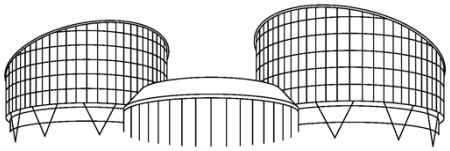

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MERABISHVILI v. GEORGIA

(Application no. 72508/13)

JUDGMENT

STRASBOURG

28 November 2017

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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In the case of Merabishvili v. Georgia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Robert Spano,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos,
Faris Vehabović
Ksenija Turković,
Jon Fridrik Kjølbro,
Yonko Grozev,
Georges Ravarani,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Lətif Hüseynov, *judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 8 March and 20 September 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 72508/13) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Ivane Merabishvili ("the applicant"), on 20 November 2013.

2. The applicant alleged that his arrest and pre-trial detention between 21 May 2013 and 17 February 2014 had been unlawful and unjustified, that on 25 September 2013 he had not obtained a proper judicial review of his detention, and that the restriction of his right to liberty had been applied for purposes other than those for which it had been prescribed.

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 24 May 2016 a Chamber of that Section, composed of the following judges: András Sajó, President, Vincent A. De Gaetano, Boštjan M. Zupančič, Nona Tsotsoria, Paulo Pinto de Albuquerque, Egidijus Kūris and Iulia Motoc, and also of Marialena

Tsirli, Section Registrar, declared the application admissible. In its judgment, delivered on 14 June 2016, the Chamber found that there had been no breach of Article 5 § 1 of the Convention and no breach of Article 5 § 3 of the Convention with respect to the initial decision to place the applicant in pre-trial detention, but a breach of Article 5 § 3 on account of the lack of any reasons for a decision of 25 September 2013 rejecting a request for release by the applicant. The Chamber found that there was no need to examine the complaint under Article 5 § 4 of the Convention. Lastly, it found a breach of Article 18 taken in conjunction with Article 5 § 1 of the Convention.

4. On 14 September 2016 the Georgian Government ("the Government") requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. On 17 October 2016 a panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. At the final deliberations, Faris Vehabović, first substitute judge, replaced Helena Jäderblom, who was unable to take part in the further consideration of the case (Rule 24 § 3).

6. The applicant and the Government both filed further written observations (Rule 59 § 1 read in conjunction with Rule 71 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 March 2017 (Rule 59 § 3 read in conjunction with Rule 71 § 1).

There appeared before the Court:

(a) *for the Government*

Mr A. BARAMIDZE, *First Deputy Minister of Justice*, *Counsel*,
Mr B. DZAMASHVILI, *Agent*,
Ms M. BILIKHODZE, *Head of Litigation Unit*,
Department of State Representation to International Courts, Ministry of Justice,
Ms N. TCHANTURIDZE, *Legal Adviser of Litigation Unit*,
Department of State Representation to International Courts, Ministry of Justice,
Mr R. BAGASHVILI, *Deputy Head of Investigation Unit*,
Chief Public Prosecutor's Office,
Ms E. BERADZE, *Head of Department of International Relations and European Integration*,
Ministry of Prisons, *Advisers*;

(b) *for the applicant*
Mr P. LEACH,
Ms J. SAWYER, *Counsel*,
Mr O. KAKHIDZE,
Mr D. KAKOISHVILI,
Ms A. KHOJELANI, *Advisers*.

The Court heard addresses by Ms Sawyer, Mr Leach and Mr Baramidze, and replies by Mr Leach and Mr Baramidze to questions put by a judge.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1968 and is now serving a sentence of imprisonment in Tbilisi.

A. Background

9. In 2003 the so-called "Rose Revolution" erupted in Georgia, after elections perceived as rigged. It consisted of twenty days of peaceful protests, and caused the then President, Mr Eduard Shevardnadze, former First Secretary of the Georgian Communist Party and former Soviet foreign minister, who had led Georgia since 1992, to resign. New presidential and parliamentary elections were held in 2004. They were won by the United National Movement ("UNM"), led by Mr Mikheil Saakashvili, one of the Rose Revolution's protagonists.

10. The applicant was an active participant in those events, a close collaborator of Mr Saakashvili, and a leading figure in UNM.

11. Until 1 October 2012, when UNM lost the parliamentary elections to the coalition Georgian Dream, led by Mr Bidzina Ivanishvili, the applicant was a member of the Georgian Government: from 2005 to 2012 he was Minister of Internal Affairs and then, from July to October 2012, Prime Minister.

12. On 15 October 2012, two weeks after the parliamentary elections, the applicant was elected Secretary General of UNM, which became the chief opposition party in Georgia.

13. Shortly after his term of office came to an end, after the presidential election on 27 October 2013, Mr Saakashvili, who had been President of Georgia since 2004, left the country.

B. The incident at Tbilisi Airport on 30 November 2012

14. Between 1 November 2012 and 21 May 2013, when he was arrested (see paragraph 26 below), the applicant had made five trips abroad, always returning as scheduled.

15. According to the Government, on 30 November 2012 the applicant had attempted to cross the border at Tbilisi Airport using a fake passport.

16. After checking the passport against the official electronic database, an officer of the Border Police spotted a discrepancy between the photograph in it, which matched the applicant's appearance, and the other data, including the name, Levan Maisuradze, which differed from the information about the applicant in the database. The officer returned the passport to the applicant's personal assistant, asking for clarification. The assistant then brought from the applicant's office another passport, issued in the applicant's real name and matching all his identification data. After a check of that passport's authenticity, the applicant was allowed to cross the border.

17. The same day the Border Police opened a criminal investigation into the incident. The head officer immediately went to Tbilisi Airport to interview the officer who had discovered the allegedly fake passport. According to evidence gathered in the course of the ensuing investigation, while he was at the airport the head of the Border Police received a call from the applicant on his mobile telephone. Relying on his status and long-standing personal connections within the Ministry of Internal Affairs, the applicant demanded that the incident not be investigated and that the border-police officer not be asked to give evidence in relation to the incident. According to statements later given to the investigating officers by the head of the Border Police, the applicant had threatened him personally and with regard to his career and used obscene language during their telephone conversation.

18. When interviewed on 1 and 7 December 2012 in relation to the incident, the applicant denied having presented a passport under the name of Levan Maisuradze, and said that he only had four passports, two ordinary ones and two diplomatic ones, all issued under his real name.

C. The criminal proceedings against the applicant in relation to the State Programme for Job Seekers and the house in the village of Kvariati

1. The initial phase of the proceedings

19. On 13 December 2012 the Prosecutor's Office of Western Georgia in Kutaisi opened criminal proceedings against the applicant and Mr Z.T., the Minister of Health, Labour and Social Affairs in his government (who immediately after the October 2012 elections had been appointed governor

of the Kakheti region), for alleged embezzlement and abuse of official authority, in relation to a "State programme for job seekers" put in place by the applicant's government between July and September 2012.

20. The same day the applicant and Mr Z.T. appeared before the prosecuting authorities and were interviewed as witnesses.

21. On 18 January 2013 the Prosecutor's Office of the Ajarian Autonomous Republic opened separate criminal proceedings against the applicant for alleged abuse of official authority in relation to a private house in Kvariati, a resort on Georgia's southern Black Sea coast.

22. On 13 February 2013 the applicant was examined as a witness in the context of those separate criminal proceedings.

23. On 20 May 2013 the two sets of proceedings were joined.

2. The applicant's arrest and placement in pre-trial detention

(a) The arrest

24. On 21 May 2013 the applicant and Mr Z.T. were summoned by the investigator attached to the Prosecutor's Office of Western Georgia in Kutaisi, which was dealing with the joined case, for an interview that day. The same day the applicant's wife left Georgia.

25. The applicant appeared for the interview, which took place from 12.25 p.m. to 3.05 p.m. on 21 May 2013.

26. Three-quarters of an hour after the interview, at 3.50 p.m., the investigator arrested the applicant under Article 171 § 2 (e) of the Code of Criminal Procedure (see paragraph 144 below). She noted that the arrest was being made because, faced with a reasonable suspicion of having committed an offence and a possible punishment, the applicant might try to flee. That risk was corroborated by his attempt to cross the border with a fake passport in 2012 (see paragraphs 15-18 above), as well as by his many trips abroad, which showed that he would have no difficulties getting out of Georgia. The investigator also noted that the applicant had held high office for many years, and was still an influential figure. There was hence a risk that he would obstruct the investigation.

27. Shortly before that, at 3.31 p.m., the investigator had also arrested Mr Z.T.

28. Later that day, at 9.50 p.m., the applicant was charged.

29. The first charge was that between July and September 2012 he had devised, and Mr Z.T. and the director of Georgia's Social Service Agency had implemented, a scheme creating fictitious public-sector jobs for 21,837 persons whereby they were unduly paid a total of 5,240,880 Georgian laris (GEL) (at that time equivalent to 2,421,953 euros (EUR)) of budgetary funds for carrying out campaign work for UNM in the run-up to the October 2012 elections. According to the authorities, the applicant had thereby bought votes contrary to Article 164[1] of the Criminal Code, misappropriated

property in large quantities, acting in an organised group and using his official position contrary to Article 182 §§ 2 (a) and (d) and 3 (b) of the Code, and abused his power as a public official holding a political post contrary to Article 332 § 2 of the Code.

30. The second charge was that after 2009 the applicant had systematically used the house in Kvariati, which belonged to a limited liability company under investigation by the Ministry of Internal Affairs, for family vacations, that in 2011 and 2012 he had had work costing GEL 131,884.60 done on that house with funds of the Ministry of Internal Affairs, and that he had caused GEL 25,784.70 to be spent on the salaries of staff servicing the house, thus depriving the State budget of a total of GEL 157,669.30 (at that time equivalent to EUR 73,216). According to the prosecuting authorities, the applicant had thereby infringed the inviolability of property by using an official position contrary to Article 160 § 3 (b) of the Criminal Code, misappropriated property in large quantities by using an official position contrary to Article 182 §§ 2 (d) and 3 (b), and abused his power as a public official holding a political post contrary to Article 332 § 2 of the Code.

31. In their observations, the Government set out the witness and other evidence on which those two sets of charges were based. Many of the witnesses whose statements related to the first set of charges were current or former officials of the Social Service Agency, of the Ministry of Health, Labour and Social Affairs, or of other ministries or government departments; some were UNM party officials. Many of the witnesses whose statements related to the second set of charges were former officials of the Ministry of Internal Affairs.

32. In the meantime, the prosecuting authorities searched the applicant's flat. They discovered and seized GEL 29,000 (at that time equivalent to EUR 13,812), 33,100 United States dollars and EUR 54,200 in cash.

(b) The placement in pre-trial detention

(i) Proceedings before the Kutaisi City Court

33. On 22 May 2013 the district prosecutor's office of Western Georgia asked the Kutaisi City Court to place the applicant in pre-trial detention. It described the offences with which the applicant was charged and cited the witness and other evidence supporting the charges. It also argued that there was a risk that the applicant would flee and a risk that he would obstruct the gathering of evidence, and that those risks could not be averted by a less restrictive measure.

34. In the prosecution's view, the risk of flight was borne out, firstly, by the applicant's having established, by dint of his having held high public office for several years, many contacts abroad and in Georgia, which would facilitate his departure from the country. Since 2009 he had crossed the

border more than sixty times. Secondly, the applicant's wife had left the country on 21 May 2013, immediately after the applicant had been served with the summons to appear for his interview with the investigator in Kutaisi. Thirdly, the search of the applicant's flat on 21 May 2013 had revealed large sums in cash. It was reasonable to suppose that the applicant had amassed that money in order to be able to leave the country. Fourthly, the applicant had a fake international passport that had been issued to him at the time when he had still been Minister of Internal Affairs. Lastly, the seriousness of the charges which the applicant was facing and the severity of the possible sentence also had to be taken into account.

35. The risk of obstructing the gathering of evidence was, for its part, borne out by the applicant's having held a number of high political posts and by his uncivil attempt to put pressure on the head of the Border Police during the incident on 30 November 2012 (see paragraph 17 above).

36. The prosecution requested that the applicant's co-accused, Mr Z.T., also be placed in pre-trial detention.

37. Counsel for the applicant opposed the prosecution's request. In their written submissions to the Kutaisi City Court they argued that since the applicant had been a member of the Government, by law only the Minister of Justice could institute criminal proceedings against him. Yet he had been arrested by an investigator from the district prosecutor's office of Western Georgia, and charged by a prosecutor from the same office. His arrest and the criminal proceedings against him were therefore unlawful. Moreover, his arrest had been in breach of Article 171 of the Code of Criminal Procedure (see paragraph 144 below). The alleged risk that he would flee was not supported by concrete evidence, and was belied by his repeated appearances before the investigating authorities and his public pledge that he would cooperate with them. Also, he had been out of Georgia many times and had not once tried to flee, including after the opening of the investigation. On the day of his arrest he had voluntarily appeared for questioning. There had therefore been no need to detain him without a judicial warrant. The alleged risk of his obstructing the investigation was also not specifically borne out. Moreover, the investigation had already lasted several months without any instances of his having interfered with it being reported. Counsel for the applicant also invited the court to take into account the applicant's achievements in combating crime and police reform during his time in office.

38. The Kutaisi City Court heard the prosecution's request at a public hearing held on the same day, 22 May 2013. Both parties made oral submissions.

39. After the hearing, the court decided to place the applicant in pre-trial detention, but to release Mr Z.T. on bail. It briefly noted that, according to the materials in the case file, there had been no serious procedural breaches in the applicant's arrest or the bringing of charges against him. In particular,

by law only acting, not former, members of the Government had to be prosecuted by the Minister of Justice rather than a regular prosecutor. The court went on to say that there was enough information to show that there was a reasonable suspicion against the applicant and Mr Z.T. The other pre-requisites for placing the applicant in pre-trial detention were also in place. A number of investigative steps were yet to be carried out, and as was apparent from the prosecution's request, there was a risk that the applicant would tamper with the evidence or put pressure on witnesses. That was borne out, in particular, by the applicant's having already tried to put pressure on a witness against him. Another factor which suggested such a risk was that the applicant had for many years held high public office and was still an influential figure in some circles of Georgian society, especially bearing in mind that the charges against him related to his time in office. Many witnesses were former subordinates of his or people under his professional or personal influence. The court also agreed with the prosecution that there was a risk that the applicant would flee. That was borne out, in particular, by his facing serious charges and the possibility of a severe sentence. Lastly, the court found that those two risks could not be averted by a less restrictive measure.

40. The court fixed the pre-trial conference hearing for 15 July 2013.

41. The applicant was remanded in custody in Prison no. 9 in Tbilisi.

(ii) Proceedings before the Kutaisi Court of Appeal

42. The applicant appealed to the Kutaisi Court of Appeal. He argued that on a proper reading of the relevant statutory provisions the Minister of Justice alone was competent to prosecute offences committed by anyone in their capacity as member of the Government, not only someone who was such a member at the time when the prosecution was being brought. He also argued that the Kutaisi City Court had erred by not examining in detail the lawfulness of his arrest. That arrest had been in breach of Article 171 of the Code of Criminal Procedure, in particular because on the day of the arrest he had voluntarily appeared for questioning. It was also hard to believe that the Kutaisi City Court, which had ruled on the prosecution's request just three or four hours after it had been made, had really studied the evidence said to give rise to a reasonable suspicion against the applicant. There were no facts or information in the case file to suggest that he had committed the offences. The lower court had also expected him to disprove the risks of flight and obstruction of justice alleged by the prosecution rather than require the prosecution to establish those risks. Its finding that the applicant had put pressure on a witness ran counter to the presumption of innocence. He had never called or threatened the head of the Border Police. The Kutaisi City Court had also disregarded the fact that in the months before his arrest he had voluntarily appeared for questioning several times. Neither that court nor the prosecution had pointed to evidence showing that he would flee

abroad. He had travelled out of Georgia many times since the investigation had been opened. The argument that his being an influential figure in some circles suggested that he could influence witnesses made it clear that he was a victim of political persecution. His character showed that there was not even a minimal risk of his fleeing, putting pressure on witnesses or destroying evidence.

43. On 25 May 2013 the Kutaisi Court of Appeal, having examined the appeal on the papers, declared it inadmissible. It noted that the Kutaisi City Court had reviewed the materials in the case and the evidence submitted to it, and had checked whether the gathering of that evidence and the bringing of the charges against the applicant had complied with the Code of Criminal Procedure. When deciding to place the applicant in pre-trial detention, that court had taken into account his personality and the risk of his obstructing the proceedings. Since that court had already dealt with all the points raised in the appeal, as well as with all the important points concerning the lawfulness of the applicant's detention, there was no reason to entertain the appeal.

3. The two adjournments of the pre-trial conference hearing

44. On 2 July 2013 the prosecution, citing the need for additional investigative steps, asked the Kutaisi City Court to adjourn the pre-trial conference hearing until 11 September 2013. On 5 July 2013 the court partly allowed the request, adjourning the conference until 23 August 2013.

45. On 12 August 2013 the applicant, citing the volume of materials in the case file and the need for more time to prepare his defence, sought a further adjournment of the pre-trial conference. The prosecution objected, stating that the applicant was trying to protract the proceedings and leave less time for the examination of the case on the merits. On 14 August 2013 the Kutaisi City Court allowed the request in full and scheduled the pre-trial conference for 12 September 2013.

4. The applicant's request for release during the pre-trial conference hearing

46. The pre-trial conference hearing took place on 12, 19 and 25 September 2013.

47. At the session on 25 September 2013 the applicant requested to be released from pre-trial detention. He pointed out that he had publicly pledged to cooperate with the investigation, that before his arrest he had always duly appeared for questioning, and that he had been abroad many times and had always returned as scheduled. He also offered to hand in his passport. He went on to say that since the investigation had already been concluded and the authorities had secured all witness and other evidence, there was no longer a risk of his influencing witnesses, which in any event

did not exist since he no longer held the high posts which he had occupied previously.

48. The prosecution argued that the applicant's high political status and connections abroad and his possession of two diplomatic passports and a fake passport made it easy for him to leave Georgia. It was also possible that he had other unidentified passports, a device used by other former officials to get out of the country. The surrender of his passport would therefore not obviate the risk of flight. The risk of his influencing witnesses was also still present. He had already done so on 30 November 2012, when no longer occupying an official post. Moreover, the witnesses were still due to testify at trial, which was by law the only way of adducing their evidence.

49. The Kutaisi City Court examined and rejected the request for release the same day. It gave its decision orally. As evidenced by the audio record of the hearing, the judge said, without further explanation, that the "request for termination of the pre-trial detention [wa]s to be rejected".

5. The applicant's request for release of 7 October 2013

50. The applicant's trial started on 7 October 2013, and he again sought release from pre-trial detention. He pointed out that before his arrest he had always appeared freely before the investigating authorities, had repeatedly declared that he had no intention of fleeing, had been abroad and back even after the proceedings against him had started, was the secretary general of a major political party, and had a wife and two children. All those factors showed that there was no real risk of his fleeing. Nor was there any risk of his influencing witnesses. The prosecuting authorities had already questioned a considerable number of witnesses, and there was no risk that those witnesses would change their statements, as they could incur criminal liability if they did so.

51. The Kutaisi City Court rejected the request in a written decision of the same day. It noted that the applicant had failed to point to, or provide evidence of, new circumstances calling for a reconsideration of the decision to place him in pre-trial detention. In that decision, the court had already dealt with all the points raised in his request. The fact that the trial had already started had no bearing on the justification for the applicant's detention.

52. The court went on to say that its decision could be appealed against at the same time as its final judgment on the merits of the criminal case.

6. The applicant's conviction and sentence and his appeals against them

53. On 17 February 2014 the Kutaisi City Court found the applicant guilty of buying votes contrary to Article 164[1] of the Criminal Code, and of misappropriating property in large quantities, acting in an organised group

and using his official position contrary to Article 182 §§ 2 (a) and (d) and 3 (b) of the Code, in relation to the fictitious-jobs scheme (see paragraph 29 above). The court also found the applicant guilty of infringing the inviolability of property by using an official position contrary to Article 160 § 3 (b) of the Code, and of misappropriating property in large quantities by using an official position contrary to Article 182 §§ 2 (d) and 3 (b) of the Code, in relation to the house in Kvariati (see paragraph 30 above). The court dismissed the charges of abuse of power under Article 332 § 2 of the Code as superfluous. It sentenced the applicant to five years' imprisonment and banned him from holding public office for one and a half years.

54. The applicant appealed against that judgment, but on 21 October 2014 the Kutaisi Court of Appeal upheld it in full.

55. On 18 June 2015 the Supreme Court declared the applicant's ensuing appeal on points of law inadmissible.

D. The other criminal cases against the applicant

56. On 28 May 2013 the Chief Public Prosecutor's Office charged the applicant with exceeding his power by using violence, contrary to Article 333 § 3 (b) of the Criminal Code, in relation to his role in a police operation to disperse a rally on 26 May 2011. On 30 May 2013 the Tbilisi City Court placed the applicant in pre-trial detention in relation to that charge, and on 27 February 2014 convicted him of it. The applicant appealed against that judgment, but on 11 August 2014 the Tbilisi Court of Appeal upheld it. An appeal by the applicant to the Supreme Court on points of law was declared inadmissible on 27 February 2015.

57. On 24 June 2013 the Tbilisi Prosecutor's Office charged the applicant with abusing his power as a public official holding a political post, contrary to Article 332 § 2 of the Criminal Code. The case concerned the applicant's role, in his capacity as Minister of Internal Affairs, in the alleged cover-up of a 2006 murder implicating high-ranking officers of the Ministry and the applicant's wife (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, §§ 15-22, 26 April 2011). Two days later, on 26 June 2013, the Tbilisi City Court refused the prosecution's request to place the applicant in pre-trial detention in relation to that charge. The applicant was later additionally charged with forging official documents in his capacity as an official, contrary to Article 341 of the Criminal Code. On 20 October 2014 the Tbilisi City Court convicted him of the two offences, and on 4 August 2015 the Tbilisi Court of Appeal upheld the conviction.

58. On 28 July 2014 the Chief Public Prosecutor's Office charged the applicant with exceeding his power by using violence, contrary to Article 333 § 3 (b) of the Criminal Code, in relation to his role in the planning and supervision of a police raid on a private television and radio

company, Imedi Media Holding, on 7 November 2007, and the ensuing withdrawal of the company's broadcasting licence (see *Akhvlediani and Others v. Georgia* (dec.), no. 22026/10, §§ 6-8, 9 April 2013). The case is apparently still pending before the Tbilisi City Court.

59. On 5 August 2014 the Chief Public Prosecutor's Office charged the applicant with exceeding his power by using violence, contrary to Article 333 § 3 (b) of the Criminal Code, in relation to his having allegedly ordered high-ranking police officers to have a member of parliament subjected to ill-treatment in reprisal for having made insulting public statements about Mr Saakashvili's wife. The prosecuting authorities later also charged the applicant with wilfully causing that person grievous bodily harm, acting in concert with others, contrary to Article 117 § 5 (e) of the Criminal Code. On 22 September 2016 the Tbilisi City Court convicted the applicant of those offences. On 24 February 2017 the Tbilisi Court of Appeal upheld that judgment.

E. Alleged covert removal of the applicant from his prison cell on 14 December 2013 and investigations into that allegation

1. The applicant's allegations

60. On 17 December 2013, during a court hearing in the trial against him, which was being broadcast live on television, the applicant stated that at about 1.30 a.m. the previous Saturday, 14 December 2013, he had been taken out of his prison cell, put in a car with his head shrouded in his jacket, and driven from Prison no. 9 in Tbilisi, where he was being held in custody, to what he believed to be the Penitentiary Department building. There, he had been taken to an office where, having had the jacket removed from his head, he had seen two men. The first had been the then Chief Public Prosecutor, Mr O.P. The applicant was not certain of the identity of the second, as he had left the office shortly after his arrival, but surmised that he had been Mr D.D., the head of the Penitentiary Department. Mr O.P. – who had been appointed as Chief Public Prosecutor on 21 November 2013 and resigned on 30 December 2013 over allegations that he had a criminal record in Germany – had requested the applicant to provide information about the death in 2005 of Mr Zurab Zhvania, the then Prime Minister, and about the bank accounts of the already former President of Georgia, Mr Saakashvili. If the applicant did that, he would be allowed to leave Georgia with "the money that he [had] made during his time in office".

61. Mr Zhvania was one of the protagonists of the Rose Revolution (see paragraph 9 above). Shortly after it, in February 2004, he became Prime Minister. In December 2004 the applicant became Minister of Internal Affairs in his government. Mr Zhvania died in February 2005. On 3 February 2005 his dead body was found along with the dead body of

Mr R.U., a deputy regional governor, in a flat in Tbilisi. According to the official version of the events, the two had died accidentally from carbon monoxide poisoning caused by faulty ventilation in a gas heater. The circumstances of Mr Zhvania's death are still a subject of heated debate in Georgia, and Georgian Dream made it one of their campaign promises in the October 2012 elections to elucidate them. Shortly after those elections, in November 2012, the investigation into Mr Zhvania's death was renewed and is apparently still pending. The applicant was questioned as a witness in the course of that renewed investigation on 21 March 2014. During the hearing before the Grand Chamber, the Government stated that while no one had asked the applicant anything about Mr Zhvania's death on 14 December 2013, there was still a "huge question" to him in relation to that death, in view of the lack of credibility of the version that he had put forward at the time when it had happened: that it had been due to an accident.

62. According to the applicant, he had replied to Mr O.P. that it made no sense to accuse Mr Saakashvili of corruption. As for Mr Zhvania's death, the investigation into it in 2005 had been comprehensive, and there was no further information that he could provide in relation to it. Mr O.P. had then threatened the applicant that if he did not cooperate, his detention conditions would worsen and he would not be able to get out of prison "until [Mr Irakli Garibashvili]'s government was in power". Mr Garibashvili had become Prime Minister of Georgia on 20 November 2013, succeeding Mr Ivanishvili, who had become Prime Minister on 25 October 2012, following the parliamentary election won by Georgian Dream (see paragraph 11 above).

63. According to the applicant, he was then taken back to Prison no. 9, arriving in his cell at about 2.30 a.m.

64. The applicant went on to say that he could describe the office where the meeting had taken place and identify the two men who had taken him from Prison no. 9 to that office.

65. At the end of his statement, the applicant suggested that the authorities could verify his allegations by checking the footage from the surveillance cameras in Prison no. 9. He also requested an examination of the footage from the road-traffic cameras situated along the road allegedly taken by the car transporting him from the prison to the Penitentiary Department.

66. In the proceedings before the Grand Chamber, the applicant submitted that he had first discussed the meeting with the Chief Public Prosecutor with his lawyers when they had visited him in prison two days later, on Monday 16 December 2013. According to him, he could not have voiced his allegations earlier, as he was not allowed to receive visitors during the weekend and did not have free access to a telephone. For their part, the Government submitted that the applicant could have telephoned his

lawyers or the Public Defender at any time, including at weekends and during the night.

2. The authorities' initial reaction to those allegations

67. The applicant's allegations prompted public reactions from several high officials.

68. On the same day, 17 December 2013, the Prime Minister stated that the allegations were an attempt to discredit the Government and a provocation, and that "questions should be rather put to psychologists and psychiatrists" in connection with them. In an official statement put out the same day, the Chief Public Prosecutor's Office described the allegations as "absurd and untrue", and surmised that the applicant had made them to manipulate public opinion and the criminal trial against him.

69. For her part, the Minister of Justice stated that, while the allegations appeared "unbelievable", they were to be addressed seriously.

70. The following day, 18 December 2013, the Prime Minister again described the allegations as a provocation and said that he would not take seriously calls for the Minister of Prisons and the Chief Public Prosecutor to be suspended from office. For his part, the Minister of Prisons stated that "[the applicant had] not [been] taken out of prison" and that the allegations were "an absolute lie". He went on to specify, in relation to the surveillance camera footage to which the applicant referred (see paragraph 65 above), that "the footage [could] not be obtained, as no investigation [was] being launched into such unserious matters". He noted, however, that if an investigation were opened, the investigators would obtain access to the footage, which otherwise no one had the right to see.

71. The next day, 19 December 2013, Georgia's Public Defender visited the applicant in prison to discuss his allegations. After the meeting, he called for an investigation into them.

3. Inquiry by the Ministry of Prisons' General Inspectorate (December 2013 – January 2014)

72. On 20 December 2013 the Ministry of Prisons' General Inspectorate opened an internal inquiry into the applicant's allegations. It was in the main handled by two inspectors.

(a) The surveillance camera footage from Prison no. 9 and the Penitentiary Department building

73. The same day, 20 December 2013, the General Inspectorate's deputy head wrote to the deputy head of the Ministry's Penitentiary Department, requesting a copy of the footage from the surveillance cameras in Prison no. 9 and the Penitentiary Department building for the period between 12 midnight on 13 December 2013 and 12 noon on 14 December 2013.

74. In his reply of the same day, the Penitentiary Department's deputy head said that the request could not be complied with as the footage from those cameras was kept for only twenty-four hours, following which it was automatically deleted.

75. At that time there were apparently no rules on the amount of time for which the footage was to be kept. Such rules were first put in place in May 2015 in response to criticism by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") in the report of its visit to Georgia in 2014.

76. According to the Government, the applicant was aware of the limited time for which the footage was kept and had for that reason first voiced his allegations about the meeting with the Chief Public Prosecutor three days after it had taken place.

77. According to the applicant, the footage was kept for longer than twenty-four hours. In support of that assertion, he pointed out that the General Inspectorate's deputy head was apparently unaware of the time-limit when asking for it (see paragraph 73 above). The applicant also submitted an affidavit by Mr G.M., deputy Minister of Prisons between 2010 and 2012, who had been in charge of reforming the surveillance system in prisons and had set up the Ministry's information-technology department in 2011. According to that affidavit, surveillance camera footage was saved on servers and back-up servers in the Penitentiary Department itself, and kept for a month. It could not be deleted before the expiry of that period without outside interference.

78. According to the Georgian Government's response to the CPT's report on its visit to Georgia in 2014 (CPT/Inf (2015) 43), footage from the surveillance cameras was kept for twenty-four hours in every prison equipped with a video surveillance system, the reason for the limited duration being a lack of adequate technical equipment. Footage was kept for longer in several prisons where the surveillance equipment and servers had been upgraded shortly before that (ibid., at pp. 17-18).

(b) Other steps taken in the course of the inquiry

79. On 24 December 2013 the General Inspectorate's head asked eight private companies who owned facilities equipped with surveillance cameras, such as petrol stations, along the road supposedly taken by the car transporting the applicant from Prison no. 9 to the Penitentiary Department to provide the footage for the period between 12 midnight on 13 December 2013 and 12 noon on 14 December 2013. All but one of those companies, which replied that the footage had already been deleted, complied with the request, and the footage was simultaneously reviewed by the two inspectors between 25 and 31 December 2013. Their notes stated briefly, without providing further details, that they had seen nothing of interest.

80. On 3 January 2014 one of the inspectors interviewed the applicant and the governor and deputy governor of Prison no. 9.

81. The applicant stated that he had been taken out of his cell by the governor, who had told him that a prosecutor wished to speak with him. Once in the prison yard, two other men, whose features he clearly remembered, had put him in a dark-coloured car, probably a Toyota Land Cruiser Prado or 200. The car had been driven by a third man whose features the applicant could not make out because once inside the car he had been blindfolded with his jacket. The car had moved for about ten minutes along main roads. Based on the direction of the drive, the applicant had surmised that he was being taken to the Penitentiary Department. During the drive, one of the men in the car had made a mobile telephone call informing someone that they would arrive in about five minutes. A short while after that, the same person had received a call saying that they would arrive in one minute. The applicant stated that he did not wish to describe in detail the office to which he had been taken, but that he could recognise it. He relayed in detail his conversation with the head of the Penitentiary Department, Mr D.D., noting that he had appeared heavily intoxicated. He did not describe in detail his ensuing conversation with the Chief Public Prosecutor, Mr O.P., stating that he had already spoken about that at the hearing on 17 December 2013.

82. The governor and the deputy governor both stated that they had been in Prison no. 9 in the early hours of the day of the alleged meeting, 14 December 2013, but that they had not seen or spoken to the applicant. When asked about the surveillance cameras, the governor said that if there had been any problem with them, he would have been told about it by the officers working in the technical room, which had not happened. He also specified that his service car was a black Toyota Land Cruiser Prado, and provided the registration number.

83. Still on 3 January 2014 one of the inspectors reviewed the logs for the movement of vehicles in and out of Prison no. 9. They did not contain any entries suggesting that the applicant had been taken out of the prison during the night in question.

84. The same day the General Inspectorate's head asked the Ministry of Internal Affairs to provide footage from the road-traffic cameras along the road supposedly taken by the car transporting the applicant from Prison no. 9 to the Penitentiary Department for the time between 12 noon on 13 December 2013 and 12 noon on 14 December 2013. Footage from nine road-traffic cameras for the time between 12 midnight on 13 December 2013 and 6 a.m. on 14 December 2013 was provided on 13 January 2014 and was reviewed by three inspectors the same day. Their notes stated briefly, without providing further details, that they had seen nothing of interest in it.

85. The next day, 4 January 2014, the inspectors interviewed two prison officers supervising the movement of prisoners in Prison no. 9 and a prison officer tasked with escorting prisoners in the applicant's wing in and out of their cells, all three of whom had been on duty between 10 a.m. on 13 December 2013 and 10 a.m. on 14 December 2013. All three officers dismissed the applicant's allegations as untrue, and stated that if he had been taken out of his cell they would have known about it and would have recorded it in the relevant logs.

86. On 6 January 2014 one of the inspectors interviewed two prison officers who had been in charge of monitoring the surveillance cameras in Prison no. 9 from screens in a technical room inside the prison and who had been on duty between 7 p.m. on 13 December 2013 and 10 a.m. on 14 December 2013. Both of them stated that nothing unusual had happened that night and that the cameras had been working properly throughout. The two officers had learned about the applicant's allegations from the media, and dismissed them as untrue. They also stated that there was a surveillance camera inside the applicant's cell, and that it enabled them to monitor all of his movements in and out of it.

87. On 9 January 2014 one of the inspectors reviewed the logs for the movement of people in and out of Prison no. 9. They did not contain any entries suggesting that the applicant had been taken out during the night in question, but showed that he had been visited by his three lawyers two days later, on 16 December 2013.

88. Neither Mr O.P. nor Mr D.D. were interviewed or asked to provide explanations in the course of the inquiry.

89. On 14 January 2014 one of the inspectors drew up a report in which he stated that the inquiry had not confirmed the applicant's allegations. In a letter dated 14 April 2014 the Chief Public Prosecutor's Office informed the applicant's lawyer, apparently in response to a request for information on his part made on 6 March 2014, that the inquiry was complete.

4. Developments after the end of the inquiry

90. The day after the end of the inquiry, 15 January 2014, the Public Defender reiterated his call for a full-scale investigation into the applicant's allegations (see paragraph 71 above).

91. On 17 January 2014 several non-governmental organisations also urged the authorities to carry out a full investigation into the applicant's allegations, expressing concern in particular about the lingering uncertainty surrounding the footage from the prison surveillance cameras.

92. In a television interview on 11 February 2014, the Prime Minister, Mr Garibashvili, said that the applicant's allegations were "absurd and ridiculous" and that he had very much liked a "rhetorical question" asked by the former Prime Minister, Mr Ivanishvili, in relation to them a few days

earlier, on 8 February 2014: "So what happened after [Mr O.P.] abducted [the applicant]? What did he do to [him] then, did he rape him or what?"

93. On 10 May 2014 a member of parliament from UNM revealed documents showing that in December 2013 forty officials from the Ministry of Prisons – among whom were the head of the Penitentiary Department, Mr D.D., his deputies, the governors of several prisons, and a Mr G.G., head of the special forces of the Ministry of Prisons – had received high bonuses: GEL 17,756 (at that time equivalent to EUR 7,430) for Mr D.D.; GEL 38,128 (EUR 15,954) and GEL 30,463 (EUR 12,747) respectively for his deputies; for prison governors, sums ranging from GEL 18,259 (EUR 7,640) for the governor of Prison no. 8 to GEL 29,609 (EUR 12,390) for the governor of Prison no. 9; and GEL 18,692 (EUR 7,821) for Mr G.G. The member of parliament suggested that the bonuses had been paid to recompense those officials for keeping the meeting between the applicant and the Chief Public Prosecutor secret. In response to those allegations, Mr D.D. stated that the bonuses had been exceptionally high because all those who had received them had worked in difficult conditions for twenty-four hours a day. For his part, the Minister of Prisons stated that the bonuses had been personally approved by Mr D.D.

94. At the hearing before the Grand Chamber, the Government denied the existence of any link between those bonuses and the applicant's allegations, emphasising that officials from other prisons had also received them. The Government also stated that it was usual for such bonuses to be paid at the end of the year to government employees, especially law-enforcement officials.

95. In an interview with a newspaper journalist on 19 May 2014 Ms L.M., adviser to Mr D.D., said: "[E]ven a child knows that [the applicant] was taken from his prison cell by D.D.". In a television interview later that day she said that she had spoken with officials from the Penitentiary Department who had confirmed that Mr D.D. had instructed them to conceal the surveillance-camera footage from the early hours of 14 December 2013. The following day, 20 May 2014, Mr D.D. dismissed Ms L.M. from her post. Three days later, on 23 May 2014, he himself resigned, apparently in connection with the controversy which had erupted following the disclosure of the bonuses paid in December 2013 (see paragraph 93 above).

96. On 17 June 2016, during an appeal court hearing in an unrelated criminal case concerning a 2006 operation in the course of which officers of the special forces of the Ministry of Internal Affairs had killed two people, one of the co-accused, Mr G.Ts., stated that he had information about the applicant's meeting with the Chief Public Prosecutor. A number of people had been arrested and accused in that case, which became known as the "Kortebi" case, including (a) the six officers who had carried out the operation, one of whom was a Mr I.M.; (b) the special forces' then deputy

head, Mr G.G. (who several years later, in December 2013, was appointed by Mr D.D. as head of the special forces of the Ministry of Prisons – see paragraph 93 above); (c) Mr I.P., former deputy head of the Central Criminal Police Department of the Ministry of Internal Affairs; and (d) the above-mentioned Mr G.Ts., former deputy head of that Department's Investigation Unit.

