Leyla Yunusova and Arif Yunusov v. Azerbaijan

(Application No. 68817/14)

Written Comments
By
Freedom Now and the Human Rights House Foundation

6 May 2015

I. Introduction

This third party intervention is submitted jointly by Freedom Now and the Human Rights House Foundation pursuant to leave granted by the President of the Chamber of the European Court of Human Rights (Court) under Rule 44§2 of the Rules of the Court. This communication addresses the detention of human rights defenders and civil society leaders in the Republic of Azerbaijan (Azerbaijan) in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

At issue in this case is the ongoing pretrial detention of Leyla Yunusova (first applicant) and Arif Yunusov (second applicant). The first applicant founded the Institute for Peace and Democracy (Institute) in 1996 and served as its director – working on a broad range of issues related to human rights promotion and peace building. She is a Chevalier of the National Order of the Legion of Honour, a tribute for her longstanding work promoting human rights. The second applicant worked as a researcher for the Institute and led its Department of Conflictology and Migration. The couple were prevented from leaving Baku's airport 28 April 2014, interrogated about their work, searched, and detained overnight. Azerbaijani authorities subsequently arrested the first and second applicants on 30 July 2014 and 5 August 2014, respectively, and have held them in pretrial detention since that time. Both applicants face charges of high treason and fraud; the first applicant faces additional charges of illegal entrepreneurship, tax evasion, and forgery. Having held the applicants for over eight months, the trial has not yet begun.

The observations contained in this intervention provide a background on the continued crackdown targeting independent human rights defenders, journalists, and activists. Further, this intervention provides a substantive explanation of the legal issues relevant to the detention of the first and second applicants and places their continued detention in the boarder context of the increasingly narrow space afforded to non-government organizations (NGOs) in Azerbaijan. Despite consistent efforts by NGO leaders – including the applicants in this case – to comply with the complex and widely-criticized regulations imposed on them, civil society leaders in Azerbaijan face criminal prosecution for peacefully pursuing their internationally protected mandates. The applicants in this case also face the additional threat of treason charges because of

their work. This intervention seeks to place these individual cases in the context of ongoing, draconian restrictions on the activities of NGOs in Azerbaijan and provide recommendations for how the Court can effectively address such violations.

II. Targeting of Civil Society and Human Rights Defenders (HRDs)

The pattern of systemic and ongoing restrictions on fundamental rights in Azerbaijan through arbitrary arrests and detention is well documented.[1] Of particular concern is the targeting of HRDs and lawyers who engage with international mechanisms – including the Council of Europe (CoE) institutions. Although the issues of wrongful imprisonment and the narrowing space for civil society in Azerbaijan have been a regular concern for CoE bodies, the situation has deteriorated substantially in recent years and resulted in the near paralysis of independent rights groups in the country. In August 2014, the first applicant and another imprisoned colleague published a list of 98 political detainees in the country – the fact that both applicants were included in the list shows how critical the situation has become.[2]

A. Restrictions on Registration, Operation, and Funding of NGOs

The Azerbaijani government interferes with the operation of independent NGOs through the imposition of arbitrary hurdles to registration and an increasingly complex constellation of administrative laws that regulate the registration, operation, and funding of such associations.

The Court has repeatedly addressed the refusal of Azerbaijani authorities to register independent organizations in a timely matter.[3] Although the Court has held that unreasonable delays in NGO registration violate the right to freedom of association under Article 11, the government's practice has continued. While it is not illegal to operate an unregistered domestic organization in Azerbaijan, registration is required to carry out important formal activities, such as opening a bank account and (since 2014) obtaining grant funds.[4] The result has been a flood of cases pending before the Court regarding the government's refusal to register these NGOs – many filed by human rights defenders now sentenced to long prison terms as punishment.[5]

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[1] The Court has addressed systemic human rights violations as being those that derive from structural causes that are not addressed by the authorities. See *Broniowski v. Poland*, European Court of Human Rights, Application No. 31443/96 (22 June 2004) at ¶¶189 - 190.

[2] *The List of Political Prisoners in Azerbaijan*, Working Group Led By Leyla Yunus and Rasul Jafarov (August 2014), available at http://eap-csf.eu/assets/files/List_of_Political_Prisoners_AZ-%282%29-%281%29.pdf.

