2.1.4. Requirement of prompt presentation to a judge

14. There is extensive case law on what is considered as “prompt”, and the required status of the officer exercising judicial power within the meaning of Article 5.3. Such an officer must be independent of the executive and of the parties and must have the power to make a binding decision as to the continued detention.¹¹

2.1.5. Appropriate conduct of the court hearing

15. The European Court of Human Rights requires that the court hearing on judicial review of the detention must be conducted in an appropriate and non-threatening manner,¹² in the presence of the detainee¹³ and of his lawyer,¹⁴ who must be given access to the case file.¹⁵

2.1.6. Duty to account for persons kept in custody

16. The duty to account for persons held in custody is a key measure to prevent enforced disappearances. Both the Court¹⁶ and the Parliamentary Assembly, in its reports on the fight against enforced disappearances,¹⁷ have laid down strict requirements aimed at ensuring accountability of the authorities for any deprivation of liberty.

2.1.7. Conditions of detention and prevention of ill-treatment

17. The prevention of ill-treatment, both during early police custody and during pretrial detention, is a major concern. It is important for ensuring the fairness of the trial, by avoiding undue pressure to obtain confessions or false testimony against third parties, and in its own right as a matter of the prevention of torture and inhuman and degrading treatment within the meaning of Article 3 of the Convention. Unfortunately, a number of recent cases have shown that conditions in pretrial detention are still troublesome, often considerably worse than in prisons where persons who were already convicted of a crime serve their sentences. I should like to recall that during pretrial detention, we are dealing with persons who are presumed innocent. Reading the statements of fact in some of the Court’s leading cases, describing in some detail the dismal conditions of detention in these very real cases, sends a chill up one’s spine.¹⁸ My visit to a pretrial detention centre in Tbilisi in February 2015 also worried me, especially regarding the prolonged isolation of the detainees from their families.¹⁹

2.1.8. Provision of adequate medical care

18. The controversy over the inadequacy of medical care afforded to former Ukrainian Prime Minister Yulia Tymoshenko is well-known.²⁰ Insufficient medical care in pretrial detention can have tragic consequences, as in the case of a cancer patient who did not receive timely diagnosis and treatment for a relapse.²¹ In Russia,

11. See, for example *Nikolova v. Bulgaria*, Application No. 31195/95, judgment of 25 March 1999 [Grand Chamber]; *Brogan and others v. United Kingdom*, Applications Nos. 11209/84, 11234/84, 11266/84 and 11386/84, judgment of 29 November 1988, the latter judgment explaining the distinction between “promptly” and the less strict requirement of the second part of Article 5.3 (“within a reasonable time”).

12. *Ramishvili and Kokhleidze v. Georgia*, Application No. 1704/06, judgment of 27 January 2009, paragraphs 129, 132 and 134; the description of the physical conditions of the trial: detainees placed in a “caged dock” at the far end of the courtroom, surrounded by guards (“special forces”), barely able to communicate with their lawyers, unable to hear the judge or the prosecutor, humiliating and unjustifiably stringent measures of restraint during the public hearing and the judge clearly aiding the prosecutor during the hearing.

13. *Grauzinis v. Lithuania*, Application No. 37975/97, judgment of 10 October 2000, paragraph 34.

14. *Wloch v. Poland*, op. cit., paragraph 129; *Salduz v. Turkey*, Application No. 36391/02, judgment of 27 November 2008.

15. *Niedbala v. Poland*, Application No. 27915/95, judgment of 4 July 2000.

16. *Kurt v. Turkey*, Application No. 24276/94, judgment of 25 May 1998.

17. [Recommendation 1995 \(2012\)](#) and the report by Mr Christos Pourgourides (Cyprus, EPP/CD) of 23 February 2012 ([Doc. 12880](#)), with references to the International Convention on the Protection of All Persons against Enforced Disappearance.

18. See, for example, *Elci and others v. Turkey*, Application No. 23145/93, judgment of 13 November 2003; *I.I. v. Bulgaria*, Application No. 44082/98, judgment of 9 June 2005; *Moiseyev v. Russia*, Application No. 62963/00, judgment of 9 October 2008; see also Mikhail Khodorkovsky on the Pussy Riot trial: [I’ve been there – how can these women endure it? the recent contribution by Mikhail Khodorkovsky](#) ([guardian.co.uk](#) of 6 August 2012).

19. See paragraph 77 below.

20. See, for example, *BBC News* of 9 May 2012, [Yulia Tymoshenko ends hunger strike after hospital move](#).

Sergei Magnitsky was diagnosed with severe pancreatitis whilst in detention. The failure to adequately treat this dangerous and painful condition contributed to his horrific death, which was the subject of a separate report of the Assembly in 2014.²² Let us not forget, once again, that the persons concerned are presumed innocent!

2.1.9. Justification of detention on remand

19. The European Court of Human Rights has set fairly strict standards following which the competent authorities must justify having examined the presence of the legal grounds for detention in view of the circumstances of each case, including consideration of possible alternatives to detention²³ (in particular bail). Acceptable grounds for (continued) detention, following the Court's case law, include: a) the risk that the accused will fail to appear for trial; b) the risk that the accused, if released, would take action to prejudice the administration of justice (for example put pressure on witnesses or otherwise interfere with evidence); c) commit further offences; or d) cause public disorder.²⁴

20. Regarding preservation of public order as a ground for detention, the Court has developed particularly stringent criteria.²⁵ When the authorities intentionally stir up public disorder through a co-ordinated campaign against well-known former high-ranking officials, as in certain cases I came across in Georgia, this surely does not create a valid ground for detention according to these criteria.²⁶

21. Formulaic references to the existence of grounds such as the gravity of the charges or the likelihood of the suspect absconding or obstructing the course of justice are not sufficient.²⁷ The arguments for and against release must not be "general and abstract", but refer to the specific facts and the suspect's personal circumstances justifying his detention.²⁸ The burden of proof for the circumstances warranting detention is on the prosecution.²⁹ The European Court of Human Rights also points out that the relevant considerations may change over time so that a fresh assessment becomes necessary at regular intervals.³⁰ Unfortunately, actual practices in many member States differ considerably from these standards, even in member States of the European Union covered by an in-depth comparative research project carried out under the auspices of the European Commission.³¹ It has been observed that requests by the prosecution for placement of a suspect in pretrial detention routinely do not refer to the specific facts of the individual case and even reproduce the same spelling mistakes. They are nevertheless "rubber-stamped" by judges, who are typically very junior, thus lack experience and are weary of drawing attention to themselves by rejecting requests for detention.³² Sadly, despite the fact that such practices clearly depart from the standards set by the European Court of Human Rights, they often do not reach the Court, which, according to practitioners interviewed as part of an European Union-sponsored research project "is no longer viewed as a useful forum in which to raise issues relating to pretrial detention ... due to the length of proceedings and the costs involved".³³

21. *Popov v. Russia*, Application No. 26853/04, judgment of 13 July 2006; see also *Aleksanyan v. Russia*, Application No. 46468/06, judgment of 22 December 2008. Mr Aleksanyan, a Harvard-trained lawyer who worked for Yukos Oil, was kept in pretrial detention for many months after he was diagnosed with an advanced stage of AIDS (see paragraphs 156-158: violation of Article 3); in *Kaprykowski v. Poland*, Application No. 23052/05, judgment of 3 February 2009, the Court was "struck by the Government's argument that the conditions of the applicant's [an epileptic] detention were adequate, because he was sharing his cell with other inmates who knew how to react in the event of his medical emergency" (paragraph 74).

22. [Doc. 13356](#), Refusing the impunity of the killers of Sergei Magnitsky (rapporteur: Mr Andreas Gross, Switzerland, SOC).

