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Keeping political and criminal responsibility separate

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Pieter OMTZIGT, Netherlands, Group of the European People's Party

Summary

The committee considers that democracy and the rule of law require that politicians shall be effectively protected from criminal prosecutions based on their political decisions. Political decisions shall be subject to political responsibility, the ultimate judges being the voters.

In line with its opposition to all forms of impunity, the committee considers that politicians shall be held to account for criminal acts or omissions they commit both in their private capacity and in the exercise of their public office.

The distinction between political decision-making and criminal acts or omissions must be based on national constitutional and criminal law, which in turn should respect certain principles, in line with the conclusions of the European Commission for Democracy through Law (Venice Commission).

In particular, wide and vague national criminal law provisions on “abuse of office” can be problematic, both with regard to Article 7 of the European Convention on Human Rights and other basic requirements under the rule of law, and they can also be particularly vulnerable to political abuse. As regards procedure, to the extent that charges brought against politicians are of a “criminal” nature according to Article 6 of the Convention, the same fair trial requirements must apply both to ordinary criminal procedures and special impeachment procedures which exist in a number of Council of Europe member States and which call for extra caution and restraint as to the manner in which they are interpreted and applied.

Concerning Ukraine, the criminal cases brought against former Prime Minister Yulia Tymoshenko and former Interior Minister Yuri Lutsenko have given rise to severe criticism by the international community. The committee is deeply troubled by the manner in which the country’s criminal justice system is abused for the persecution of political opponents. It considers that in both these cases the principles on the separation of political and criminal responsibility have been violated.

1. Reference to committee: Doc. 12749, Reference 3819 of 25 November 2011.

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A. Draft resolution[2]

1. The Parliamentary Assembly considers that democracy and the rule of law require that politicians shall be effectively protected from criminal prosecutions based on their political decisions. Political decisions shall be subject to political responsibility, the ultimate judges being the voters.

2. The Assembly also reconfirms its principled opposition to all forms of impunity, as expressed in its Resolution 1675 (2009)on the state of human rights in Europe: the need to eradicate impunity. Consequently, politicians shall be held to account for criminal acts or omissions they commit both in their private capacity and in the exercise of their public office.

3. The distinction between political decision-making and criminal acts or omissions must be based on national constitutional and criminal law, which in turn should respect the following principles, in line with the conclusions of the European Commission for Democracy through Law (Venice Commission):

3.1. criminal proceedings should not be used to penalise political mistakes or disagreements;

3.2. politicians should be accountable for ordinary criminal acts in the same way as ordinary citizens;

3.3. substantive national rules on ministerial criminal responsibility must comply both with Article 7 of the European Convention on Human Rights (ETS No. 5, “the Convention”) and other requirements derived from the principle of the rule of law, including legal certainty, predictability, clarity, proportionality, and equal treatment;

3.4. in particular, wide and vague national criminal law provisions on “abuse of office” can be problematic, both with regard to Article 7 of the Convention and other basic requirements under the rule of law, and they can also be particularly vulnerable to political abuse;

3.5. politicians should, as a rule, be held criminally liable for acts or omissions committed in the exercise of their office when they act for personal gain or violate fundamental rights of others;

3.6. As regards procedure, to the extent that charges brought against politicians are of a “criminal” nature according to Article 6 of the Convention, the same fair trial requirements must apply both to ordinary criminal procedures and to the special impeachment procedures which exist in a number of Council of Europe member States;

3.7. special rules for impeachment of ministers must not be in breach of basic principles of the rule of law. As such rules are susceptible to political abuse, they call for extra caution and restraint as to the manner in which they are interpreted and applied.

4. Concerning Ukraine, the criminal cases brought against former Prime Minister Yulia Tymoshenko and former Interior Minister Yuri Lutsenko have given rise to severe criticism by the international community. The Assembly is deeply troubled by the manner in which the country’s criminal justice system is abused for the persecution of political opponents. It considers that in both cases the principles on the separation of political and criminal responsibility have been violated.

5. In view of the above, the Assembly:

5.1. invites the legislative bodies of those member States whose criminal law still includes broad abuse-of-office provisions to consider abolishing or redrafting such provisions, with a view to limiting their scope in line with the recommendations of the Venice Commission;

5.2. invites the competent authorities of those member States whose constitutions provide for special impeachment procedures for ministerial criminal responsibility to ensure that they are interpreted and applied with the degree of caution and restraint recommended by the Venice Commission;

5.3. urges the Ukrainian authorities to take specific measures to ensure the effective independence of the judiciary, in particular by implementing the recommendations of the Venice Commission in this respect and by speedily and comprehensively executing the relevant judgments of the European Court of Human Rights.

2. Draft resolution adopted by the committee on 23 April 2013.

B. Explanatory memorandum by Mr Omtzigt, rapporteur

1. Procedure

1. The motion for a resolution dated 5 October 2011 was transmitted to the Committee on Legal Affairs and Human Rights for report on 25 November 2011.[3] At its meeting on 13 December 2011, the committee appointed me as its rapporteur, and at its January 2012 meeting, it authorised me to carry out fact-finding visits to Iceland and to Ukraine and to organise a hearing with experts at a forthcoming meeting.

2. At its meeting on 24 April 2012, the committee examined an introductory memorandum,[4] requested an opinion from the European Commission for Democracy through Law (Venice Commission) from a comparative and constitutional law perspective and authorised me to launch an information request through the European Centre for Parliamentary Research and Documentation (ECPRD)[5] network. From 6 to 9 May 2012, I carried out a fact-finding visit to Iceland. On 21 May 2012, the committee held a hearing with the participation of Professor Helmut Satzger (University of Munich, Germany) and Professor Luc Verhey, State Councillor (University of Leiden, Netherlands).

3. At its meeting on 1 October 2012, the committee considered an information memorandum on the situation in Iceland,[6] held an exchange of views and agreed to declassify the information memorandum. From 18 to 20 February 2013, I carried out my fact-finding visit to Ukraine.[7] Finally, on 8 March 2013, the Venice Commission adopted the opinion requested by the committee.[8]

2. Introduction

4. The principle laid down by the initiators of the motion underlying my mandate is seemingly clear and simple:

> *"The Assembly finds it necessary to distinguish between political and criminal responsibility. Political decisions shall be judged by parliament and ultimately the voters at the next elections. Criminal acts shall give rise to prosecution, no matter by whom they are committed."*

5. The motion rightly stresses that "there must be no impunity of political actors who commit or participate in such ordinary crimes as murder, abduction, embezzlement, theft and corruption".

6. The difficulty lies in correctly distinguishing between actions or omissions of political actors that are properly defined as "criminal" and others that should only give rise to political responsibility, no matter how controversial and disputable they may be. In starting work on this subject I was particularly worried about the enormous consequences certain types of political action can provoke. In this time of deep economic recession in many parts of the Eurozone, calls for action to be taken against politicians and decision-makers may well increase, as unemployment soars and austerity measures really bite. When, with hindsight, some political decisions are not perceived as appropriate, the call for action to be taken may well grow very loud. Yet, it is good to have the rules of the game set out clearly before "the game" starts. One can limit the action politicians are able to take in a constitution or in ordinary laws. There is an obvious need to assess how best one can limit the (potentially) massive contingent liabilities politicians are able to provoke; such action can cause real hardship and a failure of the State. That said, this important issue – which certainly merits further reflection – goes beyond the scope of the present report.

7. My objective is to propose a set of objective and practical criteria allowing us to make this distinction in such a way as to avoid double standards. The starting point must be that politicians are responsible for their actions before their electorate. If, in addition, they shall be held criminally responsible for any actions or omissions whilst in office, this is only acceptable if they have committed criminal offences that have been clearly and strictly defined by law, in advance, and if they are prosecuted and tried following a fair and transparent procedure before an independent and impartial court.

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3. Doc. 12749, Reference 3819.
4. Document AS/Jur (2012) 18.
5. The ECPRD is jointly managed by the Parliamentary Assembly and the European Parliament.
6. Document AS/Jur (2012) 28.
7. Programme available from the secretariat upon request.
8. Document CDL(2013)003, Study No. 682/2012.

8. The cases of the former Ukrainian Prime Minister, Yulia Tymoshenko, and the former Minister of Interior, Yuri Lutsenko, and of the former Icelandic Prime Minister, Geir Haarde, which were also referred to in the motion, raise a number of challenging issues. They must also be placed in the context of the legal situation in other member States. Our colleague Marieluise Beck (Germany, ALDE), rapporteur on “Threats to the Rule of Law – asserting the authority of the Parliamentary Assembly”, was told by the Ukrainian authorities during her fact-finding visit to Kiev in February 2012 that similar provisions to those sanctioning “abuse of power” on the basis of which Ms Tymoshenko and Mr Lutsenko were convicted also existed in many other countries, including France, Germany, Poland and the United Kingdom. She was also told that the “abuse of power” provisions criticised by the Assembly in its Resolution 1862 (2012) on the functioning of democratic institutions in Ukraine are needed for the fight against corruption and against torture. Ms Beck asked me to follow this up as part of the present report. In fact, during my own visit to Kiev, in February 2013, I heard the same arguments.

9. Consequently, I launched an information request through the ECPRD in order to find out whether and how different types of abuse of office procedures are penalised in the Council of Europe’s member States. I shared the information received through the ECPRD network with the Venice Commission, which provided an excellent opinion focusing on the constitutional and human rights law aspects of ministerial criminal responsibility. This opinion will be the basis for the first main part of this report (section 3), in which I attempt to develop some general principles guiding the distinction between political and (legitimate) criminal responsibility of politicians.

10. In the second main part of this report (section 4) and in section 5, I will apply these principles to the above-mentioned cases in Ukraine and Iceland.

11. In my introductory memorandum,[9] I had submitted a cursory overview of the various types of cases that could fall under this rapporteur mandate and gave some specific examples.[10] Unfortunately, the resources available to a rapporteur of the Assembly do not permit me to cover many of these still very topical issues and cases. In line with the conclusions of the introductory memorandum, the committee therefore agreed that I should concentrate on developing general principles and limit the case studies to the aforementioned Ukrainian and Icelandic examples.

3. Towards the establishment of guiding principles for separating political and criminal responsibility

12. I am aware that proposing guiding principles for separating political and criminal responsibility – or more precisely, developing criteria distinguishing legitimate criminal responsibility of politicians from unacceptable criminalisation of political decision-making – is a tall order. Using as a basis the Venice Commission opinion, the contributions of the legal experts at the hearing before the committee and the data provided by the ECPRD network, I will submit but a modest proposal for basic principles that we should all be able to agree on. I shall begin by examining some procedural problems, before addressing relevant substantive issues, and before trying to distil some “guiding principles.”