5. Investigation by the Chief Public Prosecutor's Office (June 2016 – February 2017)

97. After the delivery of the Chamber judgment on 14 June 2016 (see paragraph 3 above), the speaker and several members of the Georgian Parliament called for a fresh investigation into the applicant's allegations. The Minister of Justice stated that she hoped that the prosecuting authorities would carry out an investigation in connection with the Chamber's findings under Article 18 of the Convention. She went on to say that the Government would seek a referral of the case before the Grand Chamber.

98. On 21 June 2016 the Chief Public Prosecutor's Office opened a criminal investigation and assigned it to two investigators from its investigative department.

99. The applicant was interviewed on 24 June 2016. He reiterated his assertions of 17 December 2013 and 3 January 2014 in relation to his conversations with Mr D.D. and Mr O.P., and the car which had taken him to his meeting with them (see paragraphs 60 and 81 above). With regard to his removal from Prison no. 9, the applicant stated that when entering his cell to take him out, the prison governor had been accompanied by his deputy. He also stated that although he could not describe the two men who had then put him in the car, he could recognise them, in particular one of them, who had a distinctive face. The applicant also named the roads along which the car had allegedly driven.

100. On 29 June 2016 one of the investigators interviewed the governor of Prison no. 9. He stated that the applicant had not been taken out of his cell, either by himself or by anyone else. He also stated, *inter alia*, that pre-trial detainees were entitled to telephone the Public Defender's Office at any time during the week, and that between 13 and 17 December 2013 the applicant had not asked to make such a call. He stated, further, that a surveillance camera had been installed in the applicant's cell with his consent, for his own safety, but that the footage from that camera, just like the footage from all other surveillance cameras in the prison, was only kept for twenty-four hours.

101. The following day, 30 June 2016, the other investigator interviewed the deputy governor of Prison no. 9. His statement was almost identical to that of the governor. He stated that he had learned about the applicant's allegations from the media and that they were false. He also confirmed that

pre-trial detainees were entitled to telephone the Public Defender's Office at any time during the week.

102. On 1 July 2016 the investigators interviewed the two prison officers in charge of monitoring the surveillance cameras in Prison no. 9. They confirmed the statements that they had given during the internal inquiry (see paragraph 86 above). Both stated that the footage from the cameras was only kept for twenty-four hours and then automatically deleted. Only if something unusual was noted during that time would the relevant footage be specially retrieved and kept for a month. Since nothing of the sort had happened in the early hours of 14 December 2013, the footage for that period had not been retrieved.

103. On 4 and 5 July 2016 the investigators interviewed the two prison officers in charge of supervising the movement of prisoners in Prison no. 9. They likewise confirmed their statements given during the internal inquiry (see paragraph 85 above).

104. On 5 July 2016 one of the investigators interviewed the prison officer in charge of escorting prisoners in the applicant's wing in and out of their cells. He stated that no one had gone into the applicant's cell in the early hours of 14 December 2013.

105. On 12 July 2016 one of the investigators interviewed one of the inspectors from the General Inspectorate of the Ministry of Prisons who had carried out the internal inquiry. The inspector described the steps that he had taken during the inquiry. In response to a question about the surveillance camera footage from Prison no. 9, he stated that the inquiry had been informed that that footage was only kept for twenty-four hours. He went on to say that the examination of the footage from the private and the road-traffic cameras had not yielded any relevant information. In particular, it had been impossible to make out the registration numbers of the vehicles caught on camera. No car matching the description given by the applicant had been spotted.

106. On 26 July 2016 one of the investigators interviewed Mr D.D.'s deputy. He stated that the footage from the surveillance cameras was kept for twenty-four hours, and denied the applicant's allegations. He explained that he had been at work in the Penitentiary Department building in the early hours of 14 December 2013, in his office which was just opposite that of Mr D.D., and that he had not seen the applicant or Mr O.P. there.

107. Between 7 and 22 July 2016 the investigators reviewed the footage obtained during the internal inquiry (see paragraphs 79 and 84 above). Their reports said, without giving further details, that they had not seen anything in it of interest for the case.

108. On 2 August 2016 the investigators interviewed Mr G.Ts. (see paragraph96 above) in the presence of a judge. He stated, *inter alia*, that on 4 February 2015, while in court for a pre-trial hearing in the "Kortebi" case, he had heard one of his co-accused, Mr G.G., former deputy head of

the special forces of the Ministry of Internal Affairs and former head of the special forces of the Ministry of Prisons (see paragraphs 93 and 96 above), say that he had been one of those who had transported the applicant on 14 December 2013, and that for that reason it would not be in the authorities' interests to keep him in detention for a long time. According to Mr G.Ts., that conversation had been recorded by the video camera in the courtroom, and overheard by another of the co-accused, Mr I.P. (see paragraphs 96 above and 109 below). Mr G.Ts. also stated that about a month later, in March 2015, Mr G.G. and the other special-forces officers accused in the "Kortebi" case, including Mr I.M., had been placed in a cell in Prison no. 9 adjacent to his. Mr G.Ts. had then heard Mr G.G. tell his cellmates that he and Mr I.M. had transported the applicant on 14 December 2013, and that it had been agreed with the authorities to release the special-forces officers if they agreed to give evidence against Mr I.P. and others connected with UNM in the "Kortebi" case. (From the materials in the case file it appears that those officers, who had been charged with aggravated murder under Article 109 of the Criminal Code, were released in August 2015 under personal surety.) Mr G.Ts. had been able to hear the entire conversation through the wall as they had talked in loud voices. Mr G.Ts. also stated that during his stay in Prison no. 9 a prison officer had told him about the applicant's removal from his cell. When asked why he had not spoken about that earlier, Mr G.Ts. replied that it was because he had no trust in the prosecuting authorities. He also stated that he had no incentive to bend the truth in favour of the applicant as the applicant had dismissed him from his post and had caused him to be detained in connection with a fight.

109. On 3 August 2016 the investigators interviewed Mr I.P., then in detention, in the presence of a judge. Mr I.P. stated that shortly before his arrest in the "Kortebi" case in February 2015 (see paragraph 96 above), he had met with Mr G.G., who had told him, albeit in veiled terms, that he and Mr I.M. had transported the applicant from Prison no. 9 to the Penitentiary Department, and that if the prosecuting authorities did not take that into account he would start talking about it in public. Mr I.P. also confirmed Mr G.Ts.'s story about the conversation in the courtroom on 4 February 2015 (see paragraph 108 above). He stated, in addition, that a Mr K.T., with whom he had shared a cell in Prison no. 9, had told him that he had seen the applicant being taken out of his cell on 14 December 2013 (see paragraph 112 below). However, Mr K.T. had only spoken about that after the delivery of the Chamber judgment on 14 June 2016 (see paragraph 3 above).

110. On 9 August 2016 one of the investigators interviewed Mr G.G. and the other interviewed Mr I.M. Mr G.G. denied Mr G.Ts.'s and Mr I.P.'s assertions that it had been he who had transported the applicant. He was not asked about the bonus which he had received in December 2013 (see

paragraph 93 above). Mr I.M. likewise denied that he had transported the applicant, and stated that he had only started working at the Penitentiary Department on 16 December 2013, two days after the alleged incident.

111. On 9, 10 and 11 August 2016 the investigators interviewed the other five special-forces officers detained in relation to the "Kortebi" case alongside Mr G.G., Mr I.M., Mr G.Ts. and Mr I.P. (see paragraph 96 above). All of them stated that they had learned about the applicant's allegations from the media, and that during their stay in the same cell as Mr G.G. he had not told them anything about the applicant's alleged removal from his cell.

112. On 11 August 2016 one of the investigators interviewed Mr K.T., who from 13 to 14 December 2013 had been detained in a cell in the same wing as that of the applicant, in the presence of a judge. Mr K.T., who had previously held various high-ranking positions in the Ministry of Internal Affairs and the Ministry of Defence, stated that on 14 December 2013 he had seen the prison governor take the applicant out of his cell through the gap between the door of his cell and its frame. He had discussed that with Mr I.P. (see paragraph 109 above), with whom he had later shared a cell, but only after the delivery of the Chamber judgment on 14 June 2016 (see paragraph 3 above). When asked why he had not spoken about all this earlier, Mr K.T. replied that when observing the reactions to the applicant's allegations, he had realised that his speaking about the issue might have repercussions for him, especially as he was detained in the same prison in which some of the alleged perpetrators were employed.

113. The next day, 12 August 2016, the investigators went to Prison no. 9 and examined Mr K.T.'s cell. According to their report, it was impossible to observe the corridor from inside the cell with the door closed. The door was fully intact and there was no gap between the door and the frame. The examination was video recorded by one of the investigators.

114. Four days later, on 16 August 2016, the prosecutor supervising the investigation decided to carry out an experiment in the cell with Mr K.T.'s participation, with a view to checking whether Mr K.T. could really observe the corridor from inside the cell. Mr K.T refused to take part in the experiment, saying that he first wished to consult with his lawyer. One of the investigators called the lawyer but he refused to see Mr K.T. The next day, 17 August 2016, Mr K.T. again refused to participate in the experiment in the absence of his lawyer. On 18 August 2016 the report of the cell's examination was sent to the National Forensic Bureau together with the video recording. The experts were asked, among other things, to examine whether there was a gap between the cell door when closed and the frame, and if so, to specify its size and exact location. In their report, filed on 24 August 2016, the experts stated that there was no such gap because the door protruded thirty millimetres from its frame. They went on to say

that, in view of the door's width and locking system, it was impossible to deform it without special instruments.

115. In the meantime, on 12 and 17 August 2016 the investigators interviewed three inmates who had shared Mr K.T.'s cell at the relevant time. All three stated that they had only learned about the applicant's allegations from the media, and that Mr K.T. had not spoken to them about that. The investigators also obtained confirmation from the Ministry of Prisons that no work had been done in Mr K.T.'s cell between 14 December 2013 and the time when they examined it.

116. On 4, 5, 10 and 11 August and 2 and 3 September 2016 the investigators also interviewed nine prison officers working in Prison no. 9. All but one of those officers had been on duty during the early hours of 14 December 2013. All of them stated that they had learned about the applicant's allegations from the media. None of them had seen the prison governor or deputy governor that night in the wing containing the applicant's cell.

117. On 13 August 2016 one of the investigators interviewed Ms L.M. (see paragraph 95 above). She stated that relations between her and her former boss, Mr D.D., had become strained after the bonuses paid in December 2013 (see paragraph 93 above). She went on to say that she had only learned about the applicant's allegations from the media, and that her statements in May 2014 had been twisted and taken out of context by the journalists who had interviewed her. She knew nothing about the incident.

118. On 1 September 2016 one of the investigators interviewed the by then former head of the Penitentiary Department, Mr D.D. He denied the applicant's allegations, and stated that on 13 December 2013 he had been in Batumi, coming back to Tbilisi late in the evening and remaining in his office late into the night. According to him, the applicant had voiced his allegations three days after the incident because he was aware that the surveillance-camera footage was only kept for twenty-four hours. He also stated that his service car at the relevant time had been a Toyota Land Cruiser 200. He was not asked about the December 2013 bonuses (see paragraph 93 above).

119. On 2 September 2016 the same investigator interviewed the by then former Chief Public Prosecutor, Mr O.P. He described the applicant's allegations as false and politically motivated. He had never met the applicant in person or been in the Penitentiary Department building. During the early hours of 14 December 2013 he had been in his office. At the relevant time, there had been no need to question the applicant and, had such a need arisen, he could have been questioned via the official channels rather than in the way alleged by him. Mr O.P. also stated that his service car at the relevant time had been a Lexus LX 570.

120. On 24 October 2016 the investigators interviewed two of the three inspectors from the Ministry of Prisons' General Inspectorate who had

reviewed the surveillance footage in December 2013 and January 2014 (see paragraphs 79 and 84 above). They said, among other things, that they had been unable to make out any vehicle registration numbers and that they had not seen a vehicle matching the description given by the applicant.

121. On 8 November 2016 the applicant's lawyer asked the Ministry of Prisons and the Chief Public Prosecutor's Office for a copy of the footage obtained in the internal inquiry. He received no reply to those requests.

122. Between 21 and 23 January 2017 the investigators asked four experts from the National Forensic Bureau to check whether the footage had been tampered with. In their report, the experts stated that they had not detected any traces of editing. They confirmed that statement when interviewed on 10 and 11 February 2017.

123. The investigators also obtained expert reports and statements by the prison officers confirming that the prison logs for 13 and 14 December 2013 had not been tampered with.

124. The investigators obtained, in addition, data from the prosecuting authorities' document-management system according to which between approximately 1 a.m. and 1.25 a.m. on 14 December 2013 the Chief Public Prosecutor, Mr O.P., had been logged in the system and working on official correspondence. At the hearing before the Grand Chamber, the applicant's representatives challenged the authenticity of that data. They also stated that even if it were to be taken at face value, it only showed that Mr O.P. had been in his office until 1.25 a.m. on 14 December 2013, whereas the alleged meeting with the applicant had taken place about twenty or thirty minutes later. Since the Chief Public Prosecutor's Office building was just a few hundred metres away from the Penitentiary Department building, that data did not therefore negate the applicant's allegations.

125. On 11 February 2017 a prosecutor from the Chief Public Prosecutor's Office closed the investigation. In his decision he set out in detail the witness and other evidence obtained during the investigation, and concluded that on 14 December 2013 the applicant had not been taken out of his cell.

F. Criminal cases against other members of UNM's leadership

126. Since the parliamentary elections in October 2012, a number of former high public officials from UNM, including the President of Georgia until October 2013, Mr Saakashvili, and several government ministers, have been prosecuted, some in separate sets of proceedings, in relation to offences allegedly committed by them while in office.

1. Statements by Georgian Dream government ministers in connection with those cases

127. At a press conference on 22 November 2012 Georgian Dream's then leader and Prime Minister of Georgia since 25 October 2012, Mr Ivanishvili, in response to a question whether the recent arrests of several former senior officials would lead to criminal proceedings against others, including the President, Mr Saakashvili, stated that it was not his wish to have an indefinite number of arrests, including that of Mr Saakashvili. He added that he was not interfering with the work of the prosecuting authorities and it was up to them to decide who should face prosecution. He went on to say that UNM's "conduct increase[d] the queues at the prosecutors' offices".

128. According to an affidavit by Mr G.B., a former member of UNM's leadership, submitted by the applicant, shortly after the 2012 parliamentary elections, on 12 October 2012, he had met in private with Mr Ivanishvili to discuss the transition of power. Mr Ivanishvili had allegedly told him, *inter alia*, that key members of the UNM leadership would face criminal prosecution unless they refrained from challenging the new government: "The more problems you create, the more people from your team will go to jail".

2. Statements by foreign governments, international organisations and non-governmental organisations in relation to those cases

129. In November 2012 those criminal prosecutions drew expressions of concern from NATO's Secretary General, the European Commission's President, the European Union's High Commissioner for Foreign and Security Policy and the United States' Secretary of State. In December 2012 a group of United States senators wrote an open letter to Georgia's Prime Minister to express their concern that the proceedings could be politically motivated. In February 2013 a group of United States congressmen did the same in a letter to the United States Secretary of State. So did twenty-three members of the European Parliament, in a March 2013 address to Georgia's Prime Minister, as well as the foreign ministers of Poland and Sweden.

130. In May 2013 the Special Representative on South Caucasus of the Parliamentary Assembly of the Organization of Security and Cooperation in Europe ("OSCE") expressed concern over the applicant's and Mr Z.T.'s arrests. So did several United States senators, leaders of the European People's Party and the President of Estonia.

131. In his report, "Georgia in Transition", published in September 2013, the European Union Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, Mr Thomas Hammarberg, former Council of Europe Commissioner for Human Rights, said, at pp. 8-9 (footnotes omitted):

"The Prosecutor's Office has initiated investigations against a number of office-holders in the previous administration. Prosecutors have questioned 6 156 persons, most of them UNM party activists, as witnesses in the framework of investigations into different suspected crimes, including misuse of the State funds and money laundering. The opposition party considers this questioning to be a politically motivated attack on the opposition. Currently, 35 former central officials are charged of whom 14 are in pre-trial detention, 14 have been released on bail, one is released without restrictive measure, one has been pardoned by the President after conviction and five have left the country. Other former civil servants have also been charged or were convicted.

One of those charged and held in pre-trial detention is [the applicant] who is not only a former Prime Minister and former Minister of Internal Affairs but was also Secretary General of UNM at the time of arrest. The UNM has consistently and vehemently been challenging the necessity of applying this measure of restraint. The case has raised deep concerns in relation to the forthcoming presidential election – as one of the key organisers of the opposition became prevented from contributing to the campaign.

...

There are signs that the courts are more independent than earlier in relation to requests from the prosecutors. For instance, there was an acquittal in a case against another former Minister, and the request for pre-trial detention was refused in another case against a leading UNM politician."

132. In a report on his visit to Georgia in January 2014 (CommDH(2014)9) the Council of Europe's Commissioner for Human Rights noted, in paragraphs 33-36, the allegations of selective justice in relation to those criminal cases and stated, in paragraph 41:

"The persistence of allegations and other information indicative of deficiencies marring the criminal investigation and judicial processes in cases involving political opponents are a cause for concern, as this can cast doubt on the outcome of the cases concerned even when there have been solid grounds for the charges retained and the final convictions. The Georgian authorities must address these issues at the systemic level, in the interests of respecting fair trial guarantees for everyone and in enhancing public trust in the institutions responsible for upholding the law."

133. In Resolution 2015 (2014), adopted on 1 October 2014, the Council of Europe's Parliamentary Assembly stated:

"2. The otherwise smooth handover of power was accompanied by a polarised and antagonistic political climate, especially during the period of cohabitation between the then President Mi[k]heil Saakashvili and the Georgian Dream coalition government. The Assembly regrets that these tensions sometimes overshadowed the many positive changes that were taking place in the democratic environment of Georgia. The United National Movement (UNM) has reported that several thousand of its activists and supporters were regularly interrogated and intimidated by various investigative agencies (some up to 30 times). A number of major opposition figures, including members of parliament, were violently attacked. It should be noted that two years on, almost the entire leadership of the former ruling party has been arrested or is under prosecution or investigation: former Prime Minister and UNM Secretary General, [the applicant], former Defence Minister, [B.A.], and former Tbilisi mayor and UNM campaign manager, [G.U.], are in prison (pre-trial detention). The judicial authorities

have brought charges against the former President, Mikheil Saakashvili – and ordered pre-trial detention in absentia – and have done the same for former Defence Minister, [D.K.], and former Minister of Justice, [Z.A.]. ...

...

5. The Assembly recalls its concerns about the administration of justice and the independence of the judiciary in Georgia. In that respect, it welcomes the adoption of a comprehensive reform package that aims to ensure genuine independence of the judiciary and a truly adversarial justice system. The Assembly welcomes the first signs that the judiciary is now working more independently. However, it also notes that the proceedings in sensitive legal cases, including against former members of government (some of whom are leading members of the opposition), have revealed continuing vulnerabilities and deficiencies in the justice system that need to be addressed. ... Further reforms of the judiciary, including of the prosecution services, are therefore necessary. In this respect, the Assembly:

...

5.4. while welcoming the recent decrease in its use, expresses its concern about the continued widespread use of pre-trial detention in Georgia. ...

...

9. The Assembly takes note of the numerous changes in local governments in Georgia as a result of local councillors and city officials resigning or switching sides following the change of power at national level. ... The Assembly is ... seriously concerned by credible reports that a number of these changes were the result of undue pressure on local United National Movement (UNM) activists by supporters of the ruling coalition. The Assembly is also concerned by reports of violent disturbances of the campaign activities of the UNM, allegedly by Georgian Dream supporters, as well as reports that a considerable number of opposition candidates in the local elections, mainly from the UNM, withdrew their candidatures, allegedly under pressure from the authorities. ..."

134. The report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (PACE doc. 13588, 5 September 2014) which led to that resolution said, among other things (footnotes omitted):

"60. Many interlocutors have reported that there seems to be less political interference in the work of the courts and that the judiciary has become increasingly more independent, including in relation to the prosecution, which has been a point of concern in previous reports. This seems to be confirmed by the court proceedings against former government members, where requests of the prosecution have regularly been denied. There has been a decrease in the granting of pre-trial detention by the courts, combined with a decline of requests by the prosecution service. According to the authorities, in the first half of 2013, the prosecution service made 9% fewer requests for pre-trial detention than in the same period the previous year, and only 46% of the requests for measures of constraint, such as pre-trial detention or bail, were granted by the courts. However, despite this positive trend, the use of pre-trial detention is still too widespread in Georgia. ...

...

90. Following the 2012 parliamentary elections, more than 20 000 complaints were lodged with the prosecutor general by citizens claiming to have been victims of

abuses committed by, or under, the previous authorities. More than 4 000 claims concern allegations of torture and ill-treatment in prisons, while more than 1 200 concern violations of property rights and approximately 1 000 complaints were filed against in total 322 prosecutors by persons claiming that they were forced to accept plea-bargain agreements.

91. The authorities announced that the 'restoration of justice' would be one of their key priorities and underscored that there would be no impunity for former officials for past abuses. In the following months a number of leading members of the former governing party and ministerial officials were arrested for alleged crimes committed under their responsibility during their tenure in office. The United National Movement has decried these arrests as political prosecutions and as revanchist justice. For its part, the authorities have stressed that no selective or political motivated justice is taking place, or will take place, in Georgia, but that these people are accused of serious ordinary crimes, for which the authorities have sufficient proof to warrant an investigation or initiate prosecution.

92. In support of their position, the authorities point to the fact that both the Minister of Defence and the Minister of Justice left the country in a hurry the day after the elections, as did a number of high-level officials from the Ministry of the Interior. While the former Minister of Defence voluntarily returned to Georgia, the others are still on the run and are the subject of an Interpol Red Notice.

93. There has been some confusion regarding the number of former officials concerned by these investigations. Until now, 35 officials of the former authorities have been charged with criminal offences. Of these, 14 are in pre-trial detention, 13 have been released on bail, one was released without restrictive measures, five have fled the country and three have been convicted, one of whom was pardoned by President Saakashvili. In addition, charges have been brought against a considerable number of former civil servants.

94. The allegations of selective and politically motivated justice and revanchist policies by the new authorities are of concern. In addition, they considerably raise emotions and tensions in an already politically tense climate, which is not beneficial for the political environment and democratic development of the country.

95. The most publicised cases against former UNM government officials are those against former Minister of Defence [B.A.], former Prime Minister and Interior Minister – and current UNM Secretary General – [the applicant], and former Tbilisi Mayor [G.U.], who were all influential members of former President Saakashvili's inner circle.

...

102. We wish to emphasise that there cannot be any impunity for ordinary crimes including, or even especially, for government members and politicians, whether current or past. However, especially in the current political context, it is important that in the criminal cases against former government officials, any perception of politically motivated or revanchist justice is avoided. The authorities should therefore ensure that the legal processes are conducted transparently and in a way which fully respects Georgia's obligations under Articles 5 and 6 of the European Convention on Human Rights. Not only should selective or politically motivated justice not take place, it should also be seen as not taking place."

135. In Resolution 2077 (2015), adopted on 1 October 2015, the Council of Europe's Parliamentary Assembly stated:

"7. The following abusive grounds for pretrial detention have been observed in a number of States Parties to the European Convention on Human Rights, namely:

7.1. to put pressure on detainees in order to coerce them into confessing to a crime or otherwise co-operating with the prosecution, including by testifying against a third person (for example ... certain cases of opposition leaders in Georgia, such as [the applicant]);

7.2. to discredit or otherwise neutralise political competitors (for example, certain cases of United National Movement (UNM) leaders in Georgia);

...

11. The root causes of the abusive use of pretrial detention include:

...

11.4. the possibility of 'forum shopping' by the prosecution, which may be tempted to develop different strategies to ensure that requests for pretrial detention in certain cases are decided by a judge who, for various reasons, is expected to be 'accommodating' (for example in Georgia, the Russian Federation and Turkey);

11.5. the possibility for the prosecution to circumvent statutory time limits imposed on pretrial detention by modifying or staggering indictments (for example, in the cases of [G.U] and [B.A.], before the judgment of the Constitutional Court of Georgia in September 2015)."

136. As a result of the concerns about the criminal prosecutions against former government officials from UNM, in February 2013 the OSCE's Office for Democratic Institutions and Human Rights assigned monitors to fourteen of those cases, including the case against the applicant at issue in these proceedings. In its report, published in December 2014, the Office noted a number of shortcomings with respect to those fourteen cases, including the cases against the applicant. The specific points in the report highlighted by the applicant related to the criticisms, in paragraphs 222-29, of the Georgian courts' failure to give appropriate reasons regarding the credibility of the witness and other evidence against him, of the cogency of those courts' findings in relation to each of the elements of the offences of which he was convicted, for example the exact manner in which he had exceeded his powers, and of the quality of their reasoning in relation to the factors determining his sentence.

137. By way of general findings, the report also noted, in paragraph 6 of its executive summary, that Georgian law was generally in line with international standards and guaranteed the right to an independent tribunal. There were, however, some aspects which raised concerns in that respect, such as the practices of transferring judges between courts, allocating cases without a fully transparent procedure, and changing judges in the course of ongoing proceedings with no explanation. Another issue was comments by public officials about ongoing criminal proceedings made in a manner implying that they had some control over the prosecuting authorities (see paragraph 7 of the executive summary). Public officials had also expressed their views on the guilt of some defendants before they had been convicted,

which raised an issue with regard to the presumption of innocence (see paragraph 9 of the executive summary). The report also expressed concern about the courts' failure in some cases to give reasons for their decisions to order pre-trial detention or to reject requests for release, and about the lack of provision in the Code of Criminal Procedure for periodic review of pre-trial detention. That had contributed to a practice of automatic prolongation of pre-trial detention up to the maximum statutory time-limit of nine months (see paragraph 11 of the executive summary).

3. Refusals to extradite former UNM officials to Georgia

138. In a decision of 27 February 2014 (no. 58/EXT/2014), the Court of Appeal of Aix-en-Provence refused to extradite to Georgia Mr D.K., Minister of Defence from 2006 to 2008. It held, among other things, that the prosecution against him was politically motivated. It based that finding on the fact that even though the Georgian court had issued warrants for the arrest of both Mr D.K. and his brother-in-law, who were being sought on identical charges, and even though the two had been found together when Mr D.K. had been arrested by the French authorities, the Georgian authorities had at first only sought the extradition of Mr D.K., specifically mentioning his political responsibilities in the Interpol Red Notice. The only difference between the two was that Mr D.K.'s brother-in-law was not involved in politics.

139. In a judgment of 9 April 2015 (no. 447/2015), the Greek Court of Cassation refused to extradite to Georgia Mr D.A., former head of the Ministry of Internal Affairs' Department for Constitutional Security. It held that there were compelling reasons to believe that there was a risk that, if extradited, his position would worsen owing to his political beliefs and his having held high office in a previous government which was in opposition to the current one.

140. In a decision of 21 March 2016 (unreported), the Westminster Magistrates' Court also refused to extradite Mr D.K. to Georgia (see paragraph 138 above). Having reviewed at length reports and other evidence about the political and legal situation there since 2012 and the criminal proceedings against Mr D.K., the chief magistrate concluded:

> "On the facts as found above ... I am not sure that the request for Mr [D.K.]'s extradition is for the purpose of prosecuting or punishing him on account of his political opinions. I am aware that the requests may have been made for entirely proper purposes. The evidence may be there to sustain one or more convictions. However this is not the test. On balance I consider it more likely than not that the desire to prosecute former UNM politicians is a purpose behind these requests. It may not be the only purpose, but without that factor I do not believe, on balance, that these requests would have been made and pursued in the way they have been.
>
> As for the future, I have considerable respect for the judiciary of Georgia. I believe it is likely that the judiciary will successfully resist pressure on them from the administration, through the public prosecutors. However, looking at what has

> happened to others, I am satisfied that there is a reasonable chance, a serious possibility, that this defendant's liberty will be restricted (and in particular that he may be detained in pre-trial detention) because of a flawed prosecution process motivated by a desire to obtain a conviction of a UNM politician, or by a desire to obtain evidence from Mr [D.K.] that can be used against senior former colleagues. ..."

141. The court described the evidence which had led it to conclude that there was a possibility that Mr D.K. could be placed in pre-trial detention in order to be pressured to give evidence against former colleagues of his in UNM in these terms:

> "I have heard evidence, about which I cannot be sure but think it is likely correct, that pressure has been applied by the prosecutor's office to witnesses to leave UNM and/or give false testimony. ... Mr [G.U.] gave evidence that he was told by former [P]rime [M]inister Garibashvili, who was also relaying the views of former Prime Minister Ivanishvili, that if he helped to locate [Mr] Saakashvili's bank accounts 'it would help relieve the situation of [Mr D.K.] as well and that all the charges against him w[ould] be dropped.' The same witness suggested that if returned, illegal methods would be used to force him ([Mr D.K.]) to give evidence against [Mr] Saakashvili."

4. Interpol's deletion of information about Mr Saakashvili and Mr D.K.

142. In July 2015 Interpol decided to delete from its files all information relating to Mr Saakashvili and Mr D.K. It did so on the basis of two recommendations by the Commission for the Control of Interpol's Files, according to which the political elements surrounding their cases prevailed over the common-law criminal elements. In arriving at that conclusion, the Commission said that in cases of doubt, it had to decide in the interest of the party seeking deletion.

II. RELEVANT DOMESTIC LAW

143. Since 2010 criminal proceedings in Georgia have been conducted under a new Code of Criminal Procedure, which superseded the previous Code which had been in force since 1998.

A. Provisions governing arrest

144. Pursuant to Article 171 § 1 of the Code, an arrest must be based on a judicial warrant. Sub-paragraphs (a) to (f) of Article 171 § 2 set out the situations in which an arrest may, by way of exception, be made without a warrant. The only relevant one in this case is sub-paragraph (e), according to which a warrant is not necessary if there is a risk of flight. Article 171 § 3 lays down a further requirement for an arrest without a warrant: that the relevant risk cannot be prevented by an alternative measure proportionate to the circumstances of the alleged offence and the accused's personal characteristics.

145. Pursuant to Article 176 § 1 of the Code, an arrest record must be drawn up immediately after the arrest. If there are valid reasons why that cannot be done, it has to be drawn up as soon as the arrestee is brought to a police station or before a law-enforcement authority.

B. Provisions governing pre-trial detention

1. Grounds for ordering pre-trial detention

146. Under Article 198 § 2 of the Code, a measure of restraint – which, in accordance with Article 199 § 1, can be bail, an undertaking not to leave one's place of residence and to observe good behaviour, a surety, or pre-trial detention – may be applied if it can reasonably be assumed that without it the accused will flee, destroy evidence or reoffend. Article 198 § 1 provides that an accused may only be placed in pre-trial detention or subjected to an alternative measure of restraint if a less severe measure cannot ensure that he or she will appear for trial or cease his or her alleged criminal activities.

147. Pursuant to Article 205 § 1 of the Code, pre-trial detention can only be imposed where it is the only means of preventing the accused from fleeing or interfering with the course of justice, obstructing the gathering of evidence or reoffending.

2. Maximum duration

148. Article 205 § 2 of the Code provides – as does Article 18 § 6 of the Constitution – that the duration of pre-trial detention must not exceed nine months. Article 205 § 2 goes on to specify that the period of pre-trial detention normally begins to run from the time of arrest and lasts until judgment of the first-instance court on the merits of the criminal case. It also provides that if the period comes to an end before the first-instance judgment is given, the accused must be released.

149. Article 205 § 3 of the Code provides that if the time between the accused's arrest and the pre-trial conference hearing exceeds sixty days, the accused must be released, unless the court has adjourned the pre-trial conference at the request of one of the parties, as is possible under Article 208 § 3 of the Code.

150. In a 2015 case brought by another of UNM's leaders, Mr G.U., former mayor of Tbilisi (no. 3/2/646, 15 September 2015), the Constitutional Court held that to the extent that Article 205 § 2 of the Code could be read as allowing someone to be kept in pre-trial detention for more than nine months if the prosecuting authorities brought further charges against him or her in a separate case with undue delay, it ran counter to Article 18 § 6 of the Constitution, according to which pre-trial detention could not last longer than nine months (see paragraph 148 above).

3. Judicial review

151. Under Article 206 §§ 1 and 8 of the Code, the accused may at any stage of the proceedings, including at the pre-trial conference hearing, request that the measure of restraint to which he or she has been subjected be varied or set aside. Within twenty-four hours, the court must review the request on the papers, checking whether it raises new essential issues. If it finds that to be the case, it must then examine the request at an oral hearing. Article 206 § 9 provides that in such proceedings the burden of proof lies on the prosecution. Pursuant to Article 206 § 6, the court's decision on the request must set out the circumstances on the basis of which the court deems it necessary to apply, vary or set aside a measure of restraint.

152. Article 219 § 4 (b) of the Code provides that during the pre-trial conference hearing the court must review the need to keep the accused in pre-trial detention regardless of whether he or she has sought release, and must then review every two months the need to keep the accused in custody.

C. Power of the prosecuting authorities to drop charges

153. Under Article 250 § 1 of the Code, the prosecutor dealing with a case may, with the consent of the higher prosecutor, fully or partly drop the charges, or replace them with lesser ones. If the charges are fully or partly dropped, the court must fully or partly discontinue the proceedings. Under Article 250 § 2, the prosecution may do so at any point in the proceedings. Article 250 § 3 specifies that charges which have been dropped may not be re-introduced against the same accused.

III. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

154. The Convention's early drafts did not contain a provision corresponding to Article 18. Such a provision appeared for the first time in the draft produced by the Conference of Senior Officials in June 1950 (see *Collected edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Martinus Nijhoff, vol. IV, 1977, pp. 190, 226 and 280). In its report to the Committee of Ministers, that Conference described that early version – Article 13 § 2 of its draft – as an application of the theory of "*détournement de pouvoir*", expressed in English as "misapplication of power" (ibid., pp. 258-59). On 16 August 1950, during the first part of the Consultative Assembly's second session, when speaking about the ways in which States could restrict the rights enshrined in the Convention, the French delegate, Mr P.-H. Teitgen, referred to the restrictions' "*légalité interne*", and drew a parallel with abuses of power by

the administration in France, noting that they could be annulled by the *Conseil d'État* (see *Collected edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Martinus Nijhoff, vol. V, 1979, p. 293).

B. European Union law

155. Misuse of power is a well-established concept in European Union law. It has, since 1952, been one of the grounds for annulling acts of institutions of the Union, formerly the Communities (see Article 33 § 1 of the 1951 Treaty establishing the European Coal and Steel Community (Treaty of Paris, 261 UNTS 140), as originally worded, and later reworded by Article H § 13 of the 1992 Treaty on European Union (Maastricht Treaty, 1757 UNTS 3) and then by Article 4 § 15 (a) of the 2001 Treaty of Nice amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts (2701 UNTS 3); Article 146 § 1 of the 1957 Treaty Establishing the European Atomic Energy Community (298 UNTS 167), as originally worded, and later reworded as Article 146 § 2 by Article I § 13, Title IV, of the Treaty on European Union, and then again reworded by Article 3 § 15 of the Treaty of Nice; Article 173 § 1 of the 1957 Treaty Establishing the European Economic Community (Treaty of Rome, 298 UNTS 11), as originally worded, and then reworded as Article 173 § 2 by Article G § 53 of the 1992 Treaty on European Union, later again reworded and renumbered Article 230 § 2 by Article 2 § 34 of the Treaty of Nice; Article K.7 § 6 (later renumbered Article 35) of the Treaty on European Union, as reworded by Article 1 § 11 of the 1997 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2700 UNTS 161); and, currently, Article 263 § 2 of the Consolidated Version of the Treaty on the Functioning of the European Union (OJ 2016/C 202/01, p. 47)).

156. According to the settled case-law of the Court of Justice of the European Union, an act is vitiated by misuse of power if it appears, on the basis of objective, relevant and consistent evidence, to have been undertaken solely or mainly for an end other than that for which the power in question was conferred (see, among many other authorities, judgment of the Court of Justice of the European Communities of 13 November 1990 in *FEDESA and Others*, C-331/88, EU:C:1990:391, paragraph 24; judgment of the Court of Justice of the European Union of 16 April 2013 in *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33; and judgment of the Court of Justice of the European Union of 4 December 2013 in *Commission v Council*, C-111/10, EU:C:2013:785, paragraph 80).

C. Case-law of the Inter-American Court of Human Rights

157. Article 30 *in fine* of the American Convention on Human Rights (1144 UNTS 123) provides that the restrictions which "may be placed on the enjoyment or exercise of the rights or freedoms recognized [in that Convention] may not be applied except ... in accordance with the purpose for which such restrictions have been established".

158. The Inter-American Court of Human Rights has held that this means that "the ends for which the restriction has been established [must] be legitimate, that is, that they pursue 'reasons of general interest' and do not stray from the 'purpose for which (they) have been established'", and that this requirement is a "teleological criterion ... establish[ing] control through the deviation of power" (see Advisory opinion OC-6/86 of the Inter-American Court of Human Rights on *The Word "Laws" in Article 30 of the American Convention on Human Rights*, 9 May 1986, Series A No. 6, § 18 (b)).

159. The Inter-American Court has also held that when checking the real purpose of measures alleged to amount to a misuse of power, it can rely on circumstantial evidence, indicia and presumptions, and has in practice done so (see Judgment of the Inter-American Court of Human Rights in *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, 6 February 2001, Series C No. 74, §§ 154-64; Judgment of the Inter-American Court of Human Rights in *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Preliminary Objection, Merits, Reparations and Costs, 23 August 2013, Series C No. 266, §§ 173-77; and Judgment of the Inter-American Court of Human Rights in *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, 28 August 2013, Series C No. 268, §§ 210-19).