23. See, for example, *Ambruszkiewicz v. Poland*, Application No. 38797/03, judgment of 4 May 2006, paragraphs 29-32.

24. See, for example, *Tiron v. Romania*, Application No. 17689/03, judgment of 7 April 2009.

25. See, for example, *Letellier v. France*, judgment of 26 June 1991, paragraph 51.

26. See paragraph 75 below (situation in Georgia).

27. *Bykov v. Russia*, Application No. 4378/02, judgment of 10 March 2009 [Grand Chamber]; *Mamedova v. Russia*, Application No. 7064/05, judgment of 1 June 2006.

28. *Aleksanyan v. Russia*, Application No. 46468/06, judgment of 22 December 2008, paragraph 179.

29. *Bykov v. Russia*, op. cit., paragraph 64.

30. Ibid. and *Labita v. Italy*, Application No. 26772/95, judgment of 6 April 2000 [Grand Chamber].

31. Note 51 below.

32. Fair Trials International and Human Rights Monitoring Institute (Lithuania), Pre-Trial Detention in Lithuania, Communiqué of the Local Expert Group (Lithuania), 9 May 2013, paragraphs 5 and 6.

33. Ibid., paragraph 35.

2.1.10. Length of detention on remand

22. Article 5.3 of the Convention lays down the right to a trial within a reasonable time or to be released pending trial. The Court has not set a fixed maximum duration for pretrial detention. The question whether or not a period of detention is reasonable must be assessed in each case according to its special features, including the complexity of the investigation.³⁴ While the severity of the sentence incurred is relevant in the assessment of the risk of absconding, the gravity of the charges by itself cannot serve to justify long periods of detention on remand.³⁵ Also, with passage of time, the requirements of the investigation no longer suffice to justify detention: normally, the risks of interference with the investigation diminish over time as the inquiries are carried out, testimony is taken and verifications are made.³⁶ When the suspect is in detention, the authorities must display “special diligence” in the proceedings.³⁷ It should be noted that bail may also be required only as long as reasons justifying detention prevail.³⁸

2.1.11. Reasons for detention other than the pursuit of criminal justice (Article 18 of the European Convention on Human Rights)

23. In its recent judgment in the case of Yuri Lutsenko,³⁹ the former Interior Minister of Ukraine, who was arrested along with former Prime Minister Yulia Timoshenko following a change of government, the Court recalled that an arrest and the subsequent detention on remand also breaches the Convention when it is motivated by considerations other than the administration of justice. In the case of Mr Lutsenko, the Court found a violation of Article 18 of the Convention – a rare feat in view of the very high threshold of evidence the Court set in its first Khodorkovskiy judgment.⁴⁰ The detention of Mr Lutsenko was found to be obviously motivated by such “political” considerations as weakening him as a senior figure of the opposition, whose leader, Ms Timoshenko, was also in prison.⁴¹ In an earlier judgment concerning the Russian Federation, the Court had found that the detention of Mr Gusinskiy on suspicion of fraud was in reality motivated by the authorities’ desire to put Mr Gusinskiy under pressure to sell his company, Most Media/NTV, to Gazprom (which subsequently shut down the news channel which had provided, inter alia, realistic coverage of the atrocities of the first Chechen conflict).⁴² The Court consequently found Mr Gusinskiy’s detention to be in violation of Article 18.⁴³ The Court’s evidentiary standards for finding a violation of Article 18 are very high, to the point that in its first Khodorkovskiy judgment,⁴⁴ the Court did not find such a violation despite the numerous indications for the political motivation of the detention of Mikhail Khodorkovsky summed up in the Assembly’s report on “The circumstances surrounding the arrest and prosecution of leading Yukos executives”.⁴⁵ During my own fact-finding visits, I have come across a number of cases where such “extra-judicial” motivations may well be the real cause for placing a person in pretrial detention.⁴⁶

34. *McKay v. the United Kingdom*, Application No. 453/03, judgment of 3 October 2006 [Grand Chamber], paragraphs 41-45.

35. *Idalov v. Russia*, Application No. 5826/03, judgment of 22 May 2012 [Grand Chamber], paragraph 145.

36. *Cloth v. Belgium*, judgment of 12 December 1991, paragraph 44.

37. *Scott v. Spain*, judgment of 18 December 1996, paragraph 74.

38. *Aleksandr Makarov v. Russia*, Application No. 15217/07, judgment of 12 March 2009, paragraph 139.

39. *Lutsenko v. Ukraine*, Application No. 6492/11, judgment of 3 July 2012.

40. *Khodorkovskiy v. Russia*, Application No. 5829/04, judgment of 31 May 2011, paragraphs 255 and 258; the Court reiterates in the Lutsenko judgment (note 39, paragraph 106) that “the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. ... A mere suspicion that the authorities used their powers for some other purposes than those defined in the Convention is not sufficient to prove that Article 18 was breached. Furthermore, high political status does not grant immunity”.

41. *Lutsenko v. Ukraine*, op. cit., paragraphs 104-110.

42. “ECHR condemns Russia in media case”, Committee to Protect Journalists, 20 May 2004.

43. *Gusinskiy v. Russia*, Application No. 70276/01, judgment of 19 May 2004. The Court granted Mr Gusinskiy some monetary compensation for the days spent in detention. The question of whether the authorities’ action aimed at depriving Mr Gusinskiy of his company also constituted a violation of Article 1 of the First Protocol (right to property) was never raised before the Court.

44. *Khodorkovskiy v. Russia*, op. cit., paragraphs 250-261.

45. Assembly Doc. 10368 (rapporteur: Ms Sabine Leutheusser-Schnarrenberger, Germany, ALDE).

46. Paragraphs 52-58, 66-67 and 75-79 below.

2.2. Previous work of the Council of Europe

2.2.1. Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse⁴⁷

24. In this recommendation, the Committee of Ministers stated:

“Considering the need to ensure that the use of remand in custody is always exceptional and is always justified;

Bearing in mind the human rights and fundamental freedoms of all persons deprived of their liberty and the particular need to ensure that not only are persons remanded in custody able to prepare their defence and to maintain their family relationships but they are also not held in conditions incompatible with their legal status, which is based on the presumption of innocence; ...

Recommends that governments of member States disseminate and be guided in their legislation and practice by the principles set out in the appendix to this recommendation.”

25. The appendix to the recommendation recalls basic principles drawn from the case law of the European Court of Human Rights and from the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and relevant United Nations treaty bodies.

2.2.2. Recommendation Rec(2006)2 of the Committee of Ministers on the European Prison Rules⁴⁸

26. Similarly, in the appendix to Recommendation Rec(2006)2, the Committee of Ministers sums up in some detail the minimum standards for the treatment of prisoners (including remand prisoners). These “European Prison Rules” are still the most comprehensive set of standards on prison conditions in Europe. Whilst they explicitly state⁴⁹ that “[p]rison conditions that infringe prisoners’ human rights are not justified by lack of resources”, numerous judgments of the European Court of Human Rights finding violations in this respect show that, in practice, these Rules are still not fully applied in all member States of the Council of Europe.

2.2.3. SPACE statistics⁵⁰

27. The Annual Penal Statistics of the Council of Europe (French acronym: SPACE) provide statistical information on prison populations (stock and flow) in all member States of the Council of Europe, as well as breakdowns according to different criteria (such as grounds for detention, duration, nationality, etc.). The SPACE statistics are valuable tools enabling comparisons between countries and over time. They permit policy makers to discern trends and allow them to place the situation in their own countries in a comparative perspective.

2.3. Work by European Union and United Nations bodies

28. Given the importance of the subject matter of pretrial detention, it is not surprising that a considerable amount of comparative research has already been carried out. The following are but two particularly interesting examples.

2.3.1. European Commission study on pretrial detention in the European Union

29. The European Commission initiated an in-depth study on pretrial detention in the European Union.⁵¹ This study provides detailed factual information and legal analysis on the situation concerning pretrial detention in EU member States. This compilation is referred to in the European Commission’s June 2011 Green Paper on “Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal

47. <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM>.

48. <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

49. Rule 4.

50. The most recent set of statistics published in February 2015 concern the year 2013: <http://wp.unil.ch/space/2015/02/space-i-and-space-ii-2013/>.