3.1. Concerning procedure: ordinary criminal courts or special impeachment procedures?

13. The comparative study by the Venice Commission shows that there is great variation in the procedures for holding politicians to account in the member States of the Council of Europe.

14. A number of countries (for example Germany, Ireland, Portugal,[11] Ukraine and the United Kingdom) have no special procedures for the criminal responsibility of politicians, which is governed by ordinary criminal procedure. In these countries, it is for ordinary public prosecutors to initiate proceedings and for ordinary criminal courts to hear the cases and judge them.

15. Other countries, in particular those in the Scandinavian region, but also Belgium, France and Poland, have separate procedures for the criminal accountability of ministers. These are usually referred to as “impeachment proceedings”,[12] and the special courts set up for this purpose as “courts of impeachment”.

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9. Footnote 4 above, paragraphs 7-16.
10. One could add the impeachment procedure for “high treason” recently opened against former Czech President Vaclav Klaus, accused of having violated the national interests of the Czech Republic by having delayed the signature of the Lisbon Treaty and the Presidential amnesty he pronounced just before the end of his term of office (see BBC news, 4 March 2013, Czech President Vaclav Klaus faces treason charge (www.bbc.co.uk/news/world-europe-21660234).
11. Under Article 196 of the Portuguese Constitution, parliament must authorise the continuation of the procedure after the filing of an accusation by the prosecutor, but in the most serious cases, this is obligatory.
12. Although the possible sanctions are not limited to the revocation of the minister from his or her office.

16. But in the latter countries, too, the special impeachment proceedings are applicable only to offences committed by ministers in their official capacity, whilst violations of ordinary criminal provisions committed in a private capacity are left to the ordinary criminal courts. The special rules may cover all stages of the proceedings, beginning with initial inquiries, the decision to initiate formal proceedings, the rules on prosecution, the composition of the court and the rules governing the procedure itself.

17. Countries in which it is for parliament to decide whether or not to initiate criminal proceedings against a government minister include all Scandinavian countries, as well as Austria, Estonia, Greece, Italy, Liechtenstein, Lithuania, the Netherlands, Poland, Romania, the Slovak Republic, Slovenia and Turkey. Special courts of impeachment for government ministers are found in most Scandinavian countries and also in France and Poland. Their typical feature is that they are usually composed partly or wholly of parliamentarians or persons appointed by parliament. Other countries having special procedures refer cases of ministerial criminal responsibility directly to a supreme jurisdiction (Constitutional or Supreme Court), for example Albania, Austria, Liechtenstein and Slovenia.

18. During my fact-finding visits to Iceland and Ukraine, I had the opportunity to study in some more detail one example of each of the two models in use in Europe, namely the special impeachment procedure, in Iceland, and recourse to ordinary criminal courts, in Ukraine. The two examples show that this procedural, institutional choice is not a decisive factor in determining whether one or the other model is inherently superior in terms of avoiding politically motivated abuses.

3.1.1. Special impeachment procedures: the Icelandic example

19. I can agree with the Venice Commission, in light of my Icelandic experience, “that special procedural rules for impeachment of ministers are often more political than ordinary procedures. Whilst this in itself may not be in breach of basic principles of the rule of law, it still makes such systems particularly vulnerable to criticism and political misuse, which calls for extra caution and restraint in the way they are interpreted and applied”.[13]

20. In my information memorandum on the case of former Icelandic Prime Minister Geir Haarde,[14] I have presented in some detail how – much to my own surprise – the Venice Commission’s misgivings about this type of procedure in general have indeed materialised. It was indeed the new majority in parliament which decided, along party-political lines, to initiate criminal proceedings for the failure to avoid the banking crisis only against the former Prime Minister and not against the ministers who had been directly in charge of banking issues within the same (coalition) government but who belonged to parties forming part of the new majority. It would indeed appear that the new majority’s objective was to somehow “criminalise” their predecessors’ choice of economic liberalism that had contributed to the rise and fall of the Icelandic banks. In my conversations in Reykjavik, I could sense a lot of unease even among the political supporters of the prosecution, especially concerning the fact that the Prime Minister was singled out in such a way.

21. I should like to stress that Mr Haarde was in the end acquitted of the main accusation – “failure to act” to prevent the banking crisis – and was found criminally responsible, but without any punishment imposed on him, only on account of a formal violation, namely failure to include the threatening banking crisis on the formal agenda of a cabinet meeting, contrary to the wording of the Icelandic Constitution (see section 5 below for a summary of my critical evaluation of this case).

22. Meanwhile, I can only welcome the fact that – as I was told in Reykjavik – the procedural provisions governing ministerial responsibility in Iceland are in the process of being reformed.

3.1.2. Ordinary criminal procedures: the Ukrainian example

23. My second fact-finding visit, to Ukraine, has made it very clear to me that the choice of using the ordinary criminal courts for holding politicians to account is by no means a guarantee for a fair procedure that ensures the exclusion of political considerations.

24. The quality of proceedings of ordinary criminal courts depends not only on the technical legal training and professionalism of the judges, prosecutors and defence lawyers, but also on the effective independence of the courts and of each individual judge. This is especially true for judges dealing with cases of ministerial criminal responsibility and called upon to interpret and apply broadly worded abuse of office provisions (see section 3.2 below). The recommendations of the Venice Commission, based on the comparative advantages

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13. Venice Commission Opinion (footnote 8), paragraph 110.
14. Footnote 6 above.

of the different models of ministerial responsibility used in different European countries, are founded on a simple assumption: namely that courts are indeed courts, as understood by the founders of the Council of Europe and the drafters of the European Convention on Human Rights (ETS No. 5, "the Convention"). Courts can make mistakes, and even the highest courts are not infallible, but they must strive to reach an objective, impartial and independent assessment of the facts put before them, in the light of evidence the credibility of which they must impartially and independently assess, and by application of the law of the land as interpreted professionally, in accordance with generally recognised principles of legal interpretation.

25. Please allow me to call a spade a spade: the Ukrainian courts which have handed down the judgments against Ms Tymoshenko and Mr Lutsenko are not "courts" within the meaning of the basic assumptions on which the Council of Europe's human rights machinery is built. Other courts dealing with related cases, such as those concerning Ms Tymoshenko's political ally and legal adviser, Yuri Vlasenko, function like clockwork, always reaching the decisions expected by the powers that be. This includes the family court refusing to take into account the fact that Mr Vlasenko had paid up the maintenance owed to his ex-wife, thus preventing him from leaving Ukraine in order to attend the Assembly's January 2013 part-session, despite the fact that he is a duly appointed member of the Ukrainian delegation. This includes the High Administrative Court, which, in record time, stripped Mr Vlasenko of his parliamentary mandate, despite the procedural violations committed in the parliamentary committee making the request and on purely formal grounds, applied selectively to his case only.[15] I cannot believe that Ms Tymoshenko and all her political allies are always legally in the wrong, every single time!

26. A recent judgment of the European Court of Human Rights ("the Court") in the case of *Volkov v. Ukraine*[16] sheds some light on the reasons for the apparent lack of independence of the Ukrainian judiciary. The Court ordered the reinstatement of the applicant, a supreme court judge removed from office for "breach of oath", having found violations both of procedural (Article 6) and substantive (Article 8) rights of the Convention. Interestingly, the judgment names as two of the key actors in the flawed procedure leading to the abusive dismissal of a senior judge, the chairperson of the Verkhovna Rada's judicial committee, "S.K.",[17] and "R.K.", who is also the leading prosecutor in the criminal cases against Ms Tymoshenko and Mr Lutsenko.

27. A recent Opinion of the Venice Commission on this issue[18] severely criticises both the procedures used in disciplinary proceedings against judges – in particular the composition of the High Council of Justice, largely controlled by the political majority – and the unclear and wide formulation of the grounds for disciplinary measures, including dismissal of judges. According to the Venice Commission, these "include very general concepts such as … the 'violation of moral and ethical principles of human conduct' among others. This seems particularly dangerous because of the vague terms used and the possibility of using it as a political weapon against judges".[19]

28. I am particularly worried about the combined effect of the public statement by the current Prosecutor General, Mr Victor Pshonka, who presented himself as "part of the President's team"[20] and the conviction rate in Ukrainian criminal courts, which exceeds 99%.[21] The subordination of the Prosecutor General to the

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15. See the public statement I made on 7 March 2013 jointly with the co-rapporteurs of the Monitoring Committee for Ukraine, Ms Marietta de Pourbaix-Lundin and Ms Mailis Reps: "PACE rapporteurs strongly criticise the revocation of the parliamentary mandate of Ukrainian opposition MP Serhiy Vlasenko",

http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8463; the destitution of Mr Vlasenko was also strongly criticised in a joint statement by European Union foreign affairs High Representative, Ms Catherine Ashton, and the European Commissioner for Enlargement and European Neighbourhood Policy, Mr Štefan Füle, on 6 March 2013.

16. *Oleksandr Volkov v. Ukraine*, Application No. 21722/2011, judgment of 9 January 2013 (not yet final).

17. None other than our committee colleague, Serhii Kivalov, recently appointed by President Yanukovich as Ukraine's new member of the Venice Commission. See also ECHR Blog of 14 January 2013: http://echrblog.blogspot.fr/2013/01/ironies-of-injustice-in-ukraine-and.html.

18. Document CDL-AD(2010)029.

19. Ibid., paragraph 45.

20. The complete statement made during a television interview in November 2010, three days after Mr Pshonka's appointment by President Yanukovich: "Of course, I am a member of the President's team. The President took a big responsibility and declared it in his decrees, in his decisions, so that we would indeed have a rule of law state, so that we have professional laws, and, of course, I – as a Prosecutor General – am a member of the team for the execution of all the decisions taken by the President" (unofficial translation; source: http://news.liga.net/news/politics/505261-pshonka-schitaet-sebya-chlenom-komandy-yanukovicha.htm).

21. 99.6% was the figure given to Marieluise Beck by the Minister of Justice, Mr Oleksandr Lavrynovich, during her visit in February 2012. At my own meeting with Minister Lavrynovich one year later, he could not yet give me a new figure because the effect of the new Code of Criminal Procedure, which he said would lead to more acquittals, could not yet be quantified.

President is not only a personal position expressed by Mr Pshonka; It stems directly from the law, because the President has unfettered discretion to dismiss the Prosecutor General, in accordance with an amendment to the Law on the Prokuratura introduced shortly after President Yanukovych came to power. The logical consequence of the subordination of the Prosecutor General to the President and the fact that the courts almost never acquit is that the President can have anyone imprisoned, at any time. The Prosecutor General and two of his deputies, including the above-mentioned (paragraph 26) Renat Kuzmin, are members of the High Council of Justice, a body with a leading role in the appointment and dismissal of judges.

