COMPATIBILITY OF THE LEGISLATION OF THE REPUBLIC OF AZERBAIJAN ON THE CONDUCT OF CRIMINAL PROCEEDINGS WITH THE STANDARDS SET OUT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS

RECOMMENDATIONS

COUNCIL OF EUROPE

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The Project aimed to support the efforts leading to improvement of the criminal justice system by providing analysis and recommendations to improve the national legislation and practice in the light of the case law of the European Court of Human Rights and other human rights protection mechanisms.

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Article 3. Prohibition of torture [1]

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Problems with the Legislation and Law Enforcement Practices and How to Solve Them

a) The burden of proof when it comes to torture or inhuman treatment lies with the accused.

Article 125.8 of the Code of Criminal Procedure of the Republic of Azerbaijan places the burden of demonstrating grounds for the refusal of evidence on the party challenging the admissibility of said evidence. That is, if the accused or defendant claims that evidence was obtained from him/her as a result of torture and thus disputes the admissibility of this evidence, then it is the obligation of the defence to substantiate these claims.

[1] A detailed analysis of the positions of the European Court on Article 3 of the Convention and the legislation of the Republic of Azerbaijan, as well as a review of the legal regulation of the legislation of other countries is set out in Section I of the Expert opinion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

Proposals:

the burden of proof of the absence of inhuman treatment should fall on the state, through the public prosecution authorities.

This requires the following amendments to be made to Article 125.8 of the Code of Criminal Procedure of the Republic of Azerbaijan:

"When considering, at the request of the defence, the possibility of dismissing evidence obtained in accordance with the requirements of this Code on the grounds that the evidence was obtained in violation of the requirements of this Code, the burden of refuting the defence's allegations lies with the prosecuting authority or prosecutor carrying out the preliminary investigation. In this case, in order to determine whether or not there is any evidence of torture, appropriate expert examinations should be carried out and a legal assessment given, regardless of the content of the motion filed. In all other cases, the burden of proof falls on the party that has filed the motion."[2]

If the prosecution fails to adequately prove the groundless nature of the motion, then the evidence of the prosecution (in particular, the evidence obtained as a result of torture and/or inhuman treatment) shall, under the requirements of Article 125 of the Code of Criminal Procedure of the Republic of Azerbaijan, be deemed inadmissible. In this case, to prevent such circumstances from arising in the future, all actions related to the preliminary investigation of cases shall be carried out in such a manner that they cannot be disputed by the defence. That is, the prosecution will have to justify the admissibility of the evidence, as it will be in its best interests to do so. The prosecution should not blindly accept the explanations provided by the criminal prosecution authorities (i.e. of those who are motivated to secure a conviction), as they should not considered reliable. Relevant evidentiary analyses (forensic medical examinations, trace examinations, and so on) should be carried out and an objective opinion should be obtained.

b) The scope of authority of the court to respond to allegations of torture and inhuman treatment is not properly defined.

During preliminary investigation, the prosecutor in charge of the investigation reviews the statement of the person (suspect, accused, witness, victim, etc.) who alleges they have been subjected to torture. Further explanations are obtained from the accuser and the law enforcement officer who is suspected of torture.

[2] The approaches set out in Article 6 of the Convention to the burden of proof in criminal proceedings also need amending (more on this later).

Typically, criminal proceedings are not initiated. It is extremely rare that investigation is launched into the alleged instance of torture.

***Proposals**:*

1) *The Code of Criminal Procedure of the Republic of Azerbaijan should clearly define the powers, rights and obligations of the court, as well as the procedures that should be followed in the event that the accused provides a statement, orally or in writing, claiming that they were subjected to torture and/or inhuman treatment during the preliminary investigation into a case by a law enforcement officer, investigator or other officials of the law enforcement bodies.*[3]
2) *In particular, if the court concludes that the actions being contested involved torture or ill-treatment in accordance with Article 451.1.2 of the Code of Criminal Procedure of the Republic of Azerbaijan, it must immediately declare both the actions being contested and the evidence obtained through these actions (for example, the on-site verification of a testimony or confession obtained as a result of torture) illegal in accordance with Article 125.2.2 of the Code of Criminal Procedure of the Republic of Azerbaijan and not allow them to be admitted as part of the criminal case.*
3) *Article 299.3 of the Code of Criminal Procedure of the Republic of Azerbaijan should include "the consideration of procedural requests received in connection with torture and other forms of inhuman treatment" as issues that need to be examined during the preparatory hearing of the court.*
4) *The basis of the law "On the Suspension of Court Proceedings for the Purpose of Investigating a Petition in Connection with the Use of Torture and other Forms of Ill-Treatment" should be added to articles 300.1 and 304.1 of the Code of Criminal Procedure of the Republic of Azerbaijan. After a full investigation of the petition in connection with the use of torture and other forms of ill-treatment has been carried out, that is, after the relevant expert opinions have been submitted and the explanations of the relevant individuals presented, the court proceedings must be updated to reflect, if it has been proven that torture was used, the inadmissibility of the evidence obtained as a result of torture and the decision must be taken to exclude these materials from the criminal case. A court hearing must then be appointed.*
5) *It would be advisable to give both the preliminary investigation body (the prosecution) and the defence (the lawyer) the right to appoint forensic medical and other relevant examinations, as well as to expand to the possibilities in terms of obtaining alternative expert opinions.*

[3] This proposal is also set forth in Paragraph 27 of (CPT/Inf (2018) 35). See Section I of the Conclusion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

c) The ineffectiveness of investigating allegations of torture and other forms of ill-treatment.[4]

1) limited procedural opportunities

Current practice is such that when suspects file claims during preliminary investigations accusing law enforcement officials of torture and/or other forms of ill-treatment, they are reviewed before a criminal case is initiated in the form of a preliminary check and, in most cases, the claims are rejected. Criminal cases are not initiated on the basis of claims filed by persons in connection with torture and/or other forms of ill-treatment. The claims are seen as preliminary verification materials only, which makes it impossible for the person investigating the claim to carry out all the investigative activities provided for by the Code of Criminal Procedure of the Republic of Azerbaijan because a criminal case into the instance of torture has not been initiated, and the Code of Criminal Procedure of the Republic of Azerbaijan limits the scope of investigative activities that can be carried out before a criminal case has been opened. Thus, in accordance with Article 207.4 of the Code of Criminal Procedure of the Republic of Azerbaijan, "On examining information concerning an offence committed or planned, the preliminary investigator, the investigator or the prosecutor in charge of the procedural aspects of the investigation may request additional documents from the informants and explanations from them and other persons," *carry out other procedures provided for in this Article and appoint an expert examination*. Other than examining the scene of an incident, *appointing an expert evaluation and performing investigative procedures connected with the fulfillment of the duties established by articles 90.11.2–90.11.5 of the Code of Criminal Procedure of the Republic of Azerbaijan regarding persons detained on suspicion of committing a crime*, other investigative procedures and coercive procedural measures (*with the exception of detainment*) are prohibited before criminal proceedings have commenced.

2) Inappropriate subject of an investigation into cases of torture

As a rule, the authorized person investigating a claim (typically the prosecutor in charge of the procedural aspects of the investigation) is not interested in establishing the fact that torture was used during a criminal investigation. Since the person who allegedly used methods of torture is an employee of the relevant state authority, the authorized person investigating the claim (the prosecutor) is, in the vast majority of cases, more inclined to support the position of the employee of the state authority and consider the explanations and evidence (and even judgements) provided by them to be more reliable. The fact of the matter is

[4] This problem is also noted in Paragraph 28 of (CPT/Inf (2018)35). See Section I of the Conclusion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

that investigations into the alleged use of torture by a law enforcement official invariably give greater credence to the witness testimonies of colleagues of the given official than to the claims made by the applicant, even if there is a high likelihood that the testimony is biased.

Proposals:

1) *Include following wording for Article 207.4 of the Code of Criminal Procedure of the Republic of Azerbaijan: "A criminal case should be opened immediately upon receipt of a complaint related to the use of methods of torture or other forms of ill-treatment and a preliminary investigation conducted. The preliminary investigation should be handled by the prosecution authorities and not the agency that is conducting the criminal proceedings against the person who has allegedly been tortured."*
2) *Entrust investigations into possible cases of torture to independent prosecutors who are not involved in the investigation of the criminal case in connection with which the claimant was being questioned (on the principle of extra-territoriality, or, for example, a prosecutor from the Prosecutor-General's Office).*
3) *Allow investigations into possible disciplinary violations on the part of government officials to be carried out by a separate internal affairs department of the relevant agencies. Despite this, it is highly recommended that a full-fledged and independent investigative body be set up. This body should not have the authority to initiate disciplinary proceedings. The formal structure of the investigative body notwithstanding, its functions should be defined in the proper manner. In addition to giving individuals the possibility to file complaints with the investigative body, it should be a mandatory requirement for government agencies such as the police to register all statements that may reasonably constitute a complaint as such. To this end, appropriate forms confirming receipt of the complaint and the subsequent investigation must be filed. If it is established in a given case that certain law enforcement officials acted in an unlawful manner, then the investigative body should, in each case and without fail, immediately notify the competent prosecution authorities.*
4) *Give the courts the power to independently verify allegations of torture and other forms of ill-treatment made during the course of criminal proceedings on their merits or if torture is reasonably suspected.*
5) *The court, as well as the bodies investigating the allegations of torture at the behest of the court, should provide a legal evaluation of the actions that are alleged to constitute torture and other forms of ill-treatment within a reasonable timeframe.*
6) *Include clarifications in the Resolution of the Plenum of the Supreme Court of the Republic of Azerbaijan and the Order of the Prosecutor-General on the required minimum standards for verifying cases of alleged torture or*

other forms of ill-treatment, as well as for responding to established cases of ill-treatment where no allegations have been made (for example: the independence and impartiality of the investigation; the expeditious manner in which the investigation should be carried out; the objectivity of the investigation – all the necessary materials should be requested, the investigation should not consist of simply taking statements from the accused that they are innocent, but should rather involve using all available means to establish the facts of the case; the commissioning of an independent expert examination; the removal of those suspected of torture from positions that would give them the opportunity to influence, directly or indirectly, those who filed the complaints, witnesses, members of their families, people involved in the investigation, etc.).[5] *Any instructions that provide for a mechanism for monitoring the bodies carrying out criminal proceedings in connection with torture and other forms of ill-treatment should be approved by the Prosecutor-General. Monitoring activities should not be limited to the courts. In this area, wherever necessary, non-governmental organizations and the media should be involved the participation (public monitoring).*

d) Inaction of the courts in response to allegations of torture and other forms of ill-treatment

The courts often demonstrate a dismissive attitude towards applicants. There is no provision for suspending proceedings on the basis of the claim filed by the applicant, and it is possible that evidence obtained during an interrogation as the result of ill-treatment is used in court. It is here that documents signed by the applicant following torture are used against him/her. What is more, the signed documents are invariably used to confirm the unfounded grounds of the applicant's claims. Even if the claimant says that the documents were signed under duress, this does not help.