51. Pre-Trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the European Union, A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (eds.); the 111-page introduction is available at: http://ec.europa.eu/justice/doc_centre/criminal/procedural/doc/chapter_1_introduction_en.pdf; the chapter on France (as an example); http://ec.europa.eu/justice/newsroom/criminal/appendix_2_-_comparative_research_en.pdf.

justice legislation in the field of detention”.⁵² As the Green Paper explains, mutual trust is the pre-condition for mutual recognition and execution of judicial decisions. Mutual trust in turn depends on reasonably comparable legal rules and judicial practices throughout the region.

30. In June 2014, the non-governmental organisation (NGO) “Fair Trials International” launched another substantial comparative law project on the practice of pretrial detention in EU member States funded by the European Commission, involving 10 partners from Greece, Hungary, Ireland, Italy, Lithuania, Poland, Romania, Spain, the Netherlands and England and Wales.⁵³

31. Proper implementation of EU law based on mutual trust can indeed contribute to reducing the use of pretrial detention against foreign residents. Foreign suspects may well be subject to pretrial detention more often than local residents in comparable cases because of the higher risk of absconding, in the eyes of the local law-enforcement bodies. Foreign nationals are indeed over-represented among pretrial detainees in all countries covered by the comparative research project. The EU rules on mutual recognition of judicial decisions, including decisions on non-custodial supervision measures as an alternative to provisional detention, may reassure a judge that an alternative measure will be supervised just as reliably in the suspect’s home country as in the country where the alleged crime took place.⁵⁴ But the mutual trust needed to make these rules fully operational still needs some time to develop. In a motion for a resolution in the European Parliament on the mid-term review of the Stockholm Programme in March 2014, the movers noted that standards in many EU member States in relation to pretrial detention fall short of human rights standards and call on the Commission to revisit the case for establishing “minimum and enforceable standards in relation to pretrial detention” through legislative action.⁵⁵ The European Parliament is now preparing to negotiate a new Directive on “presumption of innocence” to ensure that the right to be presumed innocent until proven guilty is fully respected in EU member States.⁵⁶

32. I cannot but welcome the sustained attention paid by different EU bodies to the issue of pretrial detention. But it should be noted that common minimum standards already exist. They are provided by the European Convention on Human Rights, which is in force in all EU member countries. In order to avoid duplication of work and diverging standards, it is therefore important that this relatively new field of activity of the European Union is developed in close co-operation with the Council of Europe.

2.3.2. Compilation of standards and practices by the Office of the United Nations High Commissioner on Human Rights

33. The Office of the United Nations High Commissioner on Human Rights (OHCHR) has also compiled a useful summary of standards and practices concerning pretrial detention, on the basis of the International Covenant on Civil and Political Rights (ICCPR) and the case law of the relevant treaty bodies, with references also to the case law of the European Court of Human Rights.⁵⁷

3. Pretrial detention in Council of Europe member States – some facts and figures and recent developments

3.1. Some facts and figures

34. The most recent detailed statistical data available (SPACE I 2013, published in February 2015) show that there are still big differences in the use of pretrial detention among the States Parties to the European Convention on Human Rights despite the fact that they are all subjected to the same standards (see above, paragraphs 8-23).

52. Document COM(2011)327 final, Brussels, 14 June 2011.

53. “Fair Trials launches new pretrial detention project”, 13 June 2014, and [Update on Fair Trials pretrial detention project](#), 26 March 2015.

54. [Report](#) from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention.

55. European Parliament, [Motion for a European Parliament Resolution on the mid-term review of the Stockholm Programme \(2013/2024\(INI\)\)](#), paragraph 46.

56. LIBE press release of 31 March 2015: www.europarl.europa.eu/news/en/news-room/content/20150330IPR39303/html/Fair-trials-MEPs-beef-up-draft-EU-law-on-presumption-of-innocence.

57. www.ohchr.org/Documents/Publications/training9chapter5en.pdf.

35. In terms of the number of detainees without final sentence per 100 000 inhabitants, the highest numbers are found in Turkey (89.2), Albania (68.1), Russia (65.6), Monaco (63.4), Latvia (61.9), Montenegro (58.3), and Luxembourg (55.5). The lowest scores are found in Iceland⁵⁸ (4.0) and Liechtenstein (5.4), and among the larger countries in Bulgaria (10.6), Finland (10.8), Slovenia (12.4), Ireland (12.8) and Germany (13.8). The average stood at 31.

36. In terms of percentage of detainees without final sentence as part of the total prison population, the highest numbers are found in Andorra (59.6), Turkey (49.6), the Netherlands (46.3), Luxembourg (41.6) and Switzerland (40.6). The best performers are Poland (8.3), Iceland (8.6), Bulgaria (8.8) and Romania (10.9). The average stood at 25.8.

37. The former set of figures reflects the absolute numbers of pretrial detainees (more precisely, of detainees against whom no judgment has yet entered into legal force), in relation to the general population, the second the proportion of pretrial detainees as a percentage of the total prison population. The figures show that a high level of imprisonment in general correlates with a high level of pretrial detention and with a high percentage of pretrial detainees among the total prison population. Worldwide figures compiled by the International Centre for Prison Studies⁵⁹ show that the countries with the highest proportion of the total prison population in pretrial detention are those with serious institutional and governance problems across the board: the Comoros (92%), Libya (87%), Liberia and Bolivia (83% each), and the Democratic Republic of Congo (82%).⁶⁰ In these countries, the total prison population is not even particularly high. But the judiciary can obviously not keep pace with arrests by the police, which in turn uses the out-of-control practice of pretrial detention as a tool to extort bribes.

38. What lessons can be drawn from these figures? First, the worldwide comparison supports the conclusion that high numbers of pretrial detainees are an alarm signal for the functioning of the judicial system and of law-enforcement in general. Second, both so-called established democracies and more recent democracies appear among the countries with high as well as those with low counts of pretrial detention. This means that high numbers of pretrial detainees are not a fatality – progress is possible, as the impressive positive examples of Poland, Bulgaria and Romania show. At the same time, even countries that are solidly anchored in the rule of law, such as the Netherlands, Luxembourg and Switzerland are not immune to backsliding – which means that continuous vigilance is needed.

39. It is therefore worth recalling the disadvantages of pretrial detention in relation to other measures of restraint such as bail, house arrest, curfew (if need be, enforced with the help of electronic monitoring devices), reporting obligations, targeted surveillance of communications (to prevent tampering with evidence) and others.⁶¹

3.2. Detrimental effects of pretrial detention on detainees and society as a whole

40. Pretrial detention has a very strong negative effect on the suspect, who is suddenly cut off from his or her professional and family life. Resulting social stigmatisation has long-term prejudicial consequences for the detainees and their families. The detainees may often be exposed to institutional violence, torture and gang violence. Homicide and suicide rates are higher among pretrial detainees than among sentenced prisoners. Pretrial detention is thus an extremely costly measure from the point of view of the accused, but also for the taxpayers, given the high cost of detention.⁶²

41. The living conditions in pretrial detention are often worse than those for convicted prisoners.⁶³ They may also impair an accused's ability to prepare for trial and even contribute towards a deterioration of the detainee's mental health, sometimes affecting how well a detainee can prepare for and cope with the trial.⁶⁴

58. The figure is 0 for San Marino, but according to an agreement with Italy, most prisoners from San Marino are detained in Italy, which distorts the statistics.

59. *World Pre-trial/Remand Imprisonment List (second edition)*, International Centre for Prison Studies (ICPS), University of Essex.

60. One European country also makes it into this rather sinister list: Monaco (73%), but this country's tiny population can cause erratic statistical movements.

61. "Pre-trial detention – a challenge for the new Justice Commissioner and for EU Member States", Quaker Council for European Affairs, QCEA Background Paper, 201: <https://www.qcea.org/2014/11/background-paper-pretrial-detention/>.