29. In my view, the cases against former Prime Minister Yulia Tymoshenko and former Interior Minister Yuri Lutsenko are not just selective justice – the term often used by international observers – but no justice at all: the outer form of court proceedings was merely used as a disguise for the execution of the new majority's intention to take key opposition leaders out of the political equation and punish them for the action they took whilst in power. I will provide a summary of my reasons for this admittedly harsh conclusion in the case studies below.

3.2. Concerning substantive criminal law: general "abuse of office" provisions or specific criminal provisions against corruption and other forms of abuses?

30. The Venice Commission opinion and the ECPRD replies confirm the statement of the Ukrainian authorities that abuse of office provisions potentially penalising politicians exist in many European countries.

31. In fact, a clear majority of the countries represented by the 28 replies to the ECPRD request (namely 20) have some form of a criminal offence of "abuse of office" on their statute books. These include not only most of the former communist States, but also the Scandinavian countries, Austria, Italy, the Netherlands, Switzerland and the United Kingdom. But it must be stressed that most of these countries require intentional or wilful violations of official duties for the purpose of either gaining an unlawful advantage or causing harm to others, and that in almost all of these countries, the provisions have been rarely, if ever, used against ministers or former ministers.

32. At the same time, the replies given by the parliamentary research services of those countries which do not have such provisions contradict the Ukrainian authorities' argument that such provisions are needed in order to effectively prosecute corruption and the use of torture by the police. There is no perception or even discussion in any of the countries without an abuse-of-office provision that there may be a gap in the legislative arsenal to combat corruption or torture. Such acts are covered without problems by other, more specific, criminal provisions such as those penalising active and passive bribery, and the intentional infliction of bodily harm.

33. As a result, there is very little difference in practical terms between those countries which do and those which do not have an offence of general "abuse of office" on their books, provided the courts construe the general offence narrowly, as is the case in most of these countries. Interestingly, Estonia recently repealed the general offence of abuse of office and replaced it by a series of specific offences because the existing provision was considered as too broad and vague and not actually needed.[22] It must also be stressed that in none of the 28 countries for which a reply was received was a former minister inflicted a penalty that was anywhere near as harsh as those imposed on the former government members in Ukraine. Also, in the small number of cases examined by the Venice Commission in which abuse-of-office provisions were actually applied to former ministers, an element of corruption or other forms of economic gain was always present,[23] with the exception of the case of former Icelandic Prime Minister Geir Haarde – who was acquitted of the main substantial charge (neglect of official duties).

34. Substantive national rules on criminal responsibility of politicians must comply with Article 7 of the European Convention on Human Rights and other requirements derived from the principle of the rule of law, including legal certainty, predictability, clarity, proportionality and equal treatment.[24] The European Court of Human Rights, in the case of *Liivik v. Estonia* criticised the provision now abolished by Estonia, which had been inherited from the Soviet legal system, finding that its interpretation "involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects".[25]

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22. In the explanatory memorandum prepared by the Ministry of Justice (referred to in the Venice Commission Opinion, paragraph 50), reference was made to the interpretation of Article 7.1 of the European Convention on Human Rights, according to which the necessary elements of a criminal offence had to be clearly defined in law.
23. Venice Commission Opinion (footnote 6 above), paragraph 52.
24. Ibid., paragraph 94.
25. Application No. 12157/05, judgment of 25 June 2009, paragraph 101.

35. In light of the above, I fully agree with the Venice Commission's conclusions that "wide and vague national criminal provisions on '*abuse of office'* constitute a particularly problematic category. While there may be a perceived need for such general clauses, they are still problematic, both with regard to Article 7 of the Convention and other basic requirements under the rule of law, and they are also particularly vulnerable to political abuse" (paragraph 113).

36. I should like to add that the above principles apply both to the legislative texts as such and, even more importantly, to its application in each individual case. In the words of the Venice Commission opinion, "provisions on 'abuse of office' should be interpreted narrowly and applied with a high threshold. … The Venice Commission also holds that when applying provisions on 'abuse of office' against government ministers the special nature of politics should be taken into account. To the extent that such provisions are invoked against actions that are primarily of a political nature, then this should only, if at all, be done as the last resort (*ultima ratio*). The level of sanctions should be proportional to the legal offence, and not influenced by political considerations and disagreements" (paragraphs 114 and 115).

3.3. Guiding principles: an attempt to distinguish political responsibility from legitimate criminal responsibility

37. In view of the above procedural and substantive considerations, it is quite straightforward to come up with the following guiding principles, which I have included in the draft resolution for explicit endorsement by the Assembly:

1) Criminal proceedings should not be used to penalise political mistakes or disagreements.

2) Politicians should be accountable for ordinary criminal acts in the same way as ordinary citizens.

3) Substantive national rules on ministerial criminal responsibility must comply both with Article 7 of the European Convention on Human Rights and other requirements derived from the principle of the rule of law, including legal certainty, predictability, clarity, proportionality, and equal treatment.

4) In particular, wide and vague national criminal provisions on "abuse of office" can be problematic, both with regard to Article 7 of the Convention and other basic requirements under the rule of law, and they can also be particularly susceptible to political abuse.

5) Politicians should therefore, as a rule, be held criminally liable for acts or omissions committed in the exercise of their office only when they act for personal gain or violate fundamental rights of others.

6) As regards procedure, as long as the charges brought against politicians are of a "criminal" nature, according to Article 6 of the Convention, the same basic fair trial requirements apply both to ordinary criminal procedures and to the special impeachment procedures which exist in a number of Council of Europe member States.

7) Special rules for impeachment of ministers must not be in breach of basic principles of the rule of law. As such rules are susceptible to political abuse, they call for extra caution and restraint in the way they are interpreted and applied.

38. The real difficulty lies in drawing the line, in practice, between the first two principles, namely between legitimate accountability of politicians for ordinary criminal acts and illegitimate penalisation of political decision-making.

39. In this respect, the Venice Commission has, if I may use the sporting image, passed the ball back to the Parliamentary Assembly, by expressly leaving the drafting of any criteria in this respect to the Assembly and limiting its own role to contributing some "general reflections".[26] Fortunately, one of our experts, Professor Satzger, came up with an original and helpful approach at the committee hearing in September 2012, which I first applied to the case of Geir Haarde in the information memorandum on the situation in Iceland.

40. Professor Satzger, too, drew a parallel with sports: he recalled that a football player, for example, is subject to sanctions under the rules of the game in case of foul play, thus escaping ordinary criminal responsibility for intentionally or negligently causing bodily harm. His opponent will get a free kick, or even a penalty shot, but the perpetrator of the foul will not be prosecuted criminally – except when he commits such an outrageous attack on an opposing player that the presumed prior consent (or waiver of criminal

26. The Opinion (paragraph 69) reads: "Drafting such criteria is for the Committee, and the Assembly, to do – and the Venice Commission will only contribute some general reflections."

responsibility) applicable to "normal" fouls clearly does not apply. *Mutatis mutandis*, a politician and his or her "team" (party) will lose votes at the next elections, and maybe even be voted out of office if he or she makes a political mistake, even a grossly negligent one, or one that looks particularly bad with the benefit of hindsight. But criminal responsibility, with all that it entails, comes into play only if and when the politician's acts or omissions fall clearly outside the perimeter of normal (albeit possibly flawed) political decision-making.

41. In my view, this would normally be the case only when a politician acts for personal gain and/or intentionally violates fundamental rights of others. Otherwise we would risk sliding down a slippery slope towards allowing judges to second-guess political decision-making, and ultimately attaching criminal sanctions to differences in opinion. Especially in the current times of economic crisis, politicians must be allowed a margin of error, without incurring the threat of criminal prosecution. With the benefit of hindsight it can be tempting to find the one or the other political decision "wrong" or even "reckless". But responsible politicians must be allowed to experiment with innovative solutions whilst incurring "only" the judgment of the electorate and not that of criminal courts making a comfortable *ex post* assessment.

42. The line between legitimate and illegitimate criminal responsibility of politicians is also clearly crossed in a given case when the criteria for the definition of political prisoners, reconfirmed by the Assembly in its Resolution 1900 (2012), are fulfilled. With the possible exception of item *b*, all the elements of the definition laid down in the resolution reproduced below are pertinent and provide valuable guidance for the distinction between legitimate accountability and politically motivated persecution.

43. According to paragraph 3 of Resolution 1900 (2012):

"A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':

a. if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association;

b. if the detention has been imposed for purely political reasons without connection to any offence;

c. if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offence the person has been found guilty of or is suspected of;

d. if, for political motives, he or she is detained in a discriminatory manner as compared to other persons; or,

e. if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."

44. Not all cases falling into one or more of the above categories concern the illegitimate criminalisation of political decision-making. The cases of politically motivated persecution of youth activists, journalists and peaceful demonstrators described in a recent report on "The follow-up to the issue of political prisoners in Azerbaijan" by our German colleague Christoph Strässer[27] do not concern political decision-making, whilst those of two former cabinet ministers figuring on Mr Strässer's list of presumed political prisoners may well do so. Also, not all politicians prosecuted for past policy choices are "presumed political prisoners" – for the simple reason that most of them were never actually imprisoned – Geir Haarde is a case in point. However, all imprisoned politicians whose cases do fulfil the above criteria can be seen as victims of illegitimate criminalisation of political decision-making. For these reasons, I intend to base the Ukrainian case studies below on the criteria laid down in Assembly Resolution 1900 (2012).

4. The persecution of leading political opponents in Ukraine – two case studies on the basis of Assembly Resolution 1900 (2012)

44. The criminal cases brought against former Prime Minister Yulia Tymoshenko and former Interior Minister Yuri Lutsenko have given rise to severe criticism by the international community.[28] Both Ms Tymoshenko and Mr Lutsenko have submitted applications to the European Court of Human Rights, some of which are still pending. Some of the accusations launched against them are also still pending before the

27. Doc. 13079 and Addendum; the draft resolution submitted by the Committee on Legal Affairs and Human Rights failed to be adopted by the Assembly during the January 2013 part-session.