[3] *Ramazanova and Others v. Azerbaijan*, European Court of Human Rights, Application No 44363/02 (1 Feb. 2007); *Ismayilov v. Azerbaijan*, European Court of Human Rights, Application No. 4439/04 (17 Jan. 2008), *Nasibova v. Azerbaijan*, European Court of Human Rights, Application No. 4307/04 (18 Jan. 2008), *Aliyev and Others v. Azerbaijan*, European Court of Human Rights, Application No 28736/05 (18 Mar. 2009).

[4] *Opinion on the Law on Non-Governmental Organizations (Public Associations and Funds) as Amended of the Republic of Azerbaijan*, European Commission for Democracy Through Law, Opinion 787/2014 (15 Dec. 2014) (hereinafter 2014 Venice Commission Report). See also *Third Party Intervention by the Council of Europe Commissioner for Human Rights*, Application No. 81553/12 (19 Feb. 2015) CommDH(2015)5.

[5] The Legal Education Society has reported that at least 20 applications were submitted to the Court in 2013 alone. *Communication from a NGO (Legal Education Society – HMC)in the case of Aliyev and others against Azerbaijan* (Application No. 28736/05)(28 Nov 2013). In addition to the cases highlighted in 2013, the Human Rights Club, headed by the prominent imprisoned activist RasulJafarov, submitted a complaint to the Court in 2014 after its application for registration was repeatedly returned by the government. Mr. Jafarov was sentenced to six years and six months in prison on 16 April 2015.

A distinct but related issue is the increasingly restrictive administrative regime governing NGOs in Azerbaijan. The provisions relevant to NGOs are found in a variety of laws that have been repeatedly revised.[6] Although the European Commission for Democracy Through Law (Venice Commission) identified existing laws as overly restrictive in 2011,[7] the parliament adopted a series of controversial amendments that entered into force in 2013 and 2014 that further restricted the ability of NGOs to carry out their work – and critically limited access to grants for non-registered groups.[8] In 2014, the Venice Commission found that these amendments largely failed to address existing concerns, imposed obligations regarding the receipt and registration of grants that "seem to be intrusive enough to constitute a *prima facie* violation of the right to freedom of association," and overall "further restrict the operations of NGOs in Azerbaijan."[9]

As the Court has noted, "the way in which national legislation enshrines [the right of individuals to act collectively for a common purpose] and its practical application by the authorities reveal the state of democracy in the country concerned."[10] In Azerbaijan, the continued refusal of the authorities to register human rights organizations and the increasingly restrictive laws passed have resulted in the de-facto closure of almost all independent rights organizations in the country.[11] It has also laid the foundation for the prosecution of civil society leaders for operating registered and non-registered NGOs.

B. The Imprisonment of HRDs in Azerbaijan

In addition to tightening restrictions on their operations and funding, civil society leaders in Azerbaijan now face the threat of long periods of imprisonment for their activities. While the prosecution of HRDs, journalists, and activists in Azerbaijan for their peaceful activities is not a new phenomenon, observers have reported a striking expansion in the scope and severity of specious charges brought against NGO leaders. Of special concern is the recent trend of officials charging HRDs with violating highly problematic administrative rules combined with criminal laws, notably tax evasion, illegal business activities, and abuse of authority – an approach that attempts to conceal the political motivation behind a deeply flawed legal theory.

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[6] The laws regulating the functions of NGOs are primarily found in the Law on Non-Governmental Organizations, the Law on State Registration and the State Registry of Legal Entities, the Civil Code of the Republic of Azerbaijan, the Tax Code, the Law on Grants, and the Code of Administrative Offenses – in addition to various implementing decrees issued by the executive.

[7] *On the Compatibility with Human Rights Standards of the Legislation on Non-Governmental Organizations of the Republic of Azerbaijan*, European Commission for Democracy Through Law, Opinion No. 636/2011 (19 Oct. 2011) (hereinafter 2011 Venice Commission Report).

[8] Amendments to the regulatory regime in 2013 and 2014 included provisions adopted by the Parliament of the Republic of Azerbaijan on 15 February 2013 (entered into force on 12 March 2013), 17 December 2013 (entered into force on 3 February 2014), 17 October 2014 (signed by the President on 14 November 2014).

[9] 2014 Venice Commission report 2014, supra note 4, at ¶¶ 88 – 93.

[10] *Sidiropoulous and Others v. Greece*, European Court of Human Rights, Application No. 26695/95 (10 July 1998) at ¶ 40.

[11] Since 2014, the government has seized the bank accounts of at least 50 independent organizations. Moreover, international human rights groups, which are subjected to additional requirements under the country's administrative laws, have also been shuttered. For example, Human Rights House Azerbaijan, which is a registered branch of the Human Rights House Foundation was forced to close by the Ministry of Justice in 2011 – without any prior notice or complaints about the organization's regular reports to the government.