62. According to figures quoted in the QCEA background paper, the cost of detention in EU member States amounted to €3 000 per detainee per month (in 2011). By comparison, in Belgium, the cost of electronic monitoring, the most expensive alternative to pretrial detention, is only one third of the cost of detention (QCEA paper, note 59, p. 5).

63. *Presumption of Guilt, The Global Overuse of Pretrial Detention*, Open Society Justice Initiative, September 2014, pp. 57-61.

42. Having visited a number of pretrial detainees during my fact-finding visits, I have seen for myself how long-term isolation affects their psychological well-being. I cannot help suspecting that harsh conditions are sometimes created on purpose, in order to put pressure on detainees to make a confession or otherwise co-operate with the law-enforcement bodies. Such cases may well violate the fair trial guarantee in Article 6 of the European Convention on Human Rights, which includes the presumption of innocence and the right to remain silent, the privilege against self-incrimination and the right to be present at trial. Depending on their severity, conditions of detention may also violate Article 3 of the European Convention on Human Rights (prohibition of torture and inhuman and degrading treatment).

43. The cost of detention both to the detainee and to society at large increases with the length of detention. Unfortunately, the 2013 figures reflected in the latest set of statistics published in February 2015⁶⁵ have not improved since 2011. The median length of pretrial detention has remained at 3.8 months, with wide disparities running between 36.1 months in “the former Yugoslav Republic of Macedonia” and 16.6 in Turkey and 0.3 months in Liechtenstein, 0.6 months in Switzerland and 0.7 months in Sweden.

3.3. Recent positive developments in some Council of Europe member States

3.3.1. Poland

44. Poland has historically had many problems regarding excessive use of pretrial detention, as shown by numerous findings of violations by the European Court of Human Rights. Progress in this respect is reflected in the Assembly’s last report on implementation of judgments of the European Court of Human Rights.⁶⁶ These reforms have triggered a positive trend towards a reduction of the use of pretrial detention in Poland, which has continued over the past years, culminating in the excellent figures reflected in the SPACE I report for 2013 (paragraph 36 above).

3.3.2. Germany

45. An important reform of the rules governing pretrial detention in Germany entered into force in January 2010. The main improvements concern the right of detainees to be assisted by a lawyer (if necessary, depending on the accused’s means, paid for by legal aid) from the first day of detention and not only after three months (as was the case before). Lawyers must also be given access to the case file throughout the period of detention (no longer only after the completion of the investigation). Finally, detainees must be informed of their rights at the very start of detention, in writing and in a language that they understand.⁶⁷ The SPACE statistics show a trend towards a reduction of the use and duration of pretrial detention.⁶⁸

4. The situation in the countries visited (Russian Federation, Turkey and Georgia)

46. In line with the committee’s decisions based on, in particular, the statistical data on numbers of relevant violations found by the European Court of Human Rights, I visited three countries, namely the Russian Federation, Turkey and Georgia, for the purpose of drawing some lessons from these examples that could also be useful for other member States. I should like to use this opportunity to thank all three national delegations for their excellent co-operation and hospitality during my fact-finding visits.

4.1. Russian Federation

47. In Russia, some general progress can be noted in terms of a downward trajectory of the number of pretrial detainees in relation to the general prison population, though it must be said that this downward trend has started at an extremely high level.⁶⁹ An effort has also been made to improve the detention conditions, including medical care. During my fact-finding visit to Moscow, in the autumn of 2013, I was given fairly impressive official statistics documenting the reduction in the number of pretrial detainees and of the overcrowding of pretrial detention facilities. By way of example, I was shown recently renovated cells in the

64. QCEQ paper, note 61, p. 5, with reference to research from the Netherlands.

65. SPACE I 2013 (note 50).

66. [Doc. 12455](#) (rapporteur: Mr Christos Pourgourides, Cyprus, EPP/CD), paragraphs 81-85; hearing on implementation of the Court’s judgments with the head of the Polish delegation during the October 2012 part-session; cases concerning pretrial detention were closed by the Committee of Ministers by Resolution CM/ResDH(2014)268.

67. See description and critical assessment of the reform measures: www.jurablogs.com/de/reform-untersuchungshaft-1 (in German).

68. SPACE I 2013, op. cit., pp. 99 and 134.

Butyrka pretrial detention centre. I was also informed about recent relevant legislative reforms, including a change in the ultimate responsibility for detainee health care, which has been transferred from the local prison director to the Federal Prison Service's medical staff.

48. The resulting positive impression is strongly contradicted by a special report I received from the [Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture](#) (FIACAT), which provides numerous examples of serious shortcomings of the conditions in pretrial detention in Russia. These include notoriously overcrowded facilities, which are badly maintained and lack ventilation in summer and heating in winter, a lack of basic medical care and the frequent circumvention of measures to prevent torture and other forms of pressure on detainees.⁷⁰

49. Another reform presented to me in Moscow concerns the exclusion, in principle, of pretrial detention for economic crime. In a particularly interesting meeting with members of relevant Duma committees, I gained the impression that our parliamentary colleagues in Russia are quite aware of the problems in this area. I was impressed with the frankness of the reasoning for the abolition of pretrial detention for economic crimes, namely the fact that pretrial detention had indeed frequently been abused by corrupt law-enforcement officials, before this reform, to put pressure on successful entrepreneurs in order to make them "share" or even sign over their business altogether to predatory law-enforcement officials – a tactic described as "hostile take-over, Russian style".⁷¹ I sincerely hope that this odious practice, which has destroyed the lives of numerous businessmen and – women and impeded the development of a sound economic structure based on vigorous small and medium-sized businesses, can be stopped in this way.

50. But given the ease with which cases can be fabricated out of thin air as long as the prosecution and the courts lack professionalism and independence, corrupt law-enforcement officials can always plant drugs or weapons on their "takeover target". The resulting case will not be an "economic crime" covered by the exclusion of pretrial detention. In my view, the problem is that as long as the powers that be refuse to let go of the judiciary by fostering a true culture of independence, because they want to keep the possibility of prosecuting and jailing political opponents at will, it will not be possible to avoid the politically unwanted fall-out of abuses by corrupt officials either.

51. Lawyers and NGOs have submitted a number of concrete cases to me, which seem to show that pretrial detention continues to be abused by Russian law-enforcement bodies. I need not go into any detail on some cases, which have already been the subject of separate reports of the Assembly and/or judgments of the European Court of Human Rights:

52. Vladimir Gusinskiy was effectively "persuaded" whilst in pretrial detention to sell his news channel NTV to Gazprom. NTV had been instrumental in stopping the first Chechen war by its realistic coverage of the horrors of war. Gazprom promptly turned NTV into a sports channel.⁷²

53. Mikhail Khodorkovskiy spent years in pretrial detention, during which time his company, Yukos Oil, was dismantled and most of its assets were taken over by State-owned Rosneft – after Mr Khodorkovskiy and Yukos became a threat to the powers that be by funding opposition groups and threatening Gazprom's pipeline-based domination of the gas market by engaging in liquefied natural gas (LNG) co-operation projects with foreign partners. The European Court of Human Rights found numerous violations of the European Convention on Human Rights in the case brought by Mr Khodorkovskiy, but stopped short of finding a political motivation for the arrest and detention; another case concerning the second trial of Mr Khodorkovskiy is still pending before the Court.⁷³

69. On 1 September 2013, Russia had 475 detainees per 100 000 inhabitants, about 17% of whom in pretrial detention (SPACE I, pp. 42 and 50). The total prison population decreased by 5.3% from 2012 to 2013, 8.2% from 2011 to 2012 and 7.6% from 2010 to 2011 (SPACE I, p. 68); a similar trend can be observed for pretrial detainees (according to the World Pre-trial/remand Imprisonment List, the rate of pretrial detainees per 100 000 inhabitants has decreased from 113 in 2005 to 83 in 2010 and 80 in April 2014).

70. The special report is on file with the secretariat (French only); see also the report by [ACAT France, Les multiples visages de la torture, étude du phénomène tortionnaire en Russie, November 2013](#).