28. See, for example, Parliamentary Assembly Resolution 1862 (2012) on the functioning of democratic institutions in Ukraine; Joint Statement by EU High Representative Ashton and Enlargement Commissioner Füle on the judgment by Ukraine's Higher Specialised Court for Civil and Criminal Cases in the case of Yulia Tymoshenko, dated 29 August 2012;

Ukrainian courts, or even still in the process of being finalised by the prosecutor's office. But the purpose of this report is not to pass a legal "judgment" on these cases, which would amount to usurping the role of the courts. The case studies are merely aimed at evaluating whether the criteria of the Assembly's definition of political prisoners are met, in order to underpin a legally well-grounded, objective but nevertheless political assessment of these cases, in line with the established practice of the Parliamentary Assembly.[29]

45. I can only join the President of the Assembly[30] in welcoming the presidential pardon granted to Mr Lutsenko and at the same time recall that Mr Lutsenko has never asked for a pardon, but for justice. He is therefore pursuing his application to the European Court of Human Rights in order to obtain full rehabilitation. Also, as President Mignon rightly pointed out, the case of Ms Tymoshenko urgently requires a solution, too. Still, I interpret this presidential pardon as a signal of good will of the Ukrainian authorities, and I sincerely hope that it will be followed up by other steps.

4.1. The case of former Ukrainian Prime Minister Yulia Tymoshenko

4.1.1. Ms Tymoshenko as a key rival of President Yanukovich

46. Ms Tymoshenko is a key leader of the opposition in Ukraine. She was a prominent figure in the "Orange Revolution" in 2004, which erupted after Viktor Yanukovych was declared the winner of an election marred by blatant vote-rigging. She had served as Prime Minister under President Yushchenko, *inter alia* between 2007 and 2010. In the 2010 presidential election, she finished in second place, losing to Mr Yanukovych by only 2.5% of the vote. Even in prison, she remains the President's main political rival, but she was prevented from participating in the October 2012 parliamentary elections due to the criminal cases against her.

4.1.2. The "gas contract case" – an illegitimate criminalisation of political decision-making

47. Ms Tymoshenko was sentenced to a seven-year prison term on the basis of vague abuse-of-office[31] charges for having entered into an agreement with Russian Prime Minister Putin on the resolution of the "gas crisis" which erupted in the winter of 2008/2009.

48. The criminal charge against the former Prime Minister was that the deal struck between her and Russian Prime Minister Putin was financially disadvantageous to Ukraine and that it had not been approved in writing beforehand by her cabinet. The political deal between the two prime ministers, which was subsequently fleshed out in detailed negotiations between Gazprom and Naftogas of Ukraine, was reached in a climate of severe crisis, after Mr Putin had ordered that gas supplies to Ukraine and through Ukraine to western Europe be cut on 5 January 2009.[32] On 17 January 2009, Ms Tymoshenko, who was under intense pressure from the European Union and key western European leaders to unblock the situation, reached an agreement of principle with Mr Putin, in Moscow. On 19 January, Naftogas and Gazprom signed the contract. On the same day, Ms Tymoshenko's cabinet held an extraordinary meeting in her absence, discussing the

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report by the Council of Europe's Human Rights Commissioner, Thomas Hammarberg, following his visit to Ukraine from 19 to 26 November 2011, in particular paragraphs 1-21 and 73; the European Parliament (see, for example, the RFE interview with European Parliament President Martin Schulz of 25 April 2012:
www.rferl.org/content/euro_parliament_chief_says_ukraine_treatment_of_tymoshenko_disgrace/24560448.html).

29. See, for example, the earlier reports on the situation of political prisoners in Azerbaijan (Resolution 1272 (2002) and Doc. 9310; Doc. 9826; Resolution 1359 (2004) and Doc. 10026; Resolution 1457 (2005), Recommendation 1711 (2005) and Doc. 10564) and the reports by Sabine Leutheusser-Schnarrenberger on the circumstances surrounding the arrest and prosecution of leading Yukos executives (Doc. 10368 + Addendum, 29 November 2004), the investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine – the Gongadze case as an emblematic example (Doc. 11686, 11 July 2008), allegations of politically motivated abuses of the criminal justice system in Council of Europe member States (Doc. 11993, 7 August 2009), by Christos Pourgourides on fair trial issues in criminal cases concerning espionage or divulging state secrets (Doc. 11031, 25 September 2006) and member States' duty to co-operate with the European Court of Human Rights, (Doc. 11183, 9 February 2007), by Dick Marty on legal remedies for human rights violations in the North-Caucasus Region (Doc. 12276, 4 June 2010), and by Erik Jurgens on repayment of the deposits of foreign exchange made in the offices of the Ljubljanska Banka not on the territory of Slovenia, 1977-1991 (Doc. 10135, 14 April 2004).

30. See press release of 8 April 2013, available on the Assembly's website.

31. "Excess of authority" – Article 365 of the Ukrainian Criminal Code.

32. See *The Economist* of 8 January 2009, "The annual gas squabble between Russia and Ukraine turns nasty – to the alarm of much of Europe", reporting that "some countries felt the effect immediately, in bitterly cold weather. Hungary, Slovakia, Bulgaria and Romania were hit hard, but the gas freeze also affects Germany, France and Italy. As attitudes hardened, Mr Putin insisted that no gas at all should cross the border. His direct personal involvement has now made the dispute more political".

gas deal but without taking a vote on the agreement. At this meeting, First Deputy Prime Minister Turchinov stated that there were no legal requirements to adopt any directives and that the Prime Minister needed only political support. After Ms Tymoshenko's return, on 21 January, the cabinet confirmed the contracts, and on 22 January, the flow of Russian gas to Ukraine and to western Europe was fully restored. Ms Tymoshenko's lawyers insist that there was no legal requirement that such an agreement needed *prior* cabinet approval, whilst the prosecution argued that it did. Astonishingly, the fact that the cabinet approved the deal two days later is not even mentioned in the judgment.

49. The gas deal of January 2009 was and still is subject to lively political debate. Even some of Ms Tymoshenko's former political allies contend that the former Prime Minister should never have accepted such a high price and should have played "hardball" with Mr Putin and with western European governments. They contend that serious gas shortages in Ukraine could have been avoided until the spring by using Ukraine's own reserves. The issue played an important role in the 2010 presidential campaign and may well have contributed to Ms Tymoshenko's narrow election loss. The fact is that Russia did agree to reduce the price of gas after Mr Yanukovich came to power, but only in exchange for far-reaching political concessions, such as the long-term extension of the lease of bases in Crimea for the Russian Black Sea fleet.

50. In my view, the political choice made by Ms Tymoshenko to strike the gas deal with Russia even at a high price in order to avert a serious political and humanitarian crisis was hers to make, as Prime Minister. She was held to account politically, in the subsequent election. It was never even alleged that she derived any personal financial gain from this deal, nor did the deal interfere with fundamental rights of individual citizens. In light of the above "guiding principles", she should therefore not have been prosecuted criminally for her political decision.[33]

4.1.3. Presumed procedural violations

51. The prosecution and trial in the gas case were also marred by a number of presumptive procedural violations. The presumption of innocence (Article 6.2 of the Convention) was apparently violated by numerous public statements by senior political and judicial personalities finding her guilty before the end of her trial, including the President, Prime Minister, Vice-Prime Minister, the Prosecutor General, his First Deputy and by members of the Verkhovna Rada belonging to the ruling party. President Yanukovich actually suggested that Ms Tymoshenko should "prove her innocence in court". Deputy Prosecutor General Kuzmin, a senior member of the High Council of Justice (the judges' and prosecutors' highest disciplinary authority), publicly stated that Ms Tymoshenko was guilty of all the crimes she had been convicted of in first instance – a few days before the appeal hearing in the case.[34]

52. The independence and impartiality of the courts which heard her case is also doubtful.[35] The young judge in charge of the trial in the first instance had only two years' experience and was still in his probationary period. He systematically refused procedural requests of Ms Tymoshenko's lawyers, including requests for postponements of hearings due to her health problems, and requests for taking evidence, including hearing witnesses put forward by the defence. Reportedly, he even rejected the request to add to the case file such a

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33. In view of the above, I cannot help being surprised that an American law firm, though commissioned by the Ukrainian Ministry of Justice (link to the report on the Ministry's website at www.minjust.gov.ua/42565) accepted to provide an expertise concluding that "… Ms Tymoshenko has provided no factual evidence of political motivation that would be sufficient to overturn her conviction under European or American standards" ("Skadden report", p. 5). Conveniently, the Skadden report skirts the key issues: whether the criminal provision applied against Ms Tymoshenko fulfils minimum standards of clarity and foreseeability and whether Ukrainian law required prior cabinet approval for the Prime Minister to enter into the disputed agreement with her Russian counterpart and to instruct Naftogas to negotiate a contract along these lines: "This issue of Ukrainian law – the requirements necessary to satisfy the elements of the statutory offence – is beyond the scope of our assignment and beyond our expertise."

34. Ms Tymoshenko's lawyers have provided me with a detailed list of such statements and references. The Danish Helsinki Committee's Legal Monitoring in Ukraine reports also lists numerous "statements and interviews by leading officials, including the President and the Prime Minister, have commented on the trials in such a way that it clearly sends a signal to the judges about the desired and expected outcome of the trial" (Legal Monitoring of Ukraine II, paragraph 2, p. 10).

35. Regarding the systemic weaknesses of the Ukrainian judiciary, see paragraphs 23-29 above; even the Skadden report, commissioned by the Ukrainian Ministry of Justice (footnote 33 above) makes some critical remarks: "We are not in a position to evaluate whether the High Council has misused its authority, or whether the threat of discipline and dismissal had an effect on Judge Kireyev in this case. However, the sheer volume of 'breach of oath' dismissals sought in recent years in Ukraine raises the specter that judicial independence is undermined by the judicial discipline system, a system in which the prosecution sits on the reviewing council." The Danish Helsinki Committee's Legal Monitoring of Ukraine II report states: "The monitoring of the four cases has left the impression of prosecutors and judges with limited understanding for the presumption of innocence and equality of the parties during the trial." (ibid., paragraph 2, p. 10).

fundamental document as the litigious gas contract itself, the main *corpus delicti*, without giving any reasons. The judge also placed Ms Tymoshenko in pretrial detention on apparently spurious grounds (because Ms Tymoshenko once arrived seven minutes late for a court hearing). According to the trial observers of the Danish Helsinki Committee, the judge generally lacked self-assurance and authority in dealing with the some provocative remarks by Ms Tymoshenko in the courtroom.[36]

53. It is also not clear whether the selection of the judge in this case and in the related cases against Ms Tymoshenko's political allies had respected the automated random case assignment procedure. The Danish Helsinki Committee monitors point out that the Pechersky District Court, which is competent to hear most of the cases against former government members, has 35 judges, whilst the cases against opposition politicians were concentrated amongst a small number of judges most of whom were still in their probation periods, to the point that "one can wonder that the judges selected for such spectacular and politically loaded cases are so young, inexperienced, exposed and vulnerable to political pressure".[37]

54. The fairness of the trial was also put into question by failures of the court to provide adequate time and facilities for the preparation of the defence within the meaning of Article 6.3.*b* to *d*. The case files in the gas contract case alone consisted of about 4 300 pages of files, including 20 expert assessments, 360 hours of statements recorded on audio tapes and about 100 transcripts of witness testimony. Ms Tymoshenko and her lawyer had only 15 working days to study this material, in May 2011, and they were only given time to copy 10 out of 15 files. The court refused all the applications of the defence for additional time to study the case file. During the trial, Ms Tymoshenko was in court almost daily, for unusually long sessions, which severely limited the time at her disposal to consult with her lawyers before or between court sessions. Conversations with her lawyer were further hampered by the obtrusive presence of police guards, a problem which the trial judge also refused to address. Last but not least, her right to effective assistance by a lawyer was restricted in different ways, including by the revocation of Mr Vlasenko's power of attorney by the trial judge on 18 July 2011. Consequently, a number of hearings took place in the absence of any legal representative, including four full days of hearings during which the court interrogated 25 of a total of 40 witnesses of the prosecution.[38]

55. The right to a public hearing (Article 6.1 of the Convention) was apparently also infringed by the choice of unusually small courtrooms, given the strong public interest in the proceedings, which led to the admission of only small numbers of allegedly "selected" journalists.

