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13 January 2016

Intervention under Rule 44(3) of the Rules of Court
Khadija Rovshan Gizi Ismayilova v Azerbaijan, Application no. 30778/15

Dear Sir,

We refer to your letter of 27 November 2015 granting leave to intervene in this Application as *amicus curiae* to Professor David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“**the Special Rapporteur**”).

We now enclose a letter of authority from the Special Rapporteur, together with the Special Rapporteur’s Intervention pursuant to Article 36(2) of the European Convention on Human Rights and Rule 44(3) of the Rules of Court.

Please acknowledge receipt.

Yours faithfully,



Piers Gardner

pgardner@monckton.com



Gerry Facenna

gfacenna@monckton.com



Julianne Morrison

jmorrison@monckton.com

IN THE EUROPEAN COURT OF HUMAN RIGHTS
FIFTH SECTION

Application no. 30778/15
Khadija Rovshan Gizi Ismayilova
Against Azerbaijan
lodged on 8 June 2015

INTERVENTION OF THE UNITED NATIONS SPECIAL RAPPORTEUR
ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF
OPINION AND EXPRESSION

Under Article 36 of the European Convention on Human Rights
and
Rule 44 of the Rules of Court

A. Introduction

1. This is the intervention of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“**the Special Rapporteur**”) in connection with the application no. 30778/15 (“**the Application**”) made by Ms Ismayilova (“**the Applicant**”). The intervention is submitted in accordance with Article 36 of the European Convention on Human Rights (“**the Convention**”) and Rule 44 of the Rules of Court. The Special Rapporteur was granted leave to intervene by the President of the Section by way of letter dated 27 November 2015.

B. Background

The Special Rapporteur

2. The Special Rapporteur is an independent expert appointed by the Human Rights Council of the United Nations. He is mandated by Human Rights Council resolution 7/36 to, *inter alia*, gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information.
3. The Special Rapporteur’s mandate rests upon Article 19 of the International Covenant on Civil and Political Rights (“**the ICCPR**”), which is similar to Article 10 of the Convention, see further below. In discharging his mandate, the Special Rapporteur has collected and continues to collect evidence, and to report, on the extent, nature and severity of the violations of, in particular, journalists’ right to freedom of expression in different countries, as well as the means by which these violations are effected by state actors.

The pattern of abuse

4. The Special Rapporteur has become increasingly concerned by evidence of a pattern of States abusing powers to arrest and detain in order to silence journalists and others gathering and disseminating information in the public interest. The Special Rapporteur (both the current incumbent and predecessors) has recognised and documented an increasing trend of states mis-using their powers of arrest and detention by levying false, vague and/or unsubstantiated charges at journalists, political opponents and human rights defenders in order to silence them.
5. The Special Rapporteur's report to the General Assembly of 4 June 2012 documented, *inter alia*: (i) increasing trends in the use of, for example, arbitrary arrest and detention as a means of preventing journalists from exercising their right to freedom of expression; and (ii) the use of criminal law on defamation, slander, treason, subversion and counter-terrorism as means of suppressing information and media reporting.¹ He referred to a notable trend in 2011 of increasing attacks against journalists, such as arbitrary arrests and detention.² The Special Rapporteur has also sent communications to member states about particular cases demonstrating the above pattern of abuse and/or publicly raising concerns about the treatment of journalists and others in parties to the ICCPR. Between 1 June 2006 and 31 May 2015 the Special Rapporteur and his predecessor mandate-holders issued 2,331 communications to Member States of the United Nations. For example:
 - a. on 16 December 2015 the Special Rapporteur expressed grave concern at the growing repression of freedom of expression in Saudi Arabia. He noted a string of severe punishments against individuals for the holding and expressing of opinions, including human rights defenders, writers and bloggers.³ He explained that such attacks on freedom of expression, including flogging human rights defenders for expressing their beliefs, "...*deter critical thinking, public participation, and civic engagement, the very things that are crucial to human development and democratic culture...*";
 - b. on 11 November 2015 the Special Rapporteur (and the Special Rapporteur on the situation of human rights defenders and others) welcomed the release by the Egyptian authorities of Hossam Bahgat, a prominent writer in Egypt for well over a decade, who had been arrested and detained by Egyptian authorities reportedly due to his writing and work as a journalist.⁴ The Special Rapporteur expressed deep concern that the mere fear of criminalization and detention creates an environment that deters reporting and intimidates writers and activists of all kinds. Information available to the Rapporteurs suggested that dozens of journalists were being held by the Egyptian authorities;
 - c. on 11 November 2015, the Special Rapporteur and other UN experts issued a statement stating that authorities in Iran should stop arresting, prosecuting and

¹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/20/17, see summary.

