

# Submission by International Partnership of Human Rights pursuant to Rule 9(2) of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments

## Comments on the action plan submitted by the Government of Azerbaijan

### of 20 September 2019 in the Ilgar Mammadov group of cases (Application no. 15172/13)

#### I. Introduction

1. International Partnership for Human Rights (IPHR) is an independent, non-governmental organisation founded in 2008. Based in Brussels, IPHR works closely together with civil society groups from different countries to raise human rights concerns at the international level and promote respect for the rights of vulnerable communities.
2. IPHR is committed to promoting human rights worldwide but has a special focus on countries in Central Asia and the South Caucasus as well as Russia and the Ukraine. It acts to empower local civil society groups who are working to advance the protection of human rights in their respective countries and assists them with raising human rights concerns at the international level. In cooperation with partner organisations, IPHR advocates on behalf of individuals and communities who are among those most vulnerable to discrimination, injustice, and human rights violations.
3. In line with Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, IPHR hereby presents a communication regarding the execution of the judgments in the proceedings of *Ilgar Mammadov v Azerbaijan*, application no. 15172/13 and the five repetitive cases under application nos. 68762/14 (*Aliyev v Azerbaijan*), 919/15 (*Ilgar Mammadov v Azerbaijan (No. 2)*), 47145/14 (*Mammadli v Azerbaijan*), 48653/13 (*Rashad Hasanov and others v Azerbaijan*), and 69981/14 (*Rasul Jafarov v Azerbaijan*) ("**Ilgar Mammadov group of cases**"). This submission argues that, in view of the requirements set by the European Court of Human Rights ("**the Court**" or "**ECtHR**"), international standards, and the Committee of Ministers ("**CM**") and notwithstanding some positive points, the Government's action plan of 20 September 2019 (DH-DD(2019)1033) ("**Action Plan**") does not constitute a sufficient execution of the judgments in the *Ilgar Mammadov* group of cases.

## II. Case Summary

4. The applicants in this group of cases, İlgar Mammadov, Rasul Jafarov, Anar Mammadli, Rashad Hasanov, Zaur Gurbanli, Uzeyir Mammadli, Rashadat Akhundov, and Intigam Aliyev (the **“Applicants”**), were all subject of criminal proceedings that the Court found to constitute a misuse of criminal law, intended to punish and silence them because of their political, social or human rights activities.
5. According to the Court, the arrest and detention of each Applicant took place in the absence of any reasonable suspicion that they had committed an offence. Rather, the actual purpose of the criminal proceedings was to punish the Applicants for having criticised the government; for their activities in the area of human rights or electoral monitoring; for their active social and political engagement; or, in two cases, to prevent further work as a human rights defender.<sup>1</sup> Accordingly, the Court found Azerbaijan in breach of Article 5 and 18 of the European Convention of Human Rights and Fundamental Freedoms (**“ECHR”**), in the Aliyev case in conjunction with the Article 8 the ECHR.

## III. General measures

### 1. Requirements by the Court and the Committee of Ministers

#### a) Requirements by the Court

6. For the *İlgar Mammadov* group of cases, the Court has determined that “these judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law” and give rise to further repetitive applications.<sup>2</sup> It has therefore stated that the judgments oblige Azerbaijan to take general measures, which “must focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention. The measures to be taken must ensure the eradication of retaliatory prosecutions and misuse of criminal law against this group of individuals and the non-repetition of similar practices in the future.”<sup>3</sup> These measures should also ensure genuine judicial oversight of the prosecution’s applications to prevent similar practices in the future as the Court found “that domestic courts systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention.”<sup>4</sup>
7. In its judgments, the Court has recognised several aspects that facilitated arbitrary arrests and therefore need to be addressed by the Government:
  - **Detention not based on facts raising a reasonable suspicion.** In several cases, the Court recognised that Azerbaijan had held individuals in detention without a reasonable suspicion based on facts.<sup>5</sup> According to the Court, such suspicion requires “the existence of facts or

1 ECtHR, judgment of 4 February 2019, Application no. 68762/14 (Aliyev v. Azerbaijan), para. 223.

2 ECtHR, judgment of 4 February 2019, Application no. 68762/14 (Aliyev v. Azerbaijan), para. 223.

3 ECtHR, judgment of 4 February 2019, Application no. 68762/14 (Aliyev v. Azerbaijan), para. 226.

4 ECtHR, judgment of 4 February 2019, Application no. 68762/14 (Aliyev v. Azerbaijan), para. 224.

5 ECtHR, judgment of 4 February 2019, Application no. 68762/14 (Aliyev v. Azerbaijan), para. 172; ECtHR, judgment of

information which would satisfy an objective observer that the person concerned may have committed the offence.”<sup>6</sup> In course of the assessment, the judge must also take into account any exonerating facts that the detainee submits.<sup>7</sup>

- **Detention based on criminal offences not laid down specifically and unequivocally in law.** In several cases, the Court also determined that the allegations against the Applicants were not based on legal provisions which specifically criminalised the detainee’s conduct.<sup>8</sup> Statements of high-ranking officials and pro-government media showed that they accused the respective individuals not of infringements of law but of what they viewed as undue criticism of the government and the State of Azerbaijan.<sup>9</sup>

In regard to this, the Court also took note of the fact that “the legislative environment regarding the operation of non-governmental, non-commercial organisations, including the regulation of matters relating to their State registration, funding and reporting requirements, has grown increasingly harsh and restrictive,”<sup>10</sup> forcing these organisations into legal grey areas. It has held that this calls for particularly close scrutiny of the facts giving rise to the charges brought against the individual.<sup>11</sup>