4.1.4. Different forms of pressure on Ms Tymoshenko and her lawyers and political allies

56. Ms Tymoshenko was reportedly also put under intense physical and psychological pressure during pretrial detention and beyond. She complained about serious health problems involving intense pain. These were confirmed by independent doctors from the Charité hospital in Berlin, who were allowed to examine her only after some delay and numerous interventions by the international community. In her cell, she is permanently filmed by several cameras, and a number of videos and conversations have been published on the Internet.[39] One apparently orchestrated leak concerned a purported telephone conversation of Ms Tymoshenko with her husband, in which she – again, purportedly – grossly insulted the Ukrainian judge at the European Court of Human Rights. Ms Tymoshenko denounced this publication as a fabrication designed to influence the Strasbourg Court.[40] Mr Lisitskov, the Head of the Ukrainian State Penitentiary Service, told me during our meeting in Kiev that 388 medical check-ups had been "arranged" for Ms Tymoshenko (of which she had rejected 295). In my view, this is more akin to harassment than to serious medical care.

57. Ms Tymoshenko's political allies and lawyers were exposed to serious pressure, too. After the appointment of Viktor Pshonka as new Prosecutor General in November 2010, following which he declared himself publicly as a "member of the President's team",[41] 12 senior members of Ms Tymoshenko's government were prosecuted: four ministers,[42] five deputy ministers and three heads of State agencies. The case of the former Interior Minister, Yuri Lutsenko, will be treated in some more detail in the second case study below. In his case, the European Court of Human Rights has already found numerous violations of the Convention, including that of Article 18.[43] The cases of Valeriy Ivashchenko, former acting Minister of

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36. See the examples of inappropriate remarks cited in the Skadden report (note 33 above), p. 110.
37. Legal Monitoring of Ukraine II, paragraph 3, p. 12.
38. More detail in Danish Helsinki Committee, Legal Monitoring of Ukraine II, paragraph 9, p. 18.
39. See, for example, www.youtube.com/watch?v=o44J1_m0AXI including even scenes filming medical procedures performed upon Ms Tymoshenko.
40. Media: Tymoshenko's husband files complaint at court in Prague against tapping of phone conversations with his wife, UR 1 News 18 January 2013: www.nrcu.gov.ua/en/148/521336/.
41. See footnote 20 above.
42. Those of the Interior, Defence, Economic Affairs and the Environment.

Defence in the Tymoshenko government, and Mr Yevhen Korniychuk, her First Deputy Minister of Justice, have also received considerable international attention due to the similarity both of the vague "abuse of office" charges, mostly criminalising normal political or administrative decision-making and of the procedural violations observed in the cases against them.[44]

58. Ms Tymoshenko's principal legal adviser and (until recently) member of the Verkhovna Rada, Serhiy Vlasenko, is apparently also a victim of well co-ordinated judicial harassment. I talked to him at length during my fact-finding visit to Kiev in February 2013, and I am deeply worried about the way he is being treated. Between June and July 2012, he was assaulted three times, a green spirit-based chemical being poured in his eyes. Reportedly, a female suspect was identified after the first assault. But the Prime Minister of Ukraine, Mr Mykola Azarov, publicly announced that "she should not be afraid because no one will be able to touch her".[45] The statement was followed by two more assaults. Whilst two suspects have by now been identified, who were questioned by the police and admitted the deeds, the cases have still not been transferred to court.[46]

59. In addition, in January 2013, Mr Vlasenko was stopped by border guards when he tried to board a plane in order to participate in the Parliamentary Assembly's part-session. He was told that he could not leave the country because he had not paid up maintenance to his ex-wife. Mr Vlasenko told me that he had indeed paid up his debt and submitted proof of payment to the civil tribunal, which had simply refused to take this information into account. He now feared that his ex-wife's accusations of conjugal violence, which he assured me were unfounded, would shortly be used as a pretext to arrest him, after he was stripped of his parliamentary mandate.

60. Two weeks after my visit, on 6 March 2013, the High Administrative Court indeed cancelled Mr Vlasenko's mandate as a member of parliament. Both the procedure followed and the reasons given are open to serious criticism, which I expressed jointly with the co-rapporteurs of the Monitoring Committee for Ukraine, Ms de Pourbaix-Lundin and Ms Reps, in a statement published the following day.[47] The parliamentary committee competent to seize the High Administrative Court had failed to take the decision in a committee meeting, as the rules foresee, but based its decision on signatures collected from absent members and without allowing Mr Vlasenko to be heard. The grounds on which destitution was based were purely formal: a delay in the suspension of Mr Vlasenko's Bar membership following his election as a deputy. In substance, Mr Vlasenko assured me that he had no longer practised as a lawyer since his election to parliament. He had merely continued to provide advice to Yulia Tymoshenko as a "legal expert" – a function that Ukrainian law distinguishes clearly from the practice of law by a member of the Bar. Whatever the legal technicalities may be, which are not for me to decide on, it is clear that Mr Vlasenko's case is at the very least one of selective justice: I was told that several other parliamentarians who belong to the ruling "Party of the Regions" remain active members of the Bar, and their status as parliamentarians is not put into question.

61. On 18 March 2013, the Central Electoral Commission (CEC) declared another person elected in Mr Vlasenko's place and registered him as a member of the Verkhovna Rada, despite protests from Mr Vlasenko's party, which had seized the Ukrainian Constitutional Court as well as the European Court of Human Rights.[48] Meanwhile, the Deputy Chair of the CEC reportedly announced that Ukraine could not possibly execute a possible future judgment of the European Court of Human Rights in favour of Mr Vlasenko because Ukrainian legislation does not foresee a procedure for reinstatement.[49] I consider such a statement as unacceptable. If the Strasbourg Court were to find that the revocation of Mr Vlasenko's mandate violated the European Convention on Human Rights, Ukraine would have to execute this judgment, by ending the violation – which cannot be achieved in any other way than by reinstating him in the mandate he had received from the voters.[50] If it is necessary to change the law to execute the Court's judgment, so be it.

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43. See paragraphs 72-93 below.
44. See, for example, Danish Helsinki Committee: Legal Monitoring in Ukraine II, passim, providing a good overview of the charges against them and the procedural irregularities noted by the independent international trial observers.
45. See *Ukrainian Weekly*, 23 September 2012, p. 6: www.ukrweekly.com/archive/pdf3/2012/The_Ukrainian_Weekly_2012-39.pdf.
46. See statement by Mr Vlasenko (in Ukrainian) in tyzhden.ua: http://tyzhden.ua/News/61879.
47. See Public Statement of 7 March 2013: "PACE rapporteurs strongly criticise the revocation of the parliamentary mandate of Ukrainian opposition MP Serhiy Vlasenko":
www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8463.
48. See Interfax–Ukraine of 18 March 2013: "Yatseniuk: CEC should not register another lawmaker instead of Vlasenko until decision of Constitutional Court"; Interfax-Ukraine of 19 March 2013: "Ukrainian opposition party appeals to European Court over expelled MP's case."
49. See Ukrainian News/Ukraine of 19 March 2013, "CEC's Deputy Chairman Mahera: It Is Impossible To Reinstate Vlasenko If European Court Of Human Rights Rules In His Favor".

62. Additional information on pressure also against Hryhoriy Nemyria, another political ally of Yulia Tymoshenko, and Eugenia Tymoshenko, her daughter, was recently transmitted to the European Court of Human Rights.[51]

4.1.5. New charges against Yulia Tymoshenko

63. When the Ukrainian authorities began to realise that the original charge – the "gas case" – may turn out to be untenable in the international arena, new cases were launched against Yulia Tymoshenko and old cases reopened. They were first announced by senior officials in the media and are now making their way through the judicial system.

64. These new charges intend to take advantage of the fact that Ms Tymoshenko's rapid rise in the 1990s to the status of billionaire "gas princess" has left a somewhat "sulfurous" aftertaste in public opinion. Reportedly,[52] her association at the time with former Prime Minister Lasarenko, who has in the meantime been convicted in the United States of America of large-scale embezzlement and money laundering, enabled her to effectively exercise a stranglehold on Ukrainian gas supplies through United Energy Systems of Ukraine (UESU) acting as a privileged "intermediary". But she abandoned her business activities and entered politics in December 1996, when she was elected as a member of parliament. As from January 1997, she gave up her job as an executive director of the UESU and the company was dismantled less than two years later. Ms Tymoshenko's past as a business woman must be assessed in the context of the "Wild East" decade following the disintegration of the former Soviet Union. During this period, future "oligarchs" throughout the region succeeded in amassing vast riches by taking advantage of the legal vacuum arising from the collapse of the Soviet system. It is notable that among those oligarchs, only those who later turned against the new political elite who came to power after the initial phase of anarchy were singled out for prosecution. This is true, in my view, for Mikhail Khodorkovsky, in Russia, and also for Yulia Tymoshenko, who during her political career implemented economic reforms threatening the interests of Ukrainian oligarchs who were and still are in league with the current authorities. *Prima facie*, I consider charges brought selectively against Ms Tymoshenko by these same authorities after almost 20 years as suspect. They must be scrutinised with special care in light of European standards on the rule of law and human rights protection.