First, the government alleges that the NGO has failed to comply with some provision of Azerbaijani administrative law. In particular, the authorities have repeatedly relied upon alleged failure to register international grants. In some cases, the alleged failure is due to government intransigence – as in cases where organizations attempt to comply with the requirements of the administrative law, but the responsible agencies refuse to take any action; a failure that is discriminatory towards NGOs that are independent of the government.[12] In other cases, the authorities simply fabricate the violation – registering the grant and then later falsely claiming that it was not registered.[13] The critical point here is that as a result of purposeful and discriminatory government malfeasance, the leaders of civil society organizations stand accused of failing to meet administrative rules that authorities made impossible in the first place.

Second, prosecutors charge the civil society leader with unrelated violations of the Criminal Code. For example, the authorities may begin with the claim that a particular grant was not properly registered. However, they do not charge the organization or its officers with failing to register the grant under the administrative laws (which involve sanctions that were controversially strengthened but do not include the prospect of imprisonment). Instead, they charge NGO leaders with unrelated provisions of the Criminal Code, such as laws against tax evasion, illegal business activity, and abuse of office. Such an approach empowers Azerbaijani authorities – ostensibly through the law – to punish and silence government critics.

This deeply flawed approach essentially relies upon the legal theory that administrative rule violations, of whatever type, do not implicate the directly relevant administrative sanctions but instead render the activity of the organization "entrepreneurial," thereby subjecting it to an entirely different regulatory and tax treatment, to which the government then alleges the organization failed to comply. This theory, as discriminatorily applied against independent NGO leaders, appears to have no basis in Azerbaijani law, which clearly distinguishes between commercial and non-commercial activity based upon the nature of the activity and not compliance with administrative regulations on grants or grant reporting.[14] As such, it becomes clear upon close examination that the use of such charges are both unfounded under domestic law and a blatant attempt to punish the exercise of internationally protected activities.

C. Use of Treason Charges Against HRDs

While considerable international attention has been paid to the use of organizational charges against human rights defenders, journalists, and activists in Azerbaijan, a select number of individuals – including the applicants – have also been charged with high treason.[15] Carrying the

[12] An example of this tactic can be seen in the case of Rasul Jafarov, pending before the Court as Application No. 69981/14.

[13] An example of this tactic can be seen in the case of Intigam Aliyev, pending before the court as Application No. 71200/14.

[14] Article 13 of the Civil Code of the Republic of Azerbaijan defines "entrepreneurial activity" as "a person's activity conducted independently and for the main purpose of receiving obtaining [sic.] profit from the use of property, sale of goods, and performance of works or provision of services." See also Article 13.2.26 of the Tax Code. Non-commercial activity, by contrast, is defined under Article 13.2.27 of the Tax Code as "a conduct of legal activity the purpose of which is not generation of profit and that stipulate the use of income received in non-commercial purposes only, including the purposes of its charter. Otherwise such activity shall be considered as commercial."

[15] In full, Article 274 of the Criminal Code of the Republic of Azerbaijan provides that: "State betray, that is deliberately action committed by a citizen of the Azerbaijan Republic to the detriment of sovereignty, territorial integrity, state security or defensibility of the Azerbaijan Republic: changeover to enemy side, espionage, distribution of state secret to foreign state,

possibility of life in prison, the invocation of such charges is especially important to highlight in the context of the ongoing crackdown.

The charge of treason is generally invoked against civil society leaders whose work involves activism aimed at promoting peace or accountability in the context of Azerbaijan's immediate neighbors. While state media and high ranking officials have increasingly accused "the West" of spying or attempting to undermine Azerbaijan's national security, the authorities have generally not used treason charges against human rights defenders, journalists, and activists who primarily engage with partners in the United States and Europe.[16] Instead, those targeted are the ones focusing their attention on addressing the conflict with Armenia (especially over the Nagorno-Karabakh region) and the rights of minority groups who live on either side of Azerbaijan's border with the Islamic Republic of Iran. While promotion of cultural diversity and intercultural dialogue internationally is one of the objectives in the Action Plan of Azerbaijan to Council of Europe,[17] HRDs who cooperate across borders face accusations and criminal charges at home.