- **Insufficient procedural safeguards in proceedings for determining pre-trial detention.** The Court also observed that the pre-trial detention proceedings lacked procedural safeguards as prescribed by Article 5(3) ECHR. According to this provision, detention proceedings “must have a judicial character, and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the proceedings must be adversarial and must always ensure “equality of arms” between the parties.”<sup>12</sup>

## **b) Observations by the Committee of Ministers**

8. Under Article 46(2) ECHR the CM examined the status of execution of the *Ilgar Mammadov* group of cases on 18 occasions. In its decision of June 2019, the CM, based on the Court’s findings, requested the Government “to adopt effective and comprehensive measures to ensure the protection of critics of the government, civil society activists and human rights defenders from retaliatory prosecutions, arbitrary arrest and detention, and other misuse of criminal law, including by reinforcing the effectiveness of judicial protection against such practices” and requested further information regarding an executive order of 2017 and a presidential decree of 2019.<sup>13</sup> Complying with this request, the Government presented its Action Plan, containing information on the judicial and legal reforms undertaken in Azerbaijan over recent years, together with an overview of further measures planned.
9. In its December 2019 meeting, the CM already noted that the Action Plan does not safeguard the independence, impartiality, and accountability of the judicial and prosecutorial institutions. The CM again underlined the importance of reforms that can protect critics of the government, civil society

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14 October 2014, Application no. 15172/13 (Mammadov v. Azerbaijan), para. 88.

6 ECtHR, judgment of 14 October 2014, Application no. 15172/13 (Mammadov v. Azerbaijan), para. 88.

7 ECtHR, judgment of 14 October 2014, Application no. 15172/13 (Mammadov v. Azerbaijan), para. 114.

8 ECtHR, judgment of 4 July 2016, Application no. 69981/14 (Jafarov v. Azerbaijan), paras. 125, 129.

9 ECtHR, judgment of 4 July 2016, Application no. 69981/14 (Jafarov v. Azerbaijan), para. 160.

10 ECtHR, judgment of 4 July 2016, Application no. 69981/14 (Jafarov v. Azerbaijan), para. 120; see also ECtHR, judgment of 19 July 2018, Application no. 47145/14 (Mammadli v. Azerbaijan), para. 54.

11 ECtHR, judgment of 4 July 2016, Application no. 69981/14 (Jafarov v. Azerbaijan), para. 120.

12 ECtHR, judgment of 14 October 2014, Application no. 15172/13 (Mammadov v. Azerbaijan), para. 114.

13 Committee of Ministers, Decision CM/Del/Dec(2019)1348/H46-1, paras. 4-5.

activists, and human rights defenders from arbitrary arrests and prosecutions and, by scrutinizing the steps taken by the Government in its Action Plan, “strongly encouraged the authorities to meet all relevant Council of Europe standards and recommendations”.<sup>14</sup>

### **c) International standards**

10. The observations of the Court and the CM must be understood in line with international standards regarding the protection of human rights defenders from retaliatory prosecution and arbitrary arrest, rule of law, and impartiality of the justice system.
11. Like the Court, several international guidelines recognise the role the abovementioned aspects can play in the facilitation of arbitrary detention. They suggest that states amend or repeal legal provisions with vague and ambiguous definitions, strengthen the independence of the judiciary and prosecution authorities, install effective<sup>15</sup> oversight mechanisms, address structural shortcomings that may give rise to the abuse of power or corruption, and guarantee a fair trial.<sup>16</sup> A key aspect of the guarantee of fair trial is access to legal representation provided by a lawyer of the defendant’s choice. Therefore, lawyers engaged in human rights work should not face intimidation or reprisals, such as the threat of disbarment, for their defence of human rights or of other human rights defenders.<sup>17</sup>
12. In the context of the prevention of the misuse of criminal law, the independence of the judiciary and prosecution authorities also plays an important role. Independence means accountability only to the law<sup>18</sup> and the ability to perform professional functions without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.<sup>19</sup> For prosecutors, the decision on whether or not to prosecute shall be “for the prosecution office alone and not for the executive or the legislature.”<sup>20</sup>
13. Such independent decision-making is promoted by institutional independence. Accordingly, international standards demand that the judiciary be separated from legislative and administrative bodies.<sup>21</sup> This especially applies to all decisions affecting the selection, recruitment, appointment,

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14 Committee of Ministers, Decision CM/Del/Dec(2019)1362/H46-2, para. 6-7, notably the Committee of Ministers Recommendation CM/Rec (2010)12 on judges: independence, efficiency, and responsibilities, as well as the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality CM (2016)36 final.

15 I.e. fair and objective disciplinary proceedings that foresee effective penalties, see International Commission of Jurists, Judicial Accountability, Practitioners Guide No. 13, 2016, p. 22; UN Guidelines on the Role of Prosecutors, 1990, paras. 21 to 22, <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

16 OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders, 2014, paras. 24 to 30, 36, <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders?download=true>; see also PACE, Resolution 1891 (2012), para. 5.7.

17 OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders, 2014, paras. 36. See also ECtHR judgment of 13 February 2001, Application no. 29731/96 (Krombach v. France), para. 89.

18 See, UN Basic Principles on the Independence of the Judiciary, 1985, para. 2, <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>; International Commission of Jurists, Judicial Accountability, Practitioners Guide No. 13, 2016, p. 15; Council of Europe, Appendix to Recommendation CM/Rec(2010)12, para. 5. Similar requirements apply to prosecutors, see UN Guidelines on the Role of Prosecutors, 1990, paras. 12 to 14.