160. In a recent case, in which the Venezuelan authorities had refused to renew the broadcasting licence of the country's oldest and most popular television station, a vocal critic of the government, the Inter-American Court first noted that in their decisions the authorities had set out an aim – to ensure more variety in the content available to viewers – which was legitimate. However, the court went on to examine whether that had been the real aim of the decisions. It took as its starting point the presumption that the authorities had acted in good faith. But it noted four strongly worded public statements by the then president, Mr Hugo Chávez, made shortly before the decisions, that the licence would not be renewed because the television station was hostile to the government. Analysing those statements jointly, the court concluded that the refusal to renew the licence had in reality been meant to silence criticism of the government. Though not referring to Article 30 of the American Convention, it held that this had been a misuse of power (see Judgment of the Inter-American Court of Human Rights in *Granier et al. (Radio Caracas Television) v. Venezuela*,

Preliminary Objections, Merits, Reparations and Costs, 22 June 2015, Series C No. 293, §§ 184-99).

D. Disguised prosecution for political opinions in extradition law

161. The rule in extradition law that extradition must be refused if the requesting State is seeking someone's extradition for a seemingly ordinary criminal offence in order to prosecute or punish him or her on account of a political opinion is well settled.

162. It features in all modern multilateral conventions and instruments relating to extradition (Article 3 § 2 of the 1957 European Convention on Extradition (ETS No. 24; 359 UNTS 273); Article 5 of the 1977 European Convention on the Suppression of Terrorism (ETS No. 90; 1137 UNTS 93); Article 6 § 6 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1582 UNTS 95); Article 15 of the 1999 International Convention for the Suppression of the Financing of Terrorism (2178 UNTS 197); Article 16 § 14 of the 2000 United Nations Convention against Transnational Organized Crime (2225 UNTS 209); Article 44 § 15 of the 2003 United Nations Convention against Corruption (2349 UNTS 41); Recital 12 of the 2002 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, OJEC 2002/L 190, pp. 1-18); Article 3 (b) of the 1990 United Nations Model Treaty on Extradition (UN Doc. A/RES/45/116); and clause 13(a)(i) of the 1966 London Scheme for Extradition within the Commonwealth, as amended in 2002).

163. The rule has also been included in many bilateral extradition treaties (see, for example, Article 7 § 4 of the 1972 Treaty on Extradition between Denmark and the United States of America (952 UNTS 29); Article 4 § 2 of the 1978 Treaty Concerning Extradition between Germany and the United States of America (1220 UNTS 269); Article 3 § 1 (a) of the 1979 Treaty on Extradition and Mutual Assistance in Criminal Matters between Turkey and the United States of America (1273 UNTS 83); Article 4 (a) of the 1985 Treaty of Extradition between Australia and Italy (1598 UNTS 31); Article 3 § 1 (b) of the 1987 Treaty Concerning Extradition between Australia and Germany (1586 UNTS 185); Article 3 § 1 (b) of the 1987 Treaty on Extradition between Australia and Luxembourg (1536 UNTS 31); Article 4 § 3 of the 1996 Extradition Treaty between Cyprus and the United States of America (2927 UNTS ...); Article 4 § 4 of the 1996 Extradition Treaty between France and the United States of America (2179 UNTS 341); Article 3 (b) of the 2005 Extradition Treaty between Canada and Italy (2859 UNTS 197); Article 3 (b) of the 2007 Extradition Treaty between France and the People's Republic of China (... UNTS ...); and Article 3 § 7 of the 2010 Extradition Treaty between Belarus and Bulgaria (2849 UNTS ...)).

164. It also features in many domestic extradition laws. For instance, in France it is set out in Article 696-4 § 2 of the Code of Criminal Procedure; in the United Kingdom it is set out in section 13(a) of the Extradition Act of 2003; and in Greece it is set out in Article 438 (c) of the Code of Criminal Procedure.

165. Under nearly all the international instruments, the standard to which a hidden political purpose must be proved is "substantial grounds for believing".

IV. COMPARATIVE-LAW MATERIALS

166. Misuse of power, or *détournement de pouvoir* as it is called in France, where the notion originated, is a well-known concept in administrative law. Despite variations in the formulation, it now exists in many domestic legal systems. It is one of the ways in which decisions by the administrative authorities can be tainted or, put differently, one of the grounds on which they can be set aside.

167. There is misuse of power when an authority uses its power for a purpose other than the one for which it was conferred. It is based on the idea that the authorities are not free to choose the aims which they can pursue, and must only use their powers to further the goals for which the law has bestowed those powers on them. This means two things: first, that the authorities must act in the public interest, and secondly, that each of their powers must only be used for the specific purpose or purposes for which it was conferred.

168. According to information available to the Court, the courts of several High Contracting States accept as proof of misuse of power the terms of the impugned decision, documents in the file relating to the adoption of that decision, documents created in the course of the judicial-review proceedings, presumptions of fact, and, more generally, contextual evidence. When faced with a situation in which an authority has pursued both an authorised and an ulterior purpose, they assess which of those purposes was predominant. If they find that the authorised purpose was predominant, they regard the authority's decision as valid. If, conversely, they find that the ulterior purpose was predominant, they quash the decision as invalid.

THE LAW

I. SCOPE OF THE CASE

169. The Court considers it important to clarify from the outset the scope of the case.

170. The applicant's complaints concerned only his deprivation of liberty between his arrest on 21 May 2013 and his conviction by the Kutaisi City Court on 17 February 2014 on the criminal charges against him relating to the State Programme for Job Seekers and the house in the village of Kvariati. The Court is therefore not directly concerned with whether the applicant's detention following his conviction was compatible with the Convention, or with the other criminal cases against the applicant (see paragraphs 56-59 above).

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

171. The applicant complained that his arrest and pre-trial detention had been unlawful and unjustified. He relied on Article 5 § 1 of the Convention, which provides, in so far as relevant:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so[.]"

A. The Chamber judgment

172. The Chamber did not deal with the lawfulness of the applicant's arrest.

173. With regard to the pre-trial detention, the Chamber held that the applicant's case could not be likened to cases in which the detainees had been held in custody solely on the basis that the prosecution had filed an indictment against them, and thus without a clear legal basis and for a potentially unlimited period of time. Though such a problem had existed in Georgia under the 1998 Code of Criminal Procedure, that was no longer the case under the 2010 Code of Criminal Procedure. The absence of a time-limit in the decisions to place the applicant in pre-trial detention, which was consistent with the Georgian courts' practice at that time, did not make that detention unlawful within the meaning of Article 5 § 1 of the

Convention, since Article 205 § 2 of the 2010 Code made it clear that pre-trial detention could not last longer than nine months, which was a point that the applicant could easily have understood through the advice of his counsel. Moreover, under Article 206 of that Code he could at any point during those nine months have sought release on the basis that the grounds for his pre-trial detention had ceased to obtain. It could not therefore be said that he had been detained for a potentially unlimited time or otherwise placed in a position of legal uncertainty.

B. The parties' submissions to the Grand Chamber

1. The applicant

174. The applicant submitted that his arrest had been unlawful because it had been made without a judicial warrant although none of the exceptions to that requirement applied in his case. The circumstances of his arrest showed that the decision to take him into custody had been taken in advance and for an ulterior purpose, and that the summons to appear for questioning had not been a bona fide attempt to obtain his cooperation in relation to the case. Yet, despite the lack of any urgency, the authorities had not applied for a warrant. Moreover, even though the applicant had specifically asked the Kutaisi City Court to review the lawfulness of his arrest, that court had not done so in any detail.

175. The pre-trial detention had not met the requirement of legal certainty because, when deciding to place the applicant in detention, the Kutaisi City Court had not fixed its duration. Although that court had made a passing reference to Article 205 of the Code of Criminal Procedure, the second paragraph of which laid down the maximum duration of pre-trial detention, it had not made it clear for how long it was placing the applicant in custody. Since the nine-month maximum could arguably be counted separately for each charge, and since the applicant had been presented with several charges, the position in his case had been particularly uncertain. The Georgian courts' practice of not fixing time-limits for pre-trial detention was in breach of the requirement of legal certainty. That was not offset by the possibility of subsequently seeking review of the detention because under Georgian law the bar for doing so was too high: only where "new essential issues" had arisen after the initial placement in detention.

176. Moreover, the detention had been unjustified, as a less restrictive measure could have been used. In opting for detention, the Kutaisi City Court had principally had regard to the seriousness of the charges against the applicant rather than his personal circumstances, and had not explored whether a less stringent measure, such as bail or a personal surety, possibly combined with measures restricting the possibility of leaving Georgia, could have ensured the applicant's availability for trial. The real purpose of his

detention had been to exclude him from political life. The ulterior motives for the detention had become manifest when the applicant had been taken to the Chief Public Prosecutor on 14 December 2013 and asked for information and threatened by him. That incident had shown that the detention had been arbitrary.

2. The Government

177. The Government submitted that the applicant's arrest had fully complied with Article 171 of the Code of Criminal Procedure, which in turn was fully in line with Article 5 § 1 of the Convention. The arrest had been made without a warrant owing to the risk of flight. The decision to arrest had not been taken in advance, but had been based on the developments which had followed the summons to the applicant to appear for questioning: his wife's departure from Georgia and his reaction during questioning to the incriminating evidence with which he had been presented. Having reviewed the file, the Kutaisi City Court had been satisfied that no procedural breaches had occurred in the course of his arrest. The risk of the applicant's fleeing had been further corroborated by the incident on 30 November 2012, and confirmed by the Kutaisi City Court's decision to place him in pre-trial detention.

178. The arrest had been based on a reasonable suspicion that the applicant had committed the offences with which he had been charged. In the months before the arrest, the prosecuting authorities had obtained ample evidence supporting those charges. The Kutaisi City Court, whose decision had been upheld by the Kutaisi Court of Appeal, had reviewed the prosecution's assessment of that evidence and had been satisfied of the existence of a reasonable suspicion. The purpose of the applicant's arrest had only been to bring him before a competent legal authority – which had been done the following day. There was no evidence that the authorities had had anything else in mind.

179. The applicant's pre-trial detention had also been lawful and justified. The prosecution had supported its request to place him in pre-trial detention with enough evidence and arguments, and the Kutaisi City Court had found that a less stringent measure would not have prevented the risks of flight or obstruction of the proceedings.

C. The Court's assessment

1. Whether the Grand Chamber has jurisdiction to examine the complaint relating to the applicant's arrest

180. The "case" referred to the Grand Chamber under Article 43 of the Convention is the application as it was declared admissible by the Chamber (see *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII). In

his application the applicant complained under Article 5 § 1 of the Convention of the alleged unlawfulness of his arrest. Though not specifically dealing with that complaint in its reasoning, the Chamber declared the application admissible as a whole. The complaint relating to the applicant's arrest was therefore covered by its admissibility decision. This is also borne out by the Chamber's adverting to the arrest in its description of the facts of the case (see paragraph 18 of its judgment). It follows that the Grand Chamber can examine the complaint that the arrest was in breach of Article 5 § 1 of the Convention (see, *mutatis mutandis*, *K. and T. v. Finland*, cited above, § 145; *Kamasinski v. Austria*, 19 December 1989, § 59, Series A no. 168; and *Scott v. Spain*, 18 December 1996, § 59, *Reports of Judgments and Decisions* 1996-VI).

2. General principles under Article 5 § 1 (c) of the Convention

181. Article 5 § 1 of the Convention guarantees the fundamental right to liberty and security, which is of primary importance in a "democratic society" (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12; *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; and *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II). More generally, Article 5 is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, ECHR 2016 (extracts)).

182. As is apparent from its wording, which must be read in conjunction with both sub-paragraph (a) and paragraph 3, which forms a whole with it, the first limb of Article 5 § 1 (c) only permits deprivation of liberty in connection with criminal proceedings (see, among other authorities, *Ciulla v. Italy*, 22 February 1989, § 38, Series A no. 148; *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; and *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 72, ECHR 2011 (extracts)).

183. To be compatible with that provision, an arrest or detention must meet three conditions.

184. First, it must be based on a "reasonable suspicion" that the person concerned has committed an offence, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. What is "reasonable" depends on all the circumstances, but the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge (see, among other authorities, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *Labita v. Italy* [GC], no. 26772/95, § 155, ECHR 2000-IV; and *O'Hara v. the United Kingdom*, no. 37555/97, §§ 34 and 36, ECHR 2001-X).

185. Secondly, the purpose of the arrest or detention must be to bring the person concerned before a "competent legal authority" – a point to be considered independently of whether that purpose has been achieved (see, among other authorities, *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 52-53, Series A no. 145-B; *Murray v. the United Kingdom*, 28 October 1994, §§ 67-68, Series A no. 300-A; and *K.-F. v. Germany*, 27 November 1997, § 61, *Reports* 1997-VII).

186. Thirdly, an arrest or detention under sub-paragraph (c) must, like any deprivation of liberty under Article 5 § 1 of the Convention, be "lawful" and "in accordance with a procedure prescribed by law" (see, among other authorities, *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; *Kemmache v. France (no. 3)*, 24 November 1994, §§ 37 and 42, Series A no. 296-C; and *K.-F. v. Germany*, cited above, § 63). Those two expressions, which overlap to an extent, refer essentially to domestic law and lay down the obligation to comply with its substantive and procedural rules (see, among other authorities, *Winterwerp*, §§ 39 and 45; *Kemmache (no. 3)*, §§ 37 and 42; *K.-F. v. Germany*, § 63; and *Assanidze*, § 171, all cited above). That is not, however, sufficient; Article 5 § 1 of the Convention also requires that domestic law itself be compatible with the rule of law. This in particular means that a law which permits deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application (see, among other authorities, *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Jėčius*, cited above, § 56; *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III; and *Kakabadze and Others v. Georgia*, no. 1484/07, §§ 62 and 68, 2 October 2012). It also means that an arrest or detention must be compatible with the aim of Article 5 § 1, which is to prevent arbitrary deprivation of liberty (see, among other authorities, *Winterwerp*, § 39; *Jėčius*, § 56; *Baranowski*, § 51; *Assanidze*, § 171; and *Kakabadze and Others*, § 63, all cited above). This presupposes, in particular, that a deprivation of liberty genuinely conforms with the purpose of the restriction permitted by the relevant sub-paragraph of Article 5 § 1 (see *Winterwerp*, cited above, § 39; *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 69, ECHR 2008).

3. Application of those principles

(a) The applicant's arrest

187. The applicant did not claim before the Court that his arrest had not been based on a reasonable suspicion of his having committed the offences in relation to which he was taken into custody, and the Government gave a full account of the incriminating material obtained by the authorities before the arrest (see paragraphs 29-31 and 174 above). Nothing in that material appears to cast doubt on the reasonableness of the suspicion against the

applicant, either on the facts or as a matter of criminal law (compare *Gusinskiy v. Russia*, no. 70276/01, § 55, ECHR 2004-IV, and contrast *Lukanov v. Bulgaria*, 20 March 1997, §§ 42-45, *Reports* 1997-II; *Kandzhov v. Bulgaria*, no. 68294/01, §§ 57-61, 6 November 2008; *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, §§ 90-99, 22 May 2014; and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 121-32, 17 March 2016). Nor does it appear that the charges themselves were related to the exercise of the applicant's rights under the Convention.

188. There is, moreover, nothing to suggest that at the time of the applicant's arrest there was no intention to bring him before a competent legal authority. That happened the next day (see paragraphs 33 and 38 above). That was enough to make his arrest compatible with the "purpose" requirement of Article 5 § 1 (c) of the Convention (compare *Gusinskiy*, cited above, § 55). The question whether the arrest also pursued another purpose falls to be examined under Article 18 of the Convention.

189. It remains to be established whether the arrest was "lawful" and "in accordance with a procedure prescribed by law".

190. Under Article 171 § 1 of the Georgian Code of Criminal Procedure, an arrest must as a rule be based on a judicial warrant. Article 171 § 2 sets out the situations in which the arrest may, by way of exception, be made without a warrant. The only one relied on by the authorities in this case was point (e), according to which a warrant can be dispensed with if there is a risk of flight. Article 171 § 3 lays down a further requirement: that the risk cannot be prevented by an alternative measure that is proportionate to the circumstances of the alleged offence and to the characteristics of the accused (see paragraphs 26 and 144 above). The points on which the parties disagreed were whether there was such a risk in the applicant's case and whether it could have been averted without resorting to his arrest.

191. Although those questions concern the application of Georgian law, the Court is competent to examine them. As already noted, where the Convention refers back to domestic law, as it does in Article 5 § 1 (c), disregard of that law entails a breach of the Convention, which means that the Court can and should review whether that law was complied with (see, among other authorities, *Winterwerp*, cited above, § 46). Its power in that respect is, however, subject to inherent limits, because even where the Convention refers to domestic law, it is in the first place for the national authorities to interpret and apply that law (see *Winterwerp*, § 46; *Kemmache (no. 3)*, § 37; and *Lukanov*, § 41, all cited above).

192. In the record of the applicant's arrest, the investigator noted that in 2012 he had tried to cross the border with a fake passport, which made it likely that he would attempt to leave Georgia, and that he had been out of the country many times, which showed that he would have no difficulties going abroad (see paragraph 26 above). Accordingly, she answered the first question directly and the second one implicitly. The Court does not find that

her findings on those two points, which should not be revisited with the benefit of hindsight, were arbitrary or patently in breach of Article 171 §§ 2 and 3 of the Code of Criminal Procedure. Whilst a fuller explanation of why the risk of the applicant's fleeing was sufficiently serious and could not be averted otherwise than by arresting him would have been desirable, nothing suggests that the level of detail of the reasons set forth in the record of the applicant's arrest clearly fell short of the requirements of Georgian law.

193. Moreover, when deciding the next day whether or not to place the applicant in pre-trial detention, the Kutaisi City Court also touched, albeit briefly, on the lawfulness of his arrest (see paragraph 39 above), and its decision was upheld by the Kutaisi Court of Appeal (see paragraph 43 above). The Court cannot depart lightly from the national authorities' and courts' findings on the application of domestic law.

194. In view of the foregoing, the Court finds no breach of Article 5 § 1 of the Convention in relation to the applicant's arrest.

(b) The applicant's pre-trial detention

195. As already noted, the applicant did not claim before the Court that his arrest and pre-trial detention had not been based on a reasonable suspicion. He rather took issue with the Kutaisi City Court's failure to fix the duration of his pre-trial detention, and argued that the detention had been unjustified because it had been imposed without due consideration for his personal situation and because it had in reality pursued an ulterior purpose.

196. The Court does not find that either of those points casts doubt on the compatibility of the applicant's pre-trial detention with Article 5 § 1 (c) of the Convention.

197. The Kutaisi City Court's failure to fix its duration does not raise an issue under that provision. That was not required under Georgian law (contrast *Logvinenko v. Russia*, no. 44511/04, §§ 37-38, 17 June 2010; *Fedorenko v. Russia*, no. 39602/05, §§ 48-50 and 54-55, 20 September 2011; and *Roman Petrov v. Russia*, no. 37311/08, §§ 43-45, 15 December 2015). Article 18 § 6 of the Georgian Constitution and Article 205 § 2 of the Code of Criminal Procedure limit pre-trial detention to nine months, but that does not mean that the court imposing it must specify its duration in its decision. Article 206 § 6 of the Code, which sets out the elements which the court's decision on pre-trial detention must contain, says nothing about an obligation to fix the period of the detention (see paragraphs 148 and 151 above).

198. Nor is there a freestanding requirement under Article 5 § 1 of the Convention that decisions ordering pre-trial detention fix its duration.

199. It is true that detention for an unpredictable amount of time owing to a legislative gap is in breach of the requirement of legal certainty (see *Baranowski*, cited above, § 56; *Gigolashvili v. Georgia*, no. 18145/05, §§ 31

and 35, 8 July 2008; *Yeloyev v. Ukraine*, no. 17283/02, § 53, 6 November 2008; *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, §§ 70-72, 27 November 2008; *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, §§ 106-10, 27 January 2009; *Feldman v. Ukraine*, nos. 76556/01 and 38779/04, § 73, 8 April 2010; *Kharchenko v. Ukraine*, no. 40107/02, § 74, 10 February 2011; *Tymoshenko v. Ukraine*, no. 49872/11, § 267, 30 April 2013; and *Gal v. Ukraine*, no. 6759/11, § 36, 16 April 2015). But that was not the case here. Georgian law provided a clear basis for the applicant's pre-trial detention and itself limited its duration. Admittedly, in three judgments the Court has said that if a national court does not fix the duration of pre-trial detention, that gives rise to uncertainty even if its maximum is clear from domestic law (see *Lutsenko v. Ukraine*, no. 6492/11, § 73, 3 July 2012; *Gal*, cited above, § 37; and *Kleutin v. Ukraine,* no. 5911/05, § 105, 23 June 2016). But those rulings must be understood in context. In all three cases the national courts had also failed to give even minimally cogent reasons for ordering pre-trial detention. They are similar to several cases in which the Court found a breach of Article 5 § 1 of the Convention owing to the combination of a lack of any reasons for ordering pre-trial detention and a failure to fix its duration (see *Khudoyorov v. Russia*, no. 6847/02, §§ 136-37, ECHR 2005-X (extracts); *Vladimir Solovyev v. Russia*, no. 2708/02, §§ 95-98, 24 May 2007; *Gubkin v. Russia*, no. 36941/02, §§ 111-14, 23 April 2009; *Arutyunyan v. Russia*, no. 48977/09, §§ 92-93, 10 January 2012; and *Pletmentsev v. Russia*, no. 4157/04, § 43, 27 June 2013, with further references). Those judgments should not therefore be read as laying down a requirement under Article 5 § 1 of the Convention for the national courts to fix the duration of pre-trial detention in their decisions regardless of how the matter is regulated in domestic law. All that this provision requires is rules that are foreseeable in their application.

200. Under Article 205 § 2 of the Georgian Code of Criminal Procedure, the applicant could not be detained for more than nine months in connection with the charges against him (see paragraph 148 above). It cannot therefore be said that there was uncertainty about the rules governing his pre-trial detention or a risk that it would last indefinitely.

201. In the event, he was convicted on 17 February 2014, eight months and twenty-seven days after being arrested (see paragraph 53 above).

202. It is true that in 2015 Georgia's Constitutional Court held that to the extent that Article 205 § 2 of the Code could be read as allowing someone to be kept in pre-trial detention for more than nine months if the prosecuting authorities brought further charges against him in a separate case with undue delay, it was in breach of Article 18 §§ 1 and 6 of the Constitution (see paragraph 150 above). However, the reasons given by that court show that its ruling was meant to forestall the possibility for the prosecuting authorities to keep bringing fresh charges against someone already in

pre-trial detention to justify prolonging that detention beyond the nine-month period.

203. No such issue, however, arose in the applicant's case. Between his arrest on 21 May 2013 and his conviction on 17 February 2014 he was presented with further charges twice. The first time was on 28 May 2013, six days after he was first placed in pre-trial detention (see paragraph 56 above). Those charges, though leading to a separate decision on 30 May 2013 by the Tbilisi City Court to place him in pre-trial detention (ibid.), did not serve as a basis for keeping him in such detention for longer than nine months, as he was convicted in the criminal case under consideration here less than nine months after his arrest. The second time was on 24 June 2013, one month and five days after he was first placed in pre-trial detention (see paragraph 57 above). Those charges did not, however, become a basis for keeping the applicant in pre-trial detention, as the Tbilisi City Court turned down the prosecution's request to that effect (ibid.). All those factors, and in particular the relatively short interval between bringing the initial and the subsequent charges, make it hard to see those subsequent charges as an expedient on the part of the prosecuting authorities to circumvent the statutory rule capping the amount of time that the applicant could be kept in pre-trial detention.

204. Thus, to the extent that the bringing of fresh charges in separate proceedings could be said to introduce uncertainty in the application of Article 205 § 2 of the Code, it did not affect the applicant. In proceedings originating in an individual application the Court's task is not to review domestic law in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (see, among other authorities, *Golder v. the United Kingdom*, 21 February 1975, § 39 *in fine*, Series A no. 18; *Minelli v. Switzerland*, 25 March 1983, § 35, Series A no. 62; and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 60, ECHR 1999-II).

205. Whether the Kutaisi City Court paid enough heed to the applicant's personal situation and, more generally, whether the reasons that it gave for placing him in pre-trial detention were sufficient raises an issue not under Article 5 § 1, but under Article 5 § 3 (see *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 44, Series A no. 77; *Khodorkovskiy v. Russia*, no. 5829/04, §§ 161 and 163, 31 May 2011; *Mikiashvili v. Georgia*, no. 18996/06, § 94, 9 October 2012; *Buzadji*, cited above, § 99 *in fine*; and *Vaščenkovs v. Latvia*, no. 30795/12, § 42, 15 December 2016). This will be examined in detail below. In view of the case-law cited in paragraph 199 above, it cannot be said that the reasons given by that court for placing the applicant in pre-trial detention suffered from such shortcomings as to call into question the lawfulness of the detention within the meaning of Article 5 § 1 (contrast *Lutsenko*, §§ 67-72, and *Tymoshenko*, §§ 269-70, both cited above).

206. Moreover, the reasons given by that court show that the applicant's pre-trial detention did pursue a purpose consistent with sub-paragraph (c) of Article 5 § 1 of the Convention. That was enough to make it compatible with that provision. As already noted, the question whether it also pursued another purpose falls to be examined under Article 18 of the Convention.

207. In sum, the applicant's pre-trial detention was in line with Georgian law, which, as applied to him, was sufficiently foreseeable and was not arbitrary.

208. There has therefore been no breach of Article 5 § 1 in relation to the applicant's pre-trial detention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

209. The applicant complained that the Georgian courts had not given relevant and sufficient reasons for his pre-trial detention, either when they had first imposed it or when they had later reviewed it. He relied on Article 5 § 3 of the Convention, which provides, in so far as relevant:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The Chamber judgment

210. The Chamber noted that the applicant had spent a total of eight months and twenty-seven days in pre-trial detention. The whole of that period could not automatically be justified on the basis of the reasons set out in the initial decisions to place him in detention. It was therefore necessary to verify not only whether the courts had given relevant and sufficient reasons for placing the applicant in detention, but also whether they had done so when rejecting the applicant's request for release on 25 September 2013. The initial decisions had endorsed both reasons cited by the prosecution for placing the applicant in custody: the risk that he would flee and the risk that he would obstruct the proceedings. The latter risk had been substantiated by reference to the applicant's former high position and by his conduct during the incident of 30 November 2012. The former risk had been borne out by the applicant's possession of a fake passport, his wife's hasty departure abroad on the day he had been summoned for questioning, and the discovery of large sums of cash in his flat. All of those grounds had been sufficiently specific. It had therefore not been unreasonable to place the applicant in pre-trial detention.

211. By contrast, when the applicant sought release on 25 September 2013, the Kutaisi City Court, instead of checking even more carefully whether his continued detention remained justified, had rejected his request

with one sentence, without giving any reasons for its decision, in breach of the relevant provisions of the 2010 Code of Criminal Procedure and of Article 5 § 3 of the Convention.

B. The Government's preliminary objection

1. The parties' submissions

212. The Government submitted that the applicant had failed to appeal against the Kutaisi City Court's decision of 25 September 2013 to the Investigative Chamber of the Kutaisi Court of Appeal, as would have been possible under Article 207 of the Code of Criminal Procedure. Such an appeal was an adequate and effective remedy. The Government therefore invited the Grand Chamber to declare the complaint inadmissible on that ground, pointing out that under Article 35 § 4 *in fine* of the Convention the Court could do so at "any stage of the proceedings".

213. In their oral submissions on behalf of the applicant, his representatives submitted that under the Georgian Code of Criminal Procedure decisions taken by the first-instance court during the pre-trial conference hearing were not amenable to appeal.

2. The Grand Chamber's assessment

214. Under Article 35 § 4 *in fine* of the Convention, the Court can dismiss an application that it considers inadmissible "at any stage of the proceedings". The Grand Chamber can therefore examine, if appropriate, questions relating to the admissibility of an application. If it finds that an application, or part of it, should have been declared inadmissible, it may – even at the merits stage – reconsider the decision in that respect (see, among other authorities, *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; and *Muršić v. Croatia* [GC], no. 7334/13, § 69, ECHR 2016). But that possibility is subject to Rule 55 of the Rules of Court, according to which "[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application submitted as provided in Rule 51 or 54 [of the Rules of Court]" (see *K. and T. v. Finland*, cited above, § 145; *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X; and *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II). Only exceptional circumstances, in particular that the grounds for the plea occurred or came to light later, could dispense a respondent Government from the obligation to raise it in their observations under Rule 51 or 54 (see *N.C. v. Italy*, cited above, § 44; *Mooren v. Germany* [GC], no. 11364/03, § 57, 9 July 2009; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 69, ECHR 2010).

215. In their observations on the admissibility of the application filed in the course of the Chamber proceedings the Government did not claim that the applicant could have availed himself of the remedy under Article 207 of the Code of Criminal Procedure. They did not argue that there were exceptional circumstances that dispensed them from the obligation to do so, and the Grand Chamber has itself been unable to discern any such circumstances. The Government are thus estopped from raising that objection.

216. It follows that the objection must be dismissed.

C. Merits of the complaint

1. The parties' submissions

217. The applicant submitted that the decision to place him in pre-trial detention had been essentially motivated by the seriousness of the charges against him and had failed to take into account his arguments in favour of his release. He invited the Grand Chamber to disregard the specific points pleaded by the prosecution in support of their contention that he might flee, noting that neither the Kutaisi City Court nor the Kutaisi Court of Appeal had mentioned them in their decisions. He also pointed out that he had been allowed to travel out of Georgia six times after the incident of 30 November 2012, each time returning as scheduled. The risk of his obstructing the proceedings had not been properly established either. Lastly, the courts had failed to duly consider alternative measures, such as bail or a personal guarantee.

218. The applicant went on to argue that the Kutaisi City Court's failure to give reasons for its decision of 25 September 2013 had been in breach of the Code of Criminal Procedure and had been particularly problematic since at that time he had already been in custody for four months.

219. The Government submitted that in their request that the applicant be placed in pre-trial detention, the prosecution had put forward a number of concrete arguments in support of their submission that there was a risk that he would flee or obstruct the proceedings. The Kutaisi City Court had heard those arguments at a public hearing at which the applicant had been able to comment on them, and had then endorsed them, as had the Kutaisi Court of Appeal.

220. The Government went on to submit that in opposing the applicant's request for release of 25 September 2013 the prosecution had likewise cited a number of concrete arguments. Those arguments had formed the basis for the Kutaisi City Court's decision to reject the applicant's request. That court had made its decision after fully adversarial proceedings and had taken into consideration all arguments put forward by the parties in those proceedings. Its oral ruling had not breached the Code of Criminal Procedure.

2. The Court's assessment

(a) Period to be taken into consideration

221. The period to be taken into consideration began on 21 May 2013, when the applicant was arrested, and ended on 17 February 2014, when he was convicted at first instance (see paragraphs 26 and 53, and *Buzadji*, cited above, § 85, with further references). It therefore lasted eight months and twenty-seven days.

(b) The reasonableness of that period

(i) General principles

222. The persistence of a reasonable suspicion that the detainee has committed an offence is a condition *sine qua non* for the validity of his or her continued detention. But when the national judicial authorities first examine, "promptly" after the arrest, whether to place the arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention. Those other grounds may be a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to protect the detainee (see *Buzadji*, cited above, §§ 87-88 and 101-02, with further references). Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see, among other authorities, *Letellier v. France*, 26 June 1991, § 51, Series A no. 207; *Clooth v. Belgium*, 12 December 1991, § 44, Series A no. 225; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX (extracts); and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, §§ 73 and 76, 13 January 2009).

223. In particular, the risk of flight cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other factors, such as the accused's character, morals, assets, links with the jurisdiction, and international contacts (see *W. v. Switzerland*, 26 January 1993, § 33 Series A no. 254-A; *Smirnova*, cited above, § 60; and *Buzadji*, cited above, § 90). Moreover, the last sentence of Article 5 § 3 of the Convention shows that when the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance (see *Wemhoff v. Germany*, 27 June 1968, p. 25, § 15, Series A no. 7; *Letellier*, cited above, § 46; and, more recently, *Luković v. Serbia*, no. 43808/07, § 54, 26 March 2013).

224. Similarly, the risk of pressure being brought to bear on witnesses cannot be based only on the likelihood of a severe penalty, but must be linked to specific facts (see, among other authorities, *Jarzyński v. Poland*,

no. 15479/02, § 43, 4 October 2005; *Kozłowski v. Poland*, no. 31575/03, § 43, 13 December 2005; *Krzysztofiak v. Poland*, no. 38018/07, § 48, 20 April 2010; and *Saghinadze and Others v. Georgia*, no. 18768/05, § 137, 27 May 2010).

225. It is essentially on the basis of the reasons set out in the decisions of the national judicial authorities relating to the applicant's pre-trial detention and of the arguments made by the applicant in his requests for release or appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see, among other authorities, *Wemhoff*, cited above, pp. 24-25, § 12; *Neumeister v. Austria*, 27 June 1968, p. 37, §§ 4-5, Series A no. 8; *Letellier*, cited above, § 35; and *Buzadji*, cited above, § 91).

(ii) Application of those principles

(α) The applicant's initial placement in pre-trial detention

226. The reasons given by the Kutaisi City Court for its decision to place the applicant in pre-trial detention – the risk that he would flee and would influence witnesses (see paragraph 39 above) – were relevant. The question is whether they were also sufficient.

227. The Kutaisi City Court did not set out all the arguments cited by the prosecution in relation to those matters, especially with respect to the risk of flight. It did, however, expressly refer to the prosecution's pleadings. By doing so, it made it clear that it had taken into account the specific points put forward by the prosecution and had found them sufficient to justify placing the applicant in pre-trial detention. Whilst more detailed reasoning would have been desirable, the Court is satisfied that this was enough in the circumstances, and that it can have regard to those specific points. It is true that under Article 5 § 3 of the Convention it is in the first place for the national judicial authorities to review all considerations for or against detention and set them out in their decisions (see, among other authorities, *Letellier*, § 35; *Labita*, § 152; and *McKay*, § 43, all cited above). But there is no single standard of reasoning in those matters, and nothing precludes the national judicial authorities from endorsing or incorporating by reference the specific points cited by the authorities seeking the imposition of pre-trial detention (see, *mutatis mutandis*, *Helle v. Finland*, 19 December 1997, §§ 56-60, *Reports* 1997-VIII, and *Lăcătuş and Others v. Romania*, no. 12694/04, § 100, 13 November 2012).

228. The risk of the applicant's influencing witnesses was not strongly substantiated. It is true that many witnesses in the case against him were former subordinates of his, and that he wielded considerable influence in some sectors of Georgian society (see paragraph 31 above). But the proceedings had been opened more than five months before his arrest, and it was not asserted that during that time he had tried to influence any

witnesses in those proceedings. The only concrete incident cited in support of that proposition – the applicant's alleged attempt to intimidate the head of the Border Police on 30 November 2012 – even assuming that it was true, which the applicant denied – had taken place before the case had been opened, and had no connection with the charges in respect of which the applicant was placed in pre-trial detention.

229. The risk of flight was established in more concrete terms. The prosecution referred, generally, to the applicant's wide network of international contacts and his many trips abroad. They also noted, more specifically, that his wife had left Georgia straight after he had been summoned for questioning on 21 May 2013, that a search of his flat had revealed large sums of cash which he might have prepared in order to facilitate his departure from Georgia, and that he still had a fake passport (see paragraph 34 above). Those facts, which were amplified by the seriousness of the punishment which awaited the applicant if convicted, suggest that at that time, straight after he was charged, the risk of his fleeing abroad could be seen as sufficiently real and incapable of being averted by a less restrictive measure.

230. The Court therefore finds that there has been no breach of Article 5 § 3 in relation to the applicant's initial placement in pre-trial detention.

(β) The continued justification for the applicant's pre-trial detention

231. The first challenge against the applicant's detention was made on 25 September 2013, four months after it had been imposed. In their submissions to the Kutaisi City Court on that date the applicant's counsel and the prosecution essentially rehashed the arguments about the risk of flight and the risk of influencing witnesses that they had already made on 22 May 2013. The only new arguments by the prosecution appear to have been that the applicant might have other unidentified fake passports and that such passports had already been used by other former officials to flee abroad, and that the risk of influencing witnesses remained, as the witnesses, though already interviewed, were still due to testify at trial, which was by law the only way of adducing their evidence. On the applicant's side, the only new argument appears to have been that the investigation had already been concluded (see paragraphs 47 and 48 above).

232. All those arguments had a bearing on the continued justification for the applicant's pre-trial detention, and none of them was entirely devoid of merit. Even if many of them were identical to those made four months previously, they all required a fresh examination, since by their very nature reasons which at first justify the imposition of pre-trial detention can change over time (see *Letellier*, cited above, § 39; *I.A. v. France*, 23 September 1998, §§ 105 and 110, *Reports* 1998-VII; and *Kudła v. Poland* [GC], no. 30210/96, § 114, ECHR 2000-XI).

233. Yet the Kutaisi City Court said nothing in relation to any of those points (see paragraph 49 above). By omitting to give any reasons for its decision of 25 September 2013, it did not make it clear why it was persuaded by the reasons cited by the prosecution and why it found that they outweighed the arguments put forward by the applicant. It is not for the Court to supplement that omission (see *Ilijkov v. Bulgaria*, no. 33977/96, § 86, 26 July 2001; *Panchenko v. Russia*, no. 45100/98, § 105, 8 February 2005; and *Giorgi Nikolaishvili*, cited above, § 77).

234. In its subsequent decision, of 7 October 2013, the Kutaisi City Court briefly noted that the applicant had not pointed to any new facts or evidence, but had merely referred to the reasons set out in the initial decision to place the applicant in pre-trial detention. It thus entirely disregarded the passage of time and made it clear that it was for the applicant to show that his detention was no longer justified (see paragraph 51 above). However, under Article 5 § 3 of the Convention it is incumbent on the authorities, rather than the detainee, to establish the persistence of reasons justifying continued pre-trial detention (see *Ilijkov*, cited above, § 85, and *Bykov v. Russia* [GC], no. 4378/02, § 64 *in fine*, 10 March 2009). As already noted, even if such reasons exist when that detention is first imposed, they can by their very nature change over time. The reasons given by the Kutaisi City Court on 7 October 2013 did not therefore suffice to justify the continuation of the applicant's detention.