What is more, the courts, just like the preliminary investigation body, assess the testimony of the accused in connection with the allegations of torture presented at court as a part of their defence and provide a formal legal evaluation thereof in the form of a guilty verdict. There are cases where the public prosecutor and the court pressure the accused into providing testimony in court that matches the statement they gave during the preliminary investigation. The testimony that the accused gives in court is not checked. At the suggestion of the public prosecutor, only the statement made during the initial investigation is used. The verdict also refers to the testimony given.

[5] Paragraph 29, paragraph 27 of (CPT/Inf (2018)35) also points to the need to determine the requirements for investigations into incidents of torture. See Section I of the Conclusion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

Proposals

1) *If there is an allegation of torture or other forms of ill-treatment, the court should, as is customary in international practice, be obliged to suspend the court proceedings and initiate a full-scale investigation into the allegation. In this regard, allegations of torture or other forms of ill-treatment should be added to Article 53 of the Code of Criminal Procedure of the Republic of Azerbaijan as grounds for suspending the conduct of a criminal prosecution. Article 304 of the Code of Criminal Procedure of the Republic of Azerbaijan should contain the exact same provisions.*
2) *A mechanism that actually ensures the right of the individual to an effective defence (the true freedom of choice of public defence) needs to be created.*[6] *The forms and mechanisms of control and public monitoring (media, NGOs, etc.) should be clearly developed.*
3) *Interrogations and other investigative actions should be recorded on video.*[7] *The video should be continuous and uninterrupted and the defence should be given the opportunity to make notes on the recordings without restriction.*
4) *Regular medical examinations (once per week from the moment of detention), with the results attached to the case materials. If a person has been subjected to physical abuse, medical examinations should be carried out before the traces of such abuse have disappeared. Medical examinations should be conducted in the presence of a lawyer (subject to the wishes of the lawyer), who should be given the opportunity to make notes in the inspection report.*
   In accordance with Article 8.2 of the Law of Azerbaijan "On Ensuring the Rights and Freedoms of Persons Kept in Detention Facilities" dated May 22, 2012, when being transferred to and from a detention facility, persons in custody must undergo a medical examination. A document containing the results of this medical examination should be attached to the case files.

Article 5. Right to liberty and security[8]

1. Everyone has the right to liberty and security of person. No one shall be deprived of his

[6] The same proposal is made in paragraphs 41–43, paragraph 27 of (CPT/Inf (2018) 35). See Section I of the Conclusion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."
[7] The same proposals are put forward in the General Report on the CPT's Activities published in 2002. The development of CPT detention standards, paragraph 36. They can also be found in paragraphs 25 and 50, paragraph 27 of (CPT/Inf(2018)35). See Section I of the Conclusion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."
[8] A detailed analysis of the positions of the European Court on Article 3 of the Convention and the legislation of the Republic of Azerbaijan, as well as a review of the legal regulation of the legislation of other countries is set out in Section II of the Expert opinion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Problems and ways to solve them

a) **Substituting criminal procedural detention with administrative detention on a formality (pretext).** An institute exists for immediately challenging unlawful detention through judicial review. Thus, articles 449.3.2 and 449.3.3 of the Code of Criminal Procedure of the Republic of Azerbaijan provide for the filing of complaints concerning detention on remand as a matter of judicial review. In order to avoid such disputes, the investigative bodies initiate administrative proceedings on a formality (pretext) against the persons who is to be criminally prosecuted. The pretext in such cases is usually the failure of the person to comply with a

police officer (535, Code of Administrative Offenses of the Republic of Azerbaijan). In such proceedings, the statements of the police officer's colleagues are taken as evidence. Administrative arrest is followed by the commencement of criminal proceedings and the reading of the relevant charges.

b) Unrecorded detention. There are cases where a person is delivered to law enforcement agencies and is detained, without reason, for a long period of time (his/her freedom is restricted for five or six hours longer than is permitted by law) in an interrogation room with a detective or investigator.

In the case of Farhad Aliyev v. Azerbaijan, prior to being brought before the judge, the applicant was detained for approximately fifty-four to fifty-five hours, about six to seven hours in excess of the maximum period permitted by domestic law.[9]

There are even cases where internal affairs bodies that are involved in the fight against organized crime unlawfully restrict a person's freedom for several days. In such cases, the investigators do not draw up the relevant detention protocol and do not provide the right to defence.

In the case of Nagiyev v. Azerbaijan, the fact that the plaintiff was detained from September 18 to September 28, 2008 was not recorded anywhere. The court emphasized that the unrecorded detention of a person is in complete disregard for the fundamentally important guarantees contained in Article 5 of the European Convention on Human Rights and is a serious violation of this ruling.[10]

c) The formal consideration by the courts of the grounds for detaining a person. - As a rule, the preliminary investigation body does not provide the court with evidence that a crime has been committed. The decision to detain a person is taken on the basis of the nature of the crime and the danger that the alleged perpetrator poses to the public, as well as on primary evidence that the person has actually committed the crime. However, the investigating authorities do not present evidence that a person who is detained on charges being at liberty may commit a crime, disappear, influence the investigating authorities falsify evidence, etc. The courts do not require such evidence. In addition to information about the fixed abode and place of work of the defendant, the court sometimes notes their education status, whether or not they are the sole breadwinner in their family, have dependent children, etc. Despite this, however, the court does not attach any significance to the material and procedural grounds for the decision to make an arrest and bases its decision to detain a person on the seriousness of the crime;

[9] *Farhad Aliyev v. Azerbaijan*, no. 37138/06, § 154–169, 09.02.2011.
[10] *Nagiyev v. Azerbaijan* (dec.), no. 16499/09, § 58–68, 23.07.2015.

- Despite the clarification of the Plenum of the Supreme Court of the Republic of Azerbaijan, the courts do not verify the legitimateness of detention. The courts typically ignore the arguments of the defence (regarding, for example, violations of the timeframes for drawing up a detention protocol, disregard of the rules for calculating the period of detention, violations in the preparation of a detention protocol, etc.) and consider only the evidence that points to the crime committed and make their decision on the basis of this information. There are almost no examples of the court dismissing an arrest, even when the accused has been unlawfully detained.
- The investigation does not provide the court with materials that confirm the grounds for detaining a person and which give reason to believe that the person may abscond from the body conducting the criminal proceedings, obstruct the normal course of the preliminary investigation or court hearing by exerting unlawful pressure on persons involved in the case, conceal or falsify materials that are relevant to the case, commit another criminal act, pose a danger to society, fail to appear when summoned by the body conducting the criminal proceedings or otherwise evade criminal liability and punishment. The preliminary investigation body usually draws up a formal list of cases where the restrictive measures indicated in Article 155 of the Code of Criminal Procedure of the Republic of Azerbaijan were applied; however, it does not provide evidence indicating grounds for the application of these measures. In the best-case scenario, the preliminary investigation body considers a decision on mandatory attendance, a summons or a telephone message to be sufficient evidence that the person has attempted to evade the investigation. However, despite the fact that other grounds are listed (for example, leaning on witnesses, victims, falsifying evidence) the preliminary investigation body provides no evidence thereof.
- When considering applications for detaining a person, the court must verify the grounds for and legality of the detention. This is noted in the 2009 Resolution of the Plenum of the Supreme Court of the Republic of Azerbaijan “On the Practice of Considering Recommendations on the Use of Preventive Measures in the Form of Detention.” However, in practice, the issue of the legality of the detention is ignored.

One of the main methods used during preliminary investigations is to declare a person officially wanted by the authorities with a view to the further use of preventive measures in the form of detention. For example, if the person in question is registered at an address that differs from that of his/her fixed abode, the investigating authority sends a notice in writing to whichever address it sees fit. As a result, the suspect does not appear at the time and place specified in the notice, which is sufficient grounds to declare that person wanted by the authorities. Once the suspect is caught, a petition is filed with the court to use preventive measures in the form of detention. Further evidence in accordance with other grounds indicated in Article 155 of the Code of Criminal Procedure of the Republic of Azerbaijan is not presented in court, nor is it required. There are

cases when the written notice arrives at the suspect’s place of abode after he/she has already been arrested and detained.

d) The unreasonable and stereotypical use of preventive measures in the form of detention with regard to certain categories of criminal cases (for example, in cases involving illicit traffic in narcotic drugs [particularly in cases that do not involve the sale of narcotic drugs], serious injury or malfeasance in office). There are cases where the petitions of the investigating authorities are granted without issue, regardless of whether or not there are actually any grounds to do so. To this day, there are cases where the petitions of the Anti-Corruption General Directorate have been granted with no questions asked, particularly with regard to initiating criminal proceedings in connection with the loan debts of businesses and issuing arrest warrants for persons who are unable to repay their loan debts. The courts do not hold any power over this government administration. Even if the administration concludes, after the fact, that there are no grounds for launching a criminal case, the case itself is not closed and the accused is convicted on a lesser charge. This stereotype should be eliminated immediately.

e) Failure to use alternative preventive measures. The possibility of using preventive measures other than detention on remand is typically not considered.

As a rule, house arrest is only applied if the defence has filed the relevant motion; the court almost never resorts to this measure at its own initiative. There are practically no instances of the court choosing to apply house arrest at its own initiative, and motions filed by the defence are only granted if the court is satisfied that the actions of the accused are not of a criminal nature, or if it believes the evidence against them is weak. In all other cases, such motions are never granted.

f) Releasing suspects on bail in cases of crimes against property is subject to the suspect compensating a portion of the damages and the fact that the victim does not have any objections to the release on bail. In the event that the victim does object to releasing the suspect on bail, any evidence that points to the need to release the suspect is not treated as particularly significant.

g) Unreasonable use of house arrest when placement in detention on remand has been refused. Despite the variety of measures provided for by the Code of Criminal Procedure of the Republic of Azerbaijan, if a motion has been filed with the court on the placement of a suspect in detention on remand, house arrest is often chosen as an alternative preventive measure. However, the European Convention on Human Rights considers house arrest to be a “deprivation of

liberty" within the meaning of Article 5 of the Convention.[11] Accordingly, the guarantees provided by Part 3 of Article 5 of the Convention apply for the entire period that the suspect is under house arrest and to the exact same extent that they apply to conventional detainment on remand. The European Court of Human Rights has rejected the argument of the authorities that softer requirements should be used to justify house arrest compared to detention on remand.[12] This is why, for example, if the court refuses to extend preventive measures in the form of detention on remand, citing the lack of grounds for changing it to house arrest, this is a violation of the guarantees provided in Part 3 of Article 5 of the Convention.[13]

h) Formal extension of the detention on remand period. Article 159 of the Code of Criminal Procedure of the Republic of Azerbaijan cites the *"complexity of the case"* and *"exceptionally complicated"* cases as grounds for extending the remand period. However, the courts interpret these concepts quite arbitrarily and describe almost every case as complex and then exceptionally complicated when extending the remand period. In cases where no investigative actions have been carried out during the initial remand period, the courts do not effectively respond to the ineffectiveness of the investigation and extend the period of detention anyway.

i) Suspects are not afforded the opportunity to appeal the decision of the court to detain them and extend the remand period during the court hearing. During trial, the person under arrest has the right to appeal to the court at any time regarding his/her release. However, this does not replace the right to file a "complaint" regarding the decision of the court. Complaints against the decision to use preventive measures in the form of detention should not be dealt with by the same court that made the decision in the first place – the person dealing with the complaint cannot be the same person against whom the complaint has been filed.