19 See, UN Basic Principles on the Independence of the Judiciary, 1985, para. 2; UN Guidelines on the Role of Prosecutors, 1990, para. 4.

20 Venice Commission, Report on the independence of the judicial system, Part II: The prosecution service, para. 43, <https://rm.coe.int/1680700a60>.

21 International Commission of Jurists, International Principles on the Independence and Accountability of

career progress or termination of the office of a judge, over which an independent judicial council shall have decisive influence.<sup>22</sup>

## 2. Irrelevance and insufficiency of the measures outlined in the Action Plan

14. Against this backdrop, this submission will hereinafter demonstrate why the reforms in the fields of judicial and criminal justice and other measures as described in the Action Plan are irrelevant or, in any case, insufficient, and thus not effective in preventing further retaliatory prosecutions and misuse of criminal law against this group of individuals and providing a guarantee of non-repetition of similar practices in the future. On the contrary, similar cases from Azerbaijan continue to be sent to the ECtHR (see section IV of this submission).

### a) General remarks

15. Many of the reforms listed in the Action Plan are reforms that were implemented in 2014 or earlier, i.e. before any of the contested infringements or violations in the *Ilgar Mammadov* group of cases were committed. This particularly applies to the reforms outlined in annex 3 to the Action Plan under the heading “Brief information on progressive institutional and legislative actions taken to ensure independence of the judiciary, to increase transparency and to fight corruption”. There are measures referred to in this section that were implemented as early as 2004. The mere fact that the incidents in the *Ilgar Mammadov* group of cases occurred, and the systematic shortcomings identified by the Court (see above para. 6-7) clearly demonstrate that these measures were ineffective.

### b) Reforms in penal policies

16. In the first section of the Action Plan, the Government highlights the Executive Order of the President of Azerbaijan of 10 February 2017<sup>23</sup> and subsequent amendments in the Criminal Code and Criminal Procedure Code (“**Penal Reform (2017)**”). While admittedly introducing some improvements in the criminal justice system, these amendments do not contain any substantive changes which would end the practice of arbitrary arrests.

#### aa) Irrelevance

17. The majority of measures outlined in this section of the Action Plan are completely irrelevant to the shortcomings identified in the *Ilgar Mammadov* group of cases. This applies, inter alia, to the following measures:

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Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, 2007, p. 21 to 23, <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>.

22 Article 1.3 of the European Charter on the Statute of Judges, <https://rm.coe.int/16807473ef>; Venice Commission, Report on the independence of the judicial system, Part I: The independence of the judiciary, para. 48, <https://rm.coe.int/1680700a63>; Council of Europe, Appendix to Recommendation CM/Rec(2010)12, paras. 46 to 47; Bingham Center for the Rule of Law, Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth, 2016, [https://binghamcentre.biicl.org/documents/5\\_cape\\_town\\_principles\\_hand-out.pdf](https://binghamcentre.biicl.org/documents/5_cape_town_principles_hand-out.pdf).

23 On 10 February 2017, President of the Republic of Azerbaijan signed Executive Order “On improvement of operation of penitentiary, humanization of penal policies and extension of application of alternative sanctions and non-custodial procedural measures of restraint”.

- **Establishment of a probation system and alternative custodial measures.** A major part of the Action Plan focuses on the regulation of alternative custodial measures, including the establishment of a probation service, use of electronic tracking bracelets, and monitoring of community work. These measures do not resolve the problem of depriving a person of their liberty without a reasonable suspicion based on sufficient evidence of them having committed a criminal offence, but only change the method of deprivation of liberty. The aim is not to decrease the overall number of detainees but to provide sufficient facts in order to affirm a reasonable suspicion of a crime as laid down in law by both the prosecutor's office as well as the judges deciding on the cases. However, the use of alternative measures does not change the root problem, which is that the work of government critics, social society activists and human rights defenders is criminalised against the substantive provisions of criminal law.
- **Decriminalisation and reducing of sanctions for economic crimes and minor assault in certain situations.** The Action Plan further highlights the decriminalisation of certain crimes under the 2017 Penal Reform. While the Government does not provide a list of the affected crimes, an analysis of the reforms shows that the crimes which were fully decriminalised by this measure relate to specific types of fraud and minor bodily injury caused in cases of self-defence or through negligence. Sanctions were reduced for certain trademark offences and negligent damage to property. However, the decriminalisation of these crimes does not address the problem of retaliatory prosecutions in Azerbaijan. As the Court noted, these are not based on a reasonable suspicion of a crime set out in law. Besides, the Applicants were charged with serious criminal offences that should not be decriminalised.
- **Focus on innovative approaches in the justice sector.** The Action Plan also emphasises the "use of innovative approaches and cutting-edge technologies in the justice sector". These measures, such as an e-justice booth at border checkpoints, have no impact on the prosecutorial system whatsoever.

bb) Insufficiency

18. Even those amendments and measures which do address shortcomings in the Azerbaijani law enforcement system are not sufficient to prevent the misuse of criminal law against critics of the government.