235. In view of the above, the Court concludes that, at least from 25 September 2013 onwards, the applicant's pre-trial detention ceased to be based on sufficient grounds, in breach of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

236. The applicant complained that the Kutaisi City Court's decision of 25 September 2013 rejecting his request for release had been given orally and had not contained any reasons. He relied on Article 5 § 4 of the Convention, which provides:

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

237. Noting that it had examined the lack of reasons for the Kutaisi City Court's decision of 25 September 2013 under Article 5 § 3 of the Convention, the Chamber did not find it necessary to review the same issue under Article 5 § 4 of the Convention.

238. The applicant pointed out that on 25 September 2013 the Kutaisi City Court had rejected his request for release orally and without giving any reasons for its decision, rendering his ensuing detention arbitrary. Since the

initial risks of flight and obstruction of the proceedings – which had in any event never been duly substantiated – had necessarily diminished with the passage of time, the lack of any reasons had been particularly problematic.

239. The Government's submissions on that complaint are summarised in paragraph 220 above.

240. The Court has already examined, under Article 5 § 3 of the Convention, the Kutaisi City Court's failure to give any reasons for its decision of 25 September 2013 rejecting the applicant's request for release (see paragraph 233 above). It sees no need to deal with the same point under Article 5 § 4 of the Convention as well (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 525, 25 July 2013).

V. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5 § 1

241. In his application, the applicant alleged that the purpose behind the criminal proceedings against him and his pre-trial detention had been to remove him from the political scene and to prevent him from standing in the Georgian presidential election in October 2013.

242. In his observations in reply to those of the Government, filed with the Chamber on 19 December 2014, the applicant further alleged that on 14 December 2013 the Chief Public Prosecutor had attempted to use his detention as leverage to pressure him to provide information about Mr Saakashvili's bank accounts and about Mr Zhvania's death.

243. The applicant relied on Article 18 of the Convention, which provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. The Chamber judgment

244. The Chamber was not convinced that the criminal case against the applicant and his pre-trial detention had been intended to exclude him from Georgia's political life, noting that the only evidence cited in support of that allegation were statements by institutions, non-governmental organisations and public figures. It was, however, persuaded by the applicant's allegations about his late-night meeting with the Chief Public Prosecutor. It found the applicant's account coherent and detailed. It also noted that the applicant had voiced his allegations immediately after the meeting; that his story had been partly confirmed by an official, Ms L.M., who had been dismissed shortly after speaking out; that the authorities had not provided access to recordings by the prison surveillance cameras which could have shed light on the allegations; and that the authorities had not duly checked the incident

or provided any materials from the inquiry into it by the General Inspectorate of the Ministry of Prisons. The Chamber concluded that the applicant's detention had been used not only for a legitimate law-enforcement purpose, but also for extraneous ones: to further the authorities' investigation into Mr Zhvania's death and to enable them to inquire into Mr Saakashvili's finances. It accordingly concluded that there had been a breach of Article 18 of the Convention.

B. The Government's preliminary objection

1. The parties' submissions

245. The Government submitted that the applicant had failed to raise his allegations about the meeting with the Chief Public Prosecutor within six months of the alleged meeting, or even within six months of his lawyer being informed that the inquiry into the matter by the Ministry of Prisons' General Inspectorate had been closed. In the Government's view, the applicant had thus failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention.

246. The applicant submitted that he had raised his complaint under Article 18 of the Convention in good time. He also pointed out that the alleged incident had taken place after he had lodged his application, and stated that the Government's argument was misconceived.

2. The Grand Chamber's assessment

247. Although the Government did not raise the above objection in their observations on the admissibility of the application in the proceedings before the Chamber, there is no estoppel, notwithstanding the requirements of Rule 55 of the Rules of Court, because the six-month rule set out in Article 35 § 1 of the Convention is a public-policy one which the Court can, and indeed must, apply even of its own motion (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 25-31, 29 June 2012, and *Blokhin v. Russia* [GC], no. 47152/06, §§ 102-03, ECHR 2016), and even for the first time in proceedings before the Grand Chamber following a referral (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 85, ECHR 2014 (extracts)).

248. The Grand Chamber can therefore examine whether the six-month rule was complied with.

249. The secret meeting with the Chief Public Prosecutor was said to have taken place a little over three weeks after the application was lodged (see paragraphs 1 and 60 above). The allegations in respect of it could not therefore feature in the application. They were not duly raised before the Court until the applicant filed his observations in reply to those of the Government in the proceedings before the Chamber, on 19 December 2014.

That was more than six months after the alleged meeting and even more than six months after the applicant's lawyer had been informed that the inquiry into the matter by the Ministry of Prisons' General Inspectorate had been completed (see paragraphs 89 above). If the allegations are to be seen as a separate complaint, they were out of time.

250. But the Grand Chamber does not find that the allegations were a separate complaint under Article 18 of the Convention. They were simply a further aspect, or a further argument in support of, the complaint already set out in the application, namely, that the restriction of the applicant's right to liberty had been applied for a purpose not prescribed by the Convention (see, *mutatis mutandis*, *Sâmbata Bihor Greek Catholic Parish v. Romania* (dec.), no. 48107/99, 25 May 2004; *Rasmussen v. Poland*, no. 38886/05, § 30, 28 April 2009; and *Mathloom v. Greece*, no. 48883/07, § 39, 24 April 2012, and contrast *Ekimdjiev v. Bulgaria* (dec.), no. 47092/99, 3 March 2005; *Cornea v. Romania* (dec.), no. 13755/03, § 51, 15 May 2012; *Kırlangıç v. Turkey*, no. 30689/05, § 54, 25 September 2012; and *Fábián v. Hungary* [GC], no. 78117/13, §§ 95-97, ECHR 2017 (extracts)). In examining a complaint the Court can take account of facts which are subsequent to the application but are directly related to those covered by it (see *Stögmüller v. Austria*, 10 November 1969, p. 41, § 7, Series A no. 9; *Matznetter v. Austria*, 10 November 1969, pp. 31-32, § 5, Series A no. 10; and, more recently, *Khayletdinov v. Russia*, no. 2763/13, § 82, 12 January 2016).

251. It follows that the Grand Chamber is not precluded from dealing with those allegations and that the Government's objection must be dismissed.

C. Merits of the complaint

1. The parties' submissions

(a) The applicant

252. The applicant submitted that Article 18 was a fundamental provision of the Convention. Its object was to protect democratic values, which, as was clear from the Preamble and the Court's case-law, underlay the entire Convention. Pluralism, free elections and political parties were key among those values. That was particularly relevant in this case, in which criminal proceedings had been used to prevent a major opposition politician from taking part in the political process. The role of Article 18 was to prevent such abuses. The question how complaints under that provision were to be made out had been answered inconsistently by the Court in its case-law. Divergences could be detected in particular with respect to the standard of proof and the types of evidence capable of showing an ulterior purpose. Those points had to be resolved in a flexible

and realistic way, for instance by requiring applicants to make a prima facie case and then shifting the burden of proof to the Government, or by taking account of the broader context. In cases in which the authorities had pursued more than one purpose, the presence of even one purpose not prescribed by the Convention was sufficient to give rise to a breach.

253. In the applicant's case, there were two strands of evidence showing an ulterior purpose behind his arrest and pre-trial detention. On the one hand, there was evidence which showed that he had been taken out of his cell on 14 December 2013 and pressured by the Chief Public Prosecutor to provide information about Mr Zhvania's death and about Mr Saakashvili's bank accounts. On the other, there was the whole context showing that the applicant and other members of his political party had been targeted for political reasons.

254. The applicant's version of the events of 14 December 2013 was more credible than that of the Government for a number of reasons. He had informed his lawyers about the incident and then spoken publicly about it at the first opportunity. His successive accounts of it had been detailed and consistent. Senior officials had from the outset dismissed his allegations out of hand and opposed a proper investigation into them. Both investigations into those allegations had been carried out by officials who had not been sufficiently independent. The second investigation, by the Chief Public Prosecutor's Office, had been opened only after the Chamber judgment. The Government's explanation about the limited amount of time for which the surveillance camera footage was kept was unconvincing. The footage from the surveillance cameras of private establishments and the road-traffic cameras had not been properly examined and had not been provided to his lawyer, in spite of his express request. The statements by prison officers during the internal inquiry had been very brief and formulaic. Neither Mr O.P. nor Mr D.D., the main protagonists, had been interviewed in the course of that inquiry. Nor had any attempt been made to take the applicant to Mr D.D.'s office in order to check his assertion that he could recognise it. It was odd that in their statements gathered during the criminal investigation all the prison officers had been able, without referring to contemporaneous records, to recall their movements and actions on a particular day two and a half years earlier; that called their credibility into question. There was evidence from three inmates, Mr G.Ts., Mr I.P. and Mr K.T., which supported the applicant's account and which had not been properly rebutted by the Government. The statements of Mr O.P. and Mr D.D. during the second investigation were not credible. There had been no attempt to verify the applicant's allegations by checking the mobile telephone records of the men in the car transporting him from Prison no. 9 to the Penitentiary Department or by carrying out an identity parade. Lastly, no proper explanation had been given for the exorbitant bonuses paid to various prison officials in December 2013.

255. The facts showing that the criminal proceedings against the applicant had been politically motivated and intended to remove him from the political scene in the run-up to the 2013 presidential election and thereafter were that: (a) shortly after the October 2012 parliamentary election criminal proceedings had been opened against many former members of UNM governments and other former high officials from UNM, which had prompted many foreign governments, international bodies, such as the Parliamentary Assembly of the Council of Europe, and non-governmental organisations to express concern about possible political persecution; (b) senior figures from Georgian Dream had publicly called for UNM's elimination, and the Prime Minister had privately threatened a UNM politician with prosecutions against UNM figures; (c) in 2015 the Constitutional Court had deplored attempts to apply public pressure against it in the case brought by Mr G.U.; (d) in 2014 and 2015 courts in France, Greece and the United Kingdom had refused to extradite two high-ranking former UNM officials to Georgia, finding that the criminal prosecutions against them were politically motivated, and Interpol had recalled or refused to issue two "Red Notices" on the same basis; (e) the OSCE trial monitoring report had highlighted a number of shortcomings in the fourteen criminal cases against former UNM officials, including the cases against the applicant; (f) in the criminal case at issue in these proceedings, the prosecution had taken statements from 3,969 witnesses and had sought and obtained leave to call all of them at trial, with the intention of intimidating them, delaying the proceedings, and thus prolonging the applicant's pre-trial detention; (g) the proceedings in that case had been conducted in Kutaisi even though both the applicant and his co-defendant, Mr Z.T., as well as most of the witnesses lived in Tbilisi; (h) several thousand UNM activists and supporters had been repeatedly questioned and intimidated by the law-enforcement authorities, a number of UNM figures had been assaulted without an adequate police response to the incidents, and many UNM officials at local level had been forced to resign or dismissed and prosecuted.

(b) The Government

256. The Government submitted that there were very few cases in which the Court had examined complaints under Article 18, as the Convention's whole structure rested on the assumption that the High Contracting Parties' authorities acted in good faith. It was for the applicant to demonstrate convincingly that the authorities' real aim had differed from the one proclaimed. A mere suspicion, however arguable, that the State's entire legal machinery had lacked independence and had been misused was not sufficient. Otherwise, the Court would have to find a breach of Article 18 in every case in which the applicant's status, wealth, reputation and so on gave rise to a suspicion that the restrictions of his or her Convention rights had

been made for an ulterior political purpose. In other words, high political status did not grant immunity. That had been clearly stated in the Court's case-law under Article 18.

257. Cases in which a breach of Article 18 had been found could be split into two groups: those in which there had existed direct proof of an ulterior purpose, and those in which, in spite of the absence of such proof, it had been possible reasonably to infer an ulterior purpose from case-specific facts.

258. In cases of the first kind, the ulterior purpose had been directly spelled out in written documents: an agreement with the authorities or official decisions. Evidence of that sort could not reasonably be rebutted or validly challenged by the respondent Government. But no such evidence had been put forward in this case, and it did not therefore fall into that category.

259. In cases of the second kind, the Court had made reasonable inferences about the ulterior purpose from combinations of facts which had not been disputed between the parties and which had clearly demonstrated the ulterior purpose. But since all the facts in the case at hand continued to be disputed and since the Government had validly rebutted all assertions made by the applicant, none of which were based on objective proof, the case did not fall into that category either. There was therefore no room for inferences such as those drawn by the Chamber.

260. The presumption of good faith on the part of the authorities, although rebuttable in theory, was difficult to overcome in practice. The presence of several purposes could not overcome it either. It could only be rebutted through incontrovertible evidence provided by the applicant, and in assessing the point the Court could only take into account the specific facts of the case. The standard of proof under Article 18 was very high and could differ from those applied domestically, and the burden of proof remained on the applicant throughout the proceedings. All that had been clearly stated in the Court's case-law.

261. The criminal cases against the applicant and other UNM figures had been the result of more than twenty thousand complaints to the prosecuting authorities, lodged after the October 2012 elections by people who had fallen victim to abuses of power during UNM's time in office. The need to respect and redress the rights of those complainants had been underlined by the Council of Europe's Parliamentary Assembly and by the European Union Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. An International Prosecution Advisory Panel, set up in 2014 at the initiative of Georgia's Chief Public Prosecutor to review the materials in high-profile cases processed by the Georgian prosecuting authorities and consisting of three foreign criminal-justice professionals, had found the evidence in those cases sufficient to justify prosecution. This showed that the applicant's arrest and pre-trial detention had only been

intended to bring him before a competent legal authority on a reasonable suspicion of having committed an offence. Since there had been no breach of Article 5 § 1 of the Convention, as confirmed by the Chamber, there was no room for a breach of Article 18 either. In fact, this was the only case in which the Court had found a violation of Article 18 in conjunction with Article 5 § 1 without having first found a violation of the latter – a possibility which had previously only been envisaged theoretically. In all previous cases, if the Court had found no breach of the Article in conjunction with which Article 18 had been pleaded, it had either not examined the complaint under Article 18 on the merits or had found no violation of that provision. The case at hand was also the only one in which the underlying facts continued to be disputed between the parties.

262. The evidence cited by the applicant in support of his claim that the prosecution against him had been politically motivated consisted of the opinions of others. However, under the Court's case-law, such opinions were not enough to show an ulterior purpose.

263. Nor was there any direct or indirect proof supporting the assertion that the applicant's detention had been used to obtain from him information about Mr Zhvania's death and Mr Saakashvili's bank accounts. All the facts to which the applicant referred in support of that assertion were disputed rather than clearly established, and hence could not form the basis of inferences. Apart from the statement of Ms L.M. in May 2014, there was no evidence corroborating the allegation that the applicant had been covertly taken to the Chief Public Prosecutor. That allegation, first voiced three days after the alleged incident, was not proof of its reality. It had been examined twice, first during the inquiry by the Ministry of Prisons' General Inspectorate and again in the course of the investigation by the Chief Public Prosecutor's Office. The ample evidence gathered in those procedures – witness statements, video footage and prison records – had shown the applicant's allegation to be false.

During the hearing before the Grand Chamber, the Government further stated that while no one had asked the applicant anything about Mr Zhvania's death on 14 December 2013, there was still a "huge question" to him in relation to that death (see paragraph 61 above).

2. The Court's assessment

(a) Interpretation and application of Article 18 of the Convention in the former Commission's and the Court's case-law

264. Since the Court's examination of this case has brought to light a need to clarify its case-law in this area, it will first provide a survey of the existing case-law.

(i) The former Commission

265. The former Commission, having briefly referred to Article 18 when examining a complaint under Article 10 of the Convention (see *X v. Austria*, no. 753/60, Commission decision of 5 August 1960, Yearbook 3, p. 310) and then in the context of the validity of derogations under Article 15 of the Convention (see *De Becker v. Belgium*, no. 214/56, Commission report of 8 January 1960, Series B no. 2, pp. 132-33, § 271, and *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67 and 3 others, Commission report of 5 November 1969, Yearbook 12, p. 112, § 225), dealt for the first time with a complaint under that Article in some detail in *Kamma v. the Netherlands* (no. 4771/71, Commission report of 14 July 1974, Decisions and Reports (DR) 1, p. 4). Mr Kamma had been detained on extortion charges, and the police had used his period in custody to question him about his alleged involvement in a murder. The Commission established two points which the Court has since confirmed (see paragraph 271 below): (a) although Article 18 cannot apply alone, it can be breached even if there is no violation of the Article in conjunction with which it is applied, and (b) it can only be contravened if the Convention right which has been interfered with is subject to restrictions – that is, is qualified rather than absolute. The Commission found no breach, saying that the police had been entitled to proceed as they had, and that the detention had not prejudiced Mr Kamma's position in the murder case (ibid., pp. 10-12).

266. In later cases the Commission dealt with such complaints in a more summary manner, dismissing them as manifestly ill-founded or on the merits for lack of proof (see, for instance, *X v. the Netherlands*, no. 5763/72, Commission decision of 18 December 1973, Collection 45, p. 76, at pp. 83-84; *X and Y v. the Netherlands*, no. 6202/73, Commission decision of 16 March 1975, DR 1, p. 66, at p. 71; *Handyside v. the United Kingdom*, no. 5493/72, Commission report of 30 September 1975, Series B no. 22, p. 52, §§ 174-75; *McFeeley and Others v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, DR 20, p. 44, at p. 102, § 133; *Bozano v. Italy*, no. 9991/82, Commission decision of 12 July 1984, DR 39, p. 147, at p. 157; and *Bozano v. Switzerland*, no. 9009/80, Commission decision of 12 July 1984, DR 39, p. 58, at p. 70).

267. Article 18 was given more attention in some Commission reports. For instance, in *Engel and Others v. the Netherlands* (nos. 5100/71 and 4 others, Commission report of 19 July 1974, Series B no. 20, p. 86, §§ 191-92) the Commission found that (a) the choice of disciplinary over criminal proceedings had not engaged Article 18 as it had not restricted the applicants' rights under the Convention, and that (b) the presence of a legitimate aim for an interference meant that no ulterior purpose under Article 18 could be made out. In *Times Newspapers Ltd and Others v. the United Kingdom* (no. 6538/74, Commission report of 18 May 1977,

Series B no. 28, p. 77, §§ 263-65) in response to a submission that a side-effect of the interference could result in a breach of Article 18, the Commission said that there was no indication that the authorities had pursued any purpose different from the stated one, which it had already accepted as legitimate.

(ii) The Court's rulings prior to 2004

268. Until 2004 the Court had not found a separate breach of Article 18 or given more than very brief reasons for its findings in relation to that Article. In all cases which it examined on the merits and in which a complaint had been made under Article 18, the Court either found no need to deal with the complaint or dismissed it summarily by reference to its rulings under the substantive Articles in conjunction with which Article 18 had been pleaded – often because the parties had either not pursued the point at all or had done so with insufficient specificity (see, among others, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 93 and 104, Series A no. 22; *Handyside v. the United Kingdom*, 7 December 1976, § 64, Series A no. 24; The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 75, Series A no. 30; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 76, Series A no. 52; *De Jong, Baljet and Van den Brink*, cited above, § 63; *Bozano v. France*, 18 December 1986, § 61, Series A no. 111; *Akdivar and Others v. Turkey*, 16 September 1996, § 99, *Reports* 1996-IV; *Lukanov*, cited above, § 49; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 62, *Reports* 1998-I; *Beyeler v. Italy* [GC], no. 33202/96, § 129, ECHR 2000-I; *Timurtaş v. Turkey*, no. 23531/94, § 118, ECHR 2000-VI; *Cyprus v. Turkey* [GC], no. 25781/94, § 206, ECHR 2001-IV; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, § 137, ECHR 2003-II; and *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 247, ECHR 2004-III).

269. Parallel to that, in its first ever judgment on the merits of a case and a number of subsequent ones, the Court used Article 18 as an aid to interpretation of the restriction clauses of other provisions of the Convention or its Protocols (see *Lawless v. Ireland (no. 3)*, 1 July 1961, p. 59, § 38, Series A no. 3 (Article 15); *De Wilde, Ooms and Versyp*, cited above, § 93 (Article 8 § 2); *Winterwerp*, cited above, § 39 (Article 5 § 1); *Guzzardi*, cited above, § 102 (Article 5 § 1); *Ashingdane*, cited above, § 44 (Article 5 § 1); *Lingens v. Austria*, 8 July 1986, § 36, Series A no. 103 (Article 10 § 2); *Gillow v. the United Kingdom*, 24 November 1986, § 54, Series A no. 109 (Article 8 § 2); *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114 (Article 5 § 1); *Beyeler*, cited above, § 111 (Article 1 of Protocol No. 1); *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008 (Article 5 § 1); *Kucheruk v. Ukraine*, no. 2570/04, § 177, 6 September 2007 (Article 5 § 1); and *United Macedonian Organisation*

Ilinden-PIRIN and Others v. Bulgaria (no. 2), nos. 41561/07 and 20972/08, § 83, 18 October 2011 (Article 11 § 2)).

(iii) The Court's rulings since 2004

270. The first case in which the Court dealt with a complaint under Article 18 in more detail and found a breach of that provision was *Gusinskiy* (cited above, §§ 73-78). Mr Gusinskiy, a wealthy businessman who owned a media company, had been charged and placed in pre-trial detention in order to be coerced to sell that company to a State-owned company.

271. In that judgment the Court confirmed two lines of reasoning under Article 18 previously only mentioned in Commission decisions and reports and Court admissibility decisions (see *Kamma*, at p. 9; *Bozano v. France*, at p. 141; and *Bozano v. Italy*, at p. 157, all cited above, and *E.O. and V.P. v. Slovakia* (dec.), nos. 56193/00 and 57581/00, 16 September 2003, and *Oates v. Poland* (dec.), no. 35036/97, 11 May 2000). The first was that Article 18 could only be applied in conjunction with another Article of the Convention, but could be breached even if there was no breach of that other Article taken alone. The second was that a breach could only arise if the right at issue was qualified, that is, subject to restrictions permitted under the Convention (see *Gusinskiy*, cited above, § 73).

272. The Court did not, however, clarify two other important points. First, it did not explain what proof would be required to sustain an allegation that a restriction had been applied for an ulterior purpose. In *Gusinskiy* itself, direct proof flowed from a written agreement, endorsed by a government minister, linking the dropping of the charges against Mr Gusinskiy to the sale of his company, and from the terms of the decision discontinuing the criminal proceedings against him, which referred to that agreement; also, the respondent Government had not sought to deny that link (ibid., § 75). Secondly, the judgment did not clearly explain what the position was when, as had happened in that case, and as often happens in practice, there was a plurality of purposes, that is, when a restriction pursued both a purpose prescribed by the Convention and an ulterior one; it merely stated that since Mr Gusinskiy's right to liberty had been restricted not only for the purpose prescribed under Article 5 § 1 (c) of the Convention but also for other reasons, there had been a breach of Article 18 (ibid., §§ 77-78).

273. Even after that judgment the Court has on a number of occasions dismissed or declined to examine complaints under Article 18 without giving detailed reasons, as it had done before 2004 (see, among others, *Öcalan v. Turkey* [GC], no. 46221/99, § 206, ECHR 2005-IV; *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 129, ECHR 2007-I; *Nemtsov v. Russia*, no. 1774/11, §§ 129-30, 31 July 2014; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 116-17, 4 December 2014; *Frumkin v. Russia*, no. 74568/12, §§ 172-73, ECHR 2016 (extracts); *Kasparov*

v. Russia, no. 53659/07, §§ 73-74, 11 October 2016; and *Kasparov and Others v. Russia (no. 2)*, no. 51988/07, § 55, 13 December 2016).

274. The Court reverted to a more detailed analysis of a complaint under Article 18 in 2007 when, in *Cebotari v. Moldova* (no. 35615/06, §§ 49-53, 13 November 2007), it found that the head of a State-owned company had been placed in pre-trial detention on fabricated charges in order to pressure him with a view to hindering a private company with which he was linked from pursuing its application to the Court. The Court based that finding on the fact that the materials in the case could not lead an objective observer reasonably to believe that Mr Cebotari could have committed the offence in relation to which he had been detained, although it was also influenced by the context of the case (ibid., §§ 52-53).

275. The next case in which the Court dealt in detail with a complaint under Article 18 was *Khodorkovskiy* (cited above). Mr Khodorkovskiy, a wealthy businessman who was also active in politics, complained that the real aims of a criminal case against him and his related pre-trial detention were to take him out of the public arena and enable the State to appropriate the assets of his company, Yukos, one of the biggest oil producers in Russia (ibid., §§ 249 and 251). The Court found no breach of Article 18. It started from the general assumption that the High Contracting States' authorities acted in good faith, and held that it could only be rebutted if applicants "convincingly show[ed] that the real aim of the authorities [had] not [been] the same as that proclaimed (or as [could] be reasonably inferred from the context)" (ibid., § 255). In relation to such allegations, the Court "applie[d] a very exacting standard of proof", and the burden of proof remained on the applicant throughout the proceedings (ibid., § 256). The Court then found that the authorities' perception of Mr Khodorkovskiy as a serious political opponent and the benefit accruing to a State-owned company as a result of Yukos's demise were not enough to establish a breach of Article 18 because the criminal prosecution of anyone with such a high profile would benefit his opponents, and because the charges against Mr Khodorkovskiy had been genuine (ibid., §§ 257-58). The opinions of others – political institutions, non-governmental organisations or public figures – regarding the political motivation behind the case against him were not evidence in the legal sense (ibid., § 259). The rulings of courts which had refused to extradite associates of his to Russia, or had denied legal assistance to, issued injunctions against, or made awards against the Russian authorities in Yukos-related cases, although a strong argument, were not sufficient because the evidence and arguments before those courts could have differed from those before the Court, and because, in any event, the standard of proof applied by the Court in cases under Article 18 was very high and could be different from those applied domestically. The claim that the authorities had acted in bad faith throughout the entire criminal proceedings

required "incontrovertible and direct proof", which, in contrast to *Gusinskiy*, was lacking (ibid., § 260).

276. In the related case of *OAO Neftyanaya Kompaniya Yukos v. Russia* (no. 14902/04, §§ 663-66, 20 September 2011), which concerned related tax proceedings leading to Yukos's demise, the Court likewise found no breach of Article 18. It again held that such finding could only be based on "incontrovertible and direct proof" adduced by the applicant (ibid., § 663). With reference to its conclusions regarding Yukos's substantive complaints, it found that the authorities had legitimately acted to counter tax evasion and that it was for the applicant company to show that in doing so they had had an improper purpose (ibid., § 664). As in *Khodorkovskiy*, the Court held that the opinions of others on the political reasons behind the case against Yukos were of little evidentiary value for the purposes of Article 18. Since there was no evidence of further defects in the tax proceedings, it could not conclude that the authorities had misused them to destroy Yukos and take control of its assets (ibid., § 665).

277. During the next two years the Court dealt with complaints under Article 18 in *Lutsenko* (cited above) and *Tymoshenko* (cited above). In neither case did it accept the allegations that the whole criminal cases against the applicants, former government ministers and leaders of opposition parties, had pursued political purposes. It focused instead on specific aspects of those proceedings (see *Lutsenko*, §§ 104 and 108, and *Tymoshenko*, § 298, both cited above). In *Lutsenko* this was the arguments in the investigator's request to place Mr Lutsenko in pre-trial detention that, by talking to the media, he was trying to distort public opinion, discredit the prosecuting authorities and influence his upcoming trial. For the Court, that showed that the detention had pursued a reason not envisaged by Article 5 § 1 (c) – to punish Mr Lutsenko for publicly disputing the charges against him (see *Lutsenko*, cited above, §§ 26 and 108-09). In *Tymoshenko* this was statements in the prosecution's request to place Ms Tymoshenko in pre-trial detention and in the corresponding court order which showed that the purpose had been to punish her for disrespect towards the court and perceived obstructive conduct during hearings (see *Tymoshenko*, cited above, §§ 30, 31 and 299).

278. In both of those cases the Court – while reiterating (see respectively §§ 106-07 and 294-95) the applicant's burden of proof as set out in *Khodorkovsky* (cited above, §§ 255-56), but not the requirement stated therein of "direct and incontrovertible proof" (ibid. § 260; see paragraph 275 above) – based its findings of a breach of Article 18 on direct written evidence of ulterior purpose, as it had done in *Gusinskiy* (cited above). The question of plurality of purposes did not arise, as in both cases the Court found that there had been no valid grounds to detain the applicants (see *Lutsenko*, §§ 63-65 and 67-72, and *Tymoshenko*, §§ 269-71, both cited above).

279. In the case of *Khodorkovskiy and Lebedev* (cited above, §§ 897-909), which concerned a later phase of the same criminal proceedings as *Khodorkovskiy* (cited above), the Court confirmed the approach to proof taken in that earlier case. It resisted the applicants' suggestion that if they provided contextual evidence of ulterior purpose, the burden to prove otherwise should shift to the respondent Government (see *Khodorkovskiy and Lebedev*, cited above, §§ 899-903). It did not accept that the whole criminal case against the applicants had been for an ulterior purpose, an allegation which the Court described as "sweeping" and contrasted with allegations about specific episodes in such proceedings. Even if there had been a mixed intent behind that case, the ulterior purpose was not fundamental or decisive, as the case concerned serious accusations relating to common criminal offences unrelated to the applicants' political activities and had a "healthy core" (ibid., §§ 904-08).

280. More recently, in the case of *Tchankotadze v. Georgia* (no. 15256/05, §§ 114-15, 21 June 2016), the Court found that public threats that the applicant, a high-ranking civil servant, would be "jailed", uttered by Mr Saakashvili, then a presidential candidate and later elected, were insufficient to find an ulterior purpose behind his prosecution and related pre-trial detention, in the absence of proof that the prosecuting or judicial authorities had themselves been driven by political motives.

281. In two other recent cases, *Ilgar Mammadov* and *Rasul Jafarov* (both cited above), the Court – while again emphasising (see respectively §§ 137-38 and 153-54) the applicant's burden of proof as set out in *Khodorkovsky* (cited above, §§ 255-56), but not the requirement of "direct and incontrovertible proof" (ibid. § 260; see paragraph 275 above) – found a breach of Article 18 of the Convention, basing itself on contextual evidence of ulterior purpose. The cases concerned the pre-trial detention of, respectively, an opposition politician and blogger critical of the Government, and that of a well-known human-rights activist. In both cases the Court analysed the factual and legal aspects of the charges and found that the detention had not been based on a reasonable suspicion, in breach of Article 5 § 1 (see *Ilgar Mammadov*, §§ 93-101, and *Rasul Jafarov*, §§ 121-34, both cited above). In itself, that was not enough to find a breach of Article 18, but proof of ulterior purpose – to silence or punish the applicant in the first case for criticising the authorities and spreading information that they were trying to suppress, and the applicant in the second case for his human-rights activities – derived from a juxtaposition of the lack of suspicion with contextual factors. In the first case, these were a close chronological correlation between the applicant's blog entries, the authorities' public statement denouncing them, the charges, and the arrest (see *Ilgar Mammadov*, cited above, §§ 141-43). In the second case, they were the increasingly harsh regulation of non-governmental organisations and their funding in Azerbaijan, allegations by officials and the pro-

government media that activists such as the applicant were a "fifth column", and the contemporaneous detention of other such activists (see *Rasul Jafarov*, cited above, §§ 156-62).

(b) The need to clarify the case-law

282. The above survey of the case-law under Article 18 of the Convention shows that in the relatively few cases in which the Court has thus far examined complaints under that provision in some detail, it has, since *Khodorkovskiy* (cited above), started from the general assumption that the national authorities of the High Contracting States have acted in good faith, adding that this assumption can only be rebutted if the applicant convincingly shows that the purpose for which those authorities have restricted his or her rights under the Convention or the Protocols thereto was in reality not the one cited by them and permitted under the Convention. In other words, the Court's scrutiny in such cases has focused on the issue of proof of bad faith in this regard.

283. But inasmuch as they underscore the exhaustiveness of the purposes for which the rights in the Convention may be restricted, Article 18's terms ("shall not be applied for any purpose other than ...") appear capable of allowing a more objective assessment of the presence or absence of an ulterior purpose and thus of a misuse of power ("*détournement de pouvoir*", as stated in the Convention's *Travaux Préparatoires* – see paragraph 154 above). Moreover, an approach that simply focuses on proof of bad faith does not sit well with that taken by the Court with respect to the restriction clauses in the Convention, which Article 18 is intended to complement. For example, in examining whether an interference with the rights guaranteed by Articles 8 to 11 is "necessary in a democratic society" for the pursuit of a legitimate aim, the Court always insists that its supervision is not limited to ascertaining whether the respondent State's authorities have exercised their discretion reasonably, carefully and in good faith (see, for example, The Sunday Times *(no. 1)*, cited above, § 59; *Olsson v. Sweden (no. 1)*, 24 March 1988, § 68, Series A no. 130; and *Perinçek v. Switzerland* [GC], no. 27510/08, § 196 (iii), ECHR 2015 (extracts)). In cases under Article 5 § 1, the authorities' good faith is likewise only one of the elements showing a lack of arbitrariness (see *Saadi*, cited above, §§ 69-74). Moreover, although "bad faith" and "ulterior purpose" are related notions, they are not necessarily equivalent in each case.

284. Furthermore, in the cases under Article 18 the Court's approach to proof has not been entirely consistent, since some, but not all, of the recent judgments have insisted on "direct and incontrovertible proof" of an ulterior purpose (see paragraphs 278 and 281 above).

285. Lastly, and perhaps most importantly, the above survey of the case-law shows that the Court has thus far not clearly separated the question

how an ulterior purpose can be made out from the question how a restriction characterised by a plurality of purposes is to be analysed under Article 18 of the Convention.

286. It is thus necessary for the Court to clarify those points and, more generally, to spell out in some detail the manner in which Article 18 is to be interpreted and applied.

(c) Interpretation and application of Article 18 of the Convention

287. In a similar way to Article 14, Article 18 of the Convention has no independent existence (see, in relation to Article 14, *Marckx v. Belgium*, 13 June 1979, § 32, Series A no. 31; *Van der Mussele v. Belgium*, 23 November 1983, § 43, Series A no. 70; *Rasmussen v. Denmark*, 28 November 1984, § 29, Series A no. 87; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94; *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)); it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction (see *Kamma*, at p. 9; *Gusinskiy*, § 73; *Cebotari*, § 49; *Khodorkovskiy*, § 254; *OAO Neftyanaya Kompaniya Yukos*, § 663; *Lutsenko*, § 105; *Tymoshenko*, § 294; *Ilgar Mammadov*, § 137; *Rasul Jafarov*, § 153; and *Tchankotadze*, § 113, all cited above, all of which expressed the same idea by saying that Article 18 "does not have an autonomous role"). This rule derives both from its wording, which complements that of clauses such as, for example, the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms.

288. Article 18 does not, however, serve merely to clarify the scope of those restriction clauses. It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous (see, *mutatis mutandis*, in relation to Article 14, *Rasmussen*, § 29; *Abdulaziz, Cabales and Balkandali*, § 71; *Thlimmenos*, § 40; and *Konstantin Markin*, § 124, all cited above). Therefore, as is also the position in regard to Article 14, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (see, on that point, *Kamma*, at p. 9; *Gusinskiy*, § 73; and *Cebotari*, § 49, all cited above).

289. Lastly, being aware – as already highlighted – of a certain inconsistency in its previous judgments regarding the use of the terms "independent" and "autonomous" in these contexts, the Court seizes the

opportunity offered by the present case to align the language used in relation to Article 18 to that used in relation to Article 14, as has been done above.

290. It further follows from the terms of Article 18 that a breach can only arise if the right or freedom at issue is subject to restrictions permitted under the Convention (see *Kamma*, at p. 10; *Gusinskiy*, § 73; *Cebotari*, § 49; and *OAO Neftyanaya Kompaniya Yukos*, § 663, all cited above).

291. The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case (see, *mutatis mutandis*, in relation to Article 14 of the Convention, *Airey v. Ireland*, 9 October 1979, § 30, Series A no. 32; *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 89, ECHR 1999-III; *Aziz v. Cyprus*, no. 69949/01, § 35, ECHR 2004-V; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII; and *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 144, ECHR 2010).

(i) Plurality of purposes

292. A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes. The question in such situations is whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer.

293. In assessing that point, the Court will begin by taking account of Article 18's wording and place in the general scheme of the Convention. As already noted, it complements the clauses which provide for restrictions of the rights and freedoms set forth in the Convention. Its wording ("shall not be applied for any purpose other than") matches closely the wording of those clauses (for example, Article 5 § 1, second sentence: "save in the following cases"; Article 8 § 2: "no interference ... except such as ... is necessary in the interests of"; Article 9 § 2: "be subject only to such limitations as ... are necessary ... in the interests of"; and Article 11 § 2: "No restrictions ... other than such as ... are necessary ... in the interests of"). The similarity is even clearer in the French text (Article 18: "*que dans le but*"; Article 5 § 1: "*sauf dans les cas suivants*"; Article 8 § 2: "*Il ne peut y avoir ingérence ... que pour autant que*"; Article 9 § 2: "*d'autres restrictions que celle qui*"; and Article 11 § 2: "*ne peut faire l'objet d'autres restrictions que celles qui*"). Since the Convention must be interpreted in a way which promotes harmony between its provisions (see, among other authorities,

Klass and Others v. Germany, 6 September 1978, § 68, Series A no. 28; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X; and *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 133, ECHR 2016), and since, when using the same terms, its different provisions must normally be taken to refer to the same concept (see *Perinçek*, cited above, §§ 134 and 146, with further references), in interpreting Article 18 the Court must thus take into account its usual approach to those restriction clauses.