² See, in particular, §§50, 63 & 78-79.

³ <https://freedex.org/2015/12/16/un-rights-expert-raises-alarm-over-saudi-arabias-growing-clamp-down-on-freedom-of-expression/>

⁴ <https://freedex.org/2015/11/11/egypt-un-experts-welcome-release-of-hossam-bahgat-but-concerns-remain-on-the-situation-of-journalists-and-rights-defenders/>

harassing journalists and online activists ahead of parliamentary elections.⁵ Five journalists were reportedly detained on suspicion of taking part in an infiltration network, seeking to influence public opinion and undermine the Islamic Republic on behalf of western governments, according to Iranian state television and media reports. More than a dozen other journalists and social media activists had also reportedly been summoned for interrogation by the authorities. The authors stated that: “*The government of Iran should not silence critical or dissenting voices under the guise of vague and unsubstantiated national security concerns*”;

- d. in a keynote address on World Press Freedom Day in Riga, Latvia, on 3 May 2015, the Special Rapporteur referred to the global attacks on the media as “a crisis of implementation, promotion, and protection”. He named specific journalists detained in Syria, Iran, Ethiopia, China, Azerbaijan (in particular the Applicant), Swaziland, Egypt, Malaysia, and others in Eritrea, Vietnam and Myanmar, “merely a few of those subject to today’s crisis of protection”.

The pattern of abuse in Azerbaijan

6. There is clear evidence of a pattern of the authorities abusing arrest and detention powers in Azerbaijan. In fact, the situation in Azerbaijan is an egregious example in the Council of Europe of the worldwide pattern described above.
7. The current Special Rapporteur’s predecessor completed a fact-finding visit to Azerbaijan in 2007, during which he met with a variety of state and non-state actors, including journalists. The Special Rapporteur at that time reported on the use of, *inter alia*, violence, defamation laws and prosecutions for other criminal charges (such as drugs and incitement charges) as a means of severely restricting the exercise of the right to freedom of expression by journalists in that country.⁶ Since then the situation has and continues to deteriorate. On 19 August 2014, the Special Rapporteur and other UN experts condemned the growing tendency to prosecute prominent human rights defenders in Azerbaijan stating: “*We are appalled by the increasing incidents of surveillance, interrogation, arrest, sentencing on the basis of trumped-up charges, assets-freezing and ban on travel of the activists in Azerbaijan,*” they said. “*The criminalization of rights activists must stop. Those who were unjustifiably detained for defending rights should be immediately freed.*”⁷
8. On 20 August 2015, the Special Rapporteur and other UN experts condemned the imprisonment of Azerbaijani human rights activists Leyla and Arif Yunus as “*manifestly politically motivated and representative of the continuing repression of independent civil society in Azerbaijan.*”⁸ Referring to a number of other cases, the experts reiterated their call to “*reverse the trend of repression, criminalization and prosecution of human rights work in the country*” as “[*s*]ilencing these prominent voices is having a devastating impact on the Azerbaijani civil society as a whole.” The Special Rapporteur has also communicated concerns about the Applicant in this case to the Azerbaijani government,⁹

⁵<https://freedex.org/2015/11/11/un-experts-call-on-iran-to-stop-intimidating-journalists-ahead-of-parliamentary-elections/>

⁶ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/7/14/Add.3

⁷ <http://www.ohchr.org/en/newsevents/pages/displaynews.aspx?NewsID=14952&LangID=E>

⁸<https://freedex.org/2015/08/20/deeply-distressing-un-experts-condemn-latest-prison-sentencing-of-rights-defenders-in-azerbaijan/>

⁹ See, for example, [https://spdb.ohchr.org/hrdb/30th/public_-_AL_Azerbaijan_29.05.15_\(2.2015\).pdf](https://spdb.ohchr.org/hrdb/30th/public_-_AL_Azerbaijan_29.05.15_(2.2015).pdf)

as well as in other similar cases.¹⁰ Copies of the Special Rapporteur's communications to the Azerbaijani Government are publicly available online.¹¹