- **No binding measures.** Firstly, any changes introduced by the Executive Order signed by the President of the Republic of Azerbaijan (the "**President**") on 10 February 2017 (the "**Presidential Order**") are ineffective, as the President as the head of the executive power cannot bindingly instruct the judiciary how to decide on cases. In order to effectively reform the judicial sector, the executive power should propose amendments of the binding laws to the parliament.
- **No effective accountability mechanisms.** Secondly, while the President instructs the courts and prosecutor's office that the choice of preventive measures by the investigation authorities and the courts should strictly follow the provisions of the criminal procedure legislation, the Penal Reform Decree (2017) does not provide for any substantive and effective accountability mechanism for violations of those provisions in practice, particularly in politically sensitive cases.
- **No implementation.** Thirdly, in the Penal Reform Decree (2017), the Presidential Order recommended that the Supreme Court of the Republic of Azerbaijan ("**Supreme Court**") regularly summarises judicial practice in respect of the choice of detention and imprisonment and ensures fair judicial practice in this area. Although the Supreme Court is the appropriate

judicial institution to be responsible for summarising existing precedents and recommend best practices in this regard, it has not yet taken any action.

### c) Further reforms of the judiciary and legal system

- The second part of the Action Plan addresses the Presidential Decree “On deepening of reforms in the judicial legal system” dated 3 April 2019 (“**Presidential Decree (2019)**” or the “**Decree**”). The Presidential Decree (2019) provides for legislative, institutional, and practical measures to particularly increase the authority of the judiciary and public confidence in it. While the first package of amendments has already been enacted; a second package has not yet been implemented. Although the Presidential Decree (2019) suggests general improvements to the judicial legal system, the envisaged measures are again not capable of changing the practice of retaliatory arrest of government critics.

aa) Irrelevance

19. The measures envisaged in the Decree do not introduce targeted solutions to the systematic shortcomings of the judiciary. In particular, the proposed amendments are not relevant to the issue of the lack of judicial independence in Azerbaijan.

- **Increased numbers of judges and increase in salaries.** The Presidential Decree (2019) provides for an increase in both the number of and the salaries of judges. These are measures that help promote judicial independence and financial self-sufficiency. While this measure benefits the judiciary as a whole and helps prevent corruption, it does not address the core of the problem of retaliatory prosecutions because Retaliatory prosecutions of government critics in Azerbaijan do not usually result from bribery, corruption or the excessive workloads of judges, but rather from judicial obedience to and dependence on the executive authorities, e.g. due to the appointment process of judges.<sup>24</sup>
- **General institutional changes in the judicial system.** Further, the Presidential Decree (2019) introduces specialised commercial and administrative courts which have no bearing on the misuse of criminal proceedings to prosecute government critics. The same applies to the restructuring of judicial divisions in courts of appeal and the Supreme Court as well as the simplification of disputes on jurisdiction.
- **Vague explanations on the content of the second stage of amendments.** In its Action Plan, the Government refers to a second stage of amendments that shall further decriminalise criminal offences, improve the efficiency of the implementation of court decisions and the use of alternative enforcement mechanisms, and modify the differentiation of litigation fees. These descriptions are too vague to allow for any reliable evaluation of the relevance of this reform. However, they do not seem to address the substantive obstacles found in the *Ilgar Mammadov* group of cases. For instance, providing alternative enforcement mechanisms and modifying the differentiation of litigation fees have no bearing on the protection of government critics, civil society activists, and human rights defenders against retaliatory prosecution. Also, neither of these reforms are relevant to the need to guarantee the independence and impartiality of the judiciary.

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24 See below at para. 25.

bb) Insufficiency

20. Further amendments proposed in the draft legislation package are insufficient to address the substantial problems of the misuse of criminal law against critics of the government.

- **Audio and video recording only in civil and commercial procedures.** The Action Plan refers to the presidential order No. 268 “About the creation of information system of Electronic court” dated 13 February 2014, which specified that electronic court systems should provide recording of court hearings using audio, video, and other recording techniques and enabled online access of these recordings. However, according to the relevant amendments to the Civil Procedure Code,<sup>25</sup> such audio-video recording is only available in commercial and civil cases where the electronic court system is used. As a consequence, recording is not a relevant tool for ensuring the objectivity of court hearings in criminal proceedings. That said, the *Ilgar Mammadov* group of cases comprises cases of criminal proceedings and administrative proceedings with a punitive element.
- **Conclusions of private forensic examinations not applicable in criminal proceedings.** The 2019 Presidential Decree provided for an amendment that expanded the rights of involved parties to apply for a forensic examination and widened the group of persons who can qualify as forensic experts to non-State institutions.<sup>26</sup> However, this possibility exists mainly in civil, administrative, and administrative offences proceedings. In criminal prosecutions, the defendant and defence council only have the right to apply for forensic examinations in relation to a very limited number of offences, which do not include grave offences. Therefore, the proposed amendment is not applicable across the entire criminal justice system, which is systematically misused by legal enforcement authorities and courts against critics of the government.

**d) Cooperation with the Council of Europe structures**

21. In the third section, the Action Plan mainly focuses on two programmes implemented by the Council of Europe between 2015 and 2019 as indicators of the Government’s engagement and robust cooperation with the European structures. The Government lists several training programmes, translations of human rights materials, and a conference about property rights as evidence of goodwill in cooperation. While educating judges on human rights can facilitate the promotion of human rights, these measures are nevertheless irrelevant to the Court findings and the CM reform demands.