71. [Doc. 11993](#), Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member States (rapporteur: Ms Sabine Leutheusser-Schnarrenberger, Germany, ALDE); see also [University of Pennsylvania, Hostile takeovers – Russian style](#), 2006.

72. See the judgment of the European Court of Human Rights in *Gusinskiy v. Russia* (note 44); other examples of abuses of pretrial detention are presented in [Doc. 11031](#), Fair trial issues in criminal cases concerning espionage or divulging State secrets (rapporteur: Mr Christos Pourgourides, Cyprus, EPP/CD).

73. [Doc. 11993](#), op. cit.

54. Sergei Magnitsky was detained and ill-treated in pretrial detention in order to make him change his testimony against corrupt officials and accuse his client, William Browder, instead. When he refused, he was denied vital medical care and died in suspicious circumstances whilst still in detention. The case has been described only recently in a special report by our colleague Andreas Gross. It has led the Assembly to recommend targeted sanctions against the officials involved.⁷⁴

55. The “Bolotnaya case” following the “March of the Millions” towards Bolotnaya Square in Moscow on 6 May 2012, the day before President Putin’s controversial return to power, involves a large number of long-term pretrial detentions whose justification seems to be particularly doubtful.⁷⁵ The arrests appear to be aimed at intimidating opposition activists and deterring any future mass protests. Reportedly, over 200 investigators have worked on this case. Twenty-seven peaceful protesters, some of whom were trying to protect themselves or others from police violence, were – so it would seem – arrested more or less at random and placed in pretrial detention, some of them for almost two years. The proceedings against them have been described as a “hideous injustice” and a “show trial”.⁷⁶

56. In addition to these high-profile examples, lawyers and NGOs brought some less well-known cases of abuse of pretrial detention to my attention.

57. Mr Sergey Mokhnatkin, a well-known human rights activist, had defended Mr Sergey Krivov in the above-mentioned “Bolotnaya case”, who had been placed in pretrial detention (like many other participants in the peaceful mass protest on Bolotnaya Square) for many months despite his critical state of health. On 31 December 2013, Mr Mokhnatkin was arrested himself during a protest meeting (“Strategy 31”), after he called on the police to refrain from using excessive force. He ended up being beaten by the police (photos of the beatings are publicly available), but instead of the police officers who had beaten him, he himself was charged with a criminal offence and placed in pretrial detention until he was transferred to the Serbsky State Scientific Center for Social and Forensic Psychiatry (Moscow). He was continuously kept in Serbsky, even beyond the time of detention ordered by the court and was only released from the psychiatric institution on 8 October 2014, after he filed an urgent complaint with the European Court of Human Rights. In November 2014, he was sentenced to four years’ imprisonment.⁷⁷

58. Mr Gleb Fetisov, a billionaire former member of the Russian Federation Council (Senate) and leader of the Green Party was arrested in February 2014 on embezzlement charges qualified as “politically motivated” by his supporters. His pretrial detention was last extended until August 2015. According to his lawyer, during the last court hearing on the extension of the detention, even the prosecutor stated that another measure of restraint could be sufficient, but the court decided otherwise. Mr Fetisov also complains about the harsh detention conditions to which he is exposed despite his health problems.⁷⁸

59. In its 2014/2015 report on the State of Human Rights 2014/2015,⁷⁹ Amnesty International noted that repeated instances of torture and other ill-treatment of detainees at the prison colony and pretrial detention centre IK-5 in the Sverdlovsk Region were reported by a Russian public monitoring body. But even photographic evidence of torture injuries allegedly sustained by a pretrial detainee (Mr E.G.) gave rise to a dismissive response of the Prosecutor’s Office – it concluded on the basis of questioning the staff of IK-5 and the paperwork held by the prison administration that the injuries had predated his transfer to the detention centre.

4.2. Turkey

60. In 2013, Turkey’s general prison population rate stood at 180 per 100 000 inhabitants,⁸⁰ which was roughly half that of Russia. But the trend has long gone in the opposite direction: the Turkish prison population increased by 78.9% between 2004 and 2013.⁸¹ The same is unfortunately true for the number of pretrial

74. Doc. 13356 and Addendum (note 22).

75. Amnesty International, “Russia: Guilty verdict in Bolotnaya case – injustice at its most obvious”, 21 February 2014; Human Rights Watch, “Russia’s Protestors on Trial: What You Need to Know About the Bolotnaya Case”, 18 December 2013.

76. Radio Free Europe/Radio Liberty, 6 May 2014, “Two Years On, Russian Activists Battle To Keep ‘Bolotnaya’ Case In Public Eye”.

77. Description of the case in the *Moscow Times*, 10 December 2014, and *Moscow Times* of 9 October 2014.

78. “Russian billionaire Gleb Fetisov turns to ECHR over detention conditions”, *RAPSI news*, 22 May 2015, and *Moscow Times*, 21 May 2015, “Imprisoned Russian Tycoon Appeals to European Court of Human Rights Over Treatment”.

79. www.amnesty.eu/content/assets/Annual_Report/Annual_Report_-_English_-_AIR1415.pdf (p. 308).

80. SPACE I 2013, op. cit., p. 42.

81. ICPS World Pre-Trial/Remand Imprisonment List (second edition), op. cit., p. 5.

detainees, which increased from 44 per 100 000 inhabitants in 2000 to 77 in 2010 (+ 75%). This strongly negative trend had somewhat tempered by 2013, when the pretrial detention rate decreased to 64, which still exceeds the 2000 figure by 45%. Other worrying numbers include the average length of pretrial detention, which stood at 16.6 months in 2013,⁸² and the fact that in the same year, around 40% of all prison inmates were pretrial/remand detainees⁸³ (23% of all prison inmates had not even been convicted at first instance yet),⁸⁴ which means that they were presumed innocent.

61. My official interlocutors in Ankara were generally aware of these numbers and of their significance. They stressed the positive trend which has established itself in recent years, in particular regarding the proportion of persons not yet convicted among the total prison population, which came down from close to 50% in 2006 to 23% in 2012⁸⁵ and 13.5% in 2014. According to these statistics, Turkey would rank among the countries with the lowest proportion of pretrial detainees among all member States of the Council of Europe, ahead of Spain (14.1%) and Germany (16.7%), for example.⁸⁶

62. Officials in Ankara also pointed out the legislative reforms already adopted or in the process of adoption, which are expected to generate further progress. These are part of an “Action Plan” for the execution of the “Demirel group” of 176 judgments of the European Court of Human Rights finding violations of the Convention linked to pretrial detention.⁸⁷ In these judgments, the Court found violations of the right to liberty and security (Article 5 of the Convention) due to, among others, the lack of relevant and sufficient grounds in the decisions about detention, failure to use alternative measures, excessive length of pretrial detention and the lack of effective remedies. The general measures included in the Action Plan include improvements for the protection of juveniles, legislative clarifications of the grounds for pretrial detention, and a reduction of the maximum period of pretrial detention from 10 years to 5 years. As the statistics show, these measures have had some success. This has also been recognised by the Committee of Ministers, which “welcomed the recent efforts made by the Turkish authorities, in particular within the context of the ‘Third and Fourth Reform Packages’, with the aim of aligning Turkish legislation and practice with Convention requirements; [and] noted with satisfaction the statistical information demonstrating that there is a significant decrease in the length of detention on remand and that the use of preventive measures as an alternative to detention has been increasing”.⁸⁸

63. After the entry into force of a relevant reform in 2012, the number of people to whom alternative judicial control measures were applied increased by 95% from the first to the second semester of 2012, according to statistics I was given in Ankara. But this number remains small in comparison with the number of detentions ordered.