For example, in the case of Hilal Mammadov, which is currently pending before the Court, the government charged the journalist and minority rights defenders with treason and inciting hatred, in addition to fabricated narcotics charges. A prominent advocate for the rights and culture of the ethnically-Persian Talysh minority in southern Azerbaijan, Mr. Mammadov was sentenced to five years in prison after authorities vaguely accused him of conspiring with Iranian agents to destabilize the country. In a similar case, the Azerbaijani government charged the journalist Rauf Mirkadirov with treason after he worked in Turkey covering the Azerbaijan-Armenia conflict and meet with civil society actors in Armenia.

III. Specific Issues of International and European Law

The case of the applicants, like the related Azerbaijani applications currently pending before the Court, implicate a number of important legal questions – including the use of pretrial detention, heightened protection for human rights defenders under international law, limits on the use of national security laws to punish peaceful activism, and how the unique violations involved in these cases can be best remedied though specific instructions by the Court.

A. Use of Pretrial Detention in Politically-Motivated Cases

Because pretrial detention has been imposed in nearly every recent criminal case involving HRDs, journalists, and activists in Azerbaijan, the issue is central to a number of cases now pending before the Court. Further, because the procedural posture of the cases revolve around the

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rendering assistance to a foreign state, foreign organization or their representatives in realization of hostile activity against the Azerbaijan Republic – is punished by imprisonment for the term from ten up to fifteen years or life imprisonment with confiscation of property or without it." An unofficial translation of the Code is available from the Organization for Security and Cooperation in Europe at http://www.legislationline.org/documents/section/criminal-codes.

[16] During a trip to Baku by Freedom Now and the Human Rights House Foundation in 2014, local state media accused representatives of the organizations of spying for the United States – even though Human Rights House Foundation is an Oslo-based organization and its representative is a citizen of Switzerland. For a discussion of the increasing anti-Western statements by some in the Azerbaijani government, see Altay Goyshov, *The Two Faces of Azerbaijan's Government*, Foreign Policy (6 Dec. 2014), available at http://foreignpolicy.com/2014/12/06/the-two-faces-of-azerbaijans-government/.

[17] Action Plan for Azerbaiajn 2014 – 2016 (1 Apr. 2014) ODGProg/Inf(2014)2Rev, at § 9.

decision to hold detainees on remand pending trial, the question of pretrial detention implicates a number of important violations, including those under Articles 5, 11, and 18 of the Convention.

The Court has repeatedly criticized the Azerbaijani authorities' approach to pretrial detention.[18] The Convention broadly establishes the requirement under Article 5(1)(c) that the government demonstrate a "reasonable suspicion" of guilt at the time of remand. Additionally, Azerbaijani law requires that local authorities consider additional facts, such as the likelihood that the suspect will flee or obstruct the investigation, his or her personal characteristics, and whether house arrest or bail would be suitable.[19] Most recently, in the case of *Mammadov v. Azerbaijan*, the Court found that the government had failed to establish a reasonable suspicion of guilt. Instead, the Court found that local courts had relied on vague and conclusory statements regarding the evidence against the defendant without reviewing any specific facts or information to support the prosecution's claims of guilt.[20] Importantly, the Court looked to "all the relevant circumstances" in assessing whether the government had met its burden – including the detainee's history as an opposition candidate who publicly criticized the government before upcoming elections and the fact that he was threatened by members of parliament with legal action.[21]

In many of the cases now pending before the Court, the question of whether the government established a "reasonable suspicion" of guilt and the government's ultimate motivation for the prosecution – which implicate both Articles 11 and 18 – are closely related. As in *Mammadov v. Azerbaijan*, these cases arise in the context of an ongoing crackdown on civil society and a targeted campaign to discredit and undermine civil society leaders, including the applicants in this case. While recent years have witnessed a narrowing of space for civil society and an increase in politically-motivated prosecutions generally, the applicants have long faced retaliation for their work – including the demolition of their offices, limits on their freedom of movement, and relentless criticism from government officials at the highest level. While the Court has noted that there is a general presumption of good faith under the Convention, that presumption is rebuttable where the applicant is able to "convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context."[22] In applying this "very exacting standard of proof," the Court has not relied on broad statements regarding the general political situation in the country. Instead, the Court has looked to the "relevant case specific facts" to determine whether, given all of the evidence before it, the ultimate motive of the government is an arbitrary limitation on the exercise of a fundamental right.[23]

While the legality of a detention will not depend upon general observations about the country,

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[18] *Mammadov v. Azerbaijan*, European Court of Human Rights, Application No. 15172/13 (22 May 2014); *Aliyev v. Azerbaijan*, European Court of Human Rights, Application No. 37138/06 (9 Nov. 2010); and *Muradverdiyev v. Azerbaijan*, European Court of Human Rights, Application No. 16966/06 (9 Dec. 2010).