294. The lists of legitimate aims for the pursuit of which Articles 8 to 11 of the Convention permit interferences with the rights guaranteed by them are exhaustive (see *Golder*, cited above, § 44, and *Šneersone and Kampanella v. Italy*, no. 14737/09, § 90, 12 July 2011, with regard to Article 8 § 2; *S.A.S. v. France* [GC], no. 43835/11, § 113, ECHR 2014 (extracts), with regard to Article 9 § 2; The Sunday Times *(no. 1)*, cited above, § 65, with regard to Article 10 § 2; and *Sidiropoulos and Others v. Greece*, 10 July 1998, § 38, *Reports* 1998-IV, with regard to Article 11 § 2; see also, generally in relation to Articles 8 to 11, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115 (b), ECHR 2006-IV; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), ECHR 2008; and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 64, ECHR 2012).

295. Yet, in cases under those provisions – as well as under Articles 1, 2 and 3 of Protocol No. 1, or Article 2 §§ 3 and 4 of Protocol No. 4 – respondent Governments normally have a relatively easy task in persuading the Court that the interference pursued a legitimate aim, even when the applicants cogently argue that it actually pursued an unavowed ulterior purpose (see, for example, *Weber v. Switzerland*, 22 May 1990, §§ 44-45, Series A no. 177; *Informationsverein Lentia and Others v. Austria*, 24 November 1993, §§ 31 and 33, Series A no. 276; *Federation of Offshore Workers' Trade Unions v. Norway* (dec.), no. 38190/97, ECHR 2002-VI; and *United Macedonian Organisation Ilinden-PIRIN and Others (no. 2)*, cited above, §§ 85-90).

296. The cases in which the Court has voiced doubts about the cited aim without ruling on the issue (see, for example, *Kandzhov*, cited above, § 73; *Tănase v. Moldova* [GC], no. 7/08, §§ 164-70, ECHR 2010; *Bayatyan v. Armenia* [GC], no. 23459/03, § 117, ECHR 2011; and *Stamose v. Bulgaria*, no. 29713/05, § 32, ECHR 2012), left the issue open (see, for example, *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 54, ECHR 2006-II; *Christian Democratic People's Party v. Moldova (no. 2)*, no. 25196/04, § 19, 2 February 2010; and *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 69, 21 October 2010), or has rejected one or more of the cited aims (see, for example, *Sidiropoulos and Others*, cited above, §§ 37-38; *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 31, 25 January 2007; *Stoll v. Switzerland* [GC], no. 69698/01, §§ 54-55, ECHR 2007-V; *S.A.S. v. France*, cited above, §§ 118-20; and *Perinçek*,

cited above, §§ 146-54), are few and far between. The cases in which it has found a breach of the respective Article purely owing to the lack of a legitimate aim are rarer still (see *Khuzhin and Others v. Russia*, no. 13470/02, §§ 117-18, 23 October 2008; *Nolan and K. v. Russia*, no. 2512/04, §§ 73-74, 12 February 2009; *P. and S. v. Poland*, no. 57375/08, § 133, 30 October 2012; and *Karajanov v. the former Yugoslav Republic of Macedonia*, no. 2229/15, §§ 75-77, 6 April 2017), although in a recent case the Grand Chamber found an absence of legitimate aim and yet went on to examine whether the interference had been necessary (see *Baka v. Hungary* [GC], no. 20261/12, §§ 156-57, ECHR 2016).

297. The Court has indeed itself recognised that in most cases it deals with the point summarily (see *S.A.S. v. France*, cited above, § 114). Even when it excludes some of the cited aims, if it accepts that an interference pursues at least one, it does not delve further into the question and goes on to assess whether it was necessary in a democratic society to attain that aim (see, for example, *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, §§ 61-63, Series A no. 246-A; *Sidiropoulos and Others*, cited above, §§ 39-47; *Nikula v. Finland*, no. 31611/96, § 38, ECHR 2002-II; *Vereinigung Bildender Künstler*, cited above, §§ 29 and 32-39; *Stoll*, cited above, §§ 56-62 and 101-62; *A.A. v. the United Kingdom*, no. 8000/08, §§ 52-71, 20 September 2011; and *Perinçek*, cited above, §§ 155-57 and 196-281).

298. The list of situations in which Article 5 § 1 of the Convention permits deprivation of liberty is likewise exhaustive (see *Engel and Others*, cited above, § 57; *Ireland v. the United Kingdom*, 18 January 1978, § 194, Series A no. 25; *Winterwerp*, cited above § 37; and *Saadi*, cited above, § 43), except when it is being applied, in the context of an international armed conflict, to the detention of prisoners of war or of civilians who pose a threat to security (see *Hassan v. the United Kingdom* [GC], no. 29750/09, § 104, ECHR 2014). If a given instance of deprivation of liberty does not fit within the confines of one of the sub-paragraphs of that provision, as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 171, ECHR 2009, and *Baisuev and Anzorov v. Georgia*, no. 39804/04, § 60, 18 December 2012).

299. Though only sub-paragraphs (c) and (d) refer to the "purpose" of the types of deprivation of liberty which they cover, it is clear from their wording and the overall structure of Article 5 § 1 that this requirement is implicit in all sub-paragraphs. While that is a point which the Court checks in each case (see *Stoichkov v. Bulgaria*, no. 9808/02, § 52, 24 March 2005, in relation to sub-paragraph (a); *Gatt v. Malta*, no. 28221/08, §§ 42 and 48, ECHR 2010; *Ostendorf v. Germany*, no. 15598/08, § 97, 7 March 2013; and *Baisuev and Anzorov*, cited above, §§ 57-58, in relation to

sub-paragraph (b); *Engel and Others*, cited above, § 69, and the judgments cited in paragraph 185 above in relation to sub-paragraph (c); *Bouamar v. Belgium*, 29 February 1988, § 50, Series A no. 129, in relation to sub-paragraph (d); *Ashingdane*, cited above, § 48, and *Enhorn v. Sweden*, no. 56529/00, § 35, ECHR 2005-I, in relation to sub-paragraph (e); and *Chahal v. the United Kingdom*, 15 November 1996, § 112, *Reports* 1996-V, and *Saadi*, cited above, §§ 77 and 79, in relation to sub-paragraph (f)), it usually does not neatly separate it from the other elements affecting the compatibility of the detention with Article 5 § 1.

300. Moreover, in such cases, if the Court is satisfied that the detention was for a purpose authorised under one sub-paragraph, it normally stops there, without checking whether it also pursued another aim (see, for example, *Winterwerp*, § 42 *in fine*; *Brogan and Others*, § 53; and *K.-F. v. Germany*, § 62, all cited above). Also, a single sub-paragraph is sufficient to legitimise the detention: when the respondent Government plead several, the Court examines each plea individually, on the understanding that it is sufficient for the detention to fall under one sub-paragraph to be compatible with Article 5 § 1 (see, for example, *Engel and Others*, §§ 67-69; *Ciulla*, §§ 35-40; *Gatt*, §§ 36 and 44-45; and *Ostendorf*, §§ 48, 76 and 89, all cited above).

301. On the other hand, if there is some manifest irregularity which, seen in context, shows that a deprivation of liberty was chiefly meant for an ulterior purpose – the applicants are detained on vague or fabricated charges to prevent or punish their participation in rallies (see *Shimovolos v. Russia*, no. 30194/09, §§ 52-57, 21 June 2011; *Hakobyan and Others v. Armenia*, no. 34320/04, § 123, 10 April 2012; *Nemtsov*, cited above, § 103; *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, §§ 107-08, 15 October 2015; *Kasparov*, cited above, §§ 50-56; *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 146-47, 11 February 2016; and *Ibrahimov and Others v. Azerbaijan*, nos. 69234/11 and 2 others, §§ 126-27, 11 February 2016); or the authorities manipulate procedures to prolong the detention for the same purpose (see *Navalnyy and Yashin*, cited above, §§ 92-95), or to delay having to obtain judicial authorisation for the detention, as required under domestic law (see *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, §§ 86-88, 24 June 2010), or to proceed with a disguised extradition (see *Bozano v. France*, cited above, §§ 59-60; *Nowak v. Ukraine*, no. 60846/10, § 58, 31 March 2011; *Azimov v. Russia*, no. 67474/11, §§ 163 and 165, 18 April 2013; and *Eshonkulov v. Russia*, no. 68900/13, § 65, 15 January 2015); or the applicant is illegally abducted and surrendered to another State (see *Iskandarov v. Russia*, no. 17185/05, §§ 109-15 and 148-51, 23 September 2010); or the citizens of another State are indiscriminately arrested with a view to being deported *en masse* as a measure of reprisal (see *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 185-86, ECHR 2014 (extracts)) – the Court finds an absence of a

legitimate ground for the deprivation of liberty and accordingly a breach of Article 5 § 1.

302. That overview shows that although the legitimate aims and grounds set out in the restriction clauses in the Convention are exhaustive, they are also broadly defined and have been interpreted with a degree of flexibility. The real focus of the Court's scrutiny has rather been on the ensuing and closely connected issue: whether the restriction is necessary or justified, that is, based on relevant and sufficient reasons and proportionate to the pursuit of the aims or grounds for which it is authorised. Those aims and grounds are the benchmarks against which necessity or justification is measured (see The Sunday Times *(no. 1)*, cited above, § 59).

303. That manner of proceeding should guide the Court in its approach to the interpretation and application of Article 18 of the Convention in relation to situations in which a restriction pursues more than one purpose. Some of those purposes may be capable of being brought within the respective restriction clause, while others are not. In such situations, the mere presence of a purpose which does not fall within the respective restriction clause cannot of itself give rise to a breach of Article 18. There is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, though they also wanted to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts. Holding that the presence of any other purpose by itself contravenes Article 18 would not do justice to that fundamental difference, and would be inconsistent with the object and purpose of Article 18, which is to prohibit the misuse of power. Indeed, it could mean that each time the Court excludes an aim or a ground pleaded by the Government under a substantive provision of the Convention, it must find a breach of Article 18, because the Government's pleadings would be proof that the authorities pursued not only the purpose that the Court accepted as legitimate, but also another one.

304. For the same reason, a finding that the restriction pursues a purpose prescribed by the Convention does not necessarily rule out a breach of Article 18 either. Indeed, holding otherwise would strip that provision of its autonomous character.

305. The Court is therefore of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose.

306. This interpretation is consistent with the case-law of the Contracting States' national courts and of the Court of Justice of the European Union (see paragraphs 156 and 168 above), which the Court can take into account when construing the Convention (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 76-77, ECHR 2008, and *Opuz v. Turkey*, no. 33401/02, §§ 184-90, ECHR 2009). That is especially appropriate in this case, since the preparatory works to the Convention clearly show that Article 18 was meant to be its version of the administrative-law notion of misuse of power (see paragraph 154 above).

307. Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.

308. In continuing situations, it cannot be excluded that the assessment of which purpose was predominant may vary over time.

(ii) Questions of proof

309. A perusal of the judgments cited in paragraphs 275, 276 and 279 above in the light of the above clarifications shows that what the Court really meant when it spoke of a stricter standard of proof under Article 18 was that it considered that a purpose prescribed by the Convention was invariably a cover for an ulterior one. But if the two points are clearly distinguished, the questions in relation to proof become simply how it can be established whether there was an ulterior purpose and whether it was the predominant one.

310. In doing this, the Court finds that it can and should adhere to its usual approach to proof rather than special rules (contrast the judgments cited in paragraphs 275 and 278 above, and see paragraph 316 below).

311. The first aspect of that approach, first set out in *Ireland v. the United Kingdom* (cited above, §§ 160-61) and more recently confirmed in *Cyprus v. Turkey* (cited above, §§ 112-13 and 115) and in *Georgia v. Russia (I)* (cited above, §§ 93 and 95), is that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion. As early as in *Artico v. Italy* (13 May 1980, § 30, Series A no. 37) the Court stated that that was the general position not only in inter-State cases but also in cases deriving from individual applications. It has since then relied on the concept of burden of proof in certain particular contexts. On a number of occasions, it has recognised that a strict application of the principle *affirmanti incumbit probatio*, that is that the burden of proof in relation to an allegation lies on the party which makes it, is not possible, notably in instances when this has been justified by the specific evidentiary difficulties faced by the applicants

(see, for example, *Akdivar and Others*, cited above, § 68, in relation to the exhaustion of domestic remedies; *Baka*, cited above, §§ 143 *in fine* and 149, and the examples cited therein, in relation to various substantive Articles of the Convention; and *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 91-98, ECHR 2016, in relation to the risk of ill-treatment in the destination country in removal cases under Article 3 of the Convention).

312. Indeed, although it relies on the evidence which the parties adduce spontaneously, the Court routinely of its own motion asks applicants or respondent Governments to provide material which can corroborate or refute the allegations made before it. If the respondent Government in question do not heed such a request, the Court cannot force them to comply with it, but can – if they do not duly account for their failure or refusal – draw inferences (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 202, ECHR 2013, with further references). It can also combine such inferences with contextual factors. Rule 44C § 1 of the Rules of Court gives it considerable leeway on that point.

313. The possibility for the Court to draw inferences from the respondent Government's conduct in the proceedings before it is especially pertinent in situations – for instance those concerning people in the custody of the authorities – in which the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations (see, among other authorities, *Timurtaş*, cited above, § 66; *Aktaş v. Turkey*, no. 24351/94, § 272, ECHR 2003-V (extracts); and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 152, ECHR 2012). That possibility is likely to be of particular relevance in relation to allegations of ulterior purpose.

314. The second aspect of the Court's approach is that the standard of proof before it is "beyond reasonable doubt". That standard, however, is not co-extensive with that of the national legal systems which employ it. First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. The Court has consistently reiterated those points (see, among other authorities, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII; *El-Masri*, cited above, § 151; and *Hassan*, cited above, § 48).

315. The third aspect of the Court's approach, also set out as early as in *Ireland v. the United Kingdom* (cited above, § 210), is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. In *Nachova and Others* (cited above, § 147), the Court further clarified that point, saying that when assessing evidence it is not bound by formulae and adopts the conclusions supported by the free evaluation of all evidence, including such inferences

as may flow from the facts and the parties' submissions. It has also stated that it is sensitive to any potential evidentiary difficulties encountered by a party. The Court has consistently adhered to that position, applying it to complaints under various Articles of the Convention (see *Baka*, cited above, § 143, with further references).

316. There is therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations.

317. It must however be emphasised that circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts (see *Ilgar Mammadov*, § 142, and *Rasul Jafarov*, § 158, both cited above). Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court (see *Baka*, cited above, § 148).

(d) Application of the above approach

318. The Court has already found that the applicant's arrest and pre-trial detention were carried out for a purpose prescribed under Article 5 § 1 (c) of the Convention (see paragraphs 188 and 206 above). It has not been argued that those measures constituted a restriction of any other rights of the applicant under the Convention. It follows that, even if it is established that the restriction of his right to liberty also pursued a purpose not prescribed by Article 5 § 1 (c), there will only be a breach of Article 18 if that other purpose was predominant.

319. The Court must thus determine whether that was so with respect to each of the two purposes cited by the applicant.

(i) The allegation that the applicant's arrest and pre-trial detention were meant to remove him from the political scene

320. In view of the context in Georgia between 2012 and 2014, the timing of the applicant's arrest and pre-trial detention, and the nature of the offences with which he was charged, it is understandable that there was a degree of suspicion that there was a political impetus behind the charges, even though the charges themselves were not overtly political. It is also true that, when it comes to allegations of ulterior purpose behind a criminal prosecution, it is hard to divorce the pre-trial detention from the criminal proceedings (see *Lutsenko*, § 108; *Tymoshenko*, § 298; and *Tchankotadze*, § 114, all cited above). Yet, there is no right as such under the Convention not to be criminally prosecuted (see *I.J.L. and Others v. the United Kingdom*, nos. 29522/95 and 2 others, § 101, ECHR 2000-IX; *Patsuria v. Georgia*, no. 30779/04, § 42, 6 November 2007; *Mustafa (Abu Hamza)*

v. the United Kingdom (dec.), no. 31411/07, § 34, 18 January 2011; and *International Bank for Commerce and Development AD and Others v. Bulgaria*, no. 7031/05, § 129, 2 June 2016, as well as, *mutatis mutandis*, *Artner v. Austria*, 28 August 1992, § 21, Series A no. 242-A). The Court is thus chiefly concerned with the purpose underlying the pre-trial detention ordered by the Kutaisi City Court on 22 May 2013 and extended on 25 September and 7 October 2013.

321. The Court must therefore assess whether the factors which, according to the applicant, showed that that detention was principally meant to remove him from Georgia's political scene are sufficient, considered alone or together, to establish that.

322. The factors deriving from the broader political context in which the criminal case was brought against the applicant are not sufficient proof in that respect.

323. Although the criminal prosecutions against a number of former ministers and other high officials from UNM could suggest a wish to eliminate or harm that party, they could equally reflect a desire to deal with alleged wrongdoings under a previous government whose members could not be held to account while in power. The mere fact that a politician is criminally prosecuted, even during an electoral campaign, is not automatically in breach of his or her right to run for office (see *Uspaskich v. Lithuania*, no. 14737/08, §§ 90-100, 20 December 2016). But more importantly, those prosecutions cannot in themselves lead to the conclusion that the courts which dealt with the question whether or not to place and keep the applicant in pre-trial detention were driven by such a purpose.

324. The same goes for the statements about the criminal cases against UNM figures by officials from the Georgian Dream Government (see paragraph 127 above, and compare with *Tchankotadze*, cited above, § 114). Such statements can only be seen as proof of ulterior purpose behind a judicial decision if there is evidence that the courts were not sufficiently independent from the executive authorities. No such evidence has been put forward in this case. On the contrary, it appears that in many cases against former UNM officials – including the case against the applicant's co-accused, Mr Z.T. – the courts turned down the prosecution's requests to impose pre-trial detention, and that, as of September 2013, fourteen out of the thirty-five former high officials from UNM who had been charged with criminal offences were in pre-trial detention and fourteen others had been released on bail (see paragraphs 39, 131 and 134 above). Lastly, it should be noted that the Constitutional Court ruled in a manner favourable to Mr G.U. (see paragraph 150 above).

325. The manner in which the criminal proceedings against the applicant were conducted does not reveal a predominantly political purpose behind his pre-trial detention either.

326. The large number of witnesses whom the prosecution wished to call did not unduly prolong the trial and the applicant's pre-trial detention. The trial started on 7 October 2013 and ended with the applicant's conviction four months and eleven days later, on 17 February 2014, just before the expiry of the maximum period of nine months for which he could be kept in pre-trial detention (see paragraphs 50, 53 and 148 above). In the circumstances, that can hardly be regarded as an unreasonable amount of time.

327. The applicant insisted that the proceedings' taking place in Kutaisi rather than Tbilisi suggested forum shopping by the prosecuting authorities, and thus an ulterior purpose. But, without going into the question whether that was in line with the Georgian rules of criminal procedure – a point not discussed by either party in their observations – the Court is not persuaded that this was redolent of forum shopping, for two reasons. First, although it placed the applicant in pre-trial detention, the Kutaisi City Court ordered the release on bail of his co-accused, Mr Z.T., who was also a prominent UNM figure. Secondly, on 30 May 2013, just eight days after that decision, the Tbilisi City Court also placed the applicant in pre-trial detention in relation to separate charges brought against him on 28 May 2013 (see paragraph 56 above).

328. It is true that four months later, during the pre-trial conference hearing on 25 September 2013, the Kutaisi City Court did not give any reasons for its decision to reject the applicant's request for release, and that it did not properly examine his further request for release on 7 October 2013 (see paragraphs 49 and 51 above). But those shortcomings, while inconsistent with the requirements of Article 5 § 3 of the Convention (see paragraphs 233 and 234 above), are not in themselves proof of a political purpose behind that court's decisions.

329. In sum, although the applicant's pre-trial detention took place against the backdrop of bitter political antagonism between UNM and Georgian Dream, the various points cited by him, between which there is a degree of overlap, are not sufficient to show that the predominant purpose of that detention was to hinder his participation in Georgian politics rather than to ensure the proper conduct of the criminal proceedings against him.

330. It is true that courts in France, Greece and the United Kingdom turned down requests by the Georgian authorities for the extradition of two high-ranking former officials from UNM on the basis, *inter alia*, that the criminal prosecutions against them were politically motivated (see paragraphs 138-140 above). But, as noted in *Khodorkovskiy* (cited above, § 260), that does not necessarily determine the Court's assessment of that point, for two reasons. First, the facts of the cases examined by those courts, while connected with those of the case before the Court owing to the fact that those cases also concerned allegations against other prominent UNM figures, were not identical. Secondly, the extradition courts were in essence

assessing a future risk, whereas the Court is concerned with past facts; that colours their respective assessment of inconclusive contextual evidence.

331. The same considerations apply to the decisions of Interpol in relation to Mr Saakashvili and Mr D.K. (see paragraph 142 above).

332. In view of the foregoing, the Court does not find it established that the applicant's pre-trial detention was chiefly meant to remove him from Georgia's political scene.

(ii) The allegation that in December 2013 the authorities attempted to use the applicant's pre-trial detention as leverage to obtain information from him

(α) Whether the allegation can be regarded as proven

333. The applicant's allegations about his covert removal from his prison cell on 14 December 2013 were fully disputed by the Government. In such cases the Court is inevitably confronted with the same difficulties as those faced by a first-instance court (see *El-Masri*, cited above, § 151). It is sensitive to its subsidiary role and recognises that it must be cautious in taking on the role of a primary finder of fact. Yet, when faced with allegations of such a serious nature as those made by the applicant, who at the relevant time was in the authorities' custody, it must apply a particularly thorough scrutiny, even if – as here – domestic investigations have taken place. In doing so, the Court may take into account the quality of those investigations and any possible flaws in the decision-making process (ibid., § 155).

334. The first point that needs to be emphasised is that the applicant's account of the way in which he was covertly taken out of Prison no. 9 and to the meeting with the Chief Public Prosecutor was, as highlighted by the Chamber, detailed and specific, and remained consistent throughout (see paragraphs 60-63, 81 and 99 above, and, *mutatis mutandis*, *El-Masri*, cited above, § 156). The fact that the applicant only voiced his allegations three days after the said meeting does not weaken their credibility. Even assuming that he could have done so earlier, it is not surprising that, being in custody, he chose to make them in a way designed to achieve maximum publicity. The alleged meeting took place in the early hours on a Saturday and the applicant spoke publicly about it at the next public hearing in his case, which was the following Tuesday.

335. It is true that there is no direct evidence in support of his account. But it must be acknowledged that the applicant, who was in the custody of the authorities, was hardly in a position to provide such evidence. There are, however, several indirect elements which tend to corroborate his assertions.

336. First, there is some evidence that at the relevant time the authorities were pressuring other senior UNM figures to give evidence against their former colleagues (see paragraph 141 above).

337. Secondly, two witnesses interviewed during the investigation by the Chief Public Prosecutor's Office, Mr G.Ts. and Mr I.P., stated that they had on several separate occasions heard Mr G.G., who was head of the special forces of the Ministry of Prisons at the relevant time, say that he had been one of those transporting the applicant to the meeting with the Chief Public Prosecutor (see paragraphs 108 and 109 above). It is true that Mr G.Ts.'s and Mr I.P.'s statements are hearsay and that their reliability may be open to question in view, in particular, of the positions of subordination to the applicant that the two of them had previously held (see paragraph 96 above). But in Mr G.Ts.'s case that factor was somewhat offset by the fact that the applicant had dismissed him from his post and had caused him to be detained (see paragraph 108 *in fine* above). Moreover, when seen against the backdrop of the fact that in December 2013 Mr G.G. was paid an extraordinarily high bonus, apparently on the basis of the decision of another official alleged to have played a central role in the events on 14 December 2013, Mr D.D. (see paragraph 93 above), Mr G.Ts.'s and Mr I.P.'s statements cannot be dismissed out of hand, even if such bonuses were also paid to other prison officials. The authorities do not appear to have attempted to verify those statements by objective means, for example by obtaining the video recording from the pre-trial hearing during which Mr G.G. was said to have spoken about his role in the events of 14 December 2013, or third-party evidence about Mr G.G.'s whereabouts in the early hours of 14 December 2013. They instead focused their efforts on interviewing Mr G.G., Mr I.M. (the other special-forces officer with whom he was alleged to have acted in concert), and their former colleagues in the special forces of the Ministry of Internal Affairs, with whom they had shared a cell in Prison no. 9 (see paragraphs 110 and 111 above). The fact that they denied their involvement during those interviews is hardly surprising.

338. Lastly, in May 2014 Ms L.M., a senior official at the Penitentiary Department, twice stated in interviews to the media that the applicant had been taken to a meeting with the Chief Public Prosecutor, and was shortly after that dismissed from her post by her superior, Mr D.D., who was also directly concerned by those allegations (see paragraph 95 above). Although she retracted her statements when questioned in relation to them during the ensuing criminal investigation, she does not appear to have provided a credible explanation for the discrepancy (see paragraph 117 above).

339. Further evidence in support of the applicant's account is the statement of Mr K.T., who at the relevant time was detained in a cell in the applicant's wing in Prison no. 9 (see paragraph 112 above). The Court is unable to place reliance on that statement however. Its reliability is somewhat weakened by Mr K.T.'s previous position of subordination to the applicant, and much further still by the fact that a physical examination carried out by the investigators showed that the prison corridor could not be

observed from Mr K.T.'s cell because there was no gap in the door, by Mr K.T.'s reluctance to take part in the ensuing experiment which was supposed to test that point, and by the conflicting statements of all Mr K.T.'s cellmates (see paragraphs 113-115 above).

340. There were, on the other hand, several parts of the applicant's account that lent themselves to verification of his allegations by objective means. Those leads were not explored however. For instance, no attempt was made to check whether the applicant could recognise Mr G.G. or Mr I.M., even though both of them were alleged by Mr G.Ts. and Mr I.P. to have been among those who had transported him from Prison no. 9 to the Penitentiary Department and the applicant stated that he would be able to recognise two of the men who had transported him (see paragraphs 81, 99, 108 and 109 above). Also, no attempt appears to have been made to check Mr G.G.'s and Mr I.M.'s mobile telephone records and cell tower data for the early hours of 14 December 2013, even though the applicant alleged that one of the men who had been in the car with him had had two mobile telephone conversations (see paragraph 81 above).

341. At the same time, the evidence put forward by the Government in support of their assertion that the applicant had not been removed from his cell and taken to the Chief Public Prosecutor is not sufficiently persuasive.

342. That evidence was gathered during the inquiry by the General Inspectorate of the Ministry of Prisons and the investigation by the Chief Public Prosecutor's Office. The findings made in the course of those two procedures must, however, be approached with caution. The first took place against a backdrop of firm and immediate denials of the applicant's allegations by the Prime Minister and the Minister of Prisons on 17 and 18 December 2013 (see paragraphs 68 and 70 above), and was carried out by officials of that Ministry. The second was only opened following the Chamber judgment in this case, and had a clear link with the Government's request for a referral of the case to the Grand Chamber (see paragraph 97 above). Indeed, it was completed just twenty-five days before the Grand Chamber held its hearing (see paragraphs 7 and 125 above), and the material obtained during that investigation served as a basis for the Government's submissions to the Grand Chamber.

343. Apart from those general considerations, there are a number of concrete elements which call the Government's assertions into question.

344. Most importantly, there are several elements casting doubt on their claim that the footage from the surveillance cameras in Prison no. 9 and the Penitentiary Department building – which could have conclusively proved or disproved the applicant's allegations – was automatically deleted after twenty-four hours. The Minister of Prisons does not appear to have been aware of that when speaking about the case on 18 December 2013 (see paragraph 70 *in fine* above). The deputy head of the General Inspectorate of the Ministry of Prisons was equally unaware of that when he requested the

footage two days later, on 20 December 2013 (see paragraph 73 above). The deputy Minister of Prisons who had been in charge of reforming the surveillance system in Georgia's prisons two years previously, in 2011, stated that the footage was kept for a month (see paragraph 77 above). Indeed, it is striking that surveillance footage from an establishment as prone to violence and accidents as a prison would be preserved for a shorter time than footage from road-traffic cameras – which was in this case still available twenty days after the alleged incident (see paragraph 84 above).

345. The exact method used to examine the footage from the private surveillance and road-traffic cameras remains unclear, and that footage was not made available to the applicant's lawyer in spite of his requests (see paragraphs 79, 84, 107, 120 and 121 above).

346. No significant value can be attached to the statements of Mr D.D.'s deputy and those of the governor and deputy governor of Prison no. 9 and the prison officers working there (see paragraphs 82, 85, 86, 100-104, 106 and 116 above). First, both the people who gave the statements and the inspectors and investigators who took them were subordinates of the alleged perpetrators. Secondly, any admission by the statements' authors of involvement in a covert removal of the applicant from his cell might have resulted in their own conduct being called into question.

347. The same goes for the statements of the former Chief Public Prosecutor, Mr O.P., and the former head of the Penitentiary Department, Mr D.D. (see paragraphs 118 and 119 above). Both of them clearly had a strong incentive to deny the allegations. The credibility of their statements is further weakened by the fact that they did not give them until during the course of the second investigation, in September 2016, nearly three years after the events, as no statements were taken from them during the initial inquiry (see paragraph 88 above).

348. The data showing that between approximately 1 a.m. and 1.25 a.m. on 14 December 2013 Mr O.P. was logged into the prosecuting authorities' document-management system (see paragraph 124 above), assuming it to be authentic and attesting his presence in his office rather than in the Penitentiary Department building, does not negate the applicant's allegations, given that the meeting between him and Mr O.P. was said to have taken place twenty to thirty minutes after 1.25 a.m. and that the distance between Mr O.P.'s office and the Penitentiary Department was apparently just a few hundred metres.

349. The Court cannot attach any significance to the absence of entries attesting the applicant's removal from his cell and Prison no. 9 in the relevant prison logs (see paragraphs 83, 87 and 123 above). In view of the covert nature of the alleged operation, it can hardly be expected that it would have been recorded in any of those logs (see, *mutatis mutandis*, *Al Nashiri v. Poland*, no. 28761/11, § 411, 24 July 2014, and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 411, 24 July 2014).

350. In view of the above considerations, the Court considers that it can draw inferences from the available material and the authorities' conduct, and finds the applicant's allegations concerning his covert removal from his prison cell sufficiently convincing and therefore proven.

(β) Whether the wish to obtain information from the applicant can be regarded as the predominant purpose of the restriction of his right to liberty

351. There is no evidence that until 14 December 2013, nearly seven months after the applicant had been remanded in custody, the authorities had attempted to use his pre-trial detention as a means to pressure him into providing information about Mr Zhvania's death or Mr Saakashvili's bank accounts. If the restriction of his right to liberty is thus seen as a whole, it is hard to regard the attempt to use it as a means to obtain such information as its chief purpose. But where the restriction of a Convention right amounts, as here, to a continuous situation, in order for it not to contravene Article 18, its chief purpose must remain the one prescribed by the Convention throughout its duration, and it cannot be excluded that the initial purpose will be supplanted by another one as time goes by (see paragraph 308 above).

352. There are several elements which lead the Court to find that this was so in this case. To begin with, by the time the applicant was pressured to provide information about Mr Zhvania's death and Mr Saakashvili's bank accounts, the reasons for keeping him in pre-trial detention appear to have receded, which led the Court to find a breach of Article 5 § 3 of the Convention in relation to the period from 25 September 2013 onwards, which was shortly before the incident of December 2013 (see paragraphs 233-235 above). Then, at that time, December 2013, Mr Saakashvili, who has since then become the target of several criminal investigations, had just left Georgia following the end of his term of office as President (see paragraphs 13 and 126 above). For its part, the investigation into Mr Zhvania's death, which had been renewed in late 2012, had apparently not made significant progress (see paragraph 61 above). It is clear that both topics were of considerable importance for the authorities. The Government's statement at the hearing before the Grand Chamber that there was still a "huge question" for the applicant to answer in relation to Mr Zhvania's death is particularly telling in that regard (see paragraph 61 above). At the same time, the prosecuting authorities had the power to drop all charges against the applicant at any point without judicial control, with the consequence that the courts would have had to discontinue the criminal proceedings against him (see paragraph 153 above), and thus cause him to be released from pre-trial detention, as promised to him by the Chief Public Prosecutor, Mr O.P., if he provided the requested information. The weight which the authorities attached to the matter is also apparent

from the way in which the entire incident on 14 December 2013 unfolded and was later commented upon and investigated. The applicant was taken to meet with Mr O.P., who had been appointed to the post three weeks previously (see paragraph 60 above), in a covert and apparently irregular manner, in a clandestine operation carried out in the middle of the night. The authorities' initial reaction to the applicant's allegations in that respect was to issue firm denials (see paragraphs 68 and 70 above), and the ensuing inquiry and investigation were, as already noted, marred by a series of omissions from which it can be inferred that the authorities were eager that the matter should not come to light. Thus, the main protagonists, Mr O.P. and Mr D.D., were not interviewed during the inquiry but only in the course of the investigation, in September 2016, nearly three years after the events, and the crucial evidence in the case – the footage from the prison surveillance cameras – was not recovered.

353. Bearing in mind all the circumstances of the case, the Court is satisfied that during the pre-trial detention, which is to be seen as a continuing situation, the predominant purpose of the restriction of the applicant's liberty changed. While in the beginning it was the investigation of offences based on a reasonable suspicion, later on it became to obtain information about Mr Zhvania's death and Mr Saakashvili's bank accounts, as shown by the incident on 14 December 2013.

(iii) Conclusion

354. There has therefore been a breach of Article 18 of the Convention taken in conjunction with Article 5 § 1.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

355. Article 41 of the Convention provides:

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

A. Damage

356. Before the Chamber, the applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

357. The Chamber found that the applicant had suffered distress and frustration on account of the breaches of Article 5 § 3 and Article 18 of the Convention, and that those breaches could not be made good solely by its findings. Making its assessment on an equitable basis, it awarded the applicant EUR 4,000 in respect of non-pecuniary damage.

358. In the Grand Chamber proceedings the applicant was advised that his claim under that head remained as originally submitted, and he expressed no wish to amend it.

359. The Government submitted that the applicant's claim was exorbitant, and noted that in *Gusinskiy* (cited above, § 84) the Court had held that the finding of a violation constituted sufficient just satisfaction.

360. The Court considers that the applicant must have suffered a certain amount of stress and anxiety as a result of the violations of Article 5 § 3 and Article 18 of the Convention in his case. Deciding on an equitable basis, it awards him EUR 4,000 in respect of that.

B. Costs and expenses

1. In the Chamber proceedings

361. Before the Chamber, the applicant claimed 39,390 United States dollars (USD) in respect of Mr Kakhidze's fees for 202 hours of work on the case, at USD 195 per hour; 4,350 pounds sterling (GBP) in respect of Mr Leach's fees for 29 hours of work on the case, at GBP 150 per hour; and USD 720 and GBP 90 in respect of translation and clerical expenses in, respectively, Georgia and the United Kingdom. In support of that claim, the applicant submitted time-sheets for Mr Kakhidze and Mr Leach and two schedules of administrative expenses.

362. The Chamber noted that no copies of legal-service contracts, invoices, vouchers or any other supporting financial documents had been submitted. It nevertheless found it reasonable to award EUR 8,000 in respect of Mr Kakhidze's and Mr Leach's fees, but rejected the claim in respect of other expenses, citing the absence of any documents in support.

2. The applicant's claims in the Grand Chamber proceedings

363. Following the referral of the case, the applicant was advised that his claim remained as originally submitted, but that he could amend it to take account of the Grand Chamber proceedings.

364. He sought an additional USD 4,251 in respect of the Mr Kakhidze's fees for 21.8 of hours of work on the case, at USD 195 per hour, and GBP 10,050 in respect of the fees of Mr Leach and Ms Sawyer, from the European Human Rights Advocacy Centre at Middlesex University ("EHRAC"), for sixty-seven hours of work on the written phase of the Grand Chamber proceedings, at GBP 150 per hour for each of them. In support of that claim, the applicant submitted time-sheets detailing the number of hours spent by Mr Kakhidze, Mr Leach and Ms Sawyer on the case. Mr Kakhidze's time-sheet mentioned an agreement between his law firm, BGI Legal, and the applicant, according to which payment of the fees would be subject to the Court's award, and mentioned that EHRAC had

joined BGI Legal on the case in December 2014. The agreement itself, however, was not submitted, and neither was an agreement between BGI Legal and EHRAC or the applicant and EHRAC. Mr Leach's and Ms Sawyer's time-sheets made no reference to payment arrangements between them and the applicant.

365. The applicant additionally sought GBP 15,375 in respect of Mr Leach's and Ms Sawyer's fees for respectively forty-four and a half and fifty-eight hours spent in preparing for the hearing before the Grand Chamber and attending it, at GBP 150 per hour for each of them. The applicant also claimed GBP 150 in respect of five hours of clerical work on the case by an EHRAC officer; GBP 31.61 for stationery; and GBP 584.80 and EUR 333 for Mr Leach's and Ms Sawyer's travel and subsistence expenses in connection with their attendance at the hearing. In support of that claim, the applicant submitted time-sheets for Mr Leach and Ms Sawyer, train tickets and taxi receipts for their journey to Strasbourg, hotel invoices for their stay in Strasbourg the night before the hearing, a restaurant receipt for the evening before the hearing, and an invoice for six lever-arch files bought by Middlesex University. The applicant requested that all those items be made payable directly to EHRAC.

3. The Government's comments on the claims

366. The Government submitted that the applicant had not produced any evidence, such as an agreement between himself and his representatives or receipts, to show that he had actually paid or was legally bound to pay them any fees for their work. The same went for the expenses incurred by the representatives in connection with the case. The claims suggested that some of those items had been borne by EHRAC, and nothing showed that the applicant was under an obligation to reimburse them.

367. With respect to the Chamber proceedings, the Government submitted that there was no proof that Mr Leach had done any work on them. As for Mr Kakhidze, both his hourly rate and the number of hours he was said to have spent on the case were excessive.