Proposals:

1) *The conditions for release on bail should be simplified, and the provisions for released on bail should be broadened. The financial situation of the accused should be taken into account when granting bail.*
2) *The norms of the Code of Criminal Procedure of the Republic of Azerbaijan should be tightened, stipulating that preventive measures in the form of detention should be applied in cases where the accused has intentionally committed serious and extremely serious offences (with the exception of crimes against property) and only when there are sufficient*

[11] *Ermakov v. Russia* (dec.), no. 43165/10, § 238, ECHR, 07.11.2013.
[12] *Buzadji v. the Republic of Moldova* (dec.) [GC], §§ 111–114.
[13] Ibid, §§ 121–122.

grounds to do so. Detention on remand should not be used in cases where the crime committed does not represent a great danger to the public.

3) *Amendments should be made to the Code of Criminal Procedure of the Republic of Azerbaijan that requires the court to indicate the specific, factual circumstances on which the judge based his/her decision to remand a suspect in custody.*
4) *In order to resolve the issue of detention on remand, a record should be kept of the receipt by the accused and their defence of the materials presented to the court by the prosecuting authority confirming that the arrest and detention on remand are lawful and justified,* ***before they are sent to court****. A corresponding amendment should be introduced to Article 91.5.21 of the Code of Criminal Procedure of the Republic of Azerbaijan.*
5) *A provision should be introduced into the Code of Criminal Procedure of the Republic of Azerbaijan on the need to evaluate all the grounds and conditions for applying detention on remand in aggregate, the need to confirm these the veracity of these grounds with specific case materials, and the obligation of the court to evaluate the evidence presented by the defence against the need to detain the accused on remand alongside the evidence provided by the prosecution and justification for rejecting these arguments.*
6) *The Supreme Court of the Republic of Azerbaijan should provide clarification of what exactly constitutes "complex" and "exceptionally complicated" cases.*

We recommend considering the following cases factually complex: cases that involve a large volume of case materials, victims and perpetrators;[14] cases involving foreign nationals where translations of the case materials are required; cases where summoning and delivering foreign nationals to investigative, judicial and procedural activities would present difficulties;[15] cases where participants live in a different part of the country; cases where a large number of expert analyses need to be carried out, or the analyses are very labour intensive[16] or complicated;[17] cases involving a time limitation of the offences committed[18] or the temporal remoteness of facts that are of legal significance to the case and which need to be established;[19] cases involving a large number of investigative activities, with the nature of those activities

[14] *H. v. the United Kingdom* (dec.), no. 9580/81, § 72, ECHR, 08.07.1987.
[15] *Petr Korolev v. Russia* (dec.), no. 38112/04, § 60, ECHR, 21.10.2010.
[16] *Sutyagin v. Russia* (dec.), no. 30024/02, § 152, ECHR, 03.05.2011; *Salikova v. Russia* (dec.), no. 19440/05, § 55, ECHR, 15.07.2010; *Bakhitov v. Russia* (dec.), no. 4026/03, ECHR, 04.12.2008.
[17] *Scopelliti v. Italy* (dec.), no. 15511/89, § 23 ECHR, 23.11.1993.
[18] *Kolchinayev v. Russia* (dec.) , no. 28961/03, § 20, ECHR, 17.03.2010.
[19] *Sablon v. Belgium* (dec.) , no. 36445/97, § 94, ECHR, 10.04.2001.

being taken into account;[20] cases involving large amounts of evidence;[21] cases where the whereabouts of witnesses need to be established,[22] etc.

7) *A mechanism for appealing the review of court decisions on the use of preventive measures in the form of detention taken during the court proceedings should be created. In particular:*
   - amend Article 300.4 of the Code of Criminal Procedure of the Republic of Azerbaijan with the following: "300.4.3. When rendering decisions under Article 300.2.3, the accused, the defence and the public prosecutor";
   - amend Article 173.2 of the Code of Criminal Procedure of the Republic of Azerbaijan as follows: "Complaints against decisions taken at preliminary case hearings on restrictive measures may be lodged with the court of appeal";
   - amend Article 382.2 of the Code of Criminal Procedure of the Republic of Azerbaijan with the words "and in connection with preventive measures in the form of detention" after "under the system of judicial supervision," and add: "appeals and protests lodged in this manner do not stop the proceedings.

In connection with paragraphs 3.2, 3.3, 6.1 and 6.3 of the new Decree of the President of the Republic of Azerbaijan on Deepening Reforms in the Judicial and Legal System and the gaps in the Azerbaijani judicial system identified by the European Court of Human Rights, the authorities should take measures to ensure that the country's courts comply with the requirements of the European Convention on Human Rights when deciding/reviewing the issue of depriving a person of their individual liberty.[23] *In particular*, this review should ensure:

a. *with regard to violations of Part 1 of Article 5 (the wrongfulness and arbitrary nature of detention)*:

- that the detention is *de facto* recorded;
- that the person appears before the court within 48 hours of his/her arrest, as established by national law;
- that the accused is not kept in custody without a court order, and is detained exclusively on the basis of the fact that the case has been sent to court for trial;
- that nobody has been detained in violation of the domestic legislation, including the provisions on the extradition of Azerbaijani nationals to foreign states;
- that every instance of non-compliance of a person with the orders of an officer of the law (for example, the refusal to produce identity documents [the Emin Huseynov case]) or accusations that a person has failed to

[20] *Alyokhin v. Russia* (dec.), no. 10638/08, § 163, ECHR, 30.10.2009.
[21] *Humen v. Poland* (dec.) [GC], no. 26614/95, § 63, ECHR, 15.10.1999.
[22] *König v. Germany* (dec.), no. 6232/73, § 102, ECHR, 28.06.1978.

comply with the requests of an officer of the law to put a stop to an unlawful demonstration (the Khalikova case) is the true reason for this person being deprived of their liberty.

b. *with regard to violations of Part 3 of Article 5*: that, when making a decision regarding the pre-trial detention of an individual (for example, extending the remand period), the national courts do not use standard form templates or resort to unjustified reasons for detaining the individual (such as the need to carry our additional investigative activities, or the fact that the person is suspected of other crimes). The national courts should not dismiss a request for release (for example, release on bail) without having considered the arguments presented in the proper manner.

c. *with regard to Part 4 of Article 5:*

- that a competent court analyses both the adherence to the procedural requirements of the national legislation and the validity of the charges that provided the basis for detaining the person and the lawfulness of his/her arrest and subsequent detention;
- that the procedure is judicial in nature and provides guarantees that are appropriate to the type of detention applied;
- that the court proceedings are adversarial and always ensure the equality of the sides;
- that, if the person is detained on remand under Part 1, sub-item (c) of Article 5, his/her case is heard in the prescribed manner;
- that the detainee has the right to speak in person or through other forms of representation as one of the fundamental guarantees of the procedure used in dealing with the issue of the deprivation of liberty;
- that the national courts examine the specific arguments of the person against the deprivation of his/her liberty;
- that, in instances where the national legislation provides for a system of appeals, the appellate body also complies with Part 4 of Article 5.

Article 6. Right to a fair trial[24]

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty

[24] A detailed analysis of the positions of the European Court on Article 3 of the Convention and the legislation of the Republic of Azerbaijan, as well as a review of the legal regulation of the legislation of other countries is set out in Section III of the Expert opinion of the Council of Europe Project "Support to Justice Sector Reform Initiatives in Azerbaijan."

according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Gaps in cases tried in Azerbaijan identified by ECHR – Unfair Criminal Proceedings (Insanov v. Azerbaijan [16133/08]; Huseyn and Others v. Azerbaijan [35485/05]):

- familial ties between the judges, prosecutors and investigative authorities involved in the trial;
- refusals to take the testimony of witnesses on behalf of the accused into account;
- unsatisfactory legal assistance and the lack of a reasonable opportunity to prepare a defence;
- insufficient time, funds and access to the case materials during the preparation of the defence; the inability to challenge the creditability of the information obtained from key witnesses/experts;
- failure of the courts to examine the defence's objections regarding the authenticity of the evidence presented by the prosecution and its use in court during the trial (specifically the allegation that the narcotics were planted by the police).

Problems and ways to solve them

1) The effective inequality of the prosecution and the defence in court hearings. The lack of a real opportunity to select a lawyer; the problem of "pocket" lawyers and the ineffective work of defence attorneys.

In most cases, a lawyer is appointed for the accused at the expense of the state during the filing of charges and the transfer to court for the assignment of preventive measures in the form of detention. The accused is not given the opportunity to choose a lawyer at his/her will or a lawyer with whom he/she has worked before. The lawyer appointed by the state is not particularly interested in defending the rights of their client and, as a result, signs all documents without question, does not protest a singly procedural action and ends up complicating

matters further for the defendant. Another problem is the fact that when the state provides a lawyer for persons who are unable to hire one for themselves, the defendant is effectively denied the opportunity to be represented by the relevant legal practice. In most cases, the investigator involves an attorney from a legal practice with which he or she usually works. That is, the right to legal assistance of the defendant’s own choosing is effectively denied.

The court typically grants the motions filed by the prosecution, especially those filed by the public prosecutor. Meanwhile, motions filed by the defence, which are aimed at a comprehensive examination of the case and obtaining evidence that could prove the innocence of the accused, are not granted in most cases. During the judicial examination, the motions submitted by the defence are left without consideration, the reasoning being that they can be considered again, if necessary, during the trial. In most cases, however, these motions are not reconsidered and are not granted. The court provides its opinion on all the arguments presented, although this is not in line with the goals pursued by the defence. The defence lawyer is thus limited in his/her ability to appoint an analysis and obtain an expert opinion in an independent manner. During the preliminary investigation, the lawyer must file a request with the investigator for an expert analysis to be carried out, and if the request is granted, an expert analysis can be carried out. The fact that the decision to perform such procedural actions (and expert analyses are often vital sources of evidence) rests entirely on the prosecution is a violation of the right to a fair trial. It turns out that the evidence available to the defence depends on the charges of the prosecution. And this does not apply exclusively to expert analyses. The inquiries of defence lawyers regarding access to government agency documents are routinely denied. Again, a request must be filed with the investigative body to make a request to the appropriate authority. The prosecuting authority is interested in collecting evidence that strengthens their case. This is why, in most cases, the petitions of the defence are denied on the grounds that the requested information or document is not relevant to the case.

Proposals:

1. *Lawyers should be given greater scope to collect evidence in a free and independent manner.*

The Code of Criminal Procedure of the Republic of Azerbaijan should include imperative norms (norms that oblige a body or organization to provide defence lawyers with information and documents) that give attorneys the right to obtain expert opinions that are relevant to their client’s case (the urgent receipt of such an expert opinion to substantiate allegations of torture is of sufficient importance), as well as the possibility to obtain information and documents from government agencies – a clause should be included stating that these bodies and organizations are obliged to provide the requested documents or copies thereof.