[19] For a detailed description of the Criminal Procedure Code, See *Aliyev v. Azerbaijan*, supra note 18, at ¶¶ 89 – 95.

[20] *Mammadov v. Azerbaijan*, supra note 18, at ¶¶ 87 – 101.

[21] *Mammadov v. Azerbaijan*, supra note 18, at ¶ 92.

[22] *Mammadov v. Azerbaijan*, supra note 18, at ¶ 137.

[23] *Mammadov v. Azerbaijan*, supra note 18, at ¶ 138. Contrast *Khodorkovskiy v. Russia*, European Court of Human Rights, Application No. 5829/04 (31 May 2011) at ¶ 254 – 260.

the specific circumstances surrounding the continued detention of human rights defenders, journalists, and activists are relevant to investigations under Articles 5, 11, and 18.[24] Indeed, a number of specific facts may be relevant to such an inquiry in this case, including the nature of the applicants' work, a history of past harassment and persecution, specific legal limitations on the activities and funding of NGOs, the conduct of state agents towards the applicants, the specificity of the charges, the length of pretrial detention, and the conduct of the proceedings.

B. Heighted Protection for HRDs Under International Law

The concept of a HRD is codified under the United Nations Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, unanimously adopted by the UN General Assembly on 9 December 1998 (Declaration).[25] The Declaration affirms the role of HRDs at the local, regional, national, and international levels. The UN General Assembly and Human Rights Committee (formerly the Commission on Human Rights) have since regularly reaffirmed the rights of HRDs to conduct their work.[26] Further, the CoE Committee of Ministers has called on Member States to "[a]cknowledge the crucial role of civil society and support its conflict prevention and resolution and peace building activities."[27]

Recognizing such standards, in 2008, the Committee of Ministers adopted a declaration on the protection of human rights defenders.[28] In particular, it called on all Members States to:

> Create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities [...] to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorized by the [Convention... and] to take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities."

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[24] The Court has held that a determination based on Article 18 will first depend upon finding a violation elsewhere in the case. In the case of *Mammadov v. Azerbaijan*, the violation of Article 5(1)(c) supported the broader finding of political motivation under Article 18.

[25] Human Rights Defenders (HRDs) are individuals who promote and protect all human rights through peaceful means without discrimination. HRDs can join groups of people with or without structure, or organizations such as associations or foundations. Anyone, regardless of their occupation, can be an HRD; they are defined primarily by what they do rather than their profession. See generally, *Declaration on the Rights and Responsibility of Individuals, groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN General Assembly, Resolution 53/144 (adopted 9 Dec. 1998).

[26] Most recently, these bodies unanimously passed resolutions in support of the rights related to the work of human rights defenders and on the protection of human rights defenders in general and women human rights defenders in particular. See *Protecting Human Rights Defenders*, UN Human Rights Council, Resolution No. 22/6 (adopted 21 Mar. 2013); *Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Protecting Women Human Rights Defenders*, UN General Assembly, Resolution 68/181 (adopted 18 Dec. 2013).

[27] *On the Role of Women and Men in Conflict Prevention and Resolution and in Peace Building*, Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)10 (adopted 30 June 2010) at ¶ 13.

[28] *On Council of Europe Action to Improve the Protection of Human Rights Defenders and Promote Their Activities*, Committee of Ministers of the Council of Europe, Declaration adopted at the 1017th Meeting of the Ministers' Deputies (adopted 6 Feb. 2008) at ¶¶ 2(i) – 2(ii).

In the specific context of arbitrary detention, the imprisonment of HRDs should be subject to heightened scrutiny. The UN Working Group on Arbitrary Detention has recognized the necessity to "subject interventions against individuals who may qualify as human rights defenders to particularly intense review."[29] This "heightened standard of review" by international bodies is especially appropriate where there is a "pattern of harassment" by national authorities targeting such individuals.[30]

The Court has adopted a similar approach in cases involving the prosecution of "public watchdogs."[31] The Court has noted that civil society groups "contribute to the public debate by disseminating information and ideas on matters of general public interest" and are therefore critical in protecting a "democratic society."[32] Indeed, this is especially true of HRDs, who work to promote and monitor respect of the very rights enshrined under the Convention. The politically-motivated prosecution and imprisonment of human rights defenders would therefore seriously implicate the Court's concern regarding the possible "chilling" effect on public debate where government action targets such human rights groups.[33]

When dealing with complaints of HRDs – especially where the rights violations involves wrongful imprisonment – it is necessary to subject government action to particularly intense review and examine both the specific facts of the case and the broader environment for HRDs.