368. With respect to the Grand Chamber proceedings, the Government queried the need for the services of more than one representative. They also queried the hourly rates charged by the applicant's representatives and the number of hours they said they had spent on the case. The Government went on to say that since the authority enabling Ms Sawyer to represent the applicant had only been given on 28 February 2017, all work done by her before that date was to be discounted.

369. With respect to the hearing, the Government queried the need for additional representatives in addition to Mr Kakhidze. They also submitted that the time said to have been spent by Mr Leach and Ms Sawyer on preparing their oral submissions on behalf of the applicant was out of proportion to the limited complexity of the case. In any event, those oral

submissions had been largely identical to the written submissions that they had both made previously on behalf of the applicant. They could not therefore justify the large number of hours allegedly spent on preparing them, which was even higher than the number of hours claimed in respect of the written submissions.

4. The Court's assessment

370. According to the Court's settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, as a recent authority, *Buzadji*, cited above, § 130).

371. A representative's fees are actually incurred if the applicant has paid them or is liable to pay them (see *Luedicke, Belkacem and Koç v. Germany* (Article 50), 10 March 1980, § 15, Series A no. 36; *Artico*, cited above, § 40; and *Airey v. Ireland* (Article 50), 6 February 1981, § 13, Series A no. 41). Accordingly, the fees of a representative who has acted free of charge are not actually incurred (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 221, Series A no. 324). The opposite is the case with respect to the fees of a representative who, without waiving them, has simply taken no steps to pursue their payment or has deferred it (see *X v. the United Kingdom* (Article 50), 18 October 1982, § 24, Series A no. 55, and *Pakelli v. Germany*, 25 April 1983, § 47, Series A no. 64). The fees payable to a representative under a conditional-fee agreement are actually incurred only if that agreement is enforceable in the respective jurisdiction (see *Dudgeon v. the United Kingdom* (Article 50), 24 February 1983, § 22, Series A no. 59; *Kamasinski*, cited above, § 115; *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, nos. 48205/99 and 2 others, § 27, 14 May 2002; *Pshenichnyy v. Russia*, no. 30422/03, § 38, 14 February 2008; *Saghatelyan v. Armenia*, no. 7984/06, § 62, 20 October 2015; and *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, § 89, 21 April 2016).

372. In this case the applicant did not submit documents showing that he had paid or was under a legal obligation to pay the fees charged by his Georgian or British representatives or the expenses incurred by them, whether in respect of the Chamber or the Grand Chamber proceedings (see *Luedicke, Belkacem and Koç*, cited above, § 15; *Artico*, cited above, § 40; *Airey* (Article 50), cited above, § 13; and *Campbell and Cosans v. the United Kingdom* (Article 50), 22 March 1983, § 14 (a), Series A no. 60). In the absence of such documents, the Court is not in a position to assess the points mentioned in the previous paragraph. It therefore finds no basis on which to accept that the costs and expenses claimed by the applicant have actually been incurred by him.

373. It follows that the claim must be rejected.

C. Default interest

374. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's objection of non-exhaustion of domestic remedies with respect to part of the complaint under Article 5 § 3 of the Convention;

2. *Dismisses*, unanimously, the Government's objection of failure to comply with the six-month time-limit with respect to part of the complaint under Article 18 of the Convention;

3. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention with respect to the applicant's arrest;

4. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention with respect to the applicant's pre-trial detention;

5. *Holds*, unanimously, that there has been no violation of Article 5 § 3 of the Convention with respect to the applicant's initial placement in pre-trial detention;

6. *Holds*, unanimously, that there has been a violation of Article 5 § 3 of the Convention in that, at least from 25 September 2013 onwards, the applicant's pre-trial detention ceased to be based on sufficient grounds;

7. *Holds*, unanimously, that there is no need to examine the complaint under Article 5 § 4 of the Convention;

8. *Holds*, by nine votes to eight, that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1;

9. *Holds*, by nine votes to eight,
   (a) that the respondent State is to pay the applicant, within three months, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 November 2017.

Søren Prebensen	Guido Raimondi
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Yudkivska, Tsotsoria and Vehabović;

(b) concurring opinion of Judge Serghides;

(c) joint partly dissenting opinion of Judges Raimondi, Spano, Kjølbro, Grozev, Ravarani, Pastor Vilanova, Poláčková and Hüseynov.

G.R.
S.C.P.

JOINT CONCURRING OPINION OF JUDGES YUDKIVSKA, TSOTSORIA AND VEHABOVIĆ

"It is better to die a glorious death than to live in shame!"
Shota Rustaveli, *The Knight in the Panther Skin*[1]

"Courage is indispensable because in politics not life but the world is at stake."
Hannah Arendt, *Between Past and Future*

I. Introduction

1. We endorse the finding of a violation of Article 18 in the present case. We do not, however, subscribe to the introduction of the "predominant purpose" test for the interpretation of Article 18, or to the conclusion that the applicant's pre-trial detention was not meant to remove him from Georgia's political scene. The present case provided the Grand Chamber with a unique opportunity to develop, for the first time in the history of the Court, a comprehensive and meaningful approach to the only measuring instrument for democracy we have – Article 18 of the Convention. In our view, the Grand Chamber failed to give appropriate consideration to the fundamental risks for democracy implicit in abuses of individuals by State authorities.

II. General comments

2. The present case revolves around the notion of political trials.[2] It is beyond the scope of this opinion, however, to engage in a comprehensive discussion of this concept in general. There is no single definition or typology of political trials.[3] While so-called "destructive trials"[4] (that is, partisan trials, aimed at eliminating a political enemy) are a major category

1. Translated by L. Coffin, Publication N. Alkhazishvili, 2015.
2. The terms "political trial" and "political justice" are used as synonyms in this opinion.
3. For a discussion on the notion and definition of a political trial, see, in general, Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton Legacy Library (1961); Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press (1986); Ronald Christenson, "A Political Theory of Political Trials", 74 *J. Crim. L. & Criminology* 547 (1983), available at: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6373&context=jclc [accessed on 17/09/2017]; Eric A. Posner, "Political Trials in Domestic and International Law", *Duke Law Journal*, Vol. 55 (2005); Jens Meierhenrich and Devin O. Pendas, "'The Justice of My Cause is Clear, but There's Politics to Fear': Political Trials in Theory and History", in Jens Meierhenrich and Devin O. Pendas (eds.), *Political Trials in Theory and History*, Cambridge University Press (2016).
4. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 48-50 and 56-60, and see infra note 10, J.N. Shklar, *Legalism: Law, Morals, and Political Trials*, p. 149.

of such cases, the existing literature on the subject notes that equating all political trials to that category would not be correct.[5] Some suggest that the notion also encompasses both trials within the rule of law and those outside it.[6] Moreover, certain political trials could "become crystals for society",[7] assisting mankind in overcoming overarching predicaments and untangling complex legacies (for example, the Nuremberg trials). In this case it could hardly be claimed that such trials are incompatible with the rule of law.[8]

3. In the current context, we will be referring to the classic, narrow understanding of political justice, largely based on Otto Kirchheimer's definition of this term, according to which "*courts eliminate a political foe of the regime according to some prearranged rules*",[9] or "*[c]ourt action is called upon to exert influence on the distribution of political power*".[10] Even against this background, we do not wish to suggest that *every* trial involving a politically active person is political. Rather, destructive trials, of which the present case is an illustration, are political because they seek, first and foremost, to eliminate or damage (symbolically, morally and/or physically) a political enemy[11] through legal proceedings. The use of judicial proceedings for political reasons is of particular significance. Through legitimisation, political justice "*enlarge[s] the area of political action*," and serves "*to authenticate*" political objectives.[12]

4. Some suggest that "*we can recognize political trials when we see them*".[13] The detection of such trials in practice, however, remains highly elusive[14] as the authorities have intricate techniques for shaping and demonstrating the legitimate purpose of their actions. Such examples are well known throughout history. Even in a democratic community as

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5. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 4, 13, 15 and 27.

6. Supra note 3, R. Christenson, *A Political Theory of Political Trials*, pp. 547, 551 and 554.

7. Ron Christenson, *Political Trials: Gordian Knots in the Law*, second edition, Transaction Publishers, New Brunswick, USA (1999), p. 5; see also Ron Christenson, "What is a Political Trial?", *Society*, Vol. 23 (1986), p. 26.

8. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 13 and 25; R. Christenson, *A Political Theory of Political Trials*, p. 573; J.N. Shklar, *Legalism: Law, Morals, and Political Trials*, pp. 143-79.

9. Supra note 3, O. Kirchheimer, *Political Justice*, p. 6.

10. Ibid., p. 49; see also supra note 3, J.N. Shklar, *Legalism: Law, Morals, and Political Trials*, p. 149: "What, after all, is a political trial? It is a trial in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies. It pursues a very specific policy – the destruction, or at least the disgrace and disrepute, of a political opponent."

11. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, p. 56.

12. Supra note 3, O. Kirchheimer, *Political Justice*, pp. 6 and 419-20.

13. Supra note 3, R. Christenson, *A Political Theory of Political Trials*, p. 548.

14. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, p. 3.

committed to the value of free speech and open debate as historical Athens was, public dissatisfaction was channelled into vague charges of moral corruption and impiety at the trial of Socrates in 399 BC.[15] The Court therefore has a particular function in this context: to find an appropriate way to address such cases. Otherwise, Article 18 will lose its usefulness.[16]

5. In order to expose ulterior motives and to understand convoluted political processes and their intra-political dimensions, the Court should look at a wide range of factors (compare *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, §§ 141-43, 22 May 2014, and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 156-62, 17 March 2016; see also paragraphs 281 and 317 of the present judgment). Even when there could be grounds to believe that a criminal act took place, it should be verified whether the authorities are using their power with ulterior motives to achieve their political ends. This is because such intent is *per se* abusive and an assault on democratic institutions.[17]

6. The above proposition is particularly relevant to the present case. Its circumstances do not merely affect the applicant or display elements of a show trial. They characterise a specific nation, period and regime and demonstrate revenge, which is considered "*among the most ancient and persistent political motives*".[18] In the framework of partisan proceedings, no defendant is an ordinary prisoner[19] and "*goings-on in courtrooms cannot be divorced from the social dynamics – political, cultural, otherwise – surrounding them*".[20] Thus, the case should be viewed against the particular landscape of historical and political processes in the respondent State, which has brought into focus the allegations against the former ruling party and the desire to prosecute it.[21]

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15. See Josiah Ober, "The Trial of Socrates as a Political Trial: Explaining 399 BCE", in Jens Meierhenrich and Devin O. Pendas (eds.), *Political Trials in Theory and History*, pp. 65-87, supra note 3.
16. See, generally, Helmut Satzger, Frank Zimmermann and Martin Eibach, "Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? (Part 2) – Prerequisites, questions of evidence and scope of application", *EuCLR* (2014), vol. 4, no. 3.
17. David Harris, Michael O'Boyle, Edward Bates, and Carla Buckley, *Law of the European Convention on Human Rights*, third edition, Oxford University Press (2014), p. 858.
18. Supra note 7, R. Christenson, *Political Trials: Gordian Knots in the Law*, p. 4.
19. Supra note 3, R. Christenson, *A Political Theory of Political Trials*, p. 576.
20. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 33; J.N. Shklar, *Legalism: Law, Morals, and Political Trials*, p. 144.
21. See, for instance, "'The Regime Should be Prosecuted': The Name of the Resolution to be considered in Parliament" (in Georgian), available at: http://radio1.ge/ge/news/view/96584.html [accessed on 17/09/2017]; "Interior Minister Says UNM Plans to Stir 'Destabilization'", available at: http://civil.ge/eng/article.php?id=27112 [accessed on 17/09/2017]; "Secret Service Investigates Alleged Coup Plot After Phone Call Leak", available at: http://www.tabula.ge/en/story/112491-secret-service-investigates-alleged-coup-plot-after-phone-call-leak [accessed on 17/09/2017].

7. Political trials do not *per se* imply that legal procedures should be violated.[22] It is their pursuit of a political objective rather than the unfairness of such trials that makes their purpose political.[23] Defendants can be charged with legal violations but prosecuted for their political status or activities.[24] While even liberal democracies are not immune from political trials,[25] the chances of the use of such trials are higher during periods of political transformation.

8. In this setting, Article 18 is of distinctive importance in States where there are no traditions, or limited traditions, of peaceful power transfers. Any long-term democratic stability requires a track record of and a commitment to rotation in office.[26] This aspect is particularly problematic for new democracies, the majority of which, more than two decades following the collapse of the Soviet Union, are still characterised by their almost invariably deeply fragile nature, with political structures that are porous to anti-democratic elements.[27] While the relevant national laws may be in line with Council of Europe and other international standards, their application by both the executive and the judiciary is frequently not. This particularly concerns Article 5 of the Convention – the right to liberty and security – which belongs to the first rank of fundamental rights and is of paramount importance in a democratic society (see paragraph 181 of the judgment). A lax interpretation of the legislation in order to justify pre-trial detention[28] or its use on abusive grounds[29] for keeping political opponents behind bars for an indefinite period of time is a highly likely prospect in those circumstances. In this regard, Article 18 needs to be preserved as an effective and instrumental protection mechanism for prohibiting the misuse of political power and for limiting the use of specific restrictive measures for improper purposes.[30]

9. Criminal law arguably has unlimited potential to be misused against political opponents, dissidents and activists. As noted by the Venice Commission, crimes such as "*abuse of office*" and "*misuse of powers*"

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22. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, p. 59.
23. Supra note 3, O. Kirchheimer, *Political Justice*, p. 49.
24. Supra note 3, E.A. Posner, "Political Trials in Domestic and International Law", p. 81.
25. See among others, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 13, 25 and 51; see also supra note 6.
26. Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge University Press (2015), p. 134.
27. Ibid., p. 124.
28. Parliamentary Assembly of the Council of Europe, Resolution 2077 (2015) on abuse of pretrial detention in States Parties to the European Convention on Human Rights, § 6, available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22206&lang=en [accessed on 17/09/2017].
29. Ibid., §§ 4 and 7.
30. Joint concurring opinion of Judges Jungwiert, Nußberger and Potocki in *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013.

constitute a particularly problematic category vulnerable to political manoeuvring.[31] Symptomatic of this is the fact that in all previous Article 18 cases where the Court has found a violation, there has been a charge of or conviction for embezzlement and/or abuse of official authority, which has been used to target political opponents rather than to address genuine public threats.[32]

10. An individual's political position cannot be a safeguard against criminal responsibility for ordinary crimes.[33] However, individuals should not fall victim to the criminal and judicial system simply on account of their politically active status. Article 18 clearly prohibits restrictions of liberty on impermissible grounds. However, it does not exclude the possibility of initiating criminal proceedings or ordering pre-trial detention (obviously, when a violent crime is committed and a person is dangerous to society). Recent cases of prosecutions brought against high-profile political leaders in western Europe and the United States can serve as examples. It is noteworthy that none of the individuals concerned was detained.

11. It is paramount for the Court not to hesitate to consider highly sensitive political contexts.[34] Doing otherwise will endanger democracy[35] and could even be seen as a possible endorsement of the existence and acceptance of political persecution. Whether evidence of an improper motive (be it political or other) is discovered at the initial or later stages of proceedings is immaterial, as it can easily be manipulated by the

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31. See European Commission for Democracy through Law (Venice Commission), Report on the relationship between political and criminal ministerial responsibility, adopted by the Venice Commission at its 94th plenary session (Venice, 8-9 March 2013), § 113, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)001-e [accessed on 17/09/2017]; see also Parliamentary Assembly of the Council of Europe, Resolution 1950 (2013) on keeping political and criminal responsibility separate, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20016&lang=en [accessed on 17/09/2017]. Paragraph 3.5 of the Resolution stresses that "*national provisions on 'abuse of office' should be interpreted narrowly*" and "*should only be invoked against politicians as a last resort and the level of sanctions should be proportional to the legal offence and not influenced by political considerations*". Furthermore, the Parliamentary Assembly calls upon 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*" (§ 4.2).

32. Supra note 3, E.A. Posner, "Political Trials in Domestic and International Law", p. 81.

33. See *Khodorkovskiy v. Russia*, no. 5829/04, § 258, 31 May 2011.

34. Helen Keller and Corina Heri, "Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights' Untapped Potential to Protect Democracy", 36 (1-6) *Human Rights Law Journal* (2016), p. 10, Helmut Satzger, Frank Zimmermann and Martin Eibach, "Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? (Part 1) – Rethinking the interpretation of Art. 18 ECHR against the background of new jurisprudence of the European Court of Human Rights", *EuCLR* (2014), vol. 4, no. 2, p. 112.

35. Supra note 30, joint concurring opinion in *Tymoshenko v. Ukraine.*

government. Such proceedings become "poisoned" as long as "destructive" political motives come to light, and this should lead to an uncontested finding of a violation of Article 18. As Albert Camus warned: "The evil that is in this world always comes of ignorance, and good intentions may do as much harm as malevolence, if they lack understanding" (*The Plague*).

12. The Court is regarded as the conscience of Europe[36] and the symbol and practical expression of the aspiration of society for effective democracy, economic prosperity and self-fulfilment of individuals,[37] thus safeguarding the consolidation of democracy and the rule of law.[38] The importance of Article 18 was already evident before the post-totalitarian eastern and central European States joined the Convention, as it was feared that democracy could be perverted. Therefore, the Article was imbued with the power allowing "*the Court to prune undemocratic buds from the legal systems of Member States before these can bloom and bear the fruit that represents a larger problem.*"[39] This danger is still relevant today. Several decades after decommunisation, the downfall of totalitarianism and the large surge of new constitutional democracies that revived a period of euphoria in Europe,[40] novel and eminent risks to a democratic future have emerged. The following words voiced during the drafting of the Convention retain their significance even in modern times:

> "*What we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means*."[41]

13. As eloquently noted by Pierre-Henri Teitgen in 1949:[42]

> "*It is legitimate and necessary to limit, sometimes even to restrain, individual freedoms, to allow everyone the peaceful exercise of their freedom and to ensure the*

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36. *Collected Edition of the "*Travaux Préparatoires*" of the European Convention on Human Rights*, Martinus Nijhoff, The Hague (1975-85), Vol. II, p. 174. See, in general, *The Conscience of Europe: 50 Years of the European Court of Human Rights*, Third Millennium Publishing Limited (2010).

37. Speech by Mr Luzius Wildhaber, Former President of the European Court of Human Rights, Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, 19 January 2007, available at: http://www.echr.coe.int/Documents/Speech_20070119_Wildhaber_JY_ENG.pdf [accessed on 17/09/2017].

38. Supra note 36; see also the speech by Jean-Paul Costa on "Immigration and Human Rights in the Case-Law of the ECHR" (London, 23 March 2009), available at: http://www.echr.coe.int/Documents/Speech_20090323_Costa_London_ENG.pdf [accessed on 17/09/2017].

39. Supra note 34, Helen Keller and Corina Heri, "Selective Criminal Proceedings and Article 18 ECHR", p. 3.

40. Supra note 26, S. Issacharoff, *Fragile Democracies*, pp. 2 and 269.

41. Statement by Lodovico Benvenuti (Italy) at the second session of the Consultative Assembly of the Council of Europe, in *Collected Edition of the "*Travaux Préparatoires*" of the European Convention on Human Rights,* Martinus Nijhoff, The Hague (1975-85), Vol. II, p. 136.

maintenance of morality of the general well-being, of the common good and of public need. When the State defines, organises, regulates and limits freedoms for such reasons, it is only fulfilling its duty. That is permissible, that is legitimate.

But when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for coordinating and guaranteeing, then it is against public interest if it intervenes."

III. New approach

14. The present case has brought to light a need to clarify the case-law under Article 18 (see paragraphs 264-86 of the judgment). The Court's objective was to contribute to a coherent interpretation of this Article, including finding a solution to situations characterised by a plurality of purposes, and to minimise the risk of divergent case-law. The prospects of achieving these aims, in the light of the solution proposed, appear dim.

15. The judgment introduces the "predominant purpose test" to guide the Court in its interpretation and application of Article 18 of the Convention in relation to situations in which restrictions of rights may have an ulterior purpose in addition to the one permitted by the Convention (plurality of purposes). The new approach is a positive development only in the sense that it does not require "direct and incontrovertible proof" in relation to complaints under Article 18, while endorsing the possibility of taking circumstantial evidence into consideration (see paragraphs 316-17 of the judgment). The judgment also affirms the well-established case-law to the effect that there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (see paragraph 288).

16. Even though we agree with the results of the application of this new test in the present case, we find it highly problematic. Our main concern relates to the fact that the test overshadows the core purpose of Article 18, namely that there should be no misuse of the restrictions placed on the rights and freedoms set out in the Convention. For instance, even where there is an ulterior purpose behind an individual's arrest and detention, the new test allows such a case to be in compliance with Article 18 unless it is proven that the ulterior purpose was the predominant reason behind the authorities' actions. The practical ramifications of the new test leave a wide margin of appreciation for governments to implement illegitimate restrictions, combining them with legitimate purposes. This will result in

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42. Statement by Pierre-Henri Teitgen (France) at the first session of the Consultative Assembly of the Council of Europe, in *Collected Edition of the "*Travaux Préparatoires*" of the European Convention on Human Rights*, Martinus Nijhoff, The Hague (1975-85), Vol. I, p. 130.

diminishing the significance of the residual protection that Article 18 provides.

17. Moreover, the content of the predominant-purpose test is ambiguous. It is unclear **which criteria the Court will use to define the "predominant" purpose of a restriction**. Neither does the test assist in determining how to differentiate between common criminal offences and, for example, misuse of criminal justice for political ends. An approach to the effect that "*which purpose is predominant in a given case depends on all the circumstances*" (see paragraph 307 of the judgment) leaves the substance of the test ambivalent. The only concrete indication that the judgment provides in this respect is that in certain situations, the Court will have regard to the "nature and degree of reprehensibility" of the alleged ulterior purpose in assessing which purpose is predominant (ibid.) and will bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law. In the light of the lack of systemic knowledge and empirical or descriptive accounts about the phenomenon of political trials,[43] the need to elucidate the essence of the test increases. Treating limitations of Convention rights **for improper political reasons (and here again, a "destructive" political trial is a vivid example)** or **with discriminatory motives** (as those two grounds of misuse of power undermine the foundations of the Convention system) by default as predominant purposes would have slightly alleviated the uncertainties associated with the new test.

18. The employment of the concept of "fundamental aspect of the case" will not contribute to defining the "predominant purpose" (see paragraph 291 of the judgment). The Court's practice is rather rich in examples where dissenting judges and legal scholars have criticised it for having overlooked the notion of "fundamental aspect of the case".[44] The case of *Georgia v. Russia (I)* serves as an illustration, where the collective expulsion of Georgians from the Russian Federation **on the basis of their ethnic and national origin** (as a means of political retaliation) was left unexamined by the Court under Article 14 of the Convention (see *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 220-21, ECHR 2014 (extracts)). By the same token, the majority's finding that it was not necessary to examine Article 18 was criticised by minority judges in *Georgia v. Russia (I)*, cited above; *Kasparov v. Russia*, no. 53659/07, 11 October 2016; *Navalnyy*

43. Supra note 3, J. Meierhenrich and D.O. Pendas, *Political Trials in Theory and History*, pp. 5 and 7.

44. See, in general, the partly dissenting opinion of Judge Tsotsoria in *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts). See also Giulia Pecorella, "A missing piece in the European Court of Human Rights' judgment *Georgia v. Russia (I)*", available at: https://aninternationallawblog.wordpress.com/2014/10/27/a-missing-piece-in-the-european-court-of-human-rights-judgment-georgia-v-russia-i/ [accessed on 17/09/2017]; and the dissenting opinion of Judge Gyulumyan in *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, ECHR 2012.

v. Russia, nos. 29580/12 and 4 others, 2 February 2017;[45] and *Kasparov and Others v. Russia (no. 2)*, no. 51988/07, 13 December 2016.

19. The new test also **bears a resemblance to** the contested approach taken in the case of *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, 25 July 2013). Both approaches presuppose the existence of at least one Convention-compliant purpose in the government's actions. In the latter judgment, the Court stressed that the existence of a "hidden agenda" was not enough to establish a violation of Article 18. A travesty of justice had to be demonstrated (ibid., § 906). If there is a "healthy core" to a case, a violation of Article 18 would be difficult to establish (ibid., § 907).[46] As suggested by one of the leading textbooks on the Convention, the *Khodorkovskiy and Lebedev* case implies that "*the Court is prepared to accept that a prosecution might not be completely free from a political agenda, but that such corrupting influence, if it exists, needs to have a decisive effect on matters, which it would not if the fundamental intention of the authorities had been legitimate, it being sufficient that the case against the applicants had a 'healthy core'*".[47] The new test, even with its relaxed standard of proof and its general approach to the effect that the predominant purpose depends on all the circumstances and, in continuing situations, may vary over time (see paragraphs 307-08 of the present judgment), **allows and possibly accepts prosecutions with ulterior motives, primarily ones with a political agenda**, in a similar manner to the "healthy core" approach.

20. The Court has a long tradition of borrowing hypotheses from other jurisdictions while developing novel concepts. This case is no exception. The judgment provides a detailed account of relevant international and comparative-law materials (see paragraphs 155-68 of the judgment) in relation to the concepts of "misuse of power" and non-extradition for politically motivated crimes. While the notion of "misuse of power" (see paragraphs 283, 303 and 306 of the judgment) is readily accepted by the Court in its interpretation of Article 18, the judgment's approach is different in relation to extradition case-law and Interpol's practice (Article 3 of the Interpol Constitution directly prohibits intervention in matters of a political nature; see paragraphs 330-31 of the judgment). It could be argued that the examination by national courts and international organisations of political motives in extradition requests differs from the Court's assessment under Article 18 (see paragraph 330 of the judgment). This argument, however, is not sufficient to conclude that the findings of bodies deciding on extradition requests will never be of any relevance to the assessment under Article 18,

45. This case is currently pending before the Grand Chamber.
46. Both the criminal cases against Mr Khodorkovskiy are considered to be examples of a political trial. See, for instance, Richard Sakwa, "The Trials of Khodorkovsky in Russia", in Jens Meierhenrich and Devin O. Pendas (eds.), *Political Trials in Theory and History*, pp. 369-94, supra note 3.
47. Supra note 17, *Law of the European Convention on Human Rights*, p. 860.

especially in view of the meticulous and broad consideration given, for example, by various domestic courts in the member States concerned to all the circumstances of extradition cases connected to the present case involving former high-ranking officials. Extradition-related sources are relevant as they do not presuppose the innocence of a person who is being politically persecuted. This is exactly the kind of "plurality of purpose" situation with which the Court was faced in this case (see paragraphs 292-308 of the judgment). It would have been expected for the Court to explore every possible avenue in this regard. The unequivocal rejection of well-developed mechanisms of extradition law which would have assisted the Court in identifying the existence of a disguised prosecution with political motives is a lamentable choice, especially in the light of the limited guidance available in this respect.

21. In the light of all the above-mentioned considerations, the introduction of a test which tolerates weighing a legitimate purpose against an illegitimate one in order to determine the predominant objective of the authorities is a dramatic step backwards and will not assist the Court in clarifying the substance of Article 18.

IV. Concrete circumstances of the present case

22. The nucleus of the present case is the removal of the applicant – a well-known political figure in Georgia who is a former Prime Minister and at the material time was Secretary General of the United National Movement (UNM), the main and largest opposition party and former ruling party – from the country's political life by means of his pre-trial detention.

23. Owing to the various high positions the applicant occupied over a long period of time, as well as his distinctive role in the government that came to power after the "Rose Revolution" and ruled the country for nine years (see paragraphs 9-12 of the judgment), his part in the recent history of Georgia is significant. The applicant has been a greatly influential and, unsurprisingly, controversial figure. He represented a valuable asset for his party, particularly in circumstances when almost the entire leadership of the UNM became affected by measures implemented by the Georgian Dream coalition and were either forced to flee Georgia or were imprisoned. It is plausible that the government benefited from the applicant's detention in order to achieve its main political goal – to destroy the UNM.[48] The fact that his co-accused Mr Z.T., undoubtedly another prominent UNM figure, or other former UNM officials (see paragraphs 327 and 324 of the judgment respectively) were released on bail is of no importance for the assessment of whether the authorities pursued a political agenda by placing the applicant

48. See infra note 54.

in pre-trial detention. His incarceration was of particular symbolic significance.

24. The main facet of the case is the analysis of the factual context under Article 18 of the Convention. The judgment rightly determines the scope of the case in observing that the allegations concerning the applicant's covert removal from his prison cell do not represent a separate complaint under Article 18 but are "simply a further aspect, or a further argument in support of, the complaint already set out in the application" (see paragraph 250 of the judgment). In other words, all the facts of the case should be analysed in the light of the applicant's complaint that the purpose of the criminal proceedings against him and his pre-trial detention had been to remove him from the political scene and to prevent him from standing in the Georgian presidential election in October 2013 (see paragraph 241 of the judgment). Therefore, the applicant's complaints form an inseparable whole and splitting them into two parts, as suggested by the judgment (see paragraph 319 of the judgment), is illogical and artificial.

25. The applicant, like applicants in some other Article 18 cases, was convicted of abuse of official authority, which is a category of crime vulnerable to political misuse as mentioned above.[49] The judgment rather overemphasises the fact that the applicant's arrest and pre-trial detention were carried out for a purpose prescribed under Article 5 § 1 (c) of the Convention, implying that the cases against him had a "healthy core" (see paragraph 318 of the judgment; here again the above discussion on the similarities between the new approach and the one applied in the *Khodorkovskiy and Lebedev* case becomes relevant). The Court finds that there was a "reasonable suspicion" as long as the authorities could show that they had at least some information linking the applicant to a criminal offence. In general, in pre-trial detention cases the case-law requires a very low level of scrutiny (see, for example, paragraph 191 of the judgment, which refers to the "inherent limits" of the Court's power in respect of Article 5 § 1, and paragraph 193, which states that the Court "cannot depart lightly from the national authorities' and courts' findings on the application of domestic law").

26. The finding of no violation of Article 5 § 1 is proof that the applicant is not immune from criminal accountability. While the omissions noted by the judgment (see paragraphs 192 and 227-28 of the judgment) may not lead to a breach of the Convention for the above-mentioned reasons, serious doubts remain as to the genuineness of all the charges brought and the reasonableness of the applicant's arrest and continuing pre-trial detention. The Grand Chamber also admits (see paragraph 320 of the judgment) that there could be a suspicion concerning a political impetus behind the

49. The Court in this case is concerned with two criminal charges in relation to which the applicant's pre-trial detention was ordered on 22 May 2013 and extended on 25 September 2013 and 7 October 2013; see paragraphs 170 and 320 of the judgment.

charges. In this regard, it is instructive that the report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, which led to the Assembly's Resolution no. 2077 (2015) on abuse of pretrial detention in States Parties to the European Convention on Human Rights, noted, in relation to Georgia, "an astonishing number of individual examples of selective and presumably abusive use of pretrial detention against political opponents".[50] In this Resolution the applicant's pre-trial detention was specifically mentioned as an example of pressure being put on detainees to coerce them into confessing to a crime or cooperating with the prosecution[51] (see paragraph 135 of the judgment).

27. After having meticulously analysed the available materials, the Grand Chamber reaches the conclusion that the applicant's allegations concerning his covert removal from his prison cell on 14 December 2013 for the meeting with the Chief Prosecutor were sufficiently convincing and proven (see paragraph 333-50 of the judgment).[52] **This implies that the whole State machinery was employed first to remove such a high-ranking prisoner from his cell and then to cover up this incident.**

28. The illegal removal of a former Prime Minister from prison is not a frivolous act and does not take place without a specific reason. Instrumental aspects of the case have been the authorities' reactions to the matter (see paragraphs 67-70 of the judgment) and, in particular, the endorsement by the serving Prime Minister, Mr Garibashvili, of the statement made earlier by the former Prime Minister Mr Ivanishvili: "so what happened after [Mr O.P] abducted [the applicant]? *What did he do to [him] then, did he rape him or what?*" (see paragraph 92 of the judgment). The majority of the assertions made in this context called the applicant's allegations absurd, untrue, lies, provocation and ridiculous; it was stated that they not only did not necessitate investigation but required assessment by psychologists and psychiatrists (see paragraph 68 of the judgment). The disclosure of such contentions should be seen as an indication of existing political preconceptions – namely that the applicant, being the representative of the previous ruling party, could not be trusted, should by default be considered

50. Committee on Legal Affairs and Human Rights, Report on abuse of pretrial detention in States Parties to the European Convention on Human Rights, 7 September 2015, Doc. 13863, § 72, available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21992&lang=EN [accessed on 20/10/2017].

51. Supra note 28, Parliamentary Assembly Resolution 2077 (2015), § 7.1.

52. A recent interview of the former head of the Public Relations Department of the Ministry of Prisons further supports the findings of the Court. Irakli Korzaia stated that Mr Merabishvili's removal from prison by officials of the Penitentiary Department had at the very least been agreed with Prime Minister Garibashvili and that the authorities had interfered with the course of the investigation and destroyed the evidence. Exclusive interview (in Georgian) to *The Other Accents*, 15 July 2017, available at: http://rustavi2.ge/en/video/26486?v=2 [accessed on 17/09/2017].

a liar and, in general, should be totally barred not only from political life but from access to the State protection system as well.

29. It is well documented that prior to and in the aftermath of the 2012 parliamentary elections, there was a polarised and fragmented political scene in Georgia (see among other references, paragraphs 127-37 and 329 of the judgment).[53] There was an environment of acute political confrontation between the Georgian Dream coalition and the UNM. Key political figures of the Georgian Dream coalition declared their aspiration to eliminate UNM as a political force.[54] Independent sources describing political developments in Georgia and criminal proceedings against former government officials, including the applicant, have indicated that they face double standards and selective justice.[55] The available materials also suggest that pre-trial detention was used excessively against UNM members and leaders specifically, apparently in order to discredit or otherwise neutralise political opponents.[56] In the words of the Chief Magistrate of the

53. See, for example, Parliamentary Assembly of the Council of Europe, Resolution 2015 (2014) on the functioning of democratic institutions in Georgia, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21275&lang=EN [accessed on 17/09/2017]; "PACE Debates on Georgia", available at: http://www.civil.ge/eng/article.php?id=27697 [accessed on 17/09/2017]; "Polish MFA 'Concerned over Possible Selective Justice in Georgia'", available at: http://www.civil.ge/eng_old/article.php?id=27551 [accessed on 17/09/2017].

54. See supra note 50, Report on abuse of pretrial detention in States Parties, § 75; "GEO PM: We Must Drive UNM out of Government Once and For All", available at: http://www.tabula.ge/en/story/84242-geo-pm-we-must-drive-unm-out-of-government-once-and-for-all [accessed on 17/09/2017]; "Head of ISFED: Tsulukiani's Comment about Destroying UNM Unacceptable", available at: http://www.tabula.ge/en/story/75721-head-of-isfed-tsulukianis-comment-about-destroying-unm-unacceptable [accessed on 17/09/2017].

55. Parliamentary Assembly of the Council of Europe, Resolution 2015 (2014) on the functioning of democratic institutions in Georgia, § 10, supra note 53; Report by the Commissioner for Human Rights of the Council of Europe following his visit to Georgia from 20 to 25 January 2014, Strasbourg, 12 May 2014, CommDH(2014)9, pp. 3, 12-15, available at: https://rm.coe.int/16806db81a [accessed on 17/09/2017]; see also Commissioner for Human Rights of the Council of Europe, Observations on the human rights situation in Georgia: An update on justice reforms, tolerance and non-discrimination, Strasbourg, 12 January 2016, CommDH(2016)2, p. 3, available at: https://rm.coe.int/ref/CommDH(2016)2 [accessed on 17/09/2017]; "EU warns Georgia against Political Revenge on Former Officials", available at: http://www.reuters.com/article/us-georgia-eu-idUSBRE8AP0U420121126 [accessed on 17/09/2017]; Human Rights Watch, *World Report 2014: Georgia*, available at: http://www.hrw.org/world-report/2014/country-chapters/georgia?page=1 [accessed on 17/09/2017]; see also supra note 50.

56. Among other references, see supra note 28, Parliamentary Assembly Resolution 2077 (2015), § 7.2; Observations on the human rights situation in Georgia, supra note 55, p. 3; and Report of the Commissioner for Human Rights following his visit to Georgia from 20 to 25 January 2014, supra note 55, pp. 12-15. See also the reference to the case of Alexander Ninua, noting that he was pressured to give testimony against Davit Kezerashvili, in the report by the Georgian Democratic Initiative, *Politically Biased Justice*

Westminster Magistrates' Court, who ruled against the extradition of the former Minister of Defence of Georgia from the United Kingdom to Georgia in 2016: "*The current government has shown ... a strong interest in the prosecution of former UNM politicians. The number of UNM officials prosecuted or detained has been very significant*" (see also paragraphs 140-41 of the judgment). Cases of UNM officials whose extradition has been rejected by Council of Europe member States are abundant, in addition to those referred to in the present case (see paragraphs 138-39 of the judgment). Many of these officials have been granted political asylum.[57]

30. Democracy and the rule of law cannot be commanded by a text but need institutional guarantees.[58] A polarised and fragmented political scene is prone to high risks of retribution against political rivals. The chances of employing criminal justice to accomplish this goal are high. Only well-functioning democracies can ensure separation between political and criminal responsibility.[59] The impartiality and independence of public prosecutors and courts is the main guarantee against misuse of power.[60] The state of the Georgian criminal justice system, however, has been a matter of concern over the years. While some progress has been acknowledged, the erosion of public trust, the lack of judicial independence (owing in particular to practices such as transferring judges between courts and allocating cases among judges without a fully transparent procedure and in a manner that leaves room for manipulation and interference), the significant role of politics in the process of filing criminal charges and selective justice have been identified as major challenges, particularly in relation to politically sensitive cases (see also paragraphs 132-37 of the judgment).[61] In

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in Georgia, (2015), pp. 67-69, available at: http://gdi.ge/uploads/other/0/241.pdf [accessed on 17/09/2017]; see also supra note 50 and infra note 61.