The proper expression of the right to legal representation should include the person in custody having the opportunity to freely choose a lawyer and obtain certain information about the person they choose (for example, track record, achievements, the type of cases they specialize in, etc.).

2. *The moment that the defence counsel becomes involved in the case must be clarified and the relevant amendments introduced to articles 90.7.5, 91.5.4 and 92 of the Code of Criminal Procedure of the Republic of Azerbaijan.*

The participation of the defence counsel in criminal proceedings should not be tied to the formal status of the person – whether they are a suspect or a defendant. The right to legal representation arises from the moment that any procedural actions are taken against the person that affect their rights and freedoms. Accordingly, the moment that the defence counsel becomes involved in the case should be determined from ***the moment that measures of procedural compulsion or other procedural actions that affect the rights and freedoms of the person are initiated***, including at the stage of checking reports on the committed or planned crime

3. *A clear rule should be established in the law on the mandatory participation of a defence counsel in criminal cases*, except in cases where the accused refuses counsel and this refusal is accepted by the person in charge of the criminal proceedings. The relevant amendments should be made to Article 92 of the Code of Criminal Procedure of the Republic of Azerbaijan. Defendants should not be forced to refuse counsel, and it is not mandatory for the person in charge of the criminal proceedings. Cases in which defendants are not allowed to refuse counsel should be established.

4. *A person who is being investigated for a crime should have a minimum set of rights guaranteeing his lawful interests.*

In this regard, amendments should be made to Article 207 of the Code of Criminal Procedure of the Republic of Azerbaijan to indicate that the rights and duties of the persons who are the subject of procedural activities during the investigation of a crime are clarified in the manner provided for by the Code of Criminal Procedure of the Republic of Azerbaijan and that these rights may be exercised in the part where procedural actions and decisions affect their interests, including the right against self-incrimination and incrimination of loved ones, the right to use the services of a defence counsel, and the right to file a complaint about the actions (inaction) and decisions of the officials conducting the investigation in the manner prescribed by the Code of Criminal Procedure of the Republic of Azerbaijan. Where necessary, the security of the person involved in pre-trial proceedings should be ensured, including when filing crime reports. Information obtained during the investigation into a crime may be used as

evidence, provided that the requirements for the legal admissibility of evidence are met.

5. *Clarifications in the Resolution of the Plenum of the Supreme Court of the Republic of Azerbaijan on the Specifics of Applying the Right to Legal Defence:*

- The right to defence is valid at all stages and phases of the criminal justice process, from criminal investigations to final sentencing.
- Any person whose rights and freedoms are significantly affected or may be significantly affected by actions and measures that are accusatory in nature, has the right to defence, regardless of their formal procedural status.
- The courts should check whether the accused has been informed about the date, time and place of hearings of the court of first instance, court of appeal or court of cassation within the timeframes established by law.
- At the request of the accused, court hearings may be suspended or postponed in order to give the sufficient time to prepare a defence.
- If the accused refuses counsel, then this should be expressed clearly and unambiguously. In the court of first instance, the refusal of counsel may be accepted on the condition that the court has effectively provided a defence counsel. The following cannot be accepted as a refusal of council on the part of the accused: a written refusal of counsel due to a lack of funds to pay for the services of a lawyer; the failure of the counsel appointed by the accused or by the court to appear in court; the refusal of the services of a particular lawyer. If the court grants the request of the accused to be tried without representation, then its decision must be reasoned.
- The court takes measures to appoint legal counsel in all cases where the accused has not exercised his/her right in the legal proceedings to engage the services of a lawyer and has not refused counsel in the prescribed manner, or his/her request to be tried without legal representation has been denied. It should be kept in mind that the law does not give the accused the right to choose the lawyer that is assigned to his/her case.
- In order to create the necessary conditions for persons to be tried who, by virtue of their physical or mental disabilities, are unable to independently exercise their right to a defence (those with a mental disorder that does not affect their capacity to understand and rationally participate in a court process, as well as persons who suffer from severe speech disorders, have serious hearing or visual impairments or another condition which limits their ability to exercise their procedural rights), the court should discuss the need to involve the relevant specialists in the case (sign language interpreters, the use of Braille, etc.).
- The courts must respond to every violation or restriction of the defendant’s right to a defence.

2) Using evidence that violates the fairness of the process:

- *The* de facto *priority given to evidence obtained from the state bodies, including through administrative procedures;*
- *The use of testimony given by law enforcement officers on the content of the information provided by the accused as evidence.*

This is especially true for criminal cases involving illicit traffic in narcotic drugs. The statements of police investigators who have detained the person are often used as evidence. In cases where there is no detective or chief investigator present at the interview and the primary statement is taken by a police investigator, the statement is used against the person during the course of the investigation. Despite this, the courts take the materials of the preliminary investigation and, where available, the primary statements of the detainee, as reliable evidence (especially if it is a signed document, in which case it is treated as important evidence). At best, the courts may, at the request of the defence, interview the police investigator as a witness.

- *The indisputable recognition by the court of investigation reports involving attesting witnesses and other materials as reliable evidence.*

Investigators invariably engage the services of persons who have an interest in the investigation as attesting witnesses, because they work with the law enforcement agencies on a non-salaried basis. These types of investigative procedures typically take place when the accused does not have a defence counsel or has been appointed a defence counsel by the state who signs all documents without objection. In practice, it is often the case that attesting witnesses do not take part in the investigative procedures. When summoned to court, the testimony provided by such witnesses often indicates that they were not present during the investigation and merely signed the relevant protocols. It is often the case that these attesting witnesses cannot even point out the accused in the courtroom. In other words, investigators only use attesting witnesses to satisfy the requirements of the Code of Criminal Procedure of the Republic of Azerbaijan. It is not possible to contest materials obtained during investigations that involve attesting witnesses.

Proposals:

1) *The practice of using “partisan” attesting witnesses should be eliminated* and a centre established where the (material) evidence provided by the investigating authorities is not taken at face value, or where attesting witnesses are replaced by video recordings of the investigative activities;

2) *The Plenum of the Supreme Court of the Republic of Azerbaijan should provide clarifications on:*

- The inadmissibility of using statements made by law enforcement officers on the content of information provided by the accused as evidence. They can only be questioned about the circumstances of the proceedings;
- Putting an end to the practice of the courts unconditionally viewing evidence obtained from state bodies or with the participation of attesting witnesses as having a predetermined force (the rule that “there is no reason to not trust law enforcement officers” should not have any bearing on the evaluation of the evidence).
- *The use of evidence obtained as a result of entrapment by law enforcement agencies.*

This is especially true for criminal cases involving illicit traffic in narcotic drugs. It is widely believed among law enforcement agencies that “entrapment” is an effective way to fight crime. Entrapment in this area typically involves spreading information in certain circles that a person is looking to buy drugs and is willing to pay a good price for them. As a rule, entrapment happens when carrying out such operational and investigative activities as “purchasing goods as part of control procedures,” “infiltrating criminal groups or criminogenic facilities” or “performing operational experiments, that is, using models of behaviour that imitate criminal activity” (Law of the Republic of Azerbaijan “On Operational-Search Activity”). In accordance with Part III, Article 11 of the Law of the Republic of Azerbaijan “On Operational-Search Activity,” the grounds for carrying out operational-search activities include: decisions of the court (judge); decisions of the investigating authorities; decisions of the authorized subjects of operational-search activities. The decision to carry out operational-search activities may also be taken upon receipt of information from a credible and impartial source about a person who is planning to commit a crime, is in the course of committing a crime or has already committed a crime.

Proposals:

1. *Judicial (prosecutorial) authorization of operational-search activities that most affect the rights and freedoms of citizens should be introduced, and the defence counsel should be afforded the opportunity to familiarize themselves with these documents.*

2. *The Plenum of the Supreme Court of the Republic of Azerbaijan should provide clarifications on the following provisions:*

- law enforcement officials and persons acting under their orders should not provoke (entrap) an individual into committing a crime;

- actions are considered entrapment if, before the decision on carrying out an operation is made, the relevant authorities did not have reasonable information that person in respect to whom the operation has been organized is involved in the preparation or commission of a wrongful act;
- there must be specific grounds for conducting an operation; unsupported data of law enforcement officers as grounds for carrying out operational-search activities is not sufficient (sufficient grounds include, for example: telephone conversations between the applicant and a drug dealer that mention previous sales of drugs, the amount of drugs left over, the appearance of new clients and the possibility of new joint deals, etc.);
- the results of operational-search activities may be used as evidence in criminal cases if they are obtained and transferred to the preliminary investigation body or the court in accordance with the requirements of the law and bear witness to the fact that the suspect intended to commit a crime and that this intention was formed independently of the activities of the law enforcement officers carrying out the operational-search activities;
- it is against the law to artificially manufacture an “ambush” situation with the aim of “catching” any person in the act of committing a crime;
- the fact that a person has a criminal past is not enough to conclude that there are objective doubts about that person’s involvement in criminal activities or their propensity to commit a crime.

3) The lack of opportunity for the defence to prove the inadmissibility of evidence

Courts often accept evidence that should be declared inadmissible: statements obtained in an unlawful manner and without securing the right to defence, or ensuring the right to defence against the wishes of the detainee (without allowing the detainee to conclude a contract with a lawyer of his/her choice); and evidence obtained in violation of the law during investigative activities. The admissibility of evidence is formally substantiated by the signature of the accused in the protocols on the investigative activities (the interrogation report in particular). In practice, the court checks that each page of the interrogation report drawn up during the preliminary investigation has been signed, and that the signature belongs to the accused. If the signature belongs to the accused, then the court considers the evidence to be admissible. Most evidence obtained through the illegal use of interrogation techniques involves the accused being forced to sign (the interrogation report and other documents connected to the investigation) so that this can be used against the defence in court.

If there are differences between the statements of witnesses and the accused obtained by means of ill-treatment during the preliminary investigation and their testimonies in court, the court invariably takes the statements given during the

preliminary investigation as a basis, despite the fact that the statements given during the preliminary investigation were presented to the court as evidence of the prosecution and the court should initiate a new independent investigation. Testimony given freely in court and without any kind of pressure should be considered more reliable.

The defence has to prove its claims that evidence was obtained through unlawful investigative activities. In practice, the prosecution often submits evidence to the court that has been obtained as a result of ill-treatment or other unlawful means. Even if the defence disputes this evidence submitted, the court does not require that the prosecution disprove these claims.