4.1.5.1. Murder charges (assassination of Yevhen Shcherban)

65. The charges concerning the murder, at Donetsk Airport on 3 November 1996, of Yevhen Shcherban, allege that Ms Tymoshenko commissioned the murder of this businessman and politician, through a company called Somolli, and a chain of additional intermediaries, which ultimately led to a Russian gangster named Vadim Bolotsky. Bolotsky was convicted in April 2003 by a court of carrying out the murder. He had testified that the killings were carried out by order of a gangster from the Donetsk region, Yevhen Kushnir. Kushnir had fled Ukraine after the murder of Shcherban. Upon his return two years later, he was shot in his car near Donetsk. He survived, only to be arrested on extortion charges, and died in the Donetsk pretrial detention centre, allegedly from an allergic reaction to medication.

66. In September 2012, Mr Vlasenko somewhat provocatively called for the interrogation, concerning the Shcherban murder, of current Prosecutor General Pshonka, who at the time of Mr Kushnir's death in pretrial detention was the Donetsk oblast prosecutor, and of current President Yanukovich, who according to him took over all the political power belonging to Mr Shcherban in the Donetsk region. Mr Vlasenko also wondered why it was never investigated how the killers of Mr Shcherban, dressed as airport staff, were able to freely approach the airplane and flee the scene of the crime in a car driven by a man wearing a police uniform.

67. The allegations concerning the Shcherban murder now launched against Ms Tymoshenko are essentially based on hearsay by long-deceased criminals transmitted by another notorious gangster. The testimony presented so far seems to violate all the normal evidentiary rules, despite the fact that the Ukrainian code of criminal procedure had recently been amended to admit hearsay evidence in limited circumstances. Reportedly, a witness heard at a court sitting on 14 February 2013 – in the absence of the accused, Ms Tymoshenko, despite her requests to be allowed to participate –[53] based his testimony solely on hearsay,

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50. Similarly, in the case of *Volkov v. Ukraine* (footnote 16 above), the Court made it clear in its judgment that Mr Volkov, the Supreme Court judge who had been fired in violation of the Convention, must be reinstated in his functions.
51. See web item at www.tymoshenko.ua/en/article/yulia_tymoshenko_11_03_2013_01.
52. See, for example, James Meek, "The millionaire revolutionary"; *The Guardian*, 26 November 2004.
53. She strongly contested the veracity of a statement submitted by the penitentiary service, according to which she had refused to participate in the court sitting. Strangely, during the same sitting, the court imposed a fine on her for "disruptive behaviour" on the basis of Article 330 of the Code of Criminal Procedure, which allows for sanctioning disruptive behaviour during a court sitting.

obtained from persons killed 10 to 12 years earlier. Also, the testimony reportedly differed from that given by the same witness between 1999 and 2002 and during an interrogation conducted between 4 and 7 May 2012. The lack of credibility of this testimony was widely exposed in the Ukrainian media, which reported that the (dead) witness claims to have remembered what perfume Ms Tymoshenko had worn at the time in question – almost 20 years ago – and which luxury brand of clothes she had worn. The point: the brand in question (Louis Vuitton) only put women's clothes on the market years after the "witness" claimed to have seen Ms Tymoshenko wearing them. Other prosecution witnesses also seem to rely mainly on hearsay. There are also serious doubts as to their credibility as they may have testified under pressure from the authorities in various forms. It is also hard to understand why the prosecution insisted on hearing all witnesses in open hearings already during the pretrial stage. The new Code of Criminal Procedure allows this only exceptionally when there is a risk that the witness may not be able to appear in court during the trial. But the prosecution did not provide any reasons for hearing the pretrial testimony in open court. Its main purpose seems to have been to smear Ms Tymoshenko in public.

4.1.5.2. New charges for attempted embezzlement by the UESU

68. The second set of new charges against Ms Tymoshenko for attempted embezzlement by the UESU are based on a State guarantee allegedly obtained by the UESU with the help of then Prime Minister Lasarenko in late 1996 in order to help the UESU obtain a contract for Russian gas deliveries for the year 1997. The alleged crime consists in an attempt to embezzle State property by unlawful reimbursement by the State budget of the UESU's debt vis-à-vis Russia.[54] The strongly disputed question whether a valid guarantee was ever given should be moot, because the prosecution for these acts should be barred by the statute of limitations.[55] The limitation period applicable at the time of the alleged criminal actions was 10 years, which seems to be undisputed. Under Ukrainian law, the clock begins to run anew (even for the old crime) when the suspect commits a new serious crime.[56] The validity of this rule under European standards seems to be at least doubtful, given the strong value attached to legal certainty in the Convention. But the alleged facts would be prescribed even if one were to consider the internationally discredited "gas contract case" relating to events in 2009 as a new, serious crime capable of restarting the clock under the doubtful rule described above. The alleged guarantee was in fact obtained in 1996, but it concerned only the payment of gas deliveries in 1997 and was limited in time from 1 January 1997 to 31 January 1998.[57] In order to justify that the *actus reus* of the (attempted) embezzlement was nevertheless after 1999, the prosecution argues that the crime was attempted only when the UESU (which, we should not forget, Ms Tymoshenko had left at the end of 1996[58]) ceased payments in 2000. This is really quite far-fetched by normal standards of interpretation of criminal law.[59] But as it is the view of the prosecution, and the courts have a conviction rate approaching 100%, the outcome is unfortunately rather predictable.

4.1.5.3. Reopening of tax fraud and money laundering cases closed in 2005

69. Similarly, the reopening of old charges for tax fraud levelled against Ms Tymoshenko does not convince me: these charges relate to value added tax fraud allegedly committed by the UESU between 1997 and 1999. At that time, Ms Tymoshenko no longer worked for this company. This fact is not even disputed by the prosecution, which is reduced to alleging that Ms Tymoshenko had given "oral instructions" to the UESU's accountants pushing them to commit such a fraud – but without offering any evidence for this assertion. Lack of evidence was in fact cited as the reason for the closure of the same investigation in 2005, which was at the time confirmed by the Ukrainian Supreme Court after several years of litigation in the lower courts.[60] Whilst the *ne bis in idem* rule[61] directly applies only to new prosecutions after a conviction or an acquittal by a court, the principles of legal certainty and non-discrimination as well as Article 18 of the Convention require in my

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54. The embezzlement was only attempted (also in the view of the prosecution), because Russia never actually demanded payment on the basis of the alleged "guarantee", but only assistance in collecting the debt from the UESU, see Danish Helsinki Committee, Legal Monitoring in Ukraine III, pp. 7 and 8.
55. Ibid., pp. 9-10.
56. Article 48 of the 1960 Criminal Code foresees that the duration of the limitation periods shall be interrupted if before they lapsed a person commits a new crime for which the law provides of punishment of more than two years of imprisonment. Then the limitation period (for the earlier crime) starts to run again from the commission of the new crime.
57. Source ("opening letter" of the SBU, which had prepared the indictment) and more detailed information in: Danish Helsinki Committee, Legal Monitoring of Ukraine III, pp. 8-10.
58. See paragraph 69 below.
59. Mikael Lyngbo, the Head of the Danish Helsinki Committee's "Legal Monitoring in Ukraine project" (a former senior prosecutor and police chief) has come to the same conclusion (see Legal Monitoring in Ukraine III, pp. 9-10).
60. Ibid., Legal Monitoring in Ukraine III, p. 12
61. Article 4 of Protocol No. 7 to the Convention.

view that a case closed by the prosecution for lack of evidence can only be reopened for a legitimate purpose, for example new evidence, and not as part of a politically motivated campaign. The reopening of this case after another eight years, without there being any new facts, in the well-known political context, smacks of abuse.[62] Also, according to an analysis by the Danish Helsinki Committee monitors, these charges, too, are time-barred, even if one were to accept that the 2009 "gas contract case" is another serious crime capable of re-starting the clock of the statute of limitations.[63]

4.1.6. Conclusion: Yulia Tymoshenko as a presumed political prisoner under Assembly Resolution 1900 (2012)

70. The analysis of key issues as presented above, in light of the criteria for the definition of political prisoners in Resolution 1900 (2012), leads to a fairly compelling result, namely that Ms Tymoshenko must be recognised as a presumed political prisoner:

1) Ms Tymoshenko is a key opposition leader and main rival of the current President. She was sentenced to a particularly harsh seven-year prison term on the basis of vague abuse-of-office charges.

2) These charges effectively criminalised the political decision she had taken as Prime Minister in favour of an agreement with Russia to end an acute crisis threatening the provision of gas to Ukraine and other European countries.

3) The prosecution and trial were marred by numerous presumptive procedural violations.

4) Ms Tymoshenko was also put under intense physical and psychological pressure, both during pretrial detention and in post-conviction custody. Her family, lawyers and political allies, in particular Mr Vlasenko, have also suffered from a co-ordinated campaign of harassment and persecution by the authorities.

5) The legally and factually dubious nature of the new charges brought against her further underpins their political motivation.

4.2. The case of former Ukrainian Interior Minister Yuri Lutsenko[64]

4.2.1. The political context of the prosecution of Mr Lutsenko

71. Mr Lutsenko is also a popular opposition leader. He was a leading member of the Ukrainian Socialist Party between 1991 and 2006. In 2006, he founded the "People's Self Defence Party", which became part of the "Our Ukraine – People's Union" bloc. This grouping came in third at the elections in 2007 and formed a parliamentary majority together with Yulia Tymoshenko's party. Mr Lutsenko's political action as a reformist Minister of the Interior (2005-2006 and again 2007-2010, under Prime Minister Yulia Tymoshenko), has earned him the respect of the progressive forces in Ukraine and of the international community. I should like to stress, in particular, his excellent co-operation with the Assembly's rapporteur who investigated the emblematic murder of the journalist Georgiy Gongadze, Ms Sabine Leutheusser-Schnarrenberger (Germany, ALDE), which contributed to the dismantling of a death squad in the Interior Ministry and ultimately to the conviction for murder of its members and ringleaders.[65] In the long and intensive conversation which I had with him in prison during my fact-finding visit in February 2013, Mr Lutsenko impressed me by his charisma, sincerity and sense of humour, and by his keen patriotism, even against his own personal interests.[66] He does not ask for mercy – i.e. to be "pardoned" – but for justice. I cannot help thinking that Ukraine can simply not afford to keep such a man behind bars – he should be free to contribute to making his country a better place.

72. Obviously, Mr Lutsenko has also made dangerous enemies by his political action as Interior Minister. In addition to investigating criminal activities of persons well connected to the current authorities, he had reportedly "crossed a line" in a live television talk show shortly after he was ousted from his ministerial post.

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62. This is also the view of Mikael Lyngbo (see Legal Monitoring in Ukraine III, p. 13).
63. Ibid., p. 9
64. I have decided to maintain the case study in the report despite the pardon granted to Mr Lutsenko on 8 April 2013. The purpose of the case study is to provide an illustration of the principles developed above. Also, Mr Lutsenko has never asked for a pardon, but is pursuing his full rehabilitation.
65. This issue will be covered in more detail in the report currently under preparation by our colleague Marieluise Beck (Germany, ALDE).
66. He argued in favour of the European Union signing the association agreement with the European Union unconditionally, dropping his prior release from prison as a precondition.