**e) Improvement of the operation of the prosecutor’s office**

- In the last section, the Action Plan claims that the Group of States against Corruption (“GRECO”) found improvements in the operation of the judiciary and the prosecutor’s office. In fact, GRECO found, inter alia, that disciplinary offences and the Code of Ethical Behaviour had become more consistent and objective criteria had been introduced for hiring law enforcement officers.<sup>27</sup>

22. However, these improvements are insufficient.

- Lack of independence of the Judicial Legal Counsel. While international standards demand that a

25 Amendment 330-VQD of 30 September 2016 and Amendment 1436-VQD of 28 December 2018.

26 Amendment 1709-VQD to the Law of the Republic of Azerbaijan “On State Forensic Activities” adopted by the Parliament on 29 November 2019

27 Council of Europe, Compliance Report on the Fourth Evaluation Round on Azerbaijan, 17 March 2017, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fe9f2>.



judicial council takes part in the appointment and monitoring of the judiciary, the increased role of a judicial council can only be desirable if the council itself is independent from the executive power. In Azerbaijan, this is not the case. As GRECO correctly states the Judicial Legal Council (“JLC”) is, contrary to international standards, neither composed of a majority of judges who are directly elected or appointed by their peers, nor chaired by a judge.

- **Lack of independence of the prosecutor’s office.** Likewise, the Government failed to realise improvements to the ethical code and disciplinary proceedings regarding the prosecutor’s office in practice. Notwithstanding the legislative amendments, the prosecutor’s office is prone to political influence. Not only was the Government unable to produce a single piece of evidence proving that the prosecutor’s office had launched disciplinary proceedings against the prosecutors affiliated in the *Ilgar Mammadov* group of cases or other cases of retaliatory prosecution, but also, the Government uses the prosecutor’s office as an instrument to suppress and disbar independent lawyers who defend politically sensitive cases. In several cases, the prosecutor’s office lodged complaints about lawyers’ public statements, leading to disciplinary proceedings against them.<sup>28</sup>

### 3. Unaddressed shortcomings

23. As outlined above, the legislative amendments proposed in the Action Plan are either irrelevant or insufficient to remedy the systematic shortcomings identified in the *Ilgar Mammadov* group of cases. Therefore, the Government of Azerbaijan needs to examine the severe systematic problems that remain unaddressed. These are in particular:

- **Independence of the Judiciary.** The core of the problem in the Azerbaijani legal system is that courts are dependent on the executive authorities, mainly the President of Azerbaijan.

On the one hand, this applies to the appointment of judges. According to Article 109(9) of the Constitution, the President provides the parliament with a list of the judges to be appointed to the Supreme Court, Constitutional Court, and appeal courts. Parliament can either accept or reject the candidates, but the majority of parliamentarians are members of the ruling party chaired by the President. Thus, through this mechanism, the President indirectly controls the courts of second and last instance, because the parliament always confirms the President’s list of judges. This situation remains unchanged by the participation of the JLC in the appointment of judges, which provides the list of judges to the President. The majority of representatives in the JLC are also, directly or indirectly, nominated by the executive branch.<sup>29</sup> The JLC is therefore itself lacking in independence.

28 IPHR, Justice under threat in Azerbaijan as Bar Association bans yet more independent lawyers, 16 May 2018, <https://www.iphronline.org/justice-under-threat-in-azerbaijan-as-bar-association-bans-yet-more-independent-lawyers.html>. European Human Rights Advocacy Center, Disbarred, suspended, or criminally prosecuted: Azerbaijani human rights lawyers, 14 August 2019, <http://ehrac.org.uk/resources/disbarred-suspended-or-criminally-prosecuted-azerbaijani-human-rights-lawyers/>.

29 According to the Council of Europe, the independence of judges should be safeguarded by an impartial, independent, and purely judicial entity, the judicial council. Ideally, its members should be selected by its peers. By contrast, the JLC gives meaningful powers to the executive branch: The JLC has been headed by the Minister of Justice since its creation in 2005 and the majority of its members are chosen by the government and the parliament, which appoints only one member but is also dominated by the President’s party. Furthermore, the nomination process of the JLC members is not publicly known and there is no information about the criteria on which the members are selected. Consequently, the Parliamentary Assembly noted that “there are still concerns regarding the Judicial Legal Council’s composition and the fact that the executive branch continues to retain prerogatives for key senior appointments.”, see Resolution 2184 (2017), on “the functioning of democratic institutions in Azerbaijan” adopted by the Assembly on 11 October 2017 (32nd Sitting), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24188&lang=en>, para. 3.

Additionally, according to the same article, the President alone is empowered to appoint judges of first instance and other courts without the approval of the parliament.

On the other hand, and even more worryingly, through the executive-dependent JLC, the executive power also retains control over all organisational aspects of the judiciary. This is because besides its role in the appointment of judges, the JLC is responsible for the admission process to the judiciary (e.g. exams, legal training), the evaluation of judges, and disciplinary proceedings.

- **Autonomy of the prosecutor's office.** A functional and effective prosecution requires prosecutors to be autonomous and free from political influence. The government can achieve this only through establishing an adequate legal structure, institutional setting, and ensuring political commitment. However, it is evident from the examples above (para. 24) that political influence continues to prevail.
- **Effective accountability mechanisms.** As explained in section 1.a), effective and well-targeted measures to prevent retaliatory prosecutions, arbitrary arrest and detention, and other misuses of criminal law against civil society activists and human rights defenders require strong accountability standards together with evidence-based reports and disciplinary proceedings against those who abuse of power. While Azerbaijani laws envisage an accountability mechanism for human rights violations, this mechanism is not enforced in practice. The Law on Courts and Judges<sup>30</sup> determines that disciplinary proceedings shall be initiated against judges, prosecutors or investigators who, according to decisions of the ECtHR and the Constitutional Court, established human rights violations or constitutional law. However, there is no evidence of disciplinary proceedings in the *Ilgar Mammadov* group of cases or in other cases of retaliatory prosecution, even though such human rights violations were identified by the ECtHR.