Proposal:

1) *Article 125.8 of the Code of Criminal Procedure of the Republic of Azerbaijan should be supplemented.*[25]

3) The Practice of Interrogating Suspects as Witnesses

Investigators often question individuals whom they later intend to charge with a criminal offence as witnesses (a potential defendant as a witness). At this time, the person does not have the right to refuse to give a statement and must answer all questions put to them. The investigator then uses this interrogation against the person who has turned from witness into the accused. There are problems with this approach, and sometimes the investigating authorities do not allow a lawyer to be present, as the status of the person under questioning has not been established (witness or suspect). Because the criminal procedure legislation primarily ensures the protection of the rights of accused persons, the rights of those who are classified as witnesses are not protected. The investigating authorities create artificial obstacles in this respect.

Proposals:

1) The Resolution of the Plenum of the Supreme Court of the Republic of Azerbaijan should include clarifications on the following:

- The right under Article 66 of the Constitution of the Republic of Azerbaijan to remain silent and not be forced to testify against oneself or one's relatives should be clarified during the interrogation of witnesses and victims. A note of this should be made in the interrogation report.
- The right under Article 66 of the Constitution of the Republic of Azerbaijan to receive qualified legal advice applies to all participants in criminal proceedings, without exception, and the counsel for the defence

[25] This proposal has already been put forward in the analysis of Article 3 of the European Convention on Human Rights.

cannot be refused the right to defend a witness in a criminal case. Article 227.1 of the Code of Criminal Procedure of the Republic of Azerbaijan clearly states that "a witness's lawyer or other representative shall be entitled to participate" in the interrogation;

- Statements obtained as a result of an interrogation of a suspect who has been treated like a witness, as well as evidence obtained on the basis of these statements, should be declared inadmissible. This practice should be seen as a violation of criminal procedure law and grounds for vacating a judgement.

6. *The lack of a mechanism for ensuring the right, as provided for in Part 3, sub-item (d) of Article 6 of the European Convention of Human Rights, "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

It often happens that witnesses recant the statements they gave during the preliminary investigation. It is quite common in the national court practice to read or otherwise make public witness testimonies obtained during preliminary investigations at court hearings. Article 329.1 of the Code of Criminal Procedure of the Republic of Azerbaijan creates unreasonably broad opportunities to disclose the testimony of witnesses who are absent at court hearings. The law does not place any restrictions on this possibility, establishing that testimony given by witnesses may be made public in the absence of the witness, and an audio recording or a video or film recording of this testimony may be played or shown, only for the reasons which rule out the attendance of the witness at the court's examination of the case, and in other circumstances provided for in Article 327.1 of the Code of Criminal Procedure of the Republic of Azerbaijan.

Proposals:

1) *Amendments should be introduced to Article 329 of the Code of Criminal Procedure of the Republic of Azerbaijan, and restrictions should be placed on the disclosure of the testimony of witnesses and victims who are absent at court hearings:*

- Testimony given by victims and witnesses during the preliminary investigation may be made public with the consent of the parties in the event that the victim or witness fails to appear in court.
- If no such consent is given when the victim or witness fails to appear in court, the court may make the testimony public in the following instances: death of the victim or witness; a serious illness that prevents the victim or witness from appearing in court; difficulties arising in connection with the fact that the victim or witness is a foreign citizen and refuses to appear in court; acts of

God or other extraordinary circumstances that would prevent the victim or witness appearing in court; cases where it has been impossible to establish the whereabouts of the victim or witness; and other exceptional circumstances.

- The court can take the decision to make the testimony of the victim or witness public, provided that the defendant has been given the opportunity at the earlier stages of the criminal proceedings to dispute this evidence in the manner provided by the law. Similar rules should apply to the broadcasting of audio recordings or video or film recordings of investigative actions carried out with the participation of a witness or victim.

2) *The appropriate means for challenging the testimonies of “key” witnesses and victims should be determined:* introducing cross-examination or the right to confrontation in order for the accused to have a real opportunity to ask the witness or victim questions (an indication that one of the objectives of the right to confrontation is to give the defence the opportunity to ask questions, etc.).

3) *The Plenum of the Supreme Court of the Republic of Azerbaijan should provide clarifications on the specific features of applying these norms:*

- The accused may refuse the right to interrogate witnesses and victims who testify against him/her. If witnesses or victims fail to appear in court, then their testimonies can, with the consent of the prosecution and the defence, be made public.
- The question of the importance and feasibility of summoning and interrogating a given witness or victim should be determined by the court, with due account of the specific circumstances of the case.
- When deciding on whether or not to make the testimony of a witness or victim public, the court should establish whether to testimony of the witness is of decisive importance, whether the reasons for his/her absence at the court hearing are compelling, and whether all the necessary measures to ensure that he/she appears in court have been taken.
- When deciding on whether or not to make the testimony of a witness or victim public, the court should give the defence additional opportunities to ensure that there is a balance between the prosecution and the defence and that the proceedings take place in a fair manner.

In accordance with articles 3.2 and 3.3 of the new *Decree of the President of the Republic of Azerbaijan on Deepening Reforms in the Judicial and Legal System* and the shortcomings identified by the European Court of Human Rights in its decisions on the judicial affairs of Azerbaijan, it should be noted that these

decisions are considered to be fair within the meaning of the Convention.[26] Legal proceedings should guarantee, *inter alia*:

- the impartiality of the consideration of the case in accordance with Part 1 of Article 6 of the European Convention on Human Rights, which must be determined on the basis of subjective indicators, including the personal convictions of the judge presiding over the case, and objective indicators, with due regard to the verification of the assumption on the provision of judicial guarantees sufficient to eliminate any legal doubt in this regard;
- the principle of the equality of the parties, which states that each side should be given a reasonable opportunity to set forth its position in conditions that do not present a significant disadvantage to the opponent;
- the right to an adversary process in a criminal case, in which both the prosecution and the defence must possess all the information and have the right to comment on the considerations and evidence presented by the other side;
- that the defence is given the opportunity to build its case in the proper manner, without any restrictions in terms of presenting all the relevant defence arguments in the court of first instance and thus have the opportunity to influence the outcome of the court proceedings;
- the accused has the right to a practical and effective defence: the appointment of legal counsel does not in itself constitute effective assistance, since a lawyer may be unable to provide such assistance for various reasons, or due to negligence of his/her duties;
- in cases where it is obvious that the lawyer representing the interests of the accused in a national court has not had sufficient time or opportunity to build a proper defence, the court should take measures to ensure that the lawyer is given the opportunity to fulfil his/her obligations under favourable conditions;
- opportunities for everyone charged with a criminal offence to familiarize themselves with the case materials regarding the results of investigations throughout the entirety of the trial;
- the right of the accused to be present in the courtroom, both during the preliminary hearing and at subsequent hearings, which is an essential requirement of Article 6;
- the opportunity for both the defence and the prosecution to present their closing arguments, which is one of the most significant aspects of hearings in criminal cases; this is the only instance in which both sides have the right to present, orally, explanations on the case, the evidence that was put forward during the trial and the legal arguments for assessing the result;
- the provision of all evidence in the presence of the defendant at an open hearing in order for the relevant positions to be defended;

[26] See above, Paragraph 58.

- in accordance with Article 6, access to legal assistance at the initial stages of interrogation by the police; even in cases where the accused remained silent and was not interrogated while detained in custody, restricting his/her right to legal assistance from the moment of arrest may be in violation of the Convention;
- that the accused has the proper opportunity to challenge or examine the person testifying against them during their testimony, or at a later stage in the proceedings;
- convincing evidence needs to be provided of reasons for the failure of prosecution witnesses to appear in court; the court needs to demonstrate that it took reasonable measures to ensure that these witnesses appeared in court, or that there were sufficient factors that allowed for a fair and proper assessment of the creditability of the testimonies of witnesses to be held at earlier stages in the proceedings;
- that the right to defence is limited to the scope of the meaning of Article 6; in the event that the prosecution is based exclusively or decisively on the testimonies of a witness whom the defendant was not given the opportunity to examine or from whom he/she was not able to receive clarifications during the investigation or in court; this also applies to hard evidence;
- that the court pay due attention to the testimony of the witness during the hearing, and not on pre-trial recordings of his/her testimony prepared by the prosecution, unless there are no compelling reasons to search for other evidence;
- that any confirmation received in violation of Article 3 is corrupt;
- that the accused has the right to contest the authenticity of evidence or oppose the use of such evidence in court;
- that Part 1 of Article 6 obliges the courts to substantiate their decisions, although this should not imply that requirements to provide detailed explanations regarding each argument be applied;
- that the proceedings may be considered fair if the shortcomings of the initial trial are subsequently rectified by the courts of appeal.

Regarding the presumption of innocence, the following legal remedies may be discussed:

- Applications submitted by prosecutors and subsequent judicial control.
- Applications that are supported by additional violations may jeopardize the security of the proceedings. In the event that these additional violations place the effectiveness of judicial control and the resumption of proceedings in question: the judge may conclude that the presumption of innocence was violated during the trial and take measures to correct this situation or publish a statement aimed at putting an end to the interference.
- Applications submitted by judges and the resumption of the proceedings.

Annex II. Examples of criminal justice reforms adopted by the CoE Member States in the context of the execution of ECtHR judgments

	CASE	MAIN VIOLATION(S)	MAIN GENERAL MEASURES ADOPTED
	ARTICLES 2 AND 3		
1	***Ramsahai and Others v. Netherlands*** No. 52391/99 Judgment final on 15/05/2007 Final Resolution CM/ResDH(2010)178	Failure by the respondent State in its obligation to conduct an effective investigation of the circumstances of the killing of *Moravia Ramsahai*, son and grandson respectively of the applicants (procedural violation of Article 2). The victim was shot and killed by a police officer on 19/07/1998, after he had drawn and had begun to point a pistol at two police officers present on the scene.	The duty system of the State Criminal Investigation Department was improved following a 2004 decision of the Amsterdam Court of Appeal in order to ensure the department's quick arrival at the place of incident. As a consequence, the State Criminal Investigation Department today reaches the scene of incident on average within an hour or an hour and a half after an incident is reported. The Board of Prosecutors General issued a new Instruction in 2006 on the action to be taken in the event of use of force by a (police) officer. This Instruction applies to all officials vested with police powers and covers situations involving allegations of violations of Articles 2 and 3 of the Convention. Whenever an incident has taken place to which the Instruction applies, the investigation will be carried out by the State Criminal Investigation Department. The regional police force should immediately report the incident to the department. The duty officer of the Department will also proceed to the scene of the incident as quickly as possible. The local police should take all necessary urgent measures, such as cordoning off the area concerned, caring for any casualties and taking down the names of any witnesses. They are not themselves to carry out any investigations unless and

			to the extent that their involvement is unavoidable. All investigations that cannot be carried out by the Department will be conducted by the Internal Investigations Bureau of the police region concerned or by members of a neighbouring police force.
2	***Corsakov group v. Moldova*** Application No. 18944/02 Judgment final on 04/07/2006 Final Resolution CM/ResDH(2018)463	Ill-treatment or torture mostly in police custody and lack of effective investigations in this respect (violations of Articles 2 and 3).	*Main legislative reforms adopted* According to the CCP as amended in 2012, the official investigation of ill-treatment and torture should start immediately after notification; certain investigative measures (searches on the spot, seizure of evidence, medical/corporal examinations) are carried out immediately even without official decision to initiate criminal investigation; the burden of proof in torture-related cases has been reversed (so that it now falls on the authority under whose custody the person was detained); mandatory forensic examinations in cases of suspected ill-treatment or torture have been introduced. The Criminal Code was also amended to exclude the statute of limitations for ill-treatment and torture. *Main institutional reforms (2016):* - the Anti-Torture Unit of the Prosecutor General's Office conducts investigations in complex cases, supervises the investigations conducted by territorial prosecutor's offices, considers complaints and provides guidance to all subordinated prosecutors on issues related to the investigation of ill-treatment/torture; - establishment of a specialised prosecutor's office on Combating Organised Crime and Special Cases, which has exclusive competence to investigate cases of ill-treatment and torture; - to ensure the requisite independence and impartiality of investigations, anti-torture sections were created in this specialised prosecutor's office and the Chișinău Prosecutor's Office. The prosecutors from the anti-torture sections are exclusively allocated to this type of cases and have no other responsibilities which would involve them in joint work with police or other law-enforcement agencies.