C. Limits on National Security Provisions Under International Law

While states are granted a certain "margin of appreciation" regarding questions of national security, the Court has recognized that limitations on fundamental rights must still meet the Convention's requirements.[34] The Court has observed that national security charges against peaceful actors – in the absence of any evidence that the individual used or advocated the use of violence to achieve their goals – will violate the state's obligations under international law.[35]

Sweeping national security charges such as treason or sedition are especially subject to abuse by authorities who are increasingly relying on such charges to deter the work of civil society

[29]*Nega v. Ethiopia,* UN Working Group on Arbitrary Detention, Opinion No.62/2012 (21 Nov. 2012) at ¶ 39; *Sotoudeh v. Islamic Republic of Iran,* UN Working Group on Arbitrary Detention, Opinion No. 21/2011 (27 Jan. 2011) at ¶ 29.

[30]*Bialiatski v. Belarus,* UN Working Group on Arbitrary Detention, Opinion No. 39/2012 (23 Nov. 2012) at ¶ 45.

[31]*Goodwin v. United Kingdom*, European Court of Human Rights, Application No. 17488/90 (27 Mar. 1996) at ¶ 39.

[32]*Steel and Morris v. United Kingdom*, European Court of Human Rights, Application No. 68416/01 (15 Feb. 2005) at ¶ 89 (applying the Court's "public watchdog" on journalists to civil society groups such as senvironmental proponents).

[33]*Steel and Morris v. United Kingdom*, supra note 32, at ¶ 95.

[34] See *Sidiropoulos and Others v Greece*, supra note 10 at ¶ 40 ("the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.").

[35]*Sidiropoulos and Others v Greece*, supra note 10 at ¶ 43. See also *Eğitim Ve Bilim Emekçileri Sendiksi v. Turkey*, European Court of Human Rights, Application No. 20641/05 (25 Sep. 2012) at ¶¶ 51 – 60.

actors.[36] In recognition of this concern, the UN Human Rights Committee has noted that "[e]xtreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of [international law].[37] The Committee of Ministers has expressed similar concern in the context of national security and urged all Members States "to take measures to ensure compliance in all circumstances with applicable human rights standards and in particular during armed conflict, as well as in situations of internal disturbances and tensions."[38] Based on Resolution 1551 (2007) adopted by the Parliamentary Assembly of the CoE (PACE),[39] it can be concluded that, for example, "high profile espionage cases against scientists, journalists and lawyers" can have a "chilling effect on other members of these professional groups. The climate of 'spy mania' fuelled by these cases and controversial statements of senior government representatives" can be "obstacles to the healthy development of civil society."

Recognizing this principle, international bodies have repeatedly blocked the use of national security rationales when such provisions are used to punish peaceful activities.[40] In *Sidiropoulos and Others v. Greece*, the Court rejected the government's vague and unproved allegations that the applicants' association posed a threat to national security and noted that nothing in the case suggested that the applicants intended to threaten the security or territorial integrity of the state. In coming to its conclusion in the case, the Court looked through the government's unsubstantiated claims about the applicants' "true intentions" and "irredentist aspirations" and found, based on the specific facts presented, that there was "nothing to indicate that they had advocated the use of violence or of undemocratic or unconstitutional means."[41] The UN Working Group on Arbitrary Detention has adopted a similar approach and looked to both the vagueness of the charges used and the specific facts of individual cases in making a determination as to whether the reliance on national security comports with international standards.[42]

D. Specific Remedies for Wrongful Imprisonment

In the context of politically-motivated arbitrary detention, which has become especially prevalent

[36] *Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Special Rapporteur on the Situation of Human Rights Defenders, UN Doc. E/CN.4/2004/94 (July 2011) at ¶ 52.

[37] *General Comment No. 34*, UN Human Rights Committee, UN Doc. CCPR/C/GC/ 34 (12 Sep. 2011) at ¶ 30.

[38] *Declaration on the Protection of Human Rights Defenders During Armed Conflict, Internal Disturbances and Tensions*, Committee of Ministers of the Council of Europe, adopted at the 869th meeting of the Ministers' Deputies (21 Jan. 2004) at ¶ 8.