64. I was also told by officials in Ankara that a new reform law was in the pipeline for adoption by parliament, which would require “actual evidence” for pretrial detention to be ordered. Admittedly, I was surprised that this was not already the case before. At a meeting with defence lawyers and academics, I was told that evidence is routinely fabricated by the authorities. I was given the example of a journalist on whose computer an (unprotected) email was found in which she purportedly made arrangements for planting a bomb. But in the recent report by Pieter Omtzigt on “Mass surveillance”,⁸⁹ we have seen how easily computers can be “hijacked”

82. SPACE I 2013, op. cit., p. 64.

83. According to the ICPS World Pre-Trial/Remand Imprisonment List (second edition), op. cit., p. 5 (which includes all those who are not yet convicted by an enforceable judicial decision).

84. According to the Action Plan dated 9 April 2013 on the Execution of the judgments of the European Court of Human Rights under the Demirel group of cases (received in Ankara), table 1 (p. 9); according to the most recent statistical data received from the Ministry of Justice in Ankara (dated 9 June 2014), the downward trend accelerated between 2013 and 2014. The proportion of detainees who were not yet convicted in the first instance has gone down to 13.5%, which places Turkey among the countries with the lowest proportion of pretrial detainees among all member States of the Council of Europe.

85. Action Plan, *ibid.*, table 2 (p. 9).

86. But it is not clear from the data received from the Ministry of Justice whether the figures from other member States also include those detainees who are awaiting the outcome of their appeals procedures; the figures for Turkey exclude this group, as can be inferred from the fact that the Ministry of Justice also refers to the Action Plan figure of 23% for 2012 (which clearly includes only those not yet convicted at first instance). The figures given by the Justice Ministry for other countries are very close to those indicated for these countries in the ICPS World Pre-Trial/Remand Imprisonment List, which explicitly include the category of detainees awaiting the outcome of their appeals procedures (and where the 2013 figure given for Turkey is 40.1%). The figures indicated by the Ministry of Justice for different countries may therefore not be directly comparable.

87. The leading case is *Demirel v. Turkey*, Application No. 39324/98, judgment of 28 January 2003.

88. 1172nd (DH) meeting (4-6 June 2013).

89. Doc. 13734.

and compromising material planted. When I raised the issue of the possible manipulation of digital evidence at the Prosecutor General's office, I was informed that Turkey has a public authority which checks relevant complaints independently.

65. Another recent reform – the introduction, in 2014, of the so-called Criminal Courts of Peace – has been criticised for having adverse effects on pretrial detention. These new courts, allegedly staffed by judges hand-picked for their proximity to the party in power, have been accused of being instruments to enforce the government's wishes by authorising arrests of dissenting journalists, activists and even police officers. Reportedly, recent operations against police officers and journalists have indeed been carried out with the participation of the Criminal Courts of Peace. Critics enjoying a great deal of credibility, such as the former President of the Turkish Constitutional Court, Haşım Kılıç, have expressed fears for the independence of the judiciary in view of the pressure under which judges have come.⁹⁰

66. A number of recent cases have worried me; for example those of young activists, including two 16 and 17 year-old high school students in Konya, and several others in different parts of Turkey, who were placed in pretrial detention for “insult to the President”.⁹¹ Putting young activists in pretrial detention for several weeks for slogans chanted at protest meetings or letting off steam in social media effectively amounts to summary punishment, to set examples intended to intimidate others. This is not what pretrial detention is for.

67. Another set of cases that give rise to concern are those linked to the Gezi Park protests in the summer of 2013. On 1 August 2013, in Ankara, 35 persons accused of having organised the protests were arrested and placed in pretrial detention, six of whom remained in detention past the end of the month. They were accused of serious offences, including membership of an illegal organisation and attempting to overthrow the government by force. At the end of August, the proceedings were declared secret so that defence lawyers did not have access to the file. Similar crackdowns took place in Istanbul, Izmir, and Antakya. In Istanbul, police detained 48 members of “Taksim Solidarity”,⁹² including Ali Çerkezoğlu, General Secretary of the Istanbul Medical Association, and Mucella Yapıcı, General Secretary of the Chamber of Architects and Engineers. I should like to stress that requests to place Ali Çerkezoğlu, Mucella Yapıcı and 10 others in pretrial detention were rejected by the court.⁹³ The final outcomes of the prosecutions have been varied, some courts having pronounced acquittals as the protesters have merely used their right to freedom of expression, whilst others have convicted protesters on the basis of highly controversial evidence.⁹⁴

68. The most worrisome development is also the most recent, namely the dismissal, on 12 May 2015 by the High Judicial Council (HSYK), of judges and prosecutors who had taken part in a corruption probe in December 2013, which involved persons close to members of the government. This decision comes shortly after the suspension by the HSYK and arrest of two judges who had refused the prolongation of pretrial detention against a journalist and a number of police officers who had respectively reported on and participated in anti-corruption investigations. Reportedly, numerous members of the legal profession as well as a former Justice Minister strongly criticised these decisions, which were seen as punishing judges and prosecutors for their judicial decisions and as the result of political influence on the HSYK.⁹⁵ When judges risk losing their jobs for refusing pretrial detention, this sends a chilling message to all of their colleagues who strive to implement European standards in this field.

90. “Former head of AYM says criminal courts of peace are illegal”, *Today's Zaman*, 13 March 2015.

91. Human Rights Watch, “Turkey: End prosecutions for insulting the President”, with references to a whole series of similar cases; and www.amnestyinternational.be/doc/actions-en-cours/les-actions-urgentes/article/action-urgente-turquie-le-militant.

92. A platform representing 150 political parties, NGOs and professional bodies that first organised opposition to the redevelopment of Gezi Park.

93. Amnesty International, 2 October 2013, “Turkey: Gezi Park protests: Brutal denial of the right to peaceful assembly in Turkey” (pp. 40-44).

94. www.hurriyetdailynews.com/i-will-commit-the-same-crime-every-day-says-teen-sentenced-for-joining-gezi-protests.aspx; a special report on the subject of police violence against peaceful protesters is currently being prepared by my colleague Antti Kaikkonen.

95. *Today's Zaman*, 12 May 2015, “HSYK disbars graft probe judge, prosecutors from profession”; as reported in this article, constitutional law expert Professor Ergun Özbudun described the HSYK decision as the “end of the judiciary”. Former Justice Minister Hikmet Sami Türk is reported as having commented the decision as follows: “The expulsion of the prosecutors and the judge from their profession is a very heavy blow to judicial independence and the principle of the rule of law. This is unacceptable.”

4.3. Georgia

69. My third and final fact-finding visit took me to Georgia, where I met with key parliamentarians representing the parties in government and in opposition, the Minister of Justice, the Chief Prosecutor, the Ombudsperson, as well as representatives of relevant local NGOs (including the Georgian Young Lawyers' Association and the Georgian chapter of Transparency International), and last but not least a number of lawyers representing pretrial detainees. I also visited three high-profile detainees in prison, namely Mr Ivane Merabishvili, former Prime Minister, Mr Giorgi Ugulava, former mayor of Tbilisi, and Mr Bachana Akhalaia, former Minister of Defence, former Minister of the Interior and former head of the Penitentiary Department of the Ministry of Justice.

70. Georgia had an extremely high imprisonment rate (including pretrial detention rate) under the government headed by the United National Movement (UNM) until the elections in October 2012.⁹⁶ In 2014, the pretrial detention rate in Georgia stood at 40 per 100 000 inhabitants, after 28 in 2013, but 61 in 2010 and even 117 in 2005.⁹⁷ My interlocutors from the UNM argued that the high detention rate was the unavoidable consequence of the much-needed crackdown on crime, including organised crime. They recognised that this policy had unwanted side effects such as prison overcrowding and harsh detention conditions. They had planned to scale down their "zero tolerance" policy in due course, after it had produced the desired effect of making Georgia safer from crime.