3	***Tsintsabadze group v. Georgia*** Application No. 35403/06 Judgment final on 18/03/2011 Status of execution	Lack of effective investigations into allegations of breaches of the right to life and ill-treatment allegedly imputable or linked to action or negligence of state agents (law enforcement officers of the Ministry of Internal Affairs, the Department of Constitutional Security, the Ministry of Corrections, the Ministry of Justice, the Public Prosecutor's Office) (violations of Articles 2 and 3).	- constitutional amendments (2018) improved the independence of the Prosecutor General who is now elected by Parliament for the term of 6 years, is accountable only to Parliament and is no longer part of the executive; - establishment of a State Inspector's Service (from 1 July 2019) to investigate crimes of torture, degrading or inhuman treatment, and several other crimes committed by law enforcement agents. The inspector is elected by Parliament for six years after a thorough pre-selection procedure. He/she shall be provided with strong guarantees of independence and will be accountable only to Parliament. The procedural guidance and supervision of the investigations will be carried out by the Chief Prosecutor's Office while a judge of the Supreme Court will control covert investigations; - to guarantee the impartiality of the courts' chairpersons, cases are distributed between judges randomly, by an electronic system; - creation of the Victim and Witness Coordinator Service within the Prosecutor's Office to support and protect the interests of victims and witnesses during the proceedings.
4	***Khaylo group v. Ukraine*** Application No. 39964/02 Judgment final on 13/02/2009 Status of execution	Lack of effective investigations into the deaths of the applicants' relatives caused, *among other things*, by road traffic accidents, illegal acts of private individuals or in unclear circumstances (procedural violations of Article 2).	*Main legislative and institutional reforms adopted*: - investigators now have the legal obligation to initiate an investigation of a criminal offence within 24 hours after it has been reported and information is registered; - the law in force provides for shorter deadlines for initiating criminal proceedings, transferring files and completing investigations; - better safeguards are provided to ensure the involvement and effective participation of victims in the proceedings given the amended legal provisions on victim's status, rights and obligations and their ability to study the case materials at the pre-trial stage; - clearer distinctions exist between the different pre-trial investigation agencies to increase independence and impartiality in the investigations; - measures related to the preservation and quality of evidence; to ensure that investigators comply with the criminal instructions of the prosecutors, and to secure the presence of participants in the trial are contained both in the new CCP, and specific Instructions addressed to the relevant institutions.

5	***Kraulaidis v. Lithuania*** Application No. 76805/11+ Judgment final on 08/02/2017 Final Resolution CM/ResDH(2018)290	Ineffectiveness of the pre-trial investigations in cases between private individuals (procedural violations of Article 3).	According to the 2010 amendments of the CCP, the pre-trial investigation must be carried out within the shortest time-limits possible, but not exceed: a) three months in case of a criminal offence; b) six months in case of a minor, less serious criminal offence; c) nine months in case of serious and especially serious criminal offences. Guidelines and recommendations on the effective and expeditious conduct of a preliminary investigation into allegations of ill-treatment were amended in 2017: the prosecutor must adopt the necessary decisions within the legally prescribed time limits. In case of delay or misconduct, the Attorney General is entitled to adopt the necessary procedural decisions. The Attorney General also supervises the reasonableness and legality of any refusal to open a preliminary inquiry. Training sessions were organised for prosecutors.
6	***Holodenko v. Latvia*** and six other cases Application No.17215/07+ Judgment final on 04/11/2013 Final Resolution CM/ResDH(2018)382	Ill-treatment by the police during the applicant's arrest and in custody and lack of effective investigation in this regard (substantive and procedural violations of Article 3)	*Prevention of ill-treatment by the police*: the establishment of the Internal Control Bureau in 2015 aiming at strengthening discipline and legality, analysing, planning, coordinating and implementing preventive measures against offences committed by police. *Independence of criminal investigations*: the establishment of the Internal Security Bureau (2015) which is institutionally supervised by the Minister of the Interior, has a separate budget, separate premises in the capital and separate units in all main regions to enhance the overall mobility and ensure prompt initial response and procedural investigative measures. Immediately after the incident, the Bureau obtains video recordings from the place of the incident, as well as necessary call recordings. Its representatives promptly arrive at the place of the incident and obtain testimonies from the victims, from the officials involved, victims, witnesses and experts. The Bureau examines in detail every instance of the use of force by the officials and assesses the necessity and proportionality. Namely, in the framework of an inquiry, the Bureau examines service reports on the use of force that must be submitted by the official who had used the force immediately after the incident. Such inquiries are also initiated if the victim complains about the use

			of force by the officials, or if the Bureau receives such information from other institutions or persons. After the inquiries, if necessary, it initiates criminal proceedings in accordance with the Criminal Procedure Law. In the framework of criminal proceedings, the Bureau evaluates materials from the inquiry in the context of the evidence gathered in the case against the official (witness testimonies, report of the inspection of the location of the event, reports of video and call recording examination, expert opinions). Taking into account both the evidence and the service report, the Bureau draws the conclusion about the necessity and proportionality of the use of force in the situation concerned. *Improved prosecutorial supervision*: in 2010, the Prosecutor General issued a Decree intensifying prosecutorial supervision of criminal investigations concerning alleged offences by State officials and giving this task priority.
7	***Kmetty v. Hungary*** and one other case Application No. 57967/00 Judgment final on 16/03/2004 Final Resolution CM/ResDH(2011)297	Lack of effective investigations into the applicants' allegations of ill-treatment by the police (violations of Article 3).	According to the 2003 CCP, victims may refer their cases to a court whenever a prosecutor refuses to arraign the alleged perpetrator of a crime under investigation; factual reasons must be cited in any decision on appeal against a prosecutorial decision to close an investigation; any court decision dismissing a private bill of indictment must include factual reasons. Such statement of reasons shall also include the facts and the pleadings advanced by the parties. The Prosecutor General's Office sent a copy of the judgment to all prosecutors with a circular letter drawing their attention to their obligation to carry out effective and thorough investigations into allegations of ill-treatment by police officers. The circular specifies that criminal investigations initiated following allegations of ill-treatment can only be discontinued if there remains no doubt that the alleged crime had not been committed. In addition, it indicates that where an investigation is abandoned without this condition being met, interested parties may request a referral to a court which will decide on the questions of criminal responsibility.
8	***Aksoy group v. Turkey***	Killing of the applicants' next-of-kin by members of the	*Extensive reforms adopted by the authorities (see more details in DH-DD(2019)155)*

	Application No. 21987/93 Judgment final on 18/12/1996 Final Resolution CM/ResDH(2019)51	security forces; failure to protect the right to life of the applicants' next-of-kin; ill-treatment and the lack of effective domestic remedies for the applicants' complaints (violations of Articles 2 and 3).	- gave direct effect to the Convention requirements; - introduced the right of individual application to the Constitutional Court; - removed any prescription period or requirement for administrative authorisation for investigations and prosecutions of crimes of torture and ill-treatment; - improved procedural safeguards in police custody, including the right to access to a lawyer; - aligned the detention periods and regulations with the Convention (ECHR) standards; - improved professional training for members of the security forces, judges and prosecutors.
9	***Iribarren Pinillos v. Spain*** Application No. 36777/03 Judgment final on 08/04/2009 Final Resolution CM/ResDH(2011)266	Ill-treatment suffered by the applicant during a demonstration (he was seriously injured by a smoke grenade thrown from a short distance by the anti-riot police) and lack of effective investigation in this regard (violation of Article 3).	The Spanish Constitutional Court has adopted the case-law of the ECtHR concerning the need to conduct exhaustive investigations in cases where there are complaints of ill-treatment by police officers. In 2008, it extended and clarified its case-law concerning the conduct of investigations in cases of ill-treatment. The case-law of the Constitutional Court concerning fundamental rights is binding on all judges and courts (Section 5.1 and 7.2 of the Spanish Courts Act.).
10	***Jasar v. The Former Yugoslav Republic of Macedonia*** and three other cases Application No. 69908/01 Judgment final on 15/05/2007 Final Resolution CM/ResDH(2018)72	Lack of effective investigation into the allegations of ill-treatment of Roma applicants in the hands of the police preventing them from taking over the investigation as subsidiary complainants (procedural violation of Article 3).	Pursuant to the Law on Public Prosecution (2007), prosecutors must take procedural steps within 30 days after a complaint was filed. According to the new CCP (2010), prosecutors have an obligation to take a decision on a criminal complaint within three months after a complaint is filed. If a prosecutor fails to do so, he/she informs the complainant and a superior prosecutor. The decision on the criminal complaint should be communicated to the individual concerned within three months from the date when the private criminal charges have been filed, and if that is not the case, the prosecutor should inform the higher public prosecutor about the reasons thereof.

			In 2013, the Prosecutor General issued a binding instruction for prosecutors to report to him cases allegedly involving ill-treatment/torture at the hands of State agents.
	ARTICLE 5		
11	***Cebotari v. Moldova*** and two other cases Application No. 35615/06+ Judgment final on 13/02/2008 Final Resolution CM/ResDH(2016)147 ***Muşuc v. Moldova*** and four other cases Application No. 42440/06+ Judgment final on 06/02/2008 Final Resolution CM/ResDH(2018)227	Arrest and detention on remand of the applicants in criminal and administrative without a reasonable suspicion that they committed an offence (violation of Article 5§1); a violation of Article 18 taken in conjunction with Article 5§1 (Cebotari) as the real aim of the criminal proceedings and of arrest and detention was to put pressure on the applicant with a view to hindering another applicant from pursuing its application before the ECtHR; the insufficiency of the reasons given for the applicant's detention (violation of Article 5§3).	*Legislative and institutional reforms adopted*: - disciplinary liability for prosecutors increased in 2008; - in 2013, the Constitutional Court introduced a clear prohibition on all State authorities to interfere in prosecutors' handling of individual cases; - a new ethical code for prosecutors was adopted in 2015. In 2016, the following substantial amendments were introduced to the CCP to ensure its compliance with Article 5 requirements: - "reasonable suspicion" was defined, and an instruction was given that such suspicion should exist whenever a person is arrested for a period of up to 72 hours; - the possibility to challenge the legality of such arrest in court was introduced (previously it could be challenged only before the prosecutor); - the possibility to detain on remand a mere suspect was removed, i.e. such detention can now be applied only to a person formally charged or a defendant against whom an indictment act has been delivered; - the law now imposes a proportionality test before deciding on the application of detention on remand, including *inter alia* the obligation to verify the existence of reasonable suspicion. - reinforcement of prosecutors' independence vis-a-vis the executive and the legislator. In 2018 the General Police Inspectorate launched a *Standard Operating Procedure* concerning apprehension, escort and detention of persons in police custody, which describes in detail the actions to be taken by police officers during apprehension in line with the Convention standards.