The same applies for criminal liability. As the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("**CPT**") found, impunity for human rights violations remains systemic and endemic. The CPT even noted that the situation in Azerbaijan is exceptional in the Council of Europe and very worrying when compared with the number of credible allegations.<sup>31</sup>

- **Suppressive regulation and registration of NGOs.** In 2014, several laws were amended to introduce strict rules for the regulation and registration of NGOs. In practice, this led to the arbitrary refusal to register NGOs that are seen as critical of government, forcing them to continue their work illegally. Additionally, the funding of NGOs has been obstructed by restricting in particular foreign funding.<sup>32</sup> As the Court has pointed out, this provides for an environment in which civil society activists and members of the opposition are hardly able to operate and are easy targets for legal attacks initiated by the government.<sup>33</sup> Therefore, the restrictive regulatory frameworks for civil society should be amended to safeguard an enabling environment for NGOs and human rights defenders.

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30 Law on Courts and Judges of 10 June 1997 (No. 310-IQ).

31 Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 23 to 30 October 2017, paras. 27 and 28 <https://rm.coe.int/16808c5e46>.

32 See e.g. Human Rights Watch, "Harassed, Imprisoned, Exiled", 20 October 2016, <https://www.hrw.org/report/2016/10/20/harassed-imprisoned-exiled/azerbaijans-continuing-crackdown-government-critics>.

33 See above, para. 7.

- **Criminalisation of government criticism.** Likewise, the right to freedom of expression has been considerably restricted in recent years. In 2013, the administrative fines for the participation in illegal demonstrations were increased by 30 times. In 2017, the criminal code increased sanctions for violating the rules governing the organising of assemblies (Article 169), adding a punishment of two years' deprivation of liberty to the list of sanctions. Additionally, in 2016 a new criminal offence of slander or insult under fake usernames or profiles in the internet was introduced.
- **Arbitrary disbarment of lawyers involved in human rights cases.** The right of every person charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial, and is crucial for the protection of human rights defenders from arbitrary arrest.<sup>34</sup> However, these rights are not protected in Azerbaijan. On 11 December 2019, the Commissioner for Human Rights of the Council of Europe issued a report following her visit to Azerbaijan in summer 2019, stating that in recent years Commissioners have been regularly alerted by the opening of selective or arbitrary disciplinary proceedings against lawyers who had been vocal about alleged human rights violations.<sup>35</sup> The report stressed that the Commissioner is particularly concerned about the use of disciplinary measures on improper grounds, such as in retaliation for an individual expressing critical views, as well as by the lack of clear criteria for the imposition of disciplinary sanctions, in particular with regards to disbarment.<sup>36</sup> In this context, the Commissioner noted that most of the lawyers recently disbarred or who had their licences suspended are those working on cases considered to be politically sensitive, suggesting that disciplinary proceedings are used as a tool for punishing lawyers who take on sensitive cases.<sup>37</sup> This is especially problematic against the backdrop of restrictions on non-professional legal representation in courts which were introduced in 2017.<sup>38</sup>

## IV. Continuous retaliatory prosecutions from 2017 to 2019

24. In addition to the aspects outlined above, ongoing prosecutions of government critics further demonstrate that the measures envisaged in the Government's Action Plan have proven ineffective in putting a stop to retaliatory prosecutions, the misuse of criminal law and guaranteeing the non-repetition of such practices.
25. In the years following the introduction of measures outlined in the Government Action Plan, critics of the government, including journalists and opposition political activists, continued being subjected to retaliatory prosecutions, arbitrary arrest and detention, and other misuses of criminal law. This is underscored by the fact that many of them have been recognised as political prisoners by the Parliamentary Assembly of the Council of Europe's (PACE) Committee on Legal Affairs and Human Rights.<sup>39</sup> A political prisoner is a person deprived of their personal liberty for purely political

34 See above, para. 11.

35 Commissioner for Human Rights of the Council of Europe, Report following the visit to Azerbaijan, CommDH(2019)27, 11 December 2019, para. 81, [https://search.coe.int/commissioner/Pages/result\\_details.aspx?ObjectId=090000168098e108](https://search.coe.int/commissioner/Pages/result_details.aspx?ObjectId=090000168098e108).

36 Commissioner for Human Rights of the Council of Europe, Report following the visit to Azerbaijan, CommDH(2019)27, 11 December 2019, para. 92.

37 Commissioner for Human Rights of the Council of Europe, Report following the visit to Azerbaijan, CommDH(2019)27, 11 December 2019, para. 84.

38 See Action Plan, annex 3, p. 4.

39 For a list see Committee on Legal Affairs and Human Rights, Reported cases of political prisoners in Azerbaijan,

reasons without connection to any offence.<sup>40</sup> As the PACE has stated, this definition is largely parallel with the term of arbitrary prosecutions: “The judgments of the Court finding a violation of Article 18, and those in very many other judgments finding arbitrary detention, establish facts that clearly satisfy the Assembly’s definition of ‘political prisoner’, as set out in its Resolution 1900 (2012):”<sup>41</sup>

26. PACE recently noted that “there can no longer be any doubt that Azerbaijan has a problem of political prisoners and that this problem is due to structural and systemic causes.”<sup>42</sup> The following section describes just some of the numerous cases of the abusive application of the criminal justice system.