He was apparently provoked by a talk show host reputed to be close to Mr Yanukovich, who asked him whether his son, who had briefly been arrested in a state of inebriation, had "inherited" his father's alcohol problem. Mr Lutsenko retaliated that his own son's transgression was harmless against that of Mr Yanukovich's son, who had been dealing in drugs, as he had learnt as Interior Minister. Many in Kiev consider this public incident as a "trigger" for Mr Lutsenko's subsequent judicial tribulations.

4.2.2. The judgment of the European Court of Human Rights

73. The European Court of Human Rights recently found that Mr Lutsenko's arrest and detention had violated Article 18 of the Convention, that is to say it pursued another purpose than that for which arrest and detention are prescribed by law.[67] Such a finding, which, when related to arrest and detention of a political figure, is akin to a finding of politically motivated abuse of the criminal justice system, is extremely rare, since the Strasbourg Court has set a very high threshold of evidence in its judgment on the first application lodged by Mikhail Khodorkovsky.[68]

74. The fact that this violation was found in Mr Lutsenko's case sends a very strong signal to the Ukrainian authorities. I pointed this out in my meeting with the Minister of Justice, in the presence of the Ukrainian government agent before the Court, who is also responsible for overseeing the execution of the Court's judgments against his country. The execution of this judgment cannot be limited to paying out the symbolic compensation fixed by the Court for non-pecuniary damage. Mr Lutsenko, whose arrest and detention were found to be in violation of the Convention, must in fact be released without further delay, and appropriate general measures should be taken in addition to ensure that the judicial machinery can no longer be abused for political purposes in such a way.

4.2.3. The charges against M. Lutsenko

75. The law enforcement bodies set up a special task force, including 14 investigators for serious crimes, in order to find grounds to prosecute him. It is very much to Mr Lutsenko's credit that all these 14 investigators were able to come up with are the following three petty charges:

1) not having cancelled the traditional National Police Day celebration, thus purportedly misappropriating the funds paid to another State body for the rent of the venue of the Ministry's reception on this occasion;

2) not having prevented the Ministry's personnel administration from recruiting his driver at a policeman's pay-grade, in line with the usual practice in this Ministry, and from helping the driver obtain the use of a service flat in Kiev;

3) having allegedly signed an executive order while officially on leave.

Even if these charges had been proven in a fair trial – which I believe they were not – they could not have justified any prison sentence, let alone four years.

76. Once again, these charges were based on the wide and unclearly worded "abuse of office" provisions in the Ukrainian criminal code, which violate the "guiding principles" on separating political and criminal responsibility developed above.[69]

77. And once again, these charges criminalise long-standing practices, for which neither Mr Lutsenko's predecessors nor his successor were ever prosecuted. In this respect, the term of "selective justice" would be appropriate if the deeds in question could at all be seen as criminal.

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67. *Lutsenko v. Ukraine*, Application No. 6492/11, judgment of 3 July 2012.
68. Application No. 5829/04, judgment of 31 May 2011; in this judgment concerning only the first conviction of Mr Khodorkovsky for tax evasion, the Court considered that there was insufficient evidence for a finding of a violation of Article 18. The second application, including the conviction for theft of the same gas which in the first judgment he had been held not to have paid sufficient taxes on, is still pending. In my view, the political motivation for the second prosecution is even clearer than for the first. But this will be for the Court to determine in due course.
69. See, in particular, paragraphs 35-37.

4.2.3.1. Non-cancellation of a National Police Day celebration

78. Regarding the non-cancellation of the National Police Day celebration, it is more than doubtful that Prime Minister Yulia Tymoshenko's general instruction to all her ministers to ban "unplanned celebrations" was even intended to nullify the Presidential Decree on the basis of which the National Police Day was celebrated. In any case, such a general instruction from the Prime Minister could not override the specific Presidential decree.

79. Interestingly, the Prime Minister attended the reception purportedly contravening her instructions, and so did, as Mr Lutsenko clearly recalls, the Minister of Justice and 11 other ministers as well as the Prosecutor General and his first deputy.[70] The top prosecutors also attended the subsequent reception at a restaurant, which Mr Lutsenko paid for out of his own pocket.

80. Mr Lutsenko was quite emotional about the fact that whilst he could not offer "his" policemen a decent salary, he found that they deserved at least some recognition and honouring, once a year. On this occasion, he had for example awarded medals to the widows of the 16 policemen killed in office during the previous year. In his view, the only reason for this charge to be launched at all was the perceived need to demonstrate a high amount of "damage" caused to the State, in order to justify a prison sentence. Ironically, the rent of 600 000 Hryvnias (about 56 000 euros) paid for the venue of the celebration was paid by the Interior Ministry to the Ukrainian Presidential Administration, which owns the building in question. The funds were thus paid by one public, budget-funded purse into another.

4.2.3.2. Favourable treatment of the minister's driver

81. The second charge at first sight seems more justifiable as it smacks of favouritism or nepotism. But upon closer inspection, it is equally unfair in that the former minister is held criminally responsible for administrative acts performed by the competent departments of his ministry in which he did not intervene at all, and which correspond to the long-standing practice of this department vis-à-vis the personal drivers of ministers.

82. It is generally accepted in Ukraine that the driver of a person holding the exposed position of Minister of the Interior must enjoy the minister's trust and is therefore chosen by him or her personally. As the driver is aware of the minister's whereabouts and overhears conversations in the car, he must also be security-vetted and bound to official secrecy. This is the reason why, in line with the practice followed previously and subsequently,[71] the minister's driver was recruited not at the pay-grade of an (ordinary) driver, but at the slightly higher grade of a policeman. This was not based on an instruction given by the minister, but done automatically by the administrative division in charge of personnel matters. According to Mr Lutsenko, this was confirmed during the trial by the ministry's head of human resources.

83. Similarly, drivers and other low-grade employees of the Ministry recruited from outside of Kiev are generally granted the use of service flats, as they cannot afford to pay Kiev market rents. Mr Lutsenko's driver was granted the same advantage: the temporary use (not ownership) of a small apartment in a building whose construction had been funded by the Ministry, whilst it was administered by the municipality. Again, the minister had never been a member of the committee allocating these apartments, nor had he given any instructions to the Ministry's representative on this committee. The allocation of the service flat followed the normal procedure.

4.2.3.3. Illegal executive order given whilst on leave

84. The third charge appears to be particularly bizarre: whilst the actual content of the order given by the minister was not in dispute, he was apparently prosecuted for allegedly signing it while he was officially on leave. In fact, according to the defence, the date appearing on the written order had been visibly manipulated. Mr Lutsenko said that he could not possibly have signed the order on that date because he was away from Ukraine on that day, in the United Kingdom.

85. I must say that I find it most unusual to even attempt to criminalise the fact of working whilst on leave. As far as I am concerned, I am doing this quite a lot, and I would be in great difficulties with my voters if I did not!

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70. When I asked the Minister of Justice for confirmation, he neither confirmed nor denied this. I had intended to ask the present Minister of the Interior about the way the Police Day is currently celebrated, but he cancelled the appointment shortly before the meeting was to take place.
71. The nominal job classification of the driver of Mr Lutsenko's successor was reportedly later changed, but the pay grade remained the same.

4.2.4. Procedural violations

86. I do not intend to repeat the findings of the European Court of Human Rights in this respect, regarding in particular the abusive arrest and detention during the trial, imposed basically as a sanction for not having admitted his guilt right away.

87. Mr Lutsenko pointed out during our meeting that of about 150 witnesses named by the prosecution, the court had heard 48, 47 of whom in fact testified in his favour. As to the others, the court did not hear them but simply used the testimony they had given before the prosecutor. This would be a clear fair-trial violation (principle of the immediacy of the evidence-taking). Later, 8 or 10[72] of those not heard in the courtroom retracted their testimony, stating that they had been pressured. According to Mr Lutsenko, many others would not have dared to lie to his face in the courtroom, had they been called to testify before the court. According to Mr Lutsenko, the court also refused to hear any of the 15 to 17 witnesses named by the defence.

88. Also, his defence attorney, Mr Moskal, was excluded from the trial because the prosecution claimed that they wanted to hear him as a witness. They never did so, but they did succeed in eliminating him as Mr Lutsenko's lawyer.

89. The impartiality and independence of judge Serhiy Vovk, who heard Mr Lutsenko's case, is put into doubt by the fact that during Mr Lutsenko's term of office, the Ministry of Interior had initiated a criminal investigation against Mr Vovk.[73] Whilst the case was reportedly closed in February 2010, Mr Vovk might still have been at risk of the case being reopened by the prosecution. These circumstances, as well as the particularly obvious procedural violations in this case, raise serious doubts both about the impartiality and the independence of the court which heard Mr Lutsenko's case, as does the particularly harsh, disproportionate sentence pronounced against him.

4.2.5. Physical and psychological pressure

90. Mr Lutsenko did not complain much about his health during our meeting. He even joked that the frugal prison food and total absence of alcohol from his diet might even help his liver. But I could not help noticing that he was quite worried about his health – he had after all been diagnosed with early stages of liver cirrhosis and had undergone surgery since his arrest for ulcers and cysts in his intestines. He was only informed belatedly about some of the diseases he was diagnosed with, and is visibly worried that his state of health may be more fragile than would appear.

91. The authorities missed an excellent chance to release Mr Lutsenko without losing face, on medical grounds, when the appeals instance refused such a release in February 2013, arguing that only the final (lethal) stages of liver cirrhosis appear in the list of grounds for early release on medical grounds.

4.2.6. Conclusion: Yuri Lutsenko as a former[74] presumed political prisoner

92. The analysis of key issues as presented above, in light of the criteria for the definition of political prisoners in Assembly Resolution 1900 (2012), leads to an equally compelling result as in the case of Ms Tymoshenko, namely that Mr Lutsenko must be recognised as a presumed political prisoner:

1) Mr Lutsenko is also a popular opposition leader and key ally of Ms Tymoshenko. The European Court of Human Rights recently found that his arrest and detention had violated Article 18 of the Convention, namely that it pursued another purpose than that for which arrest and detention are prescribed by law.

2) The special task force set up to investigate Mr Lutsenko's action as Interior Minister came up with three petty charges aimed at criminalising long-standing practices for which neither Mr Lutsenko's predecessor nor his successor were prosecuted.

3) These charges could not justify a custodial sentence even if they had been proven in a fair trial, which Mr Lutsenko was in fact denied.