9. The Special Rapporteur is not alone in raising concerns about the treatment of journalists, media and human rights defenders in Azerbaijan, including the use of arbitrary arrest and detention as a means of silencing them. For example:¹²
 - a. The OSCE Representative on Freedom of the Media has repeatedly condemned the treatment of journalists in Azerbaijan, including the sentencing of the Applicant. In her most recent release dated 29 December 2015 in relation to the case of journalist Rauf Mirkadayov, the Representative stated that more than 10 journalists are currently in jail in Azerbaijan, and this fact reflects a string of troubling developments in the field of media freedom in Azerbaijan.¹³
 - b. During the Universal Periodic Review of Azerbaijan's compliance with its human rights obligations by the UN, a number of states raised concerns about Azerbaijan's record in relation to freedom of expression and the treatment of journalists and the media;¹⁴ and

¹⁰ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16337&LangID=E>. Other highly criticised arrests and convictions of journalists include: Rasul Jafarov, free speech advocate, on charges of abuse of power and tax evasion; Seymur Hazi, columnist for Azadliq newspaper, on a charge of hooliganism; Omar Mamedov and Abdul Abilov, bloggers, on charges of illegal storage and sale of drugs; Parviz Hashimli, journalist, on charges of smuggling and illegal storage and sale of firearms; Nijat Aliyev, editor-in-chief of azadxeber.org news website, on various charges, including drug possession and incitement of hatred; Sardar Alibeyli, editor-in-chief of P.S. Nota newspaper, on charges of hooliganism; and Rashad Ramazanov, an independent blogger, on charges of illegal storage and sale of drugs, and others.

¹¹ [https://spdb.ohchr.org/hrdb/19th/AL_Azerbaijan_24.08.2011_\(2.2011\).pdf](https://spdb.ohchr.org/hrdb/19th/AL_Azerbaijan_24.08.2011_(2.2011).pdf);
[https://spdb.ohchr.org/hrdb/19th/AL_Azerbaijan_27.09.2011_\(3.2011\).pdf](https://spdb.ohchr.org/hrdb/19th/AL_Azerbaijan_27.09.2011_(3.2011).pdf);
[https://spdb.ohchr.org/hrdb/20th/AL_Azerbaijan_09.12.11_\(4.2011\).pdf](https://spdb.ohchr.org/hrdb/20th/AL_Azerbaijan_09.12.11_(4.2011).pdf);
[https://spdb.ohchr.org/hrdb/20th/AL_Azerbaijan_05.03.12_\(1.2012\).pdf](https://spdb.ohchr.org/hrdb/20th/AL_Azerbaijan_05.03.12_(1.2012).pdf);
[https://spdb.ohchr.org/hrdb/21st/UA_Azerbaijan_22.03.12_\(2.2012\).pdf](https://spdb.ohchr.org/hrdb/21st/UA_Azerbaijan_22.03.12_(2.2012).pdf);
[https://spdb.ohchr.org/hrdb/22nd/public_-_UA_Azerbaijan_27.06.12_\(4.2012\).pdf](https://spdb.ohchr.org/hrdb/22nd/public_-_UA_Azerbaijan_27.06.12_(4.2012).pdf);
[https://spdb.ohchr.org/hrdb/23rd/public_-_AL_Azerbaijan_10.12.12_\(5.2012\).pdf](https://spdb.ohchr.org/hrdb/23rd/public_-_AL_Azerbaijan_10.12.12_(5.2012).pdf);
[https://spdb.ohchr.org/hrdb/23rd/public_-_AL_Azerbaijan_18.01.13_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/23rd/public_-_AL_Azerbaijan_18.01.13_(1.2013).pdf);
[https://spdb.ohchr.org/hrdb/23rd/public_-_UA_Azerbaijan_01.02.13_\(2.2013\).pdf](https://spdb.ohchr.org/hrdb/23rd/public_-_UA_Azerbaijan_01.02.13_(2.2013).pdf);
[https://spdb.ohchr.org/hrdb/24th/public_-_AL_Azerbaijan_28.03.13_\(3.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Azerbaijan_28.03.13_(3.2013).pdf);
[https://spdb.ohchr.org/hrdb/24th/public_-_UA_Azerbaijan_26.07.13_\(4.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_UA_Azerbaijan_26.07.13_(4.2013).pdf);
[https://spdb.ohchr.org/hrdb/27th/public_-_UA_Azerbaijan_11.04.14_\(1.2014\).pdf](https://spdb.ohchr.org/hrdb/27th/public_-_UA_Azerbaijan_11.04.14_(1.2014).pdf);
[https://spdb.ohchr.org/hrdb/27th/public_-_AL_Azerbaijan_06.05.14_\(2.2014\).pdf](https://spdb.ohchr.org/hrdb/27th/public_-_AL_Azerbaijan_06.05.14_(2.2014).pdf);
[https://spdb.ohchr.org/hrdb/27th/public_-_AL_Azerbaijan_09.05.14_\(3.2014\).pdf](https://spdb.ohchr.org/hrdb/27th/public_-_AL_Azerbaijan_09.05.14_(3.2014).pdf);
[https://spdb.ohchr.org/hrdb/28th/public_-_UA_Azerbaijan_12.08.14_\(4.2014\).pdf](https://spdb.ohchr.org/hrdb/28th/public_-_UA_Azerbaijan_12.08.14_(4.2014).pdf);
[https://spdb.ohchr.org/hrdb/28th/Public_-_UA_Azerbaijan_15.08.14_\(5.2014\).pdf](https://spdb.ohchr.org/hrdb/28th/Public_-_UA_Azerbaijan_15.08.14_(5.2014).pdf);
[https://spdb.ohchr.org/hrdb/29th/public_-_UA_Azerbaijan_13.02.15_\(1.2015\).pdf](https://spdb.ohchr.org/hrdb/29th/public_-_UA_Azerbaijan_13.02.15_(1.2015).pdf);
[https://spdb.ohchr.org/hrdb/30th/public_-_AL_Azerbaijan_29.05.15_\(2.2015\).pdf](https://spdb.ohchr.org/hrdb/30th/public_-_AL_Azerbaijan_29.05.15_(2.2015).pdf)