27. **June 2017: Fuad Ahmadli.** Fuad Ahmadli is a well-known activist of Azerbaijan’s oppositional Popular Front Party. On 18 August 2016, Ahmadli was detained at his workplace and charged with stealing the personal data of his employer’s clients. He was further charged with having links to the Turkish preacher Fethullah Gulen, with the authorities claiming that they had found books by Fethullah Gulen in Ahmadli’s apartment. He was subsequently placed in pretrial detention, where he was held incommunicado for ten days and the authorities refused to allow him to contact his lawyer or family members. On 16 June 2017, Baku City Court on Grave Crimes sentenced Ahmadli to four years in prison and he has remained in detention ever since. Ahmadli was recognised as a political prisoner by the ‘Working Group on a Unified List of Political Prisoners in Azerbaijan’ which the Committee on Legal Affairs and Human Rights, reported cases of political prisoners in Azerbaijan referred as a credible and reliable list of political prisoners.<sup>43</sup>

28. **May 2017: Exiled journalist Afgan Mukhtarli.** Azerbaijani opposition journalist and outspoken critic of the Azerbaijani government Afgan Mukhtarli was abducted from his home in Tbilisi, Georgia, on 29 May 2017 and surfaced the following day in a detention centre in Baku. He was charged with illegally crossing the Georgia-Azerbaijani border, smuggling, and resisting police officers. Although Mukhtarli had visible injuries on his face at his pre-trial detention hearing on 31 May 2017, the court did not order a forensic medical examination. Additionally, even though requested by his lawyers, the investigation failed to examine recordings made by video cameras at border control. On 12 January 2018, a district court sentenced the journalist to six years in prison. Later the Supreme Court of Azerbaijan upheld the verdict. The European Parliament adopted a resolution on 15 June 2017, calling for Mukhtarli’s immediate release.<sup>44</sup> Considering the overall circumstances and in particular his long-standing criticism of the government and the apparent hostility towards him,

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AS/Jur (2019) 46, p. 2, see <http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2019/20191210-AzPolPrisReported-EN.pdf>.

40 Resolution 1900 (2012), on the definition of a political prisoner, adopted by the Assembly on 3 October 2012 (33rd Sitting), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19150&lang=en>.

41 PACE, Resolution 2322 (2020), adopted by the Assembly on 30 January 2020, para. 4.

42 Resolution 2322 (2020), Reported cases of political prisoners in Azerbaijan, PACE, para. 10. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28584&lang=en>. Similarly, the Commissioner for Human Rights of the Council of Europe after her latest country visit noted that no progress had been made: Commissioner for Human Rights of the Council of Europe, Report following her visit to Azerbaijan, CommDH(2019)27, 11 Dezember 2019, para. 5, <https://rm.coe.int/report-on-the-visit-to-azerbaijan-from-8-to-12-july-2019-by-dunja-mija/168098e108>.

43 Working Group on Unified List of Political Prisoners, Unified List of Political Prisoners in Azerbaijan of 25 November 2019, <https://smdtaz.org/wp-content/uploads/2019/11/Political-Prisoners-Report-25.11.2019-WG-eng.pdf>, as referenced by the Committee on Legal Affairs and Human Rights, Reported cases of political prisoners in Azerbaijan, AS/Jur (2019) 46, Explanatory memorandum by Ms Thorhildur Sunna Ævarsdóttir, para. 55, <http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2019/20191210-AzPolPrisReported-EN.pdf>.

44 European Parliament resolution of 15 June 2017 on the case of Azerbaijani journalist Afgan Mukhtarli (2017/2722(RSP)), 15 June 2017, [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0267\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0267_EN.html).

Mukhtarli should be considered as a political prisoner in accordance with the PACE's definition.<sup>45</sup>

29. **October 2018 to June 2019: Journalists Ikram Rahimov and Polad Aslanov.** On 26 October 2019, the State Security Service detained Ikram Rahimov, editor-in-chief of the independent news website Realliq, on extortion charges, eventually leading to his conviction to five and a half years in prison by the Baku Court of Grave Crimes on 12 June 2019. The Committee to Protect Journalists believes the charges were brought in retaliation for an editorial that Rahimov published on his website a few hours before the arrest. Following his arrest on 12 June 2019, Polad Aslanov, editor-in-chief of the independent news websites Xeberman and Press-az, was sentenced on 28 October 2019, to four months' pre-trial detention pending an investigation on charges of high treason. The Committee to Protect Journalists called the Government of Azerbaijan to drop the charges against both men.<sup>46</sup>
30. **Baku protests and arrests of opposition activists in October 2019.** The 2019 Baku protests were a series of peaceful rallies held on 8, 19 and 20 October 2019 in Baku. The protests were organised by the National Council of Democratic Forces and an alliance of opposition parties and called for the release of political prisoners and free elections.
- On the eve of the protest rally scheduled for 19 October 2019, about 60 members of the Popular Front Party of Azerbaijan (PFPA), including the Deputy Chairman of the PFPA Seymur Hazi, were detained. Even though some of them were released, at least 35 senior PFPA politicians received sentences of up to 60 days on bogus charges. Of the PFPA members, the most severe charges were brought against Pasha Umudov. He was arrested by unknown individuals in civilian clothes on 15 October 2019 and subsequently taken to the Ministry of Internal Affairs of Azerbaijan. The following day, Narimanov District Court sentenced Umudov to three months' imprisonment on charges of drug trafficking.<sup>47</sup> On 25 November 2019, the Working Group (WG) on the Unified List of Political Prisoners in Azerbaijan included Pasha Umudov on the updated list Unified List of Political Prisoners in Azerbaijan.<sup>48</sup>
  - Police officers also detained Tofiq Yagublu, member of Musavat Party and the National Council of Democratic Forces, and a former political prisoner, during the protests. Yagublu's lawyer, Nemet Karimli, met with his client in custody on 21 October 2019 and reported that four policemen had beaten Yagublu repeatedly and demanded he make a public statement "repenting" his actions and pledging to stop his political activity. Yagublu had visible bruises on his face and difficulty walking. On the same day, Yagublu was taken to the Interior Ministry's hospital for a medical exam, where doctors diagnosed that he had bruised ribs. In the aftermath of an interview with Yagublu's lawyer, the Azerbaijani Bar Association started disciplinary proceedings against him after receiving a complaint from the General Prosecutor's Office.<sup>49</sup>
  - The repression of the peaceful protests was internationally condemned. The Spokesperson for Foreign Affairs and Security Policy/European Neighbourhood Policy and Enlargement

45 See also Committee on Legal Affairs and Human Rights, Reported cases of political prisoners in Azerbaijan, AS/Jur (2019) 46, *Explanatory memorandum* by Ms Thorhildur Sunna Ævarsdóttir, para. 58.