[39] *Resolution 1551 on Fair Trial Issues in Criminal Cases Concerning Espionage or Divulging State Secrets*, Parliamentary Assembly of the Council of Europe, adopted at the 17th sitting of the Assembly (19 Apr. 2007) at ¶7.

[40] See e.g. *Sohn v. Republic of Korea*, Human Rights Committee, Communication No. 518/1992 (18 Mar. 1994); *Second Report on the Situation of Human Rights Defenders in the Americas*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 66 (31 Dec. 2011)at ¶¶ 93, 107 – 108; *Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia*, African Commission on Human and Peoples' Rights, Resolution No. 218 (2 May 2012).

[41] *Sidiropoulos and Others v Greece*, supra note 10, at ¶ 43.

[42] See e.g. *Nega v. Ethiopia*, supra note 29 at ¶ 40 (finding a violation where the imprisonment of a journalist on overly-broad terror charges and where the source "provided convincing facts that the judgment is a consequence of [the detainee's] use of his right to freedom of expression and his activities as a human rights defender, which the Government has not rebutted."). See also, *Amanklychev and Khadziev v. Turkmenistan*, UN Working Group on Arbitrary Detention, Opinion No. 15/2010 (31 Aug. 2010).

in Azerbaijan since 2011, the issue of remedies is especially critical. In light of the nature of wrongful imprisonment, a specific order by the Court seeking the release of individuals detained in violation of the right to liberty – in addition to any monetary sanctions imposed by the Court – would be an appropriate and effective response under the circumstances.

Article 41 of the Convention authorizes the Court to "if necessary, afford just satisfaction to the injured party."[43] The Court has acknowledged that the language of this provision grants it considerable latitude in addressing the issue of remedy in each case. In *Guzzardi v. Italy*, the court highlighted that "as is borne out by the adjective 'just' and the phrase 'if necessary,' the Court enjoys a certain discretion in the exercise of the power conferred by [the Convention]."[44] Despite this generally broad grant of authority, however, the case law of the court in most areas has developed a narrower approach. In most cases, an offending State is free to choose the means by which it will remedy the violation – with the Court limiting its disposition to identifying the portions of the Convention violated and in some cases awarding monetary damages.[45]

Despite its generally cautious approach, in the context of the right to liberty, the Court has exercised its broad authority under Article 41 to specifically order the release of wrongly detained individuals. In *Assanidze v. Georgia*, the Court considered the imprisonment of a former elected official who – while suffering from an urgent medical condition – continued to be imprisoned on criminal charges after a presidential pardon quashed one sentence and the national courts vacated another. In reviewing its jurisprudence on remedies, the Court noted both its own flexibility in crafting remedies under Article 41 and the discretion generally afforded to governments in ending violations.[46] The Court ultimately found that the applicant's arbitrary detention violated Articles 5(1) and 6(1) of the Convention and that, "by its very nature, the violation found in this case does not leave any real choice as to the measures required to remedy it" and must therefore "secure the applicant's release at the earliest possible date."[47] In concurring with the unanimous decision in *Assanidze v. Georgia*, Judge Costa added the additional consideration that specific relief, in the particular case, would facilitate the legal review of the case by the Committee of Ministers and that "[a]s regards principle, which is the most important factor, it would have been illogical and even immoral to leave [the State] with a choice of (legal) means, when the sole method of bringing arbitrary detention to an end is to release the prisoner."[48]

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[43] In its entirety, Article 41 provides that "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[44] At the time of the decision in *Guzzardi v. Italy*, the provisions regarding remedies were located in Article 50. Although original language was revised in the current Article 41, the revisions were intended to simplify the former Article 50 and not alter the jurisprudence of the Court. David Scorey and Tim Eicke, *Human Rights Damages: Principles and Practice*, London: Sweet and Maxwell (2002 - 2003) at § A1-21.

[45] Tom Barkhuysen and Michiel L Van Emmerik, *A Comparative View of the Execution of Judgments of the European Court of Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS, REMEDIES AND EXECUTIONS OF JUDGMENTS (2005), pp 1-23, T Christou, eds., BIICL (London 2003).

[46] *Assanidze v. Georgia*, European Court of Human Rights, Application No. 71530/01 (8 Apr. 2004) at ¶ 198.

[47] *Assanidze v. Georgia*, supra note 46, at ¶ 202-203. In addition to identifying the specific nature of the violation, the Court also looked to questions of certainty in light of the fact that the applicant's detention had continued despite a presidential pardon and a decision by the Supreme Court rejecting the charges against him. *Id.* at ¶ 175.