71. The representatives of the authorities led by the "Georgian Dream" coalition criticised their predecessors very strongly and pointed to the marked improvement of detention statistics since the change of power after the elections in October 2012. They explained that the new upward trend for detentions observed in 2014 could be explained by the fact that after the 2012 amnesty law, a number of released prisoners re-offended, in particular in drug-related crimes, which exposed them to pretrial detention on the ground of prevention of new crimes. Most importantly, the courts had become far more ready to turn down requests by the prosecution to order pretrial detention. According to the Georgian authorities, courts granted 99.5% of prosecutors' requests for pretrial detention in 2010 and even 99.9% in 2011. This figure went down to 78.6% in 2013 and 66.5% in 2014. I tend to agree with the assessment by the Justice Minister and the representatives of the High Council of Judges that this shows that courts have taken a more independent attitude vis-à-vis the prosecutors' requests. The figures reflect clear progress in tackling the problem of the over-use of pretrial detention in general, and my conversations with relevant actors have given me the impression that they are generally aware that further reductions in the number and duration of pretrial detention are desirable.⁹⁸

72. At the same time, an astonishing number of individual examples of selective and presumably abusive use of pretrial detention against political opponents show that the new authorities appear not to have resisted the temptation to make use of existing law-enforcement mechanisms to harass and weaken the opposition. As a matter of fact, a large number of former officials are either in pretrial detention or wanted for arrest, beginning with former President Mikheil Saakashvili, former Prime Minister Ivane Merabishvili, former Justice Minister Zurab Adeishvili, Former Mayor of Tbilisi and UNM election campaign manager Giorgi Ugulava, former Defense Minister Davit Kezerashvili, former Health, Labour and Social Affairs Minister Zurab Tchiaberashvili, former Defense and Interior Minister Bachana Akhalaia, as well as his brother David Akhalaia, former head of the Interior Ministry's Constitutional Department. In April 2015, I received a list of 24 former senior officials who have been prosecuted by the new authorities.

73. During my visit in Tbilisi, I was struck by the deep divisions between the supporters of the current government and their predecessors. At the chief prosecutor's office, I was shown shocking video footage of instances of ill-treatment in prison allegedly taken by whistle-blowers and of killings during special police operations, for which I was told leading representatives of the previous authorities, including Mr Bachana Akhalaia (former Minister of Defense, Minister of Internal Affairs and former head of the penitentiary department in the Ministry of Justice), were directly responsible. When I raised these videos with the UNM representatives, I was told that the video on ill-treatment in prison, which had been aired on television and was now even shown to schoolchildren, had indeed strongly influenced the election against the UNM. The video had been made public many months after it was filmed, at the height of the election campaign. In their view,

96. The total prison population in 2013 (SPACE I 2013, Facts and Figures, table 1, p. 8) stood at 198 per 100 000 inhabitants, which still places Georgia in the group of countries with the highest number of detainees in Europe. But the prison population decreased by 61.6% between 2012 and 2013 (SPACE I, p. 64).

97. Source: ICPS World Pre-trial/remand imprisonment list, op. cit., p. 5, and SPACE I, table 5.1 (2013).

98. Secretariat note, added upon the instructions of the rapporteur: On 8 July 2015, the Parliament of Georgia adopted an amendment to the Criminal Procedure Code, which obliges the courts to automatically reassess the validity of the grounds for pretrial detention every two months. The rapporteur welcomes this reform, which should contribute to further reducing the length of pretrial detention in Georgia.

whilst ill-treatment of prisoners certainly existed, in particular as a consequence of the temporary overcrowding problem, it had never been government policy. The timing of the publication of the video (whose authenticity is not in doubt) and the fact that the guards who were shown torturing prisoners got off with very mild sentences after the change of power pointed, so it is suggested, to the scandalous incident being “orchestrated” by Georgian Dream supporters. As regards the killings during a special operation, these were the result of a shoot-out with violent organised criminals. The belated arrests, nine years after the operation in question, of senior police officers, including Mr Irakli Pirtskhalava (whom I met in the pretrial detention centre), were, in the opinion of the accused, a political pay-off ordered by Georgian Dream “puppet master” Ivanishvili, as a payback vis-à-vis a senior organised crime figure who had helped in collecting the signatures Mr Ivanishvili needed to obtain Georgian citizenship and whose son had been killed in a police operation. The senior crime figure was himself killed in an explosion at his son’s graveside.⁹⁹

74. I made it clear to both sides that it is not part of my mandate to take position, one way or another, on the guilt or innocence of the detainees I met, or of any others. It is even less my role to come to the defence of my political colleagues of the UNM – which Justice Minister Tea Tsulukiani explicitly accused me of at the outset of our meeting in her ministry. My role is merely to collect information and comment on the way pretrial detention is applied, in the States Parties to the European Convention on Human Rights in general and in the three countries selected for my visits on the basis of objective criteria, in particular, on the basis of the standards set in the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

75. In this respect, I was indeed confronted with some worrisome facts, including the participation of senior representatives of the current authorities in a bitter public campaign against their predecessors, which preceded their arrests and appears to violate the presumption of innocence. The Minister of Justice, in particular, publicly declared the destruction of the UNM as her aim,¹⁰⁰ and she and other leading figures of Georgian Dream called prominent opponents “criminals and guilty”,¹⁰¹ even “monsters”, before they were detained, let alone convicted. UNM representatives pointed out a recurrent pattern, which consisted in former officials being first subjected to public accusations of despicable human rights violations, followed by highly-publicised arrests, lengthy pretrial detentions, and finally far less publicised acquittals or convictions for different, less serious offenses¹⁰² – in the hope that some dirt would stick to the persons concerned, and rub off on the UNM as a whole. I was also given specific examples of pressure on judges who refused to order pretrial detention, and of forum shopping techniques designed to ensure that requests for pretrial detention against former officials are decided by judges considered as favourably disposed by the prosecution.

76. I do not assert that all the former UNM leaders are innocent, and I certainly do not favour impunity for politicians who commit crimes whilst in office. But I find it hard to imagine that practically the whole of the former Georgian Government are criminals. In fact, for some of the above-mentioned persons, extradition requests were denied by judicial authorities in Ukraine (Mr Saakashvili), France (Mr Kezerashvili) and Greece (Mr Davit Akhalaia), because they considered the extradition requests as politically motivated.

77. During my visits to MM. Ugulava, Merabishvili and B. Akhalaia in their places of detention, I also noted that they had been kept in pretrial detention for an unusually long time. In particular, the detention of Mr Ugulava was prolonged beyond the legal nine-month time limit just after my visit to Tbilisi. Georgian NGOs had pointed out that the legal time limit was frequently circumvented in “political” cases by the prosecutors’ practice of “serial accusations” consisting in launching one case after the other against the same people, each time starting a new nine-month term. I also noted that the three men were kept in an unusual state of isolation, including from their families. Mr Ugulava complained that the authorities refused to allow him to meet with his wife and children (between 5 and 13 years old) because of the “interests of the investigation”. The first phone

99. I received even more detailed information on the circumstances on the crimes allegedly committed by the former government officials in an untitled, undated 19-page “background paper” prepared by Ms Eka Beselia, Chairperson of the Human Rights and Civic Integration Committee of the Parliament of Georgia on 2 June 2015, an advance copy of which I received through the Georgian delegation secretariat in early May. In a meeting with the accused persons’ lawyers in Tbilisi, followed up by a written communication, I also received detailed information on the relevant cases from their point of view. Both sides also gave me their reasons why pretrial detention was in order, or not, in light of the circumstances of the cases at issue.

100. “Head of ISFED: Tsulukiani’s comment about destroying UNM unacceptable”: www.tabula.ge/en/story/75721-head-of-isfed-tsulukianis-comment-about-destroying-unm-unacceptable.

101. <http://foreignpolicy.com/2012/11/30/georgian-foreign-minister-saakashvili-officials-are-criminals-and-guilty/>.