46 Committee to Protect Journalists, Two journalists jailed in separate cases in Azerbaijan, 18 June 2019, <https://cpj.org/2019/06/two-journalists-jailed-in-separate-cases-in-azerba.php>.

47 Turan, Approximately One Hundred Activists Detained or Arrested on Eve of October 19 Rally – PFPA, 20 October 2019, <http://www.turan.az/ext/news/2019/10/free/politics%20news/en/84596.htm>.

48 See footnote 43 above.

49 The International Human Rights Organizations' Joint Statement, 12 December 2019, <https://crd.org/2019/12/12/azerbaijani-bar-association-must-cease-harassment-of-human-rights-lawyers/>.

Negotiations<sup>50</sup> said in a statement that “excessive and unprovoked force was reportedly used to disperse the crowds and arrest participants.” The Commissioner for Human Rights of the Council of Europe issued a statement condemning police violence in Baku on 19 October 2019 and calling for the release of all peaceful protestors.<sup>51</sup>

31. The documented evidence demonstrates that the Government of Azerbaijan is not acting in good faith to address the systematic problems inherent its criminal justice and judiciary system and has not taken any substantive measures to prevent similar violations in the future.

## V. Conclusion and Recommendations

32. In light of the evidence presented above, this submission concludes that whereas the reforms of policies and legislation relating to criminal justice, the cooperation with the structures of the Council of Europe may have some limited positive impact, they are not sufficient to ensure that critics of the government, civil society activists, and human rights defenders are sufficiently protected from retaliatory prosecutions, arbitrary arrest and detention, and other misuses of criminal law.

33. The evidence set out in this submission clearly justifies the need for additional concrete measures to be taken in good faith to address the factors leading to the violation of Article 18 ECHR, in conjunction with Article 5. In order to effectively address the systematic problems within the judicial and prosecution systems, which were identified in the *Ilgar Mammadov* group of cases, this submission suggests the following recommendations:

- Demand that the Government ensures that detention is only imposed where a reasonable suspicion based on facts suggests the committing of a crime unequivocally set out in law;
- Call upon the Government to strengthen and implement legislation regarding the accountability of judges and law enforcement authorities for abuse of power in the context of retaliatory prosecutions, in particular:
  - Open a genuine, impartial and effective investigation in all cases where a violation of Article 18 ECHR in conjunction with Article 5 ECHR has been found in a judgment or decision of the ECtHR or Supreme Court;
  - Ensure the accountability of judges and prosecutors for misusing the law to punish or silence government critics through effective disciplinary and criminal sanctions imposed in transparent and fair proceedings;
  - Implement the recommendations on strengthening the role of the Supreme Court to exercise effective judicial control over cases of detention and imprisonment by e.g. summarising precedent and recommend best practices to courts;

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50 European Union External Action, Statement by the Spokesperson on the latest developments in Azerbaijan, 19 October 2019, [https://eeas.europa.eu/headquarters/headquarters-homepage/69107/statement-spokesperson-latest-developments-azerbaijan\\_es](https://eeas.europa.eu/headquarters/headquarters-homepage/69107/statement-spokesperson-latest-developments-azerbaijan_es).

51 Council of Europe, Commissioner raises concerns about police conduct and people’s right to peaceful protest in Azerbaijan, 21 October 2019, <https://www.coe.int/en/web/baku/-/commissioner-raises-concerns-about-police-conduct-and-people-s-right-to-peaceful-protest-in-azerbaijan>.

- Call upon the Government to safeguard the independence of the judiciary, in particular to restructure the composition of the JLC in order to achieve a judicial body composed of a majority of judicial members who were elected by their peers without undue influence of the executive power;
- Call upon the Government to guarantee standards of fair trial in criminal proceedings by, inter alia:
  - Ensuring that continuous audio-video recordings and forensic examination is available in criminal proceedings and that they are made accessible upon request of parties;
  - Refraining from arbitrary disciplinary proceedings and disbarment of lawyers fulfilling their legal duties in human rights cases and restoring the rights of all lawyers who were disbarred after complaints from the Prosecutor General's Office regarding their involvement in the proceedings of the *Ilgar Mammadov* group of cases;
- Call upon the Government to refrain from the arbitrary denial of state registration, to lift restrictions on funding to human rights and pro-democracy NGOs, and to amend the law on NGOs to ensure an enabling environment for civil society activism;
- Request the Government to provide evidence-based reports on how the proposed reforms have effectively prevented further similar cases, in particular cases of that received the attention of CoE institutions.

**IPHR** - International Partnership for Human Rights

Rue Belliard 205, 1040 Brussels, Belgium

**W** [IPHRonline.org](http://IPHRonline.org)

**E** [IPHR@IPHRonline.org](mailto:IPHR@IPHRonline.org)