57. See among other references, "Statement by the Office of the Chief Prosecutor in Connection with the Extradition of M. Saakashvili and Z. Adeishvili", available at: http://pog.gov.ge/eng/news?info_id=637 [accessed on 17/09/2017]; "Prosecutor's Office Explains the Reasons for Annulling Interpol Red Notice, International Search Warrant against Z. Adeishvili and S. Kavtaradze", available at: http://pog.gov.ge/eng/news?info_id=674 [accessed on 17/09/2017]; "Ex-official wanted in Georgia given asylum in EU", available at: http://dfwatch.net/ex-official-wanted-in-georgia-given-asylum-in-eu-23468-23281 [accessed on 17/09/2017].

58. Supra note 26, S. Issacharoff, *Fragile Democracies*, p. 1.

59. Supra note 31, Venice Commission, Report on the Relationship between Political and Criminal Ministerial Responsibility, § 105.

60. Ibid., § 86.

61. OSCE Office of Democratic Institutions and Human Rights, *Trial Monitoring Report Georgia, 2014*, §§ 51 and 63, available at: http://www.osce.org/odihr/130676?download=true [accessed on 17/09/2017]; see also *Amnesty International Report 2016/17: The State of the World's Human Rights*, released on 22/02/17, available at: https://www.amnesty.org/en/documents/pol10/4800/2017/en/ [accessed on 17/09/2017]. The latter report notes: "On 12 January, the Council of Europe

this regard, the words of the Parliamentary Assembly's Rapporteur regarding pre-trial detention are instructive: "*I was also given specific examples of pressure on judges [in Georgia] who refused to order pretrial detention, and of forum shopping techniques designed to ensure that requests for pretrial detention against former officials are decided by judges considered as favourably disposed by the prosecution*."[62] The Commissioner for Human Rights of the Council of Europe even called for the allegations of selective justice to be addressed at the "systemic level" (see paragraph 132 of the judgment). According to the recently published *Global Competitiveness Report*, the situation regarding judicial independence has further deteriorated in the country during 2017.[63]

31. The circumstances described above reinforce the certainty of the political dimensions of the authorities' actions with regard to the applicant, particularly in view of the investigation into the death of the former Prime Minister Mr Zurab Zhvania and the allegedly secret offshore bank accounts of the former President Mikheil Saakashvili, regarding which the applicant was pressured to cooperate.

32. The significance of these two cases for Georgian internal political dynamics may be summarised in the following manner.

1. Case of the investigation into the death of former Prime Minister Zhvania

33. The death of Mr Zurab Zhvania, a distinguished figure in Georgian politics, has been actively debated in Georgia for over a decade (see paragraph 61 of the judgment). During the pre-election campaign and after it had come to power, the Georgian Dream coalition declared that an investigation into this case was "among its top priorities".[64] A resumed investigation was launched in November 2012 and was believed to be gaining momentum dynamically, thus raising high expectations among society. In this context the eagerness of O.P.,[65] appointed as Chief

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Commissioner for Human Rights reported that courts were more likely to approve detention or give custodial sentences to members of the UNM compared with bail and fines issued to pro-government activists in comparable cases." See also US State Department, *Georgia 2016 Human Rights Report*, available at: https://www.state.gov/documents/organization/265634.pdf [accessed on 17/09/2017].

62. Supra note 50, Report on abuse of pretrial detention in States Parties, § 75.

63. World Economic Forum, *The Global Competitiveness Report 2017-18*, p. 125, available at: http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf [accessed on 03/10/2017].

64. "Probe 'Resumed' into PM Zhvania's Death", available at: http://www.civil.ge/eng/article.php?id=25487 [accessed on 17/09/2017]; see also "Ivanishvili's Incoming Govt's Program", available at: http://www.civil.ge/eng/article.php?id=25384 [accessed on 17/09/2017].

Prosecutor on 21 November 2013 to make a breakthrough in the investigation,[66] is highly plausible. In the same time-frame, two bodyguards of Mr Zhvania were arrested together with the former chief forensic pathologist, who had performed an autopsy on the late Prime Minister.[67] One of the bodyguards, Mr Kh., was detained in connection with an unrelated case on 16 December 2013 (the day before the applicant voiced allegations about his covert removal from the prison cell). This immediately triggered speculation that it might be related to the ongoing investigation into Mr Zhvania's death. Prime Minister Garibashvili, when commenting on the applicant's allegations, among other things, mentioned that Mr Merabishvili had apparently "panicked" after the arrest of Mr Kh.[68] To date the resumed investigation has not altered the initial finding that Mr Zhvania's death was caused by carbon monoxide poisoning triggered by an inadequately ventilated gas heater.[69]

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65. This is not the only case when this person has been at the epicentre of media attention. He has resigned as a result of a criminal records scandal, but is still believed to retain informal authority over law-enforcement agencies (see "Chief Prosecutor Resigns", available at: http://civil.ge/eng/article.php?id=26835 [accessed on 17/09/2017]; "Targamadze: Financial Police is under ownership of Partskhaladze" (in Georgian), available at: http://www.tabula.ge/ge/story/120353-targamadze-finansuri-policia-farcxaladzis-pirad-sakutrebashia [accessed on 17/09/2017]. In 2017 O.P. was also accused of physically assaulting the Auditor General of Georgia. See "Georgia's State Audit Office Chairman Assaulted", available at: http://www.civil.ge/eng/article.php?id=30099 [accessed on 17/09/2017]. The handling of the latter case by the authorities has also been the subject of criticism. See "Joint Statement of NGOs regarding Assault of Lasha Tordia, Auditor General of Georgia", available at: https://idfi.ge/en/ngos_statement_on_attack_to_general_auditor_lasha_tordia [accessed on 17/09/2017].

66. "Kbilashvili: There is Progress in the Investigation of the Death of Zurab Zhvania" (in Georgian), available at: http://www.tabula.ge/ge/story/73052-kbilashvili-zurab-zhvanias-gardacvalebis-saqmis-gamodziebashi-progresia [accessed on 17/09/2017].

67. "Ex-Chief Forensic Pathologist Arrested into Zhvania's Case", available at http://www.civil.ge/eng/article.php?id=27053 [accessed on 22/10/2017]; "PM Comments on Merabishvili's Allegations", available at: http://www.civil.ge/eng/article.php?id=26792 [accessed on 22/10/2017]; "Prosecutor's office detains Zhvania's bodyguard", available at: http://www.tabula.ge/en/story/81293-prosecutors-office-detains-zhvanias-bodyguard [accessed on 22/10/2017].

68. "PM Comments on Merabishvili's Allegations", supra note 67; "Prison Minister Denies Merabishvili's Allegations as 'Utterly False'", available at: http://www.civil.ge/eng/article.php?id=26797 [accessed on 22/10/2017].

69. The former chief forensic pathologist was acquitted by the Supreme Court on 3 December 2016 in relation to the charge of neglect of official duty (erroneous reporting) for not examining the late Prime Minister's injuries comprehensively. In 2015 two bodyguards were found guilty of neglect of official duties (as they did not follow the standard protocol of the security detail and left Mr Zhvania without protection at the time of the incident). See "Jury Finds Late PM Zhvania's Bodyguards Guilty of Neglect", available at: http://www.civil.ge/eng/article.php?id=28501 [accessed on 22/10/2017]; "Expert L.Ch. acquitted on Zhvania case in all three instances court", available at: http://rustavi2.ge/en/news/62732 [accessed on 22/10/2017].

2. Case of former President Saakashvili

34. Former President Saakashvili is a founder of the UNM. Since the end of his term of office he has resided outside Georgia and has been stripped of Georgian nationality. Notwithstanding this, he is still regarded as the leader of the UNM even though formally the position of chairperson of the party is vacant. Several investigations were initiated in respect of him, among others, concerning his personal assets and Mr Zhvania's death, and this led to him being summoned for questioning in March 2014.[70] Many international observers raised concerns about the possible political motivation and the lack of impartiality of the investigations.[71]

35. According to the Westminster Magistrates' Court judgment in the extradition case referred to above (see paragraph 141 of the present judgment), the prosecution was particularly interested in the alleged financial assets of the former President and the applicant was not the sole politician who was approached for such information. Moreover, many individuals testified that they had been pressured to obtain evidence or a conviction against UNM members and especially against Mr Saakashvili.[72] This implies that the need to acquire this sort of evidence was of crucial importance to the authorities. The timing of the pressure on the applicant also appears to be important: Mr Saakashvili finished his term of office as

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70. "Prosecutors Summon Saakashvili for Questioning", available at: http://www.civil.ge/eng/article.php?id=27059 [accessed on 17/09/2017].

71. "Georgia Files Criminal Charges Against Ex-President", available at: http://www.nytimes.com/2014/07/29/world/europe/georgia-files-criminal-charges-against-ex-president.html [accessed on 17/09/2017]; "Prosecutors Offer Saakashvili Questioning via Skype", available at: http://www.civil.ge/eng/article.php?id=27084 [accessed on 17/09/2017]; "Georgia: EU concern at criminal charges against former President Saakashvili", available at: http://www.finchannel.com/~finchannel/world/georgia/38859-georgia-eu-concern-at-criminal-charges-against-former-president-saakashvili [accessed on 20/10/2017]; "Georgian PM: Swedish, Lithuanian FMs are from 'Club of Saakashvili's Friends'", available at: http://www.civil.ge/eng/article.php?id=27565 [accessed on 17/09/2017]; "Bildt: If PM Does Not Want To Listen To Best Friends of His Country, We Take Note", available at: http://www.tabula.ge/en/story/86622-bildt-if-pm-does-not-want-to-listen-to-best-friends-of-his-country-we-take-note [accessed on 17/09/2017].

72. "Roland Akhalaia: There is pressure on us to give testimony against Saakashvili" (in Georgian), available at: http://netgazeti.ge/news/30106/ [accessed on 17/09/2017]; "Ex-Head of Security of Zurab Zhvania: 'They wanted to obtain testimony against Saakashvili, but I was against it'" (in Georgian), available at: http://saqinform.ge/news/25300/zurab+Jvanias+dacvis+yofili+ufrosi%3A+%E2%80%9Czurab+Jvanias+orientaciis+shesaxeb+didi+xania+vicodi+da+misgan+sheTavazebac+mqonda...+undodaT+mishasTvis+gadabraleba%2C+Tumca%2C+mis+winaaRmdeg+chveneba+ar+miveci...%E2%80%9C.html [accessed on 17/09/2017]; "Erekle Kodua was promised reinstatement in the system of the Ministry of Internal Affairs in exchange for testimony against Saakashvili" (in Georgian), available at: http://www.fmabkhazia.com/news/3803-saakashvilis-cinaaghmdeg-chvenebis-micemis-sanacvlod-erekle-koduas-sistemashi-aghdgenas-sthavazobdnen.html [accessed on 17/09/2017]; see also supra notes 55and 56.

President in November 2013 (see paragraph 13 of the judgment), shortly before the removal of the applicant, and thus was no longer protected by immunity.

V. Conclusion

36. "Every political regime has its foes or in due time creates them".[73] "There never was a golden age in which government refused to persecute anyone, though there once was a hope that we would reach that end."[74] Indeed, the present case is neither the first nor the last case to deal with a sensitive political context, especially in the framework of Article 18 of the Convention. Retaining its politically neutral standing, the Court should be particularly attentive to cases displaying signs of political repression. Certainly, there is a need to maintain a delicate balance in not trivialising Article 18 and saving it as an effective protection mechanism. Yet recourse to it should not be impossible.

37. The introduction of the predominant-purpose test will weaken Article 18 as a safeguard against unjust restriction of Convention rights. This vaguely defined new standard does not provide objective criteria for the assessment of situations involving a plurality of purposes and leaves the authorities a wide margin to misuse the criminal justice system to achieve political goals, including the possibility of eliminating political opponents, by masking their improper agendas in a more sophisticated way. Consequently, it will lead to a new wave of divergent case-law that is particularly disturbing in this sensitive area of Convention protection.

38. Detention cannot be used as a means of exerting moral pressure on an accused (see *Gusinskiy v. Russia*, no. 70276/01, §§ 74-77, ECHR 2004-IV, and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, §§ 57-58, 13 January 2009). When arrest and detention, even if legitimate, are turned into an abusive tool by authorities with ulterior political (and primarily destructive) motives, this should not be tolerated. Doing otherwise will amount to giving carte blanche to the national authorities and will have a "chilling effect" on the state of democracy.[75] It might also result in deterring the public at large from participating in open political debate that would endanger the functioning of democratic institutions. **Therefore, in cases when there is evident misuse of State machinery for improper political ends, the Court should treat it by default as the predominant purpose and thus find a violation of Article 18.**

39. Returning to the circumstances of the present case, the clandestine removal of the former Prime Minister from prison for a meeting with the

73. Supra note 3, O. Kirchheimer, *Political Justice*, p. 3.
74. Supra note 3, J.N. Shklar, *Legalism: Law, Morals, and Political Trials*, p. 150.
75. See, for example, *Navalnyy and Yashin v. Russia*, no. 76204/11, § 74, 4 December 2014, and *Frumkin v. Russia*, no. 74568/12, § 141, ECHR 2016 (extracts).

Chief Public Prosecutor in the early hours, with the aim of exerting pressure on him with regard to two politically important and sensitive issues, is a disturbing fact. The Government explicitly acknowledged during the hearing before the Grand Chamber that there was still a "huge question" for the applicant to answer in relation to Mr Zhvania's death (see paragraphs 61 and 352 of the judgment). **The chronological correlation between the applicant's removal from his prison cell and developments surrounding two sensitive topics of domestic politics is self-evident.** It reveals the real ulterior purpose of the authorities: to benefit from the applicant's arrest by, on the one hand, totally hampering him from continuing his political activities while, on the other hand, also obtaining information about politically significant investigations.

40. The Grand Chamber itself admitted in its reasoning that the applicant's pre-trial detention in its later stages was aimed at obtaining information about Mr Zhvania's death and Mr Saakashvili's bank accounts (two topics that in the Court's own words were of considerable importance for the authorities – see paragraph 352 of the judgment). Those two objectives, which, being extraneous to the set of permissible restrictions contained in Article 5 § 1, formed the ground for the finding of a violation of Article 18 in the present case (see paragraph 354 of the judgment), were themselves of an obviously political nature. All these clearly visible political connotations do not leave room for any conclusion other than that the predominant purpose of depriving Mr Merabishvili of his physical liberty was to diminish his impact on political life in Georgia, in breach of Article 18 of the Convention.

CONCURRING OPINION OF JUDGE SERGHIDES

1. My only disagreement with the judgment centres on the interpretation and application of Article 18 of the Convention taken in conjunction with Article 5 § 1 of the Convention. Whilst I have reached the same conclusion as in the judgment, namely, that there has been a violation of Article 18 taken in conjunction with Article 5 § 1 of the Convention, I disagree with the manner in which that conclusion has been reached.

I. INTERPRETATION AND APPLICATION OF ARTICLE 18 OF THE CONVENTION – PLURALITY OF PURPOSES OF RESTRICTIONS

2. With due respect, I do not share the view that the text and purpose of Article 18 of the Convention bear an interpretation which can differentiate between restrictions whose purpose is predominantly legitimate and others whose purpose is illegitimate but not predominantly so, and vice versa. In other words, I am unable to follow the view adopted in the judgment (see paragraphs 305, 307, 309, 318, 332 and 351-53) that the test to be applied to the restrictions of rights prescribed in the Convention, in the present case under Article 5 § 1, should be based on the predominance of their purpose as legitimate over any illegitimate purpose. It is to be noted, in this regard, that the legitimacy of the purpose of restrictions is one of the constituent elements or components of their legality or lawfulness.

3. To this end, I do not support the dominant-purpose test which tolerates the presence of a "plurality of purposes", one of which may be illegitimate, though not dominant, within the prohibitive clause of Article 18 of the Convention. I rather favour the line of reasoning of the Chamber judgment, adopted unanimously, which did not go into the sort of distinction and formulation that the present judgment does. The relevant paragraphs of the Chamber judgment are paragraphs 106-07, which read as follows:

> "106. Having regard to the facts established above, the Court cannot but find that the applicant's pre-trial detention was used not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of abuse of official authority and other offences in public office with which he had been charged, but was also treated by the prosecuting authority as an additional opportunity to obtain leverage over the unrelated investigation into the death of the former Prime Minister and to conduct an enquiry into the financial activities of the former head of State, two aims wholly extraneous to sub-paragraph (c) of the above provision. Indeed, the prospect of detention cannot be used as a means of exerting moral pressure on an accused ...
>
> 107. There has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1."

4. As I will explain, the distinction drawn in the judgment between restrictions according to whether their predominant purpose was legitimate or illegitimate is not supported by any method of interpretation.

5. It must be said from the outset that, as provided in Articles 19 and 32 of the Convention respectively, the Court was set up to function on a permanent basis in order to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention" and to exercise jurisdiction in "all matters concerning the interpretation and application of the Convention".

A. Text and character of Article 18 of the Convention (textual or literal interpretation)

6. The interpretation of a Convention provision usually begins with the text of the provision in issue and the ordinary meaning of its terms. On numerous occasions the Court has employed the concept of ordinary meaning to elucidate the provisions of the Convention (see, for example, *Johnston and Others v. Ireland*, 18 December 1986, § 51, Series A no. 112, and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 114, Series A no. 102).

7. Article 18 of the Convention, headed "Limitation on use of restrictions on rights", reads as follows:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

8. The wording of the above provision – "shall not be applied for any purpose other than those ..." – is drafted in such a mandatory, plain, clear and unambiguous way as to leave no doubt about the mandatory nature or character of the rule it establishes.

9. Moreover, the phrase "other than those for which they have been prescribed", referring to restrictions provided in the Convention, leaves no doubt that the said restrictions were intended to apply only for the purposes prescribed in the Convention and not for any other purpose. The purposes prescribed in the Convention are the only legitimate ones and they "form a *numerus clausus*, as the protected conduct and interest of the rights may not be limited for any purpose apart from one stated in the relevant specific limitation provision".[1] Article 18 is intended to provide protection against misuse of power. As rightly stated in the judgment (see paragraph 167), "[t]here is misuse of power when an authority uses its power for a purpose other than the one for which it was conferred". Article 18 covers any misuse of power and is not limited to misuse of power for improper political

1. See Gerhard van der Schyff, *Limitation of Rights – A Study of the European Convention and the South African Bill of Rights,* Van Der Schyff, Tilburg, 2005, p. 186, § 149.

reasons or with discriminatory motives, which are the most common examples of misuse of power.

10. The clear and plain text of Article 18 leaves no room whatsoever for unlawful or illegitimate restrictions, regardless of whether their purposes are to a greater or lesser extent predominant in gravity over the purposes provided for the restrictions in the Convention (i.e. restrictions with a legitimate or lawful purpose). Furthermore, it should be observed that nowhere in Article 18 or in any other provision of the Convention does the adjective "predominant" or "main" or "chief" referring to a purpose of a restriction appear. It is a basic principle of interpretation that words must not be added, when reading or interpreting a provision, which do not exist in the text itself, especially where the meaning is absolutely plain.[2]

11. Lastly, the rule of construction, namely, that where the law does not distinguish, one ought not to distinguish, "*ubi lex non distinguit, nec nos distinguere debemus*",[3] may be particularly relevant and useful here. With all due respect, this rule appears to have been infringed by the conclusion arrived at in the judgment.

B. Object and purpose of Article 18 of the Convention (purposive or teleological interpretation)

12. Let us now examine Article 18 of the Convention in the context of the objective that the provision is designed to achieve. Since the text of the Article is clear and unambiguous its purpose is also clear. In what follows I shall deal with the purposive or teleological[4] interpretation of Article 18, that is to say, an interpretation which is based on the object and purpose of the said Article.

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2. See John Bell and Sir George Engle (eds), *Cross Statutory Interpretation,* 2nd edn., London, 1987, p 14; Roy Wilson and Brian Galpin (eds), *Maxwell on the Interpretation of Statutes,* 11th edn., London, 1962, pp. 3 et seq.). Also of pertinence are the following legal maxims of interpretation, which are based on common sense and leave no doubt as to the point in issue: "*interpretatio cessat in claris*" (interpretation stops when the text is clear); "*quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est*" (when there is no ambiguity in the words, then no exposition contrary to the words is to be made – see Coke, *On Littleton*, 147 a); "*verbis standum ubi nulli ambiguitas*" (where there is no ambiguity, words stand as written – Traynor's *Maxims*, 612); "*absoluta sententia expositione non indiget*" (an absolute sentence needs no exposition – see 2 Justinian, *Institutes*, 533, and Emer De Vattel, *Law of Nations*, Bk. 2, § 263: "it is not allowable to interpret what has no need of interpretation"); "*expressio facit cessare tacitum*" (to state a thing expressly ends the possibility that something inconsistent with it is implied – see Coke, *On Littleton*, 210 a, and F.A.R. Bennion, *Bennion on Statutory Interpretation: A Code*, 5th edn, London, 2008, section 389, pp. 1249-50).

3. See 7 Coke's *Reports*, 5.

4. The word "teleological" derives its meaning from the Greek word "τέλος" (*telos*), which means purpose (see Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles,* vol. 2 (N-Z), Oxford, 1993, p. 3239 under entry: "teleologia").

13. First and foremost, there is no doubt that Article 18 was intended to preserve and not to harm human rights. Its object was to prohibit the misuse or abuse of power and arbitrariness and to prevent infringements of the principle of good faith on the part of the national authorities. In other words, it was intended to make sure that the national authorities never deviated from the rule of law and the principle of democracy in any way or to any extent when limiting the rights safeguarded in the Convention. Regarding the very clear link between the Convention and democracy, the Court in the case of *Refah Partisi (the Welfare Party) and Others v. Turkey* rightly made the following observation:

> "In view of the very clear link between the Convention and democracy ... no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society."[5]

14. The presumption of good faith is an objective concept that reflects a proper level of behaviour on the part of the national authorities. All the above-mentioned principles of rule of law, democracy and good faith permeate the objective purpose of every Convention provision, especially of Article 18, which specifically deals with the prohibition of misuse and abuse of power. In this connection I find it quite useful to refer to what Professor Aharon Barak, former President of the Supreme Court of Israel, said about fundamental constitutional values and purposive interpretation of a legal text. What he says in the following passage regarding ordinary national legislation can *a fortiori* apply in interpreting Article 18 of the Convention, which was intended to support and enhance these values:

> "The interpreter of any legal text must integrate it into the constitutional structure of the democracy and the system's fundamental values. These values reflect the constitution's democratic character, the basic values and aspirations of the legal system, and its constitutional law. They constitute its credo and the environment of every piece of legislation. Sometimes these values are part of the intent of the author of the text (subjective purpose). They are always part of the intent of the reasonable author and of the system (objective purpose). They reflect the pre-understanding with which the interpreter approaches his or her work. They express the background assumptions at the base of the legal system. This approach plays a central role in interpreting constitutions and statutes, but it applies to the interpretation of every legal text. We assume, based on the various presumptions of purpose, that a statute actualizes constitutional value. A specific legislature that wants to deviate from this fundamental system must express that desire explicitly and unequivocally, in the language of the statute. An interpreter should not assume that a particular text seeks to deviate from fundamental constitutional principles. To the contrary, the interpretive assumption – and it is the objective purpose of every text, expressed in the presumptions of objective purpose – is that the text of a statute is designed to realize democracy and the fundamental principles of the system, not to deviate from them.

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5. See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 Others, § 99, ECHR 2003-II.

> A statute should thus be interpreted against the background of institutional principles, justice, and human rights."[6]

15. Unlike the interpretation followed in the judgment, the interpretation I propose is fully in line with the purpose of Article 18. An interpretation which fails to take account of the purpose of Article 18, namely, that the rule of law is to be maintained at all times and by all authorities, may lead to uncertainty, unforeseeability and eventually to legal chaos and anarchy. The rule of law is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles.

16. The *raison d'être* of Article 18 is to safeguard the principle of legal certainty. As the Court pertinently held in The Sunday Times *v. the United Kingdom (no. 1)*:[7]

> "... [A] norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

In the case at hand, allowing a restriction under Article 5 § 1 of the Convention on the right to liberty and security in the light of an extraneous purpose that was not communicated to the applicant would not permit the applicant to know the real reasons for his arrest as provided in Article 5 § 2 of the Convention and to challenge properly the lawfulness of his detention as provided in Article 5 § 4 of the Convention. The whole wording and purpose of Article 5 and Article 18 are based on the idea that restrictions on the right to liberty and security must be lawful. In the same vein, Article 7 of Resolution 2077 (2015), adopted on 1 October 2015 by the Council of Europe's Parliamentary Assembly (see also paragraph 135 of the judgment), condemns abusive pre-trial detention.

17. The Court rightly observes, in paragraph 307 of the judgment, that "the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law". However, it claims to bear this in mind when adopting the test as to which purpose – the legitimate or the illegitimate one – is predominant in a given case. In my view, with all due respect, the rule of law and the values of a democratic society cannot be maintained if the Court accepts an abuse of power to any degree or extent. One cannot assert that the rule of law is maintained if it does not remain inherently intact at all times, but is allowed to be perforated and penetrated by an act of abuse of power. It is not explained in the judgment how it is possible to reconcile any abuse of power on the part of the authorities with the rule of law, the principle of legality and the values

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6. See Aharon Barak, *Purposive Interpretation in Law*, translated from Hebrew by Sari Bashi, Princeton and Oxford, 2005, p. 256.

7. See The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30.

of a democratic society. In my view, abuse of power not only undermines democracy but is the greatest threat to it.

18. Without wishing to reduce its great significance in any way,[8] Article 18 of the Convention is an *ex abundandi cautela* (by excess caution) provision, which intends to make it absolutely clear that there shall be no misuse of the restrictions placed on the rights and freedoms set out in Section I of the Convention. Even without it, this aim is clear from the provisions dealing with those rights – in the present case from Article 5 § 1 of the Convention – which are drafted particularly clearly and provide an exhaustive list of restrictions which leave no scope for misuse or abuse of power or arbitrariness. Besides, according to the case-law of the Court, the key purpose of Article 5 § 1 is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X; *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III; and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33). J.G. Merrills and A.H. Robertson[9] make the following pertinent observation:

> " ... although Article 18 in one sense only makes explicit what is already implicit in the Convention, it certainly adds clarity on the vital matter of restrictions and underpins the primacy of good faith in their application. As such it has rightly been described as a useful part of the Convention."[10]

19. According to a Latin maxim, an exception proves or maintains the rule concerning things that are not excepted, "*exceptio probat regulam de rebus exceptio*".[11] The prescribed restrictions on rights in the Convention, which form exceptions to the rights to which they relate – in the present case Article 5 § 1 of the Convention – have exactly this aim: to maintain the rule and not betray it, so nothing illegal should be allowed to enter those restrictions which has nothing to do with the substance of the rule or of the right concerned.

20. Consequently, no interpretation of Article 18 would be justified if it were to result in changing the scope of the rights and the limitations on them, as provided for in the specific provisions of Section I of the Convention. The inclusion of Article 18 in the Convention shows that the drafters were very much concerned that without it the prescribed restrictions

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8. See, on the significance of Article 18, Helen Keller and Corina Heri, "Selective Criminal Proceedings and Article 18 of the European Convention on Human Rights' Untapped Potential to Protect Democracy", 36 (1-6) *Human Rights Law Journal* (2016), pp. 1 et seq.

9. See J.G. Merrills and A.H. Robertson, *Human Rights in Europe – A study of the European Convention on Human Rights,* 4th edn., Manchester, 2001, p. 217.

10. Ibid*.,* loc. cit.

11. See 11, Coke's *Reports,* 41. See the similar maxims: "*exceptio quoque regulam declarant*" - see Bacon's *Aphorisms*, 17, meaning an exception also declares the rule. "*exceptio quae firmat legem, exponit legem*" - see 2 Bulstrode's *Reports* 189, meaning that an exception which confirms the law expounds the law.

in the Convention on the rights guaranteed would be misused. Article 18 thus contains a general warning to abstain from abuses of power. That Article could be considered as a reminder of the devastating experience of the Second World War that led drafters of the Convention to strengthen the protection of the rights of individuals *vis-à-vis* the State, as well as a reminder of what the main purpose of the Convention is. In my view, an interpretation of Article 18 which accepts an abuse of power would run counter to "the aim of the Council of Europe", which is "the achievement of greater unity between its members", pursued through "the maintenance and further realisation of human rights and fundamental freedoms" (see Preamble to the Convention). Not only would an abuse of power not maintain and further realise human rights, nor even merely lower the standard of protection of such rights; it would rather amount to the destruction of the rights themselves. This, of course, would be the most serious setback human rights may face.

21. It is perhaps no accident that Article 18 is to be found at the end of Section I of the Convention dealing with "Rights and Freedoms". It comes as a normative umbrella covering and protecting all the limited or qualified rights and freedoms (that is, rights and freedoms in respect of which restrictions are prescribed and are thus not absolute) from misuse of power, and together with Article 1 of the Convention dealing with the "Obligation to respect human rights" (which immediately precedes Section I), Article 18 can be considered as the floor and the ceiling of the Convention temple or the stern and bow of the Convention ship, embracing all the human rights provisions contained in Section I. As I have said earlier, Article 18 is intended to enhance and certainly not to diminish the rule of law and the other fundamental or basic principles, values and aspirations of the Convention system, such as the principle of democracy and the principle of equality. Not only do Articles 17 and 18 not condone any abuse of power, they provide a safeguard against any such abuse. One could liken Articles 1, 17 and 18 to the three walls or pillars of a sacred temple – the Convention – which the interpreter must approach cautiously and meritoriously, lest the sacred temple collapse and the scope of the Convention be rendered a mockery.

22. Moreover, Article 18 is placed immediately after Article 17 of the Convention, which is headed "Prohibition of abuse of rights". Although neither the text of Article 18 nor that of Article 17 uses the word "abuse", Article 18 is in essence dealing with the prohibition of abuse of restrictions, just as Article 17 deals with the prohibition of abuse of rights. As Gerhard van der Schyff pertinently said:

> "Article 18 can also be viewed as a refinement of the principle in article 17, which provides that rights may not be limited to a greater extent than is provided for under the Convention, as it applies the latter principle to the legitimate purposes that may be pursued in limiting rights. Kristin HENRARD[12] is therefore correct to argue that

article 18 is an instrument with which to ensure the effective protection of rights, as it seeks to exercise control over the possible purposes that may be pursued in limiting rights."[13]

23. With due respect, unlike the interpretation adopted in the judgment, my proposed interpretation of Article 18 of the Convention is in line with Article 31 §§ 1 and 2 of the Vienna Convention on the Law of Treaties of 1969 ("the Vienna Convention"), to which the Court often refers, and which reads as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ..."

In *Saadi v. the United Kingdom* the Court summarised its usual interpretive approach based on the provisions of the Vienna Convention as follows:

"Under the Vienna Convention on the Law of Treaties, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golde*r, cited above, § 29; *Johnston and Others*, cited above, § 51; and Article 31 § 1 of the Vienna Convention). The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Al-Adsani*, cited above, § 55; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; and Article 31 § 3 (c) of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable (Article 32 of the Vienna Convention)."[14]

24. No interpretation of Article 18 would comply with the notion of good faith as provided in Article 31 § 1 of the Vienna Convention if it were to accept that Article 18 recognises that some abuses of power are or should be acceptable. This is obvious, because an abuse of power is not compatible with the notion of good faith.

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12. The reference here is to Kristin Henrard's book entitled: *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination,* the Hague/Boston/London, 2000, p. 140.

13. See Gerhard van der Schyff, *Limitation of Rights – A Study of the European Convention and the South African Bill of Rights*, cited above, loc. cit.

14. See *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008.

25. The interpretation I adopt follows the principle, to which again the Court often refers, that the Convention should be read as a whole in order to promote internal consistency and harmony between its various provisions (see, *inter alia*, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The following legal maxim is also relevant: *interpretare et concordare legis legibus est optimus interpretandi modus*,[15] meaning "to interpret and harmonise laws is the best method of interpretation". But even before the Romans, Aristotle pointed out that a sentence must have a meaning and that the words in a text should not be read in isolation, but in their context, for the text to be understood as a whole.[16]

26. Unlike my proposed interpretation, the one adopted in the judgment would result in widening the restrictions prescribed in the Convention, making the Convention apply not only to legitimate restrictions, but also to a mixture of legitimate and illegitimate restrictions. Unavoidably, such an interpretation would result in limiting the scope of the rights affected and would therefore militate against the principle that the rights in the Convention are to be interpreted widely and any limitations to them narrowly and strictly.

27. With all due respect, the interpretation adopted in the judgment also runs counter to a basic principle of the Convention system and of public international law, namely, that any restrictive interpretation of human-rights provisions contradicts the principle of effectiveness and is not part of international law.[17] Professor Merrills pertinently comments that "this principle [of effectiveness], the value of which is recognized by all schools of interpretation, occupies a very significant place in the Court's judgments".[18] He also rightly makes the following observation:

> "The effectiveness principle is, after all, a principle of *interpretation.* It requires, it will be recalled, that provisions shall be interpreted 'so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text'. It follows that the terms of any treaty are the primary reference point and no interpretation which is inconsistent with the text, whatever its other merits, can be regarded as legally correct."[19]

28. What is said in the last sentence of the above quotation is particularly important for the issue at hand and supports what is said above regarding the textual interpretation of Article 18.

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15. See 8 Coke's *Reports* 169.
16. See Aristotle, *On Interpretation,* IV.
17. See Hersch Lauterpacht, "Restrictive Interpretation and Effectiveness in the Interpretation of Treaties" in *BYIL* (1949), p. 48, at pp. 50-51, 69; and Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford 2008, reprinted 2013, p. 414.
18. J.G. Merrills, *The Development of International Law by the European Court of Human Rights,* Manchester-New York, 2nd edn., 1993, p. 98.
19. Ibid*.,* pp. 119-20. See also p. 98.

29. Jacob, White, & Ovey, referring to the above approach of interpretation followed by Professor Merrills, and particularly to the principle of effectiveness, make the following important point:

> "It was use of the object and purpose provisions of the Vienna Convention in the context of the European Convention which opened the door to this approach to interpretation of the Convention".[20]

30. Also, according to the case-law of the Court, a restrictive interpretation of the rights guaranteed in the Convention provisions would not correspond to the aim and purpose of these provisions (see, for example, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11; *Perez v. France* [GC], no. 47287/99, § 64, ECHR 2004-I; and *Artico v. Italy,* 13 May 1980, § 33, Series A no. 37).[21] This is because the principle of effectiveness, which is inherent in the Convention and underpins all its provisions dealing with human rights, requires that these provisions should be interpreted and applied properly and in a practical and effective way so as to fulfil the scope and purpose of the Convention as a human rights treaty, without any deviation or reduction from its provisions. The words of Kristin Henrard,[22] namely, that Article 18 is an instrument ensuring the effective protection of rights because it seeks to exercise control over the possible purposes that may be pursued in limiting rights, are absolutely correct and relevant here. The mandatory and clear text and purpose of Article 18 should not be ignored.

31. The wording of Article 18 is to be construed according to the principle of effectiveness so as to convey its meaning according to its purpose and not to go against it.[23] Even if, supposedly, the meaning of Article 18 were not clear as regards the issue of plurality of purposes of restrictions, and there were two valid or arguable interpretations, one which favoured the right secured and the other which did not, the former would be preferred. Relevant here is the doctrine *in dubio, in favorem pro libertate*, used in its widest sense, which is a manifestation of the principle of effectiveness.

Article 18 is closely linked to the principle of effectiveness. A literal interpretation of Article 18 is a condition *sine qua non* of the effective protection of human rights. A purposive interpretation of Article 18 coincides with a literal interpretation. If Article 18 is not construed

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20. See Robin C.A. White and Clare Ovey (eds), Jacobs, White, and Ovey, *The European Convention on Human Rights,* 5th edn., Oxford-New York, 2010, p. 73.
21. See further discussion on this in Merrills, cited above, pp. 113-19.
22. Cited above in the quotation from Gerhard van der Schyff's book.
23. See the following relevant maxims of interpretation: *ut res magis valeat, quam pereat* – meaning that "it is better for a thing to have effect than to perish" (see, on this maxim, Sir William Blackstone, *Commentaries on the Laws of England,* 10th edn., London MDCCLXXXVII, § 3, p. 89), and the Latin maxim *verba cum effectu suunt accipienda* – see Bacon's *Maxims* 3, meaning that words are to be construed as to their effect.

according to either of these interpretations, the principle of effectiveness will be devoid of its purpose and object. With due respect, the principle of effectiveness is thus sacrificed in the judgment on the altar of the "dominance-purpose test" followed in it. Article 18 does not only stand as a safeguard of the principle of effectiveness of all the rights in respect of which the Convention prescribes restrictions, but is also a preventative measure since it ensures that the rule of law is not undermined. It is only by respecting and protecting human rights and the rule of law and other democratic values that the parasitic development of undemocratic tendencies which might eventually lead to totalitarianism can be prevented.

32. There is a Latin legal maxim according to which, when anything is prohibited directly it is also prohibited indirectly – *quando aliquid prohibetur ex directo, prohibetur et per obliquum*.[24] Similarly, according to another Latin legal maxim, when anything is prohibited, all that relates to it is also prohibited – *quando aliquid prohibetur prohibetur omne, per quod devenitur ad illud*.[25] These maxims, which simply assert that if something is prohibited it cannot be allowed in by the back door, may find application in the present case. If Article 18 of the Convention were to be interpreted in such a way as to encourage the national authorities to abuse their powers by manipulating the Convention provisions dealing with lawful restrictions and using them also for ulterior or extraneous or unlawful purposes, this would not only run contrary to Articles 18 and 5 § 1 of the Convention, but would be a kind of negation of the Convention system as a whole, which aims to secure the effective protection of human rights.

33. Another possible negative consequence of such an interpretation would be that the national authorities would be in a position to derive a benefit or advantage from their own wrongdoing, which would be unacceptable.[26] The same prohibition applies even more strictly when someone seeks to acquire a right through his or her own fraud or abuse of power.[27] Lastly, what is most important is that no one can profit by what is

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24. See Coke *on Littleton*, 223. b; see also the maxim *nemo potest facere per obliguum quod non potest facere per directum,* meaning that no one can do indirectly that which cannot be done directly – see 1 Eden's *Reports,* 512.