¹² The intervention of the Council of Europe Commissioner for Human Rights in the case of *Mammadov* provides a summary of the evidence the Commissioner has collected and considered on the systematic practice of unjustified or selective criminal prosecutions of journalists and others who express critical opinions.

¹³ See <http://www.osce.org/fom/213301>; <http://www.osce.org/fom/179391>; <http://www.osce.org/fom/176611>; <http://www.osce.org/fom/204186>; <http://www.osce.org/fom/130076>; <http://www.osce.org/fom/126534>; <http://www.osce.org/fom/122389>.

¹⁴ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/154/65/PDF/G1315465.pdf?OpenElement>. See, for example, paragraphs 26, 75, 109.105, 109.107, 109.113 & 109.120.

- c. The Report of the International Bar Association’s Human Rights Institute, entitled “*Azerbaijan: Freedom of Expression on Trial*”, documents concerns about the prosecution of journalists on fabricated charges.¹⁵
10. Journalists and human rights defenders are also regularly the victims of violence in Azerbaijan, violence which is committed with impunity.¹⁶
11. The Council of Europe has responded to concerns, raised by the Court and others such as the Special Rapporteur, about the widespread practice in Azerbaijan of arbitrary misapplication of the law by launching an inquiry into its implementation of the Convention pursuant to Article 52. In announcing the inquiry, the Secretary General stated:

“Judgments from the European Court of Human Rights have highlighted an arbitrary application of the law in Azerbaijan, notably in order to silence critical voices and limit freedom of speech.

In these worrying circumstances, and given the lack of positive steps to address the situation, I will send representatives to Azerbaijan to seek explanations from the authorities concerning the country's implementation of the Human Rights Convention. I am particularly alarmed when individuals are deprived of their liberty due to an abuse of power by a country’s legal authorities, as the European Court of Human Rights found in the case of Ilgar Mammadov. This is a very serious violation of the Convention”

C. Article 10 of the Convention: Freedom of expression and the role of the media as the public watchdog

12. Article 10(1) of the Convention guarantees the right to freedom of expression, subject to the qualifications laid down in Article 10(2).
13. The Court has repeatedly emphasised the pre-eminent role of the press in a state governed by the rule of law, and it has observed that “*freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders.*”¹⁷ In *Barthold v Germany* (1985) 7 EHRR 383, the Court described the role of the press as the “*purveyor of information and public watchdog*” (§58). Simply put, it is the role and duty of the press to gather information and report on matters of public interest and to provide analysis to give context to the reporting. This is a protected part of a journalist’s or a newspaper’s right to freedom of expression even if the opinion advanced is not positively received. Critically, the law has protected the press not merely so that specific journalists may conduct their work; it has protected the press

¹⁵ **Azerbaijan: Freedom of Expression on Trial** April 2014 Report of the International Bar Association’s Human Rights Institute (IBAHRI) Supported by the British Embassy Baku and the Open Society Foundations Central Eurasia Project, pages 26-31:
<http://www.ibanet.org/Document/Default.aspx?DocumentUid=D168B0B4-C377-4EC7-A0B9-D029EF09A39C>.