12	***Labita v. Italy*** Application No. 26772/95 Judgment final on 06/04/2000 Final Resolution CM/ResDH(2009)83	Lack of reasonable grounds for the applicant's continued detention pending trial and the excessive length of this detention (two years and seven months) (violation of Article 5§3); unlawfulness of the applicant's detention for 12 hours after being acquitted, owing to the absence of the competent officer (violation of Article 5§1).	*Violation of Article 5§3:* the CCP was amended in 1995: detention pending trial is revoked *ex officio* if there are no longer sufficient grounds to justify it. Time already served in detention pending trial is to be taken into account in determining the sentence. In addition, the CCP provides the maximum length of detention pending trial according to specific circumstances. *Violation of Article 5§1:* The Department of penitentiary administration of the Ministry of Justice, in its circular letter addressed in 1999 to the Directors of Prisons and to regional inspectors of the penitentiary administration, recalled that the immediate release of prisoners should permanently be assured, 24 hours a day, every day. To this effect, the circular letter establishes precise and coherent provisions about the procedure to be followed in the prisons.
13	***Lutsenko v Ukraine*** Application No. 6492/11 Judgment final on 19/11/2012 ***Tymoshenko v. Ukraine*** Application No. 49872/11 Judgment final on 30/07/2013 Status of execution	Unlawful detention on remand and use of detention for other reasons than those permissible under Article 5 in the context of criminal proceedings; inadequate scope and nature of judicial review of the lawfulness of detention; lack of effective opportunity to receive compensation (violations of Article 5 §§ 1, 4, 5 and Article 18 taken together with Article 5).	There are significant ongoing reforms of both the judiciary and the prosecutor's office aiming at strengthening the judiciary from political or other unjustified influence (see for details DH-DD(2017)82); strengthening the independence of the General Prosecutor's Office by the following: - the amendments of 2016 to the Constitution which abolished the wide general supervisory authority of the prosecutors and aimed to reduce abuse and corruption; - the adoption, in 2014, of the new Law "On the Prosecutor's Office"; - the adoption of the Presidential Decree "On the Strategy for Reforming the Judiciary and Related Legal Institutions for 2015 - 2020".
14	***Nikolova v. Bulgaria No. 2*** Application No. 40896/98 Judgment final on 30/12/2004	Excessive length of pre-trial detention and subsequent house arrest; lack of effective judicial review of the lawfulness of house arrest and excessive length of criminal proceedings against her had exceeded a	*Lack of effective judicial review of the lawfulness of house arrest*: the CCP was modified, and a full initial and subsequent judicial review of this measure was introduced. *Excessive length of house arrest*: the dissemination of the judgment to the competent courts with an explanatory note drawing their attention to the requirements of the ECHR concerning the length and the justification of such

	Final Resolution CM/ResDH(2012)167	reasonable time (violations of Article 5 §§ 3 and 4).	measures was requested.
15	***Imre v. Hungary*** and three other cases Application No. 53129/99 Judgment final on 02/03/2004 Final Resolution CM/ResDH(2011)222	Excessive length of the applicants' deprivation of liberty due to the lack of sufficient reasons to justify it (violation of Article 5§3).	Pursuant to the 2006 CCP, domestic courts may order detention on remand only as a last resort while taking into account the principle of proportionality. Domestic courts must give detailed reasons for their decisions. They are also obliged to evaluate more attentively the facts on which decisions prolonging detention on remand are based. The risk that an accused might abscond shall no longer be deduced from the seriousness of the alleged criminal offence alone; according to the well-established practice of the domestic courts, such a risk must be established on the basis of specific evidence and not on the basis of presumptions.
16	***Patsuria group v. Georgia*** Application No. 30779/04+ Judgment final on 06/02/2008 Final Resolution CM/ResDH(2011)105	Placement and continued detention on irrelevant/insufficient grounds; absence of a valid court order authorising the continued detention; unfair nature of the supervision exercised by the judge ordering detention on remand and lack of a "prompt" reply on an appeal against unlawful detention (violations of Article 5 §§ 1(c), 3 and 4).	The old (1998) CCP distinguished between two periods of detention on remand: detention "pending investigation", that is whilst the competent prosecution agency investigated the case and detention "pending trial", whilst the case was tried in court. The new CCP of 2010 definitively repealed the provision at issue. Furthermore, pursuant to the new CCP: - the prosecutor must address to the judge a reasoned detention request within 48 hours after an individual's arrest. The request must contain the individual's personal details, the charge and any information or evidence on which that charge is based. The judge examines this request within 24 hours. After verifying the merits and the formal and procedural bases of the requested measure, the judge delivers a reasoned judgment. The judge may reject the request for appropriate reasons and apply the less severe measure. - detention on remand may only be applied if the objectives pursued cannot be achieved by a less severe measure; - judgments concerning deprivation of liberty may be the subject to single appeal to the investigations section of the Court of Appeal. That appeal may be lodged by the prosecutor, by the accused or his representative within 48 hours after the adoption of the judgment. The court considers the appeal within 72 hours: it issues a definitive inadmissibility judgment, without a hearing or, if the appeal is admissible, a hearing is held.

17	***Shannon v. Latvia*** Application No. 32214/03 Judgment final on 24/02/2010 Final Resolution CM/ResDH(2016)64	Failure by a regional court to examine promptly appeals against the extension of remand in custody; lack of sufficient grounds to justify the applicant's continued detention (violation of Article 5§4).	The 2005 CCP has introduced the position of investigative judges, whose primary duty is to ensure observance of human rights during the pre-trial stage of criminal proceedings. The CCP envisages maximum procedural terms for detention, which are binding both during the pre-trial proceedings and the adjudication stage. Detention orders are subject to regular judicial review at two levels of jurisdiction. The CCP established mandatory periodic control over the applied pre-trial detention, which, as a rule, is carried out every two months by the investigative judge. The individual concerned may at any time submit an application to the investigative judge asking to review the imposed security measure. Following the 2012 amendments to the CCP allows reviewing of the detention after convicting judgment of the first instance court. The appellate courts have been granted authority to review the necessity for continuous detention in cases when appellate proceedings are not expected to commence within two months from the date when the criminal case file has been received by the appellate court, or when the appellate proceedings have been adjourned or suspended for two months or longer. The domestic courts aligned their case-law accordingly.
18	***Bednov v. Russia*** and 12 other cases, Application No. 21153/02+ Judgment final on 01/09/2006 Final Resolution CM/ResDH(2015)249	Detention on remand in the absence of a court decision or of a reasoned court decision; absence of time-limit for the extensions of the detention period; detention hearings conducted in the absence of the applicants and their counsel; failure to examine complaints against detention on remand orders (violation of Article 5§4).	Legislative reforms and rulings of the Constitutional Court and the Supreme Court have ensured that - in compliance with Article 5 § 1 and 4 of the Convention, detention on remand is always ordered by a court decision; - such decisions contain both reasons and a time-limit for the detention; - the hearings are held in the presence of the applicants and their representatives.
1	***Demirel v. Turkey***	Structural problem of the	According to the CCP (2005), the reasons of the detention shall be

9	and 195 other cases Application No. 39324/98+ Judgment final on 28/04/2003 Final Resolution CM/ResDH(2016)332	malfunctioning of the Turkish criminal justice system and the legislation: excessive length of detention on remand and absence of sufficient reasons given by domestic courts in their decisions extending such detention; lack of domestic remedy to challenge the lawfulness of detention on remand; absence of a right to compensation for unlawful detention on remand (violations Article 5 §§ 3, 4 and 5).	demonstrated, and the judge ordering the detention shall set forth the legal and factual reasons as to why alternative measures cannot be applied in the particular circumstances of a case. Following the 2012 CCP amendments, the offences requiring imprisonment for up to two years as well as judicial fine shall not be subject to detention on remand. The range of measures alternative to detention has also been broadened. Alternative measures can be applied to all crimes irrespective of any upper limit of sentences laid down. The Constitutional Court aligned its case law with the ECHR standards. It assesses the compliance of the length of detention on remand taking into account specific circumstances of the case at hand and its complexity. The adversarial principle for review and the right to compensation for unlawful detention on remand were introduced in 2013.
20	***Harkmann v. Estonia*** and one other case Application No. 2192/03+ Judgment final on 11/10/2006 Final Resolution CM/ResDH(2010)158	Violation of the applicants' right to be brought promptly before a judge after their arrest (violation of Article 5§3); absence of an enforceable right to compensation for unlawful detention (violation of Article 5§5).	According to the 2004 CCP, an investigating judge may issue a warrant to arrest a person who has been declared a fugitive. In this case, not later than on the second day following the arrest, the person shall be taken to the investigating judge for interrogation. If there are no grounds for arrest, the person shall be released immediately. Amendments to the *State Liability Act* (2006) foresee the right to compensation for unlawful activities of a public authority if the ECtHR found a violation of the Convention in a particular case; for applicants who have filed an application with the ECtHR in a matter in which the latter has already found a violation before; in case of unlawful detention under the new CCP or under Article 5§3 of the Convention, which is an integral part of Estonian law.
	ARTICLE 6		
21	***Igual Coll v. Spain*** and 11 other cases	Lack of a public hearing before the courts of appeal, when they are called upon to decide on both	To address the systemic issue originating in the appeal courts' discretion to decide on the necessity to hold an oral hearing or not, the Constitutional Court changed its case-law in 2012. The Supreme Tribunal's case-law followed with