25. See Coke, *on Littleton*, 223. b.

26. Numerous legal maxims, based on common sense and fairness, prohibit such behaviour, and the different ways in which they describe this rule are an indication of its importance (see, for example, "*commmodum ex injuria sua memo habere debet*" – see Jenkins' *Centuries or Reports*, 161, meaning that no one should derive any benefit from his own wrong; "*injuria propria non cadet in beneficium facientis*" – see Branch's *Principia Legis et Equitatis*, meaning that no one should be benefited by his own wrongdoing; "*Un ne doit prise advantage de son tort demesne*" – 2 Anderson's *Reports* 38, 40, meaning that one ought not to take advantage of his own wrong; "*nemo ex suo delicto meliorem suam conditionem facere protest*" – see *Digest, or Pandects* of Justinian, 50, 17, 134, 1, meaning that no one can improve his condition by his own wrong.

27. See the relevant legal maxims "*nemo ex dolo suo proprio relevetur, aut auxilium capiat*" – *Corpus Juris Civilis*, meaning that no one is relieved or gains an advantage from

contrary to law,[28] and that a State cannot have a reasonable expectation of gain from unlawfulness. All the above-mentioned principles apply, in my view, not only regarding private law but also regarding public law and especially public international law, including of course the Convention. An interpretation of Article 18 which results in allowing a misuse or abuse of power may have the concomitant effect of violating the principle of the separation of powers.

34. It is not the task of a judge to balance a legitimate restriction against an illegitimate restriction according to its gravity or predominant position in a case in order to determine which was the most influential and then to proceed to establish whether there has been a violation of Article 18. The proportionality test required by the Convention is only between a right and a lawful restriction which is necessary in a democratic society. The Convention does not require that a proportionality test also be applied between a lawful and an unlawful restriction, something which no democratic society could countenance.

35. If it can be proved that a seemingly legitimate restriction is stained by an illegitimate one, the former cannot be extricated or separated from the latter; the result will be that the legitimate restriction is subsumed by the illegitimate restriction and taken outside the scope of the relevant Convention provision. The third of the cardinal rules of logic should be applied here, namely, the principle or law of excluded middle – *principium tertii exclusi* or *tertium non datur*, which states that for any proposition, either that proposition is true or its negation is true and that no further possibility can exist. As Aristotle put it,[29] it is impossible to hold or suppose the same thing to be or not to be. In the present case, a restriction on a right should be considered either legitimate or illegitimate and nothing in between. The illegitimacy of one of the purposes of a restriction has the effect of contaminating the entire decision of the national authority in question, in this case the decision to detain the applicant.

36. Furthermore, logic dictates that to allow the misuse or abuse of power in one instance would open the floodgates for more to follow. The same applies to anything which is allowed that is not reasonable, just and right, namely, absurdity,[30] arbitrariness and injustice. Abuse is strongly

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his own fraud; "*nemo ex proprio dolo consequitur actionem*" – see Traynor's *maxims* 366, meaning that no one can acquire a right of action through his own fraud; "*ex abusu non arguitur ad usum*" – see Broom's *Legal Maxims,* 42, meaning that no argument can be drawn from the abuse of a thing against its use".

28. See the legal maxim "*nihil cuiquam expedit quod per leges non licet*" – see Halkerston's *Maxims* 103. See also the legal maxim *frustra legis auxilim quaerit qui in legam committit* – See Fleta, *seu Commentarius Juris Agliae*, 4, 2, 3; Osborn's *Concise Law Dictionary,* 7th edn., London, 1983, p. 155, meaning vainly does he who offends against the law seek the help of the law.

29. See Aristotle, *Metaphysics* iv, 3, 1005 b, 24; iv, 6 1011 b, 13-20; *On Interpretation,* c 9.

associated with anything which is capable of being used, so there is profound meaning in the maxim which says that there can be an abuse of anything of which there is a use, virtue alone excepted.[31] An abuse of power may often trigger, or be the cause of, violence, terrorism and other extreme behaviour.

37. Of particular relevance to the present case is the following remark of Lord Hardwicke, made in 1742 in a celebrated contempt-of-court case:

> "There cannot be anything of greater consequence than to keep the streams of justice clear and pure."[32]

On this remark, Lord Denning, in his book entitled *The Due Process of Law*, commented as follows:

> "There is not one stream of justice, but many streams. Whatever obstructs their courses or muddies the waters of any of those streams is punishable ..."[33]

Also, the same judge, in the introduction and at the end of his lecture entitled "Misuse of Power",[34] said, respectively, the following:

> "You will all know the famous aphorism of the great historian, Lord Acton: 'Power tends to corrupt, and absolute power corrupts absolutely.'
>
> ... The only admissible remedy for any abuse of power – in a civilised society – is by recourse to law.
>
> In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of power from whatever quarter it may come. No matter who it is – who is guilty of the abuse or misuse. Be it government, national or local. Be it ... Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy."[35]
>
> ...
>
> "To return to whence I started: 'Power tends to corrupt'. This I have shown you. That is why in civilised society there should be a system of checks and balances – to restrain the abuse of power."[36]

38. I am of the opinion that the Convention provides for a system of checks and balances, thus a system of control, in a civilised society –

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30. See, for instance, the Latin maxim *uno absurdo dato, infinita sequuuntur* – Coke' 1 *Reports,* 102, meaning one absurdity being allowed, an infinite number follow.
31. See *omnium rerum quarum usus est, potest esse abusus, virtute solo excepta* in Davies' *Reports* 79.
32. In *The St. James' Evening Post* case (1742) 2 *Atkins* 469, at p. 472.
33. See Lord Denning, *The Due Process of Law,* Oxford-New York, 1980, repr. 2008, preface p. v.
34. See Lord Denning, The 1980 Richard Dimbleby Lecture: *Misuse of Power*, which was broadcast on BBC 1 on Thursday 20 November 1980 and published by the British Broadcasting Corporation, Northampton, 1980.
35. Ibid., p. 5.
36. Ibid., p. 19.

Europe – in the sense understood by Lord Denning. Article 18 of the Convention aims to achieve this end,[37] being fully compatible with the idea that the Court is the "Conscience of Europe",[38] the guardian of human rights and a contributor to the transition from totalitarianism to democracy and the rule of law in Europe. Abuse of power cannot coexist with the idea of a civilised society and the notion of legality. Nor can it be reconciled with respect for human rights and human dignity.

39. The Court, as the guardian of human rights and fundamental freedoms, has the role of securing and protecting these, and should not be prepared to condone abuses or to allow anyone to jeopardise these rights and freedoms and the Convention system in general. It is not therefore the task of the Court to undertake a "parasitic" interpretation of Article 18, if I may call it so, opening the door to elements which are not only extraneous to but also militate against the nature of the Convention rights and the scope of Article 18.

40. It does not matter whether the extent of the misuse or abuse of power reflected in the purpose for imposing a restriction on a right was small or large. The very existence of any such misuse or abuse of power will suffice for the Court to condemn it by finding a violation of Article 18 in conjunction with another Convention provision, in the present case with Article 5 § 1. The Court is an international and supranational court; it is a beacon not only for Europe but for the whole world. Through its jurisprudence it sheds its guiding light and its rays on all countries and is a court for more than 800 million people of the 47 member States of the Council of Europe. Its case-law is a source of inspiration for every lawyer, judge and law-maker. The Convention is a catalyst for peace and stability and the Court thus safeguards peace through the promotion of the protection of human rights, democracy and the rule of law. The Court should therefore not accept an abuse of power when it is proved that this exists, and should not take it into account (as the judgment does) when deciding, in accordance with its degree or extent, whether there has been a violation of Article 18.

41. Although, it is self-evident that an abuse of power and arbitrariness militate against the text, aim and nature of all the provisions of the Convention, it is important to observe that, apart from Articles 17 and 18, which deal specifically with the abusive exercise of rights and restrictions

37. Loukis Loucaides, a former judge of the Court, also rightly uses the term "check", which denotes control in terms of the mechanism of Article 18 ("According to Article 18 ... the Court [has] the power to check the reasons behind a particular restrictive measure ...") – See Loukis G. Loucaides, "Restrictions or Limitations on the Rights Guaranteed by the European Convention of Human Rights" *The Finnish Yearbook of International Law,* vol. IV (1993), 335, at p. 377.

38. See Council of Europe publication, *The Conscience of Europe – 50 Years of the European Court of Human Rights*, London, 2010.

respectively, Article 35 § 3 (a) of the Convention contains the following mandatory provision:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is incompatible with the provisions of the Convention ... or an abuse of the right of individual application ...
>
> ..."

42. Furthermore, according to its case-law, the Court intervenes when an interpretation or a conclusion by the national courts is arbitrary or manifestly unreasonable (see*, inter alia*, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015; *Hamesevic v. Denmark* (dec.), no. 25748/15, § 43, 16 May 2017; *Alam v. Denmark* (dec.), no. 33809/15, § 35, 6 June 2017; *Dulaurans v. France,* no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia,* no. 72118/01, § 170, 15 November 2007; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013). By analogy, if the Court, by way of an exception to its subsidiary role, finds it justifiable to intervene where a national court has interpreted the national legislation in an arbitrary or manifestly unreasonable way, then it will have an even greater duty to do so where the national authorities wrongfully restrict human rights contrary to Article 18 and other provisions of the Convention, which it is within the primary duty of the Court to interpret and apply.

43. The interpretation followed by the present judgment is, with due respect, a "free" or a subjective interpretation that is not based on any interpretive rules or objective criteria. As Aharon Barak rightly observed, "[i]n essence, the free approach is not interpretive at all – it negates the guiding power of interpretive rules".[39]

44. In view of the above, I am of the opinion that nothing is more incumbent upon the Court than to ensure that the interpretation and application of the Convention's provisions are pure and unpolluted by any abuse or misuse of power or political considerations. Article 18 of the Convention was meant to be a safeguard, a hallmark and a bulwark against misuse and abuse of power and arbitrariness. I am not arguing, however, that every time an applicant alleges that his or her detention was made for an illegitimate purpose, Article 18 should be applied. Such an allegation must be proved by the facts of the case. In the judgment (see paragraph 350) the allegation is considered "sufficiently convincing and therefore proven". I am not, however, proposing to examine the degree of that illegitimate purpose, as the judgment does.

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39. See Aharon Barak, *Purposive Interpretation in Law,* op. cit., p. 297.

C. Analysis of the judgment's approach

45. The issue at stake here is discussed in paragraphs 292-308 of the judgment, under the subheading *"(i) Plurality of purposes"*.

46. In paragraph 292 of the judgment the question is raised "whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer". In my view, as I have explained above, the mere presence of an ulterior purpose, if it is proven, contravenes Article 18 of the Convention. Like Article 17, Article 18 of the Convention prohibits the abuse of power, and any abuse of power infringes the provisions of the Convention.

47. I absolutely agree with the approach described in paragraph 293 of the judgment, namely, that, in assessing the above point, "the Court will begin by taking account of Article 18's wording and place in the general scheme of the Convention". In that paragraph it is also said that the wording of Article 18 "matches closely" the wording of other provisions of the Convention, including the wording of Article 5 § 1, second sentence: "save in the following cases". I can add to this that the wording of Article 18 is framed in even more mandatory terms by using the verb "shall" in the negative form ("shall not").

48. Paragraphs 294-97 of the judgment contain an overview of the case-law concerning Articles of the Convention other than Article 5 § 1 and paragraphs 298-301 an overview of the case-law concerning Article 5 § 1. In paragraph 302 it is stated that the overview in the above-mentioned paragraphs shows that "the legitimate aims and grounds set out in the restriction clauses in the Convention are exhaustive". I unequivocally agree with that. The judgment then proceeds to state that these legitimate aims and grounds "are also broadly defined and have been interpreted with a degree of flexibility" (see paragraph 302).

49. However, as I said earlier, according to the case-law of the Court, restrictions on rights should be interpreted narrowly, and in my opinion what is even more relevant and important is that, irrespective of its ambit, no illegitimate purpose can be incorporated within the scope or meaning of a legitimate restriction. It is also stated in paragraph 302 of the judgment that "[t]he real focus of the Court's scrutiny has rather been on the ensuing and closely connected issue: whether the restriction is necessary or justified ..." This paragraph ends by stating: "Those aims and grounds are the benchmarks against which necessity or justification is measured ...". Of course all these statements are correct, but they do not support the test proposed in the judgment regarding the issue at hand but rather support my proposed test, since the restrictions must be necessary in a democratic society which does not accept or countenance any form of abuse of power.

50. In paragraph 303 of the judgment it is stated that "[t]hat manner of proceeding [the one mentioned in paragraph 302] should guide the Court in its approach to the interpretation and application of Article 18 of the Convention in relation to situations in which a restriction pursues more than one purpose". And the same paragraph concludes as follows:

> "Some of those purposes may be capable of being brought within the respective restriction clause, while others are not. In such situations, the mere presence of a purpose which does not fall within the respective restriction clause cannot of itself give rise to a breach of Article 18. There is a considerable difference between cases in which the prescribed purpose was the one that truly actuated the authorities, though they also want to gain some other advantage, and cases in which the prescribed purpose, while present, was in reality simply a cover enabling the authorities to attain an extraneous purpose, which was the overriding focus of their efforts. Holding that the presence of any other purpose by itself contravenes Article 18 would not do justice to that fundamental difference, and would be inconsistent with the object and purpose of Article 18, which is to prohibit the misuse of power. Indeed, it could mean that each time the Court excludes an aim or a ground pleaded by the Government under a substantive provision of the Convention, it must find a breach of Article 18, because the Government's pleadings would be proof that the authorities pursued not only the purpose that the Court accepted as legitimate, but also another one."

51. With due respect, I disagree with what is stated in the above passage. I would stress that there is no reference in the judgment to even one case regarding any right of the Convention in which the Court has had to deal with a situation in which it was proved that there were two purposes for the detention, one of which was illegitimate. The statement in paragraph 300 of the judgment that in some cases "if the Court is satisfied that the detention was for the purpose authorised under one sub-paragraph [of Article 5 § 1 of the Convention], it normally stops there, without checking whether it also pursued another aim" does not provide us with any assistance in finding a solution regarding the issue here. This is so because in the cases where the Court did not proceed to check purposes under other sub-paragraphs of Article 5 § 1, there was no allegation – and therefore no proof – of an ulterior purpose,[40] but only of parallel legal purposes. Since, under the proportionality test, only legitimate aims are the benchmarks against which necessity is measured, I wonder how, with this in mind, those benchmarks can lead to the conclusion drawn in the judgment that the mere presence of an illegitimate purpose which does not fall within a restriction clause cannot of itself give rise to a breach of Article 18. The "fundamental difference" mentioned in the above passage from the judgment (see paragraph 303) does not have a legal basis in Article 18.

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40. See, for example, *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, cited in paragraph 300 of the judgment, where the Court said that it had no reason to doubt the objectivity and soundness of the medical evidence on the basis of which the Dutch courts authorised the detention of the applicant as a person of unsound mind (ibid., § 42).

52. Article 18 of the Convention prohibits the abuse of power absolutely, irrespective of whether the extraneous purpose of the national authorities was to "gain some other advantage" or was the "overriding focus of their efforts". With due respect, the purpose of Article 18 is not, as the judgment suggests, "to do justice to that fundamental difference", which, in my view, not only is not fundamental, but is also irrelevant for the purposes of Article 18. Besides, I cannot see how such a distinction made in the judgment, which allows abuse and misuse of power to a certain extent, can assist the purpose of Article 18, which, as rightly said in the judgment, is "to prohibit the misuse of power". I absolutely disagree with the whole logic of the judgment which establishes a rule on the basis of a distinction which Article 18 does not make, instead of having regard to the absolute prohibition expressly and mandatorily provided by that Article. I disagree with the conclusion in the judgment that there is nothing legally problematic in accepting that an illegitimate or ulterior purpose that is not predominant cannot lead to a finding of a violation of Article 18 by overriding and inactivating a legitimate purpose.

53. As has been said above, the national authorities are obliged to be governed by and to observe the rule of law, legal certainty and the proper administration of justice and to secure to everyone within their jurisdiction the rights guaranteed in the Convention as provided in Article 1 of the Convention. The role of the Court is, as provided in Article 19 of the Convention, to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention to secure human rights.

54. The affirmation in paragraph 304 of the judgment that "a finding that the restriction pursues a purpose prescribed by the Convention does not necessarily rule out a breach of Article 18 ..." neither supports the view adopted by the judgment nor provides an answer to the issue at hand.

55. With due respect, the following conclusion, reached in paragraph 305 of the judgment, is not justified, for the reasons I have given in the present opinion, and has no foundation in the Convention or the case-law of the Court:

> "The Court is therefore of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose."

56. In paragraph 306 of the judgment three additional arguments to justify the interpretation of Article 18 of the Convention (as summarised in paragraph 305 of the judgment, cited above) are presented: (a) the said interpretation is consistent with the case-law of the Contracting States' national courts; (b) the same is consistent with the case-law of the Court of

Justice of the European Union; and (c) the preparatory works to the Convention clearly show that Article 18 was meant to be its version of the administrative-law notion of misuse of power.

57. I disagree with the above arguments and will deal with each one in turn.

58. Regarding the first one, namely, that the interpretation adopted in the judgment is consistent with the case-law of the Contracting States' national courts, reference is made in paragraph 306 of the judgment, in brackets, to paragraph 168 of the judgment. In paragraph 168 it is acknowledged that "information available to the Court" shows that national courts have a practice of adopting the dominant-purpose test, without revealing, however, what that information is. In the same paragraph the judgment makes reference to the "courts of several High Contracting States" which accept this practice, without, however, naming the States to which it refers.

59. In view of the above, I find the judgment's reasoning weak and vague as regards the interpretation of Article 18 of the Convention on the basis of comparative law. I would point out that recourse to comparative law should be made when the interpretation of a Convention provision lacks clarity, which is not the case here as the wording of Article 18 is unambiguous.

60. The word "several", which refers to the number of High Contracting States taken for comparison purposes and is used in paragraph 168 of the judgment, literally means "more than two but not many".[41] So the small number of unnamed States which allegedly apply such a test cannot provide a basis for an objective comparative study and a consensus among the different laws of the High Contracting States. As Jacobs, White and Ovey rightly say, "... the interpretation of the European Convention may legitimately be based on a common tradition of constitutional laws and a large measure of legal tradition common to the countries of the Council of Europe".[42] Besides, the law of a State cannot be used in a comparative study without reference first being made to the source of the information, the validity of that source, whether there are conflicting decisions or views on the issue and which is the prevailing one.

61. Nor can it be right for Article 18, which was intended to be a bastion in the fight against the abuse of power, to be interpreted according to practices, if any, in some States which are contrary to the letter and spirit of that Article. Quite the opposite should have happened: if there are any High Contracting States which have administrative practices condoning the abuse of power, those States must abandon such practices and be ready to conform to the mandates of Articles, 1, 17 and 18 of the Convention as well as of any

41. See Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles,* vol. 2*,* op. cit., p. 2799, under the entry: "several", which is defined as "2. More than two but not many; *Law* more than one."

42. See Robin C.A. White and Clare Ovey (eds), Jacobs, White, and Ovey, op. cit., p. 77.

other provision of the Convention in full respect for human rights. Hence, comparative law can only be used as an external source of interpretation by taking into account the above considerations and with great caution, diligence and transparency and only when the text and object of a Convention provision is not clear, which is not the case as far as Article 18 of the Convention is concerned.

62. In view of the above, it has not been shown that comparative-law materials aid the interpretation of Article 18 in the way adopted in the judgment.

63. Regarding the second additional argument in the judgment (see paragraph 306), namely, that the interpretation adopted in the judgment is consistent with case-law of the Court of Justice of the European Union, reference is made in paragraph 306 of the judgment to paragraph 156 of the same, where it is stated that "[a]ccording to the settled case-law of the Court of Justice of the European Union, an act is vitiated by misuse of power if it appears, on the basis of objective, relevant and consistent evidence, to have been undertaken solely or mainly for an end other than that for which the power in question was conferred (see, among many other authorities, ...)". Reference is made in the brackets to three judgments which, in my view, are not relevant for the purposes of interpreting Article 18 in the present case. In other words, I am unable to follow the approach taken in the judgment whereby the misuse-of-power test, as per the Court of Justice of the European Union, is used as an argument to support the "dominant-purpose test" in the context of Article 18.

64. The misuse-of-power test at the European Union level, referred to in the judgment, is not concerned with violations of fundamental human rights. Even if the said cases before the Court of Justice of the European Union did deal with a violation of fundamental human rights, the Charter of Fundamental Rights of the European Union does not contain a provision analogous to Article 18. Article 52 of that Charter, entitled "Scope and Interpretation of Rights and Principles", deals with limitations on the rights and freedoms enshrined in the Charter and allows for a wider margin of discretion on the part of Contracting States. Article 52 reads as follows:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

65. The mandatory provisions of Article 18 do not allow the limitations of the rights and freedoms in the Convention to be applied "for any purpose other than those for which they have been prescribed" in contrast to the more permissive provision of Article 52, which allows "any limitation on the exercise of the rights and freedoms recognised by [the] Charter [to] be provided for by law".

66. The aforementioned three cases before the Court of Justice of the European Union, cited in paragraph 156 of the judgment, were not concerned with violations of human rights. Rather, the first cited judgment, namely, *FEDESA and Others v Council*, C-331/88, questioned the validity of EU Directive 88/146/EEC of 7 March 1988 regarding its consistency with the objectives of the common agricultural policy as stipulated in the EEC Treaty. The subject matter of the second cited judgment, namely *Spain and Italy v Council* in the joined cases C-274/11 and C-295/11, was the Council of the European Union's authorisation of enhanced cooperation in the area of competition rules necessary for the functioning of the internal market, while in the last-cited judgment, namely *Commission v Council* Case C-111/10, the European Commission contested Council Decision 2009/983/EU of 16 December 2009 on the granting of State aid by the authorities of the Republic of Lithuania for the purchase of agricultural land.

67. The allegations of misuse of power by the Council of the European Union in the above-mentioned cases do not concern a misuse of power that results in the limitation of a citizen's fundamental human rights. Thus, a general misuse-of-powers test under EU law cannot be used by analogy as a comparative precedent or argument for the interpretation of Article 18 since there is neither a legal nor a conceptual basis on which to draw such a parallel.

68. The third and last additional argument in the judgment (see paragraph 306) is that "the preparatory works to the Convention clearly show that Article 18 was meant to be its version of the administrative-law notion of misuse of power". I do not believe that this is quite so, but before I deal with this argument it is important to refer to Article 32 of the Vienna Convention, which is entitled "Supplementary means of interpretation" and provides as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 [cited above], or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable."

69. In paragraph 306 of the judgment there is a cross-reference within brackets to paragraph 154 of the judgment, in which there is a further reference to the *Travaux Préparatoires* of the European Convention on Human Rights, but again there is nothing in these to support the contention that Article 18 could have been intended to be a version of the administrative-law notion of misuse of power. In any event, there is nothing in the *Travaux Préparatoires* which supports the test adopted in the judgment regarding a plurality of purposes of restrictions.

70. On the contrary, it is clear from the *Travaux Préparatoires* that the intention of the drafters of the Convention was to prevent the rise of totalitarianism "by pseudo-legitimate means".[43] As has been said above, this provision is a poignant example of the "never again" rhetoric which developed after the devastating experience of the Second World War. The genesis of the Convention signified Europe's attempt to face the violent past and to guarantee the non-repetition of the experience of the Second World War. Thus, Article 18 stands as a safeguard against totalitarianism in Europe and it is the only Article in the Convention that regulates the limitation of rights enshrined therein.

71. Furthermore, the intention of the drafters was to ensure that the arbitrary limitation of the rights enshrined in the Convention was never excused. All totalitarian regimes have one common element - the arbitrary limitation of human rights. As Mr P.-H. Teitgen aptly put it:

> " ... when [a] dictatorship is firmly established, it suppresses, one after the other, the freedoms defined by earlier laws."[44]

He also remarked as follows:

> "Individual freedom, in our democratic countries, is protected by our democratic institutions. Consequently, the safeguards required, too, are inseparable from these institutions.
>
> ...
>
> When, for example, in France an employee is the victim of an illegal abuse of power on the part of his department, he appeals to the Conseil d'Etat. And the latter rescinds the illegal measure."[45]

72. Those last two extracts from Mr P.-H. Teitgen's speech formed perhaps the basis of the conclusion in the present judgment that Article 18 was intended to be a version of the administrative-law notion of misuse of power.[46] But these quotations do no lend themselves to such an interpretation, and in any event cannot provide an answer to the issue at hand, since they deal only with the supervisory power of the administrative courts to rescind illegal measures.

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43. See Statement of Ludovico Benvenuti (Italy) at the first session of the Consultative Assembly of the Council of Europe, Strasbourg, 8 September 1949, in the *Collected Edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Volume 1I, 1975, p.136.

44. See Statement of Teitgen (France) at the second session of the Consultative Assembly of the Council of Europe, Strasbourg, 16 August 1950, in the *Collected Edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Martinus Nijhoff, vol. V. 1979, p. 294.

45. Ibid*.,* p. 292 (text in English), p. 293 (text in French). The judgment in paragraph 154 refers to page 293 of vol. V of the *Travaux Préparatoires*.

46. This may be so, because the judgment in paragraph 154 refers to page 293 of vol. V of the *Travaux Préparatoires*.

73. Mr P.-H. Teitgen proposed the following wording of the provision which went on to become Article 18:

> "In the exercise of the rights and enjoyments of freedoms guaranteed by the Convention, everyone shall be subject only to such limitations as are laid down by law with the sole aim of ensuring recognition and respect for the rights and freedoms of others, and in order to meet the proper requirements of morality, order, public safety and the general well-being in a democratic society. These rights and freedoms shall not be in any case exercised in opposition to the objects and principles of the Council of Europe."[47]

The last sentence of that draft provision is of particular importance because it shows the purpose of Article 18 in its final version.

74. From the above, it is clear that the *Travaux Préparatoires* confirm the meaning of Article 18 of the Convention resulting from the application of Article 31 of the Vienna Convention referred to above, and so they can be used as a supplementary means of interpretation of Article 18 of the Convention by virtue of Article 32 of the Vienna Convention. However, the *Travaux Préparatoires* cannot be used by virtue of Article 32 of the Vienna Convention in order to determine the meaning of Article 18, since its interpretation according to Article 31 of the Vienna Convention, as has been explained before, leaves the meaning of Article 18 neither ambiguous nor obscure; nor does it lead to a result which is manifestly absurd or unreasonable.

75. In paragraph 307 of the judgment it is stated that "[w]hich purpose is predominant in a given case depends on all the circumstances". "In assessing that point", as the next sentence of that paragraph goes on to say, "the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of democratic society governed by the rule of law." In the last paragraph (see paragraph 308 of the judgment) and sentence under the subheading *"(i) Plurality of purposes*", it is said that "[i]n continuing situations, it cannot be excluded that the assessment of which purpose was predominant may vary over time".

76. In my view, the fact that the "dominant-purpose test" is said to "depend on all the circumstances" and the fact that in continuing situations whether a purpose is predominant may vary over time, make the test adopted in the judgment even more ambiguous and uncertain. In fact, such an interpretation is not at all compatible with the scope of Article 18 for the reasons I have given. I have already commented, in paragraph 17 above, on the passage in paragraph 307 of the judgment which says that "the

47. See Statement of Mr P.-H. Teitgen at the first session of the Consultative Assembly of the Council of Europe, Strasbourg, 30 August 1949, in the *Collected Edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Martinus Nijhoff, vol. I, 1975, p.178.

Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law", and I will not revert to that point now.

II. CONCLUSION

77. Lastly, with all due respect, an interpretation that were to allow for a differentiation of restrictions, as proposed in the judgment, would be unconvincing: it would not only be devoid of any legal basis, and therefore arbitrary, but it would also be incompatible with the wording and purpose and scope of the Convention as a human rights treaty.

78. Regarding the applicant's allegation that in December 2013 the national authorities attempted to use his pre-trial detention as leverage to obtain information from him, I agree with the finding of the judgment that it was proven and in particular that the applicant's allegations about his secret meeting and conversation with Mr O.P. were "sufficiently convincing and therefore proven" (see paragraph 350 of the judgment).

79. In general, States must not be exempted from their obligation under Article 5 § 1 of the Convention, read in conjunction with Article 1 of the Convention, if their authorities detain a person for an illegitimate purpose even if that is not the predominant purpose for the detention. In my view, unless they fully and absolutely comply with their obligations under the Convention provisions they must not expect the Court to show any tolerance towards them. They have a Convention obligation to abide by the rule of law in its entirety: not only to do what is lawful, but also to abstain from what is unlawful.

80. Since, therefore, it has been proved that for the pre-trial detention of the applicant there was a purpose other than that provided in Article 5 § 1 of the Convention, and thus an ulterior purpose, I conclude that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1 of the Convention. However, unlike the ruling in the present judgment, I consider it immaterial whether that purpose was also the chief or main or predominant purpose for the detention.

JOINT PARTLY DISSENTING OPINION OF JUDGES RAIMONDI, SPANO, KJØLBRO, GROZEV, RAVARANI, PASTOR VILANOVA, POLÁČKOVÁ AND HÜSEYNOV

I.

1. We fully concur with the Court's important clarification of the general principles to be applied in the interpretation of Article 18 of the Convention as set out in paragraphs 282-307 of today's judgment. However, we respectfully disagree with the majority as to the application of those principles to the facts of the case (Parts II-III). Furthermore, we consider it important to elaborate further on the interplay between Articles 5 § 1 and 18 of the Convention in the light of the approach adopted by the Court to the interpretation of the latter provision (Part IV).

II.

2. At the outset, we emphasise that Article 18 of the Convention sets a very high threshold as manifested in the predominant-purpose test adopted by the Court in today's judgment. In the interpretation and application of Article 18 account must be taken of the fact that those provisions of the Convention which allow for restrictions also invariably provide certain guarantees against arbitrary and illegitimate grounds for limiting the rights in question. This applies, in particular, to Article 5 on the right to liberty, applicable in the present case, which the Court has long held must be interpreted so as to effectively protect against arbitrary detention (see, in particular, *Mooren v Germany* [GC], no. 11364/03, §§ 72 and 77-81, 9 July 2009). Furthermore, account must be taken of the inter-relationship between Articles 17 and 18 of the Convention, the former explicitly prohibiting the "abuse of rights" and the latter setting "limitations" on the "use of restrictions on rights".

3. It follows that Article 18 can in our view only apply in the most serious of cases where it is adequately demonstrated on the facts, in accordance with the standard and burden of proof described in paragraphs 309-17 of the judgment, that the predominant purpose of the authorities was to limit Convention rights on the basis of motives which cannot be subsumed under the restrictions permitted by the Convention provision in question. This important qualification of the scope and content of the predominant-purpose test under Article 18 is highlighted in paragraph 307 of the judgment, where the Court rightly states that in assessing whether the purpose for a restriction was "predominant" it will have regard to the "nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to

maintain and promote the ideals and values of a democratic society governed by the rule of law".

III.

4. On this basis, and moving to the application of Article 18 to the facts of the present case, we note that in paragraph 351 of the judgment the majority acknowledge that there is no evidence that until 14 December 2013, nearly seven months after the applicant had been remanded in custody, the authorities had attempted to use his pre-trial detention as a means to pressure him into providing information about Mr Zhvania's death or Mr Saakashvili's bank accounts. The majority thus concede that if the restriction of his right to liberty were seen as a whole, it would be hard to regard the attempt to use it as a means to obtain such information as its predominant purpose. However, the majority rely on the premise that where a "restriction of a Convention right amounts, as here, to a continuous situation, in order for it not to contravene Article 18, its chief purpose must remain the one prescribed by the Convention throughout its duration, and it cannot be excluded that the initial purpose will be supplanted by another one as time goes by". The majority then go on to find on the facts that several elements support their conclusion that that is indeed what happened in this case, namely, that at the point in time when the applicant was removed from his cell, the predominant purpose of his detention changed and that purpose was in violation of Article 18 of the Convention.

5. We respectfully disagree for the following reasons.

6. In our view, it is important to bear in mind at the outset that the applicant's pre-trial detention lasted from his arrest on 21 May 2013 until he was convicted at first instance on 17 February 2014 (see paragraphs 26 and 53 of the judgment). There is no evidence before the Court to suggest that for the major part of that period of nearly nine months the prosecuting or the judicial authorities sought to restrict his right to liberty with a view to pressuring him to provide information about Mr Zhvania's death or Mr Saakashvili's bank accounts. On the contrary, the chronological sequence of their actions – proceeding with the pre-trial conference hearing and then the trial – does not substantiate another interpretation of events than that the predominant purpose for keeping the applicant in pre-trial detention was to ensure the smooth conduct of the criminal proceedings against him.

7. The meeting with the Chief Public Prosecutor, Mr O.P., took place at a time when the applicant's widely publicised trial was well under way (see paragraphs 50 and 60 of the judgment). There is no discernible link between that meeting and any procedural steps in the criminal proceedings against the applicant or in the proceedings relating to his pre-trial detention. Mr O.P. had taken up office just three weeks before the meeting and

resigned two weeks after it over an unrelated matter (see paragraph 60 of the judgment); he does not appear to have played any specific role in the criminal proceedings against the applicant.

8. To accept that the predominant purpose of the continued pre-trial detention of the applicant after 14 December 2013 was the extraction of evidence from him would require also to accept that the authorities were ready to dismiss the criminal charges against him. It is true that under Article 250 §§ 1 and 2 of the Code of Criminal Procedure the prosecuting authorities, which were under the overall control of Mr O.P., were free to drop the charges against the applicant at any point without judicial control of that decision (see paragraph 153 of the judgment). However, there is no basis in fact, founded on evidence submitted before the Court, to conclude that the authorities were actually considering that option. On the contrary, the applicant was a high-profile defendant in whose widely publicised case the prosecuting authorities had invested considerable time and resources. We are not persuaded by the facts before us that, even if they were eager to obtain the information which the Chief Public Prosecutor pressured the applicant to provide, they were prepared to reverse their actions and drop the charges against him mid-trial, or that they were able to give him credible assurances that they would do so. Moreover, for the applicant to go free, the charges in the other criminal case against him in Tbilisi, which was even more high profile (see paragraph 56 of the judgment), would have had to be dropped as well.

9. In view of those considerations, we are unable to conclude that the wish to obtain information from the applicant about Mr Zhvania's death and Mr Saakashvili's bank accounts can be regarded as the predominant purpose of his pre-trial detention or, indeed, that removing the applicant from the cell can be considered to be a motive, as such, for detaining him before, during or after the removal took place. Even assuming that the removal and the attempt to obtain information from the applicant was an advantage which the authorities hoped to derive from his being in their custody, we cannot accept that his pre-trial detention, in whole or in part, was merely a cover intended to enable them to attain that purpose.

IV.

10. As previously mentioned (see paragraph 4 above), the majority base their conclusions on their qualification of the applicant's situation in detention as "continuous" and find that the predominant purpose "must remain the one prescribed by the Convention throughout its duration, and it cannot be excluded that the initial purpose will be supplanted by another one as time goes by". On this basis, the majority seem to accept that the applicant's pre-trial detention was initially, and for the first seven months, adequately justified under Article 5 § 1 of the Convention. However, at the

point in time when the applicant was removed from his cell, the predominant purpose of his detention changed and that purpose was in violation of Article 18 of the Convention.

11. We have no reason of principle to quarrel with this understanding of the predominant-purpose test under Article 18 when applied to Article 5 pre-trial detention situations. As can be seen from the Court's case-law, the possibility cannot, as such, be ruled out that a pre-trial detention may be justified under Article 5 § 1 if a person is reasonably suspected of a criminal offence, although it is clear on the facts that the predominant purpose of the authorities for imposing that measure is one which falls under Article 18 of the Convention.

12. However, the Convention requirement that pre-trial detention be justified throughout its duration as based on a legitimate purpose is already a fundamental component of Article 5 § 1 itself. In fact, the Court has consistently held that "Article 5 § 1 requires ... that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness" (see *Mooren*, cited above, § 72). As to the "notion of arbitrariness", it is a general principle established in the case-law that detention will be "arbitrary" where, despite complying with the letter of national law, "there has been an element of bad faith or deception on the part of the authorities" (ibid., § 77). It follows that, due to this delicate interrelationship between the notion of arbitrariness – as an element inherent in Article 5 § 1 – and the notion of a predominant purpose restricting Convention rights under Article 18, the finding of no violation of the former, but a violation of the latter, can in reality only arise in exceptional circumstances. Such exceptional circumstances would only occur where the threshold for the applicability of Article 18 is reached, namely, in the most serious cases of particularly reprehensible abuse of power. In our view, the present case does not fall into that category for the following reason.

13. We observe that the majority consider that the whole of the applicant's pre-trial detention was in fact in conformity with Article 5 § 1, even after he was removed from his cell, but, at the same time, consider that removing the applicant from his cell then rendered the detention in violation of Article 18 of the Convention. Therefore, on the facts of this particular case and bearing in mind that the majority have correctly rejected the allegation that the applicant's detention was predominantly based from the outset on a purpose that falls under Article 18, we fail to see how the removal of the applicant from the cell could have, in and of itself, constituted a shift of purpose so serious as to warrant a finding of a violation of that provision, whilst at the same time not calling into question the legality, as such, of the applicant's detention under Article 5 § 1.

14. In our view, it is more in conformity with the facts, as demonstrated, that the removal from the cell was not rationally related to the applicant's pre-trial detention as such (whether before, during or after the event

occurred), but rather a spontaneous act from which the authorities hoped, at best, to gain the opportunity to extract certain information from the applicant. Viewing the case through this lens, it is clear that the applicant's pre-trial detention was therefore justified throughout under Article 5 § 1 and did not give rise to a violation of Article 18 of the Convention.