102. For example abuse of authority or office – a broad criminal provision existing in a number of post-Soviet jurisdictions, which the Assembly had previously criticised as prone to abuse on political grounds, see Doc. 13214, Keeping political and criminal responsibility separate (rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD), in particular the case study on former Ukrainian Interior Minister Yuriy Lutsenko (pp. 18-20).

call with his family was allowed only in January, after six and a half months in prison, despite the fact that the law allowed him three 15-minute calls per month. Mr Akhalaia had spent two years in pretrial detention. He was not allowed any family visits or phone calls for the entire duration of pretrial detention, and was not even allowed to see his new daughter born shortly after his arrest. When I raised these issues with the Chief Prosecutor, he could not remember having turned down any requests for family visits by these persons but promised to examine the files. But the information I received from the authorities after my visit is incomplete and inconclusive.¹⁰³

78. The “Trial Monitoring Report Georgia” of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), released on 9 December 2014,¹⁰⁴ also makes numerous critical remarks concerning the trials of senior opposition figures it has monitored, including violations of the presumption of innocence and doubts on the impartiality and independence of the prosecutor’s office,¹⁰⁵ and failure to comply with international standards concerning the imposition and prolongation of pretrial detention as a measure of restraint.¹⁰⁶

79. In the circumstances, I could not help getting the impression that detentions of senior officials of the previous government are part of a bitter campaign by the current authorities against their predecessors. The demonisation of political competitors, which I have observed on both sides of the political playing field in Georgia, is not healthy for a democracy. Nor is the pervasive politicisation of the judiciary healthy for the rule of law. The politicisation clearly did not start with the change of power in 2012, but it was also not discontinued by the new authorities. The power to detain suspected criminals must never be used, or appear to be used, to settle political scores.¹⁰⁷

5. Conclusion

80. As we have seen, abusive use of pretrial detention – it is applied too often, for too long, and above all, for the wrong reasons – is still prevalent in numerous States Parties to the European Convention on Human Rights. Statistics show that overuse of pretrial detention is not only a problem for the so-called new democracies, but also for some States that have well-established judicial systems based on the rule of law. The fight against the abuse of pretrial detention therefore concerns, in principle, all States Parties to the Convention. The draft resolution and recommendation preceding this report therefore include a number of findings and recommendations addressed to all our member States. These are designed to point out ways and means of improving practices everywhere, by learning from successful examples, such as Poland, in order to bring down the number and duration of pretrial detention in the interest of the detainees and of society as a whole.

81. In addition to the issue of overuse of pretrial detention, which concerns most, if not all States Parties to the Convention, I have also come across instances of the abuse of pretrial detention for purposes other than the administration of criminal justice: detention used to put pressure on detainees in order to coerce them into confessing to a crime or otherwise co-operating with the prosecution, including by testifying against a third person; to discredit or otherwise neutralise political competitors; to promote other political, including foreign policy-related objectives; to put pressure on detainees in order to compel them to sell their businesses or in order to extort bribes from them; or to intimidate civil society and silence critical voices.

103. In the above-mentioned memorandum received in early May 2015 (note 99 above) the only information on the isolation issue concerned Mr Merabishvili and reads as follows: “Request for visiting Ivane Merabishvili in penitentiary establishment was filed on various criminal cases. In the course of the case examined by the Regional Prosecutor’s Office of the West Georgia, family members and close relatives applied for visits 11 times. The mentioned requests have not been restricted (spouse, family members, parents and etc.). In the course of the criminal case examined by the Office of the Chief Prosecutor of Georgia, family members and close relatives filed the request on visiting him for 8 times and used the mentioned right for 5 times.” I did not find any information on family visits to MM. Ugulava and Akhalaia, who had made the most specific complaints about their isolation.

104. www.osce.org/odihr/130676?download=true (henceforth: OSCE/ODIHR report).

105. OSCE/ODIHR report, *ibid.*, pp. 49-55; see in particular pp. 53 and 54 with instances of public statements by then Interior Minister Gharibashvili concerning the case of Mr Merabishvili; and page 34 on statements by then Prime Minister Khukhasvili on the cases of Bachana Akhalaia and Mikheil Saakashvili and by Vice-Speaker of Parliament Manana Kobakhidze on the case of Mr Saakashvili.

106. OSCE/ODIHR report, *ibid.*, pp. 61-66 (in particular: lack of reasons and assessment of the evidence with reference to the circumstances of the individual case, quasi-automatic prolongation until the legal limit of nine months).

107. See public statement on 20 February 2015, following the visit to Georgia: “PACE rapporteur in Georgia: ‘don’t use detention to settle political scores’”:

www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5439&lang=2&cat=5.

82. I came across such cases in the three countries I visited (Russia, Turkey and Georgia), but I do not exclude that they occur also elsewhere, for example in Azerbaijan, whose weak, politically influenced judicial system I have come to know as co-rapporteur on this country for the Monitoring Committee.¹⁰⁸ The main cause for such cases happening is the persistent lack of independence of the judiciary in these countries.

83. As long as the powers that be refuse to “let go of the judiciary” by fostering a true culture of independence, because they want to keep the possibility of prosecuting and jailing political opponents at will, it will not be possible to avoid the politically unwanted fall-out of abuses by predatory officials either. The judiciary can only be independent or not independent. And if it is not independent, even politically undesirable street-level abuses of pretrial detention for “non-political” motives cannot be excluded. Those in power must choose. My impression today is that in Russia, the choice for true independence of the judiciary has not yet been made, to the detriment of the legal security of ordinary citizens and of the development of a sound economic fabric of small and medium-sized enterprises. This is unfortunately also true for Azerbaijan. Turkey and Georgia, in turn, had progressed a long way towards rendering the judiciary truly independent, but the current authorities appear to be tempted to backtrack, as shown by the recent instances of pressure on judges mentioned in the respective country chapters.

108. The European Court of Human Rights has found a number of violations in this respect, see for example the case of *Ilgar Mammadov v. Azerbaijan*, Application No. 15172/13, judgment of 22 May 2014; see also the statement on the case of Intigam Aliyev: “Azerbaijan: PACE monitoring co-rapporteurs deeply disappointed by Intigam Aliyev sentence”: <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5579&lang=2>; and on the same case: “Legal Affairs Committee appalled by the conviction of a prominent Azeri human rights lawyer”: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5570&lang=2&cat=5> (with references to the cases of other well-known activists who are still in pretrial detention); I intend to return to relevant cases in the report I am currently preparing for the Committee on Legal Affairs and Human Rights on “Azerbaijan’s Chairmanship of the Council of Europe: What follow-up on respect for human rights?”.

Appendix – Dissenting opinion by Ms Eka Beselia (Georgia, SOC),¹⁰⁹ member of the committee

I do not agree with the words in brackets in paragraph 7.2 of the draft resolution. Reference to a single political party is not relevant in this case because pretrial detention is used not because they are affiliated to some political party but because we are bound by Article 5 of the European Convention on Human Rights. Pretrial detention should be used only as an absolutely necessary last measure in the specific criminal cases on most of which there are final court judgments already. In some cases involving the UNM members no pretrial detention measure was used (for example in the case of Mr Chiaberashvili). Moreover, in most of the criminal cases the court used pretrial detention measure only after a person did not appear before the investigation body or absconded from justice.

I also cannot agree with paragraph 11.4 of the draft resolution because the rapporteur does not mention any single fact in the explanatory memorandum to prove the statement. I would agree with the formulation if it referred to the period before the change of government in October 2012.

Paragraph 11.5 states that the Prosecution somehow manipulates pretrial detention periods. This is absolutely wrong because only the courts take decisions on restraint measures in Georgia. According to the statistics, the level of independence of courts in Georgia has significantly increased since 2012 where use of pretrial detentions has shrunk by 34%.

Sub-paragraph 12.2.2 should be corrected because such a demand goes beyond the authority of the Parliamentary Assembly of the Council of Europe and belongs to the exceptional competence of national courts and the European Court of Human Rights. As the meaning of sub-paragraph 12.2.1 is really vague and general, I would rather suggest merging these two sub-paragraphs with the following wording: “the Assembly urges the States to consult Article 5 of the European Convention on Human Rights and abide by the standards of the Convention when using pretrial detention.”

109. Rule 50.4 of the Assembly’s Rules of Procedure: “The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote.”