4) Overly zealous and selective prosecution, the abuse of pretrial detention and a disproportionate sentence indicate the existence of political motivation with respect to his case.

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72. During our conversation, Mr Lutsenko did not remember the exact number.
73. For forging a court ruling and fraudulent appropriation of land.
74. See footnote 64 above.

5. The case of former Icelandic Prime Minister Geir Haarde

93. As I had already indicated in my information memorandum on the situation in Iceland,[75] the case of Mr Geir Haarde cannot, in all fairness, be compared with those of Ms Tymoshenko and Mr Lutsenko. There can be no question of him being a "presumed political prisoner" – he was never even arrested, and he was acquitted of the main charge pertaining to his political decision-making, namely the alleged "failure to act" in order to prevent the Icelandic banking crisis.

94. That said, the fact of Mr Haarde's selective prosecution, which was decided along party-political lines by a new parliamentary majority, the over-zealousness of the special prosecutor pinning him down for a formal violation which, in addition, corresponded to a long-standing practice dating back to before the independence of Iceland, and several other issues, which I have described in more detail in the above-mentioned information memorandum[76] do make this case a violation, in my opinion, of the "guiding principles" on keeping political and criminal responsibility separate, as developed above in section 3.

75. See footnote 6 above.
76. See, in particular, paragraphs 24-34.

Appendix – Dissenting opinion by Ms Þuríður Backman (Iceland, UEL), member of the committee and Chairperson of the Icelandic Delegation to the Parliamentary Assembly of the Council of Europe[77]

The Court of Impeachment, the Landsdómur, originally established in 1905, acts in accordance with the Law on Landsdómur, No. 3/1963, with later amendments. Its mandate is to handle cases where members of the Cabinet of Iceland are suspected of criminal behavior. According to Article 2 of the law, the Court has 15 members – the five longest serving Supreme Court Justices, the President of the District Court of Reykjavík, a Professor of Constitutional Law at the University of Iceland and eight people elected by Parliament every six years.

The Court of Impeachment assembled for the first time in 2011 to prosecute former Prime Minister Geir H. Haarde for alleged gross misconduct in the events leading up to the 2008 financial crisis in Iceland. The Althingi decided on 28 September 2010, by 33 votes against 30, to charge Mr Haarde. The case before the Court was subsequently tried, with the result that Mr Haarde was found guilty of not placing the imminent banking crisis on the agenda of the Cabinet of Ministers. However, Mr Haarde was not sentenced to any fine and was awarded the reimbursement of his legal defense costs.

The Althingi's arguments for the prosecution of Mr Haarde were as follows:

– For having grossly neglected his duties as Prime Minister opposite a great threat facing Icelandic financial institutions and the State treasury, a threat he was or should have been aware of and could have responded to by promoting action or legislation, issuing general government orders, or by taking administrative decisions on the basis of existing laws to prevent the foreseeable danger to the well-being of the State.

– For not having taken the initiative, either with his own action or by proposing action to other ministers, to have the administrative system produce a comprehensive and professional analysis of the financial risk the State faced on account of the threat of a financial crisis.

– For having neglected to initiate effective government action to diminish the size of the Icelandic banking system, for example by promoting that the banks reduce their balance sheet or that some of them move their headquarters out of the country.

– For not having followed up on and made sure that the Landsbanki was working effectively on transferring its "Icesave" accounts in Britain to the bank's subsidiary, and then sought ways to promote the process with active government involvement.

– For having neglected to ensure that the work and emphasis of the government's Consultative Group on Financial Stability and Preparedness, established in 2006, was purposeful and returned intended results.

– For not having, from February until October 2008, fulfilled the duty of holding ministerial meetings on important State matters, as provided in Article 17 of the Icelandic Constitution. During the time period in question the imminent threat was not much discussed at ministerial meetings, it was not discussed formally and no records on the issue documented. There was however every reason to, especially following the former Prime Minister's meeting with the former Deputy Prime Minister, the former Minister of Finance, and the former Chairman of the Board of the Central Bank of Iceland on 7 February 2008, following his meeting with the Deputy Prime Minister and the board of the Central Bank on 1 April, 2008, and in the wake of the issuing of a declaration to Swedish, Danish and Norwegian Central Banks, signed on 15 May 2008. The former Prime Minister did not initiate a formal ministerial meeting on the situation nor give the government a special report on the problem the banks were facing or its possible impact on the Icelandic State.

The following marks the basic legal basis for the procedural part of the Althingi's decision to impeach Mr Haarde:

– According to Article 14 of the Icelandic Constitution ministers are accountable for all executive acts. The accountability of ministers is established by law. The Althingi may impeach ministers on account of their official acts. The Court of Impeachment has competence in such cases.

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77. In accordance with Rule 49.4 of the Assembly's Rules of Procedure ("The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote").

– Criminal accountability of ministers is governed by the Act on Ministerial Accountability, No. 4/1963. The procedure is governed by the Act on the Court of Impeachment, No. 3/1963. Both Acts are a product of a law revision replacing older laws which originated in 1904 and 1905, and have been amended a few times over the years to meet the demands of modern times. The Acts are based on a Danish model and basically include the same rules as the Danish *Lov om ministres ansvarlighed*, No. 117/1964, and the *Lov om rigsretten*, No. 100/1954.

– Even though the Acts had been inactive (in the sense that they had not been applied) at the date of Mr Haarde's impeachment, they had all the same been in force, with Icelandic legal scholars concluding they are and have been "alive". In this regard, judges have for example been appointed regularly to the Court of Impeachment.

– Iceland ratified the European Convention on Human rights in 1953. At that time Icelandic legal scholars assumed the rights of the Convention were already guaranteed by Icelandic law. In 1994 the Convention and amendments to it were passed as Icelandic law. A year later the human rights chapter of the Icelandic Constitution was reviewed to ensure that its content was in line with the obligations Iceland had undertaken in the Human Rights field. For a long time Icelandic courts have interpreted Icelandic law in line with the country's international human rights obligations.

– According to Article 69 of the Icelandic Constitution no one shall be subjected to punishment unless found guilty of conduct that constitutes a criminal offence according to the law at the time when it was committed. The article corresponds to Art. 7 of the European Convention on Human Rights.

– According to Article 51 of the Act on the Court of Impeachment, provisions from the Act on Criminal Procedure, No. 88/2008, shall prevail as appropriate regarding the procedure of a case by the Court of Impeachment.

– According to Article 142 of the Act on Criminal Procedure every punishable act leads to indictment. This rule has been called the indictment rule and is an integral part of the indictment procedure. When deciding whether a person should be indicted the rule places an obligation on a prosecutor to indict if he considers the odds are for a guilty verdict according to Art. 145 of the aforementioned Act.

There are also some key points worth noting with regard to Mr Omtzigt's information memorandum:

– In Mr Omtzigt's information memorandum, the Parliamentary Review Committee on the SIC Report (PRC) is said to have decided to initiate prosecutions against the three former ministers the SIC had found negligent. That is not entirely accurate. The PRC had 9 members. Five of them (a majority) suggested that the Althingi should impeach four former ministers, among them the Minister for Banking and the Minister for Foreign Affairs, which the SIC had not considered negligent. Two suggested that the Althingi should impeach three former ministers, the Minister for Banking excluded. Two did not make any suggestions at all. The voting was however conducted in a way that made it possible to impeach any number of ministers, from none to four.

– Mr Omtzigt raises concern with regard to the Althingi relying solely on an enquiry carried out by the SIC. That is not entirely accurate. The PRC conducted its own inquiry although it did not have the mandate to launch a full criminal investigation. It collected raw data from the administrative level and gave the ministers an opportunity to react to its basic findings. The ministers' views can be found in an annex to the PRC's opinion to the Althingi.

– The party-political lines Mr Omtzigt refers to were not as clear as he presents them to be. The Progressive Party, in opposition, and the Social Democratic Alliance, in government, were for instance divided on the issue.

– Although Mr Omtzigt finds it questionable that a majority of the judges of the Court of Impeachment had been elected by the Althingi, he fails to mention that the Court's resolutions were very professional. Even though the Court gave three separate resolutions, the dividing lines were not between those judges elected by the Althingi and the others. The Althingi had furthermore elected the judges before the investigation on Mr Haarde began.

– In Mr Omtzigt's Information Memorandum he seems to find it odd that a former minister was prosecuted for a minor violation of a formal requirement which his predecessors had also violated without being punished. Rules on equality have not secured anyone anytime a right to commit criminal acts. It is also at best highly debatable to talk about a formal requirement and mention in the same sentence "a minor violation". The purpose of the constitutional duty to hold ministerial meetings to discuss important State matters is to keep all ministers informed of matters which could lead to actions on their part. In the SIC

report it is for instance strongly indicated that vital information had been withheld from the Minister of Banking. When informed of the situation, he had proposed actions, although we can perhaps say that he was not as decisive as he could have been.

– In Mr Omtzigt's Information Memorandum we can find an analogy with a football match. Mr Omtzigt says that as with footballers playing their game on the football field "criminal responsibility comes only into play if and when the politician's acts or omissions fall clearly outside the perimeter of normal political decision-making". But that is exactly what you will find in the Icelandic Act on Ministerial Accountability, a standard or a scale to weigh whether a minister has gone too far or not done what could be expected of a professional politician in his situation. The law sets the standard that ministers must apply to. If they do not and the result is damage to public interests that could have been minimized then the politician's acts or omissions fall clearly outside the perimeter of normal political decision-making. It should also be noted that when a footballer's effort on the field is lacking, or the player seems preoccupied in a way that could negatively affect the team's performance, the team's coach can always replace him. This possibility is simply not at hand in politics. A minister has both political and administrative duties – he is not simply a player. Given that the opportunity to replace a minister in the middle of the game is lacking, the Act on Ministerial Accountability provides for a different kind of pressure, – the possibility of impeachment for actions or omissions which unnecessarily endanger a nation's well-being.

– It should also be noted that in Mr Omtzigt's report he indicates that Mr Haarde had been impeached for the failure to avoid the banking crisis (paragraph 20). That is simply not true. Mr Haarde was impeached for neglecting to take actions that could have lowered the level of damage to Icelandic interests. No one has maintained that it was in Mr Haarde's powers to prevent the banking crisis.

– In his capacity as an economist, Mr Omtzigt concludes that maybe Mr Haarde's actions or lack of actions did not result in grave consequences after all. In that context a quote from Professor of Economics Ásgeir Jónsson's book "Why Iceland" may be in order: "As it turned out, doing nothing in the face of danger was the most reckless behaviour imaginable."[78]

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78. Ásgeir Jónsson, "Why Iceland?", p. 148.