[48] *Assanidze v. Georgia*, European Court of Human Rights, Application No. 71503/01 (Partly Concurring Opinion of Judge Costa)

Crafting specific remedies in cases of arbitrary detention is consistent with the Court's jurisprudence in other areas. The decision in *Assanidze v. Georgia* built upon the Court's jurisprudence in the area of illegal expropriation and property rights, where the Court has looked to non-monetary relief in light of specific guidance under customary international law and ordered that specific lands be returned.[49] In *Broniowski v. Poland*, the court again addressed property rights, but also looked to the "systemic" nature of the violation – which had resulted in a flood of cases before the Court and impacted a "whole class of individuals" who were unable enjoy rights because of "deficiencies in national law and practice identified in the application [that] may give rise to numerous subsequent well-founded applications."[50] In that case, the Court particularly invoked the obligation to comply with its orders under Article 46 of the Convention and the positions of the Council of Ministers emphasizing the importance of addressing systematic problems underlying violations identified in specific cases addressed by the Court.[51]

The approach of calling for the release of wrongfully imprisoned individuals is consistent with international practice. Indeed, many of the international mechanisms that consider cases of wrongful imprisonment have adopted this approach, including the Human Rights Committee, the Inter-American Court of Human Rights, and the UN Working Group on Arbitrary Detention.[52]

In the instant case, it is critical that if the Court finds a violation, a specific instruction regarding immediate release is given. The unique nature of arbitrary detention is such that where there is a finding that an individual is detained in violation of international law, the only remedy is the release of that individual. Further, in previous cases where the Court has found a violation of Article 5(1)(c) in the context of the prosecution of an Azerbaijani political leader – as in the case of Ilgar Mammadov – the prosecution continued despite the government's wrongful motives and the case ultimately resulted in a long period of detention. As such, and especially in light of serious concerns about the health of both the applicants, the most effective remedy would be a specific order for the immediate release of the applicants and an end to the politically-motivated prosecution against them.

E. Conclusion

In recent years, the situation for HRDs has become increasingly precarious in Azerbaijan.

(8 Apr. 2004) at ¶ 9.

[49] In *Papamichalopoulos v. Greece*, European Court of Human Rights, Application No. 14556/89 (31 Oct. 1995), the Court ordered the offending State to return illegally expropriated land by looking expressly to standards regarding such expropriations under customary international law and the jurisprudence of the Permanent Court of International Justice. See also *Brumărescu v. Romania*, European Court of Human Rights, Application No. 28342/95 (23 Jan. 2001).

[50] *Broniowski v. Poland*, European Court of Human Rights, Application No. 31443/96 (22 June 2004) at ¶ 189.

[51] In particular, the Court cited Resolution (Res(2004)3) of 12 May 2004 and Recommendation (Rec(2004)6) of 12 May 2004). *Broniowski v. Poland*, supra note 50 at ¶¶ 190 – 191.

[52] See e.g. *Iskandarov v. Tajikistan*, UN Human Rights Committee, Communication No. 1499/2006 (28 Apr. 2011) at ¶ 8 (calling for "immediate release or retrial with all the guarantees enshrined under the Covenant"); *María Elena Loayza-Tamayo*, Inter-American Court of Human Rights, Petition No. 11154 (17 Sep. 1997) at ¶ 84 (ordering the State to "in accordance with its domestic legislation, order the release of [the victim] within a reasonable time."); *Nega v. Ethiopia*, supra note 29 at ¶ 46 (calling on the government "to take the necessary steps to remedy the situation, which include the immediate release of [the detainee] and adequate compensation to him.").

Defenders face arbitrary barriers to registration, limits on their ability to operate and raise funds, and even the prospect of imprisonment in response to their peaceful work. Despite protection under international law for a series of rights including free expression and association, the government continues to prosecute HRDs, journalists, and activists – almost always subjecting them pretrial detention.

The current detention of HRDs in Azerbaijan implicates a number of important principles of international law, including the special protection afforded to such advocates and critical limitations on the use of national security laws to punish peaceful activism. Further, the politically motivated use of pretrial detention – which is especially relevant to Articles 5, 11, and 18 – must be analyzed the in the context of the ongoing persecution of HRDs in Azerbaijan and the specific targeting of the applicants. Finally, in order to effectively address the problem of politically motivated imprisonment, a specific order calling for the immediate release individual detainees is best tailored to address the specific nature of arbitrary detention.

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