	Application No. 37496/04 Judgment final on 10/06/2009 Final Resolution CM/ResDH(2017)69	factual and legal aspects of a criminal case (violation of Article 6 § 1)	decisions rejecting the quashing of acquittal judgments when no public hearing had taken place in the second instance. The Law on Criminal Procedure was amended in 2015 strengthening procedural safeguards. Thus, if the appellate court finds an error in the assessment of evidence, it will quash the first instance judgment and return the case for reconsideration of the evidence produced before it, or order for a public hearing to be held anew before it.
22	***Erkapic v. Croatia*** Application No. 51198/08 Judgment final on 05/07/2013 Status of execution	Violation of the applicant's right to a fair trial in that the domestic courts convicted him on the basis of incriminating statements made by his co-accused to the police and subsequently retracted before the trial court, while failing to properly examine their allegations that these statements had been obtained under pressure exercised by the police and that the lawyers imposed on them by the police had not been present during the questioning (Article 6§1).	In April 2013, the Constitutional Court changed its case-law to align it with the ECtHR findings in this case concerning the assessment of the evidence in criminal proceedings (see also *Ajdarić v. Croatia*, closed in 2016, CM/ResDH(2016)38**)**. The domestic courts are now bound to apply the principles set out in the present judgment when adducing and assessing the evidence in criminal proceedings. In 2014 and 2015, the Supreme Court followed the same reasoning. It held that upon convicting a suspect, the domestic courts could rely only on evidence obtained under circumstances that cast no doubt on its reliability or accuracy. In case a witness changes his previous statements in the course of pending criminal proceedings, the trial court must properly examine and assess such statements.
23	***Salduz v. Turkey*** Application No. 36391/02 Judgment final on 27/11/2008 Final Resolution CM/ResDH(2018)219	Violations of the right to a fair trial arising from the fact that, pursuant the Law which was then in force, the applicants, as persons accused of committing offences falling within the jurisdiction of the State Security Courts, were systematically	In 2003, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Court was lifted; In 2005, a new CCP entered into force, granting all detained persons the right of access to a lawyer from the moment they are taken into police custody and making the appointment of a lawyer obligatory in respect of minors or persons accused of an offence punishable by a maximum of at least five years' imprisonment;

		denied access to a lawyer during questioning at police stations and that the statements they made were subsequently admitted in evidence at trial (violations of Article 6§3(c) in conjunction with Article 6§1).	In 2016, additional amendments were made to the CCP, providing that, by a court order, the right of access to a lawyer can be restricted during the first 24 hours of police custody in respect of an exhaustive list of crimes, including crimes relating to national security, terrorism and organised drug trafficking, but that suspects cannot be interrogated while denied access to a lawyer during this period and that there is, therefore, no possibility of statements made while denied legal assistance being admitted in evidence against them.
24	***Romenskiy v. Russia*** Application No. 22875/02 Judgment final on 13/098/2013 Final Resolution CM/ResDH(2017)280	Lack of impartiality of a domestic court referring to an accused person as "guilty" in a ruling issued before his conviction and failure of the appellate court to address the applicant's complaint about the alleged partiality of the trial court, summarily rejecting all his "procedural" complaints as unsubstantiated (violation of Article 6§1).	In the context of a revision of the impartiality requirement for courts, in 2002, the principle of the presumption of innocence was introduced in the current CCP, to give effect to Article 49 of the Constitution. A Supreme Court Plenum Ruling of 2013 on the application of the ECHR by the Russian courts clarified that wordings which in any way claim a person guilty before delivery of a decision to terminate criminal proceedings on non-rehabilitative grounds are unacceptable. The importance of the presumption of innocence was underlined in the Code of Judicial Ethics, in the context of disciplinary liability of judges.
25	**Guilloury v. France** Application No. 62236/00 Judgment final on 22/09/2006 Final Resolution CM/ResDH (2010)46 ***Bracci v. Italy*** and one other case	Unfair criminal proceedings resulting in convictions on the basis of testimony given by prosecution witnesses without the possibility of counter-examination in investigation or	**France** According to the legislation in force at the material time, appellate judges could order the hearing of new prosecution witnesses who had not testified at first instance. Such hearing was, however, optional and judges could decline it provided that they gave reasons for their decision. As regards defence witnesses, no such limitation was provided by the legislation. In the present case, the ECtHR noted that the appellate court had not heard them even though at least two of them had been present at the hearing and it had thus the material possibility to do so. After the facts in the case, the amended Article 513 of the CCP provides that witnesses called by the accused shall be heard. The prosecution may object to such witnesses' testifying if they have already been heard by the court. It is for the court to determine such issues before

	Application No. 36822/02 Judgment final on 15/02/2006 Final Resolution CM/ResDH(2014)102	trial stage (violations of Article 6 §§ 1 and 3(d)).	considering the merits. Thus, the hearing of the defence witnesses by the judge is guaranteed. **Italy** Following the ECtHR judgment, the domestic courts changed the interpretation and application of Articles 512 and 526 of the Italian CCP, regulating the use of evidence, which had not been acquired in an adversarial manner. They recalled the obligation to comply with the final ECtHR judgments, by virtue of Article 46 of the Convention, and emphasized the need to interpret article 512 of the criminal procedure in accordance with the Convention.
26	***Kakabadze and Others v. Georgia*** Application No. 1484/07 Judgment final on 02/01/2013 Final Resolution CM/ResDH(2017)77	Arbitrary arrest of the applicants by court bailiffs and punishment by detention, imposed in unfair proceedings as an administrative sanction by a court on the same day, for their participation in a demonstration outside the Tbilisi Court of Appeal; failure to justify the dispersal of the demonstration and imposition of administrative detention; inability to appeal the decision on the imposition of administrative detention (violations of Articles 5§1 and 6§1 in conjunction with 6§3 (c)).	The CCP was significantly revised to guarantee the holding of an oral hearing when detention is concerned and the principles of equality of arms and adversarial proceedings. The maximum term of administrative detention was reduced from 90 to 15 days, and domestic courts generally impose more lenient administrative sanctions, such as fines, for minor administrative offences. A decision imposing detention may be appealed against within 48 hours and shall be reviewed without an oral hearing within 24 hours from the moment of its filing. The possibility for detained persons to obtain compensation for their illegal or unjustified detention is ensured, independently of conviction or acquittal.
27	***Tunc Talat v. Turkey*** and one other case Application No. 32432/96+ Judgment	Absence of effective legal assistance by a lawyer during trial and failure to ensure the accused person's appearance in the court hearing (violations of	The requirement of obligatory defence counsel was introduced into the CCP in 2005. As to the right to a hearing, new rules provide that in case of transfer of the accused out of the competent court's jurisdiction, the accused may only be exempt from appearing before the court providing that his/her statements have been taken.

	final on 27/06/2007 Final Resolution CM/ResDH(2017)398	Article 6 §§ 1-3c)	Recently, an Audio-Visual Information System was introduced enabling courts and the chief public prosecutors' offices to receive audio-visual statements of suspects, accused persons, witnesses, complainants, interveners etc. without a presence at hearings.
28	***Balitskiy group v. Ukraine*** Application No. 12793/03 Judgment final on 03/02/2012 Status of execution	Convictions of the applicants on the basis of self-incriminating statements made in the absence of a lawyer and in the circumstances giving rise to a suspicion that the confessions had been given against their will (violations of Article 6 §§ 1 and 3 (c)). The ECtHR stressed the structural nature of the problem regarding the malpractices of using the administrative arrest to ensure the availability of a person as a criminal suspect and of initial "artificial" under-charging to classify the alleged offence under an article of the Criminal Code which did not require obligatory legal representation. The Court indicated under Article 46 that specific reforms in Ukraine's legislation and administrative practice should be urgently implemented to ensure	The 2012 CCP specifies that a suspect shall be able to consult his/her lawyer confidentially before the first interview and that no limitations as to the number or length of the consultations shall be imposed. Any suspect/accused has the right to engage legal counsel at any time during the proceedings. The relevant prosecutorial authorities or courts shall further assist an arrested/detained person in engaging legal counsel and shall refrain from making any recommendations as to which lawyer is retained; - the CCP requires a court to ensure the participation of a lawyer when such participation is mandatory (in cases of special gravity), but the suspect has failed or is unable to engage a lawyer; - the CCP no longer retains the concept of "appearance with confession" which was one of the sources of the violation of Article 6 in the present cases as a person who had "appeared with confession" was by definition denied access to a lawyer; - the problem of formally placing a suspect under administrative arrest without access to legal representation even though he/she was, in fact, the suspect of a crime, was repealed. The new definition of the concept of "suspect" means that administrative arrest can no longer be used to bypass the requirements of criminal procedure; - the CCP has enhanced the requirements for documenting waivers of the right to legal representation. Such waivers can be given only after the suspect or accused has been allowed to consult confidentially with his lawyer and must be given in the presence of his lawyer and duly documented; - all evidence obtained through significant violations of human rights and fundamental freedoms shall be declared inadmissible and expunged from the record. There are procedural safeguards in place that allow the accused or his/her defenders to move to have evidence declared inadmissible. The

		compliance with Article 6 and avoid further repetitive complaints of this type.	domestic courts must decide on the admissibility of all evidence; - in 2011, the Constitutional Court held, with reference to the ECtHR case law, that the accusation of a crime cannot be based on evidence obtained as a result of investigative or search measures which violate constitutional provisions, including the right to a lawyer; - a number of practical recommendations issued by the courts between 2014 and 2017 concern the right to defence. They call, *inter alia*, for the quashing of judgments in proceedings conducted in the absence of a lawyer, where a lawyer's participation was mandatory. They also recommend the application of the ECtHR case-law on the effectiveness of the right to defence in criminal proceedings.
29	***Burak Hun v. Turkey*** and one other case Application No. 17570/04+ Judgment final on 15/03/2010 Final Resolution CM/ResDH(2018)217	Unfair criminal proceedings resulting in convictions for crimes committed upon active incitement by undercover state agents (violation of Article 6 §1)	The new CCP of 2005 introduced a new framework for "undercover investigators" ("gizli soruşturmacı") to reveal crimes, take part in the investigation of crimes involving production and trade of narcotics and psychotropic substances regardless of whether or not they are committed in an organised way. Undercover investigators are appointed by decision of a judge and are subject to special supervision. In particular, it is forbidden to incite the commission of offences. The law further provides that no decision can be based on illegally obtained evidence. The Court of Cassation has adapted its case law, and the action plan for the prevention of violations of the Convention developed in 2014 contained training activities on the subject, particularly for judges and prosecutors.
30	***Caka v. Albania*** and two other cases Application No. 44023/02+ Judgment final on 08/12/2009 Final Resolution CM/ResDH(2017)417	Failure to secure the appearance of witnesses and first instance court's failure to have due regard to testimonies in the applicant's favour; lack of procedural guarantees in criminal proceedings in absentia and lack of access to the Constitutional Court due to miscalculation of the time-limit;	*Summoning of witnesses and the procedures for witness testimonies*: new rules were elaborated in 2013 and completed in 2017 clearly regulating refusals to testify. The right to defend oneself in courts of first instance and appeal was unambiguously established through domestic case-law in 2013/2014 and enshrined in the CCP in 2017, together with legal aid provisions. *The opportunity to obtain a revision of the merits of charges in case of judgments in absentia*: revision requests must be filed within 30 days after the convicted person's is informed of the trial and its result.

		refusal to grant the right to defend oneself at a public hearing before the Court of Appeal and the Supreme Court (violations of Article 6§1 combined with Article 6 § 3(d), 6 § 3c and 6 § 3)	The ECtHR judgment is used in training organised by the School of Magistrates. Concerning the reopening of proceedings to give effect to European Court judgments, the Supreme Court, in its case-law, recognised this possibility in 2011. Ensuing amendments of the Code of Criminal Procedure were introduced in 2017.