¹⁶ See, for example, *ibid.* and <http://www.osce.org/fom/176611>.

¹⁷ Application 11798/95: *Castells v Spain* (1992) 14 EHRR 445, at §43; and Application 9815/82 *Lingens v Austria* (1986) 8 EHRR 407, at §42.

in order to guarantee the public's right of access to information in the public interest.¹⁸ The Court has set out these important propositions in a number of its judgments.¹⁹

14. The Court has also explained that there is little scope under Article 10(2) of the Convention for restrictions on political speech or debates on questions of public interest, and that the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual,²⁰ and the same applies to acceptable criticism of civil or public servants.²¹
15. The Court applies the “*most careful scrutiny*” to measures taken or sanctions imposed by the State’s authorities where they are capable of discouraging participation in the press in debates over matters of legitimate public concern.²² The margin of appreciation otherwise afforded to member States is “*circumscribed by the interest of democratic society in enabling the press to exercise its rightful role of “public watchdog” in imparting information of serious public concern...*”.²³
16. The prominent place afforded to the right of freedom of expression, and in particular the special recognition of the press as a public watchdog, reflects universal values recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. For example, the Human Rights Committee has adopted a similar approach to the interpretation and application of Article 19 (as well as 17, 18 25 and 27) ICCPR. Paragraph 13 of the Committee’s General Comment 34 on Article 19 states: “*A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society... The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*”²⁴ The Committee emphasises, for example, that State parties to the ICCPR must put in place effective measures to protect individuals against attacks aimed at silencing those exercising their right to freedom of expression, including arbitrary arrest.²⁵

D. Articles 5, 10 and 18 of the Convention

17. Article 5(1) of the Convention provides in particular that:

“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

¹⁸ See the Special Rapporteur’s Report to the General Assembly, A/70/361, paragraphs 4 to 7:

<https://freedex.org/resources/sources-and-whistleblowers/>.

¹⁹ See, for example, *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, §65; *Handyside v. the United Kingdom*, Application No. 5493/72, judgment of 7 December 1976, §49.

²⁰ See, e.g., *Dichand & Others v Austria*, §39, referring to *Lingens v. Austria*, judgment of 8 June 1986, Series A no. 103, p. 26, § 42; *Oberschlick v. Austria*, judgment of 23 May 1991, Series A no. 204, p. 26, § 59

²¹ See *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, §47.

²² *Björk Eidsottir v Iceland* (application no. 46443/09) judgment of 10 July 2012, §69.

²³ *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, §67.

²⁴ See also §§3-4, 9, 11, 15, 20, 23, 28, 38 and 42.

²⁵ General Comment 34 §23.

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...”

18. The right to security, as opposed to liberty, is absolute: see, in particular, *Bozano v France*, 18 December 1986, Series A No 111, (1987) 9 EHRR 297, §§54 & 60; *Öcalan v Turkey*, Application no. 46221/99, judgment of 12 May 2005, §§83 & 85; *Wassink v the Netherlands*, judgment of 27 September 1990, Series A No 185-A, §24.²⁶ In *Öcalan*, for example, the Grand Chamber concluded that an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the individual’s right to security. The Human Rights Committee has adopted a similar approach to its interpretation of Article 9 of the ICCPR.²⁷
19. Individuals also shall not be arbitrarily deprived of their right to liberty or security: *Bozano* §§54 & 59-60. One general principle established in the case-law is 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: *Saadi v United Kingdom*, Application no. 13229/03, judgment of 29 January 2008, §69.
20. The Court may consider whether a case raises concerns that a member State has adopted an administrative practice violating the Convention. In *Caraher v the United Kingdom*, Application no. 24520/94, 11 January 2000, the Court summarised its case-law on this concept of an administrative practice as involving two elements:
 - a. a repetition of acts (referring to a substantial number of acts linked or connected in some way by the circumstances surrounding them (eg. time and place, or the attitude of persons involved) and which are not simply a number of isolated acts). The Court has stated that a practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system (*Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, §159); and
 - b. official tolerance, meaning that, though acts are plainly unlawful, they are tolerated in the sense that the superiors of those responsible, though aware of the acts, take no action to punish them or prevent their repetition; or that a higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that in judicial proceedings a fair hearing of such complaints is denied (*mutatis mutandis*, Application Nos. 9940-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, dec. 6.12.83, DR 35 p. 143 at p. 163, § 19).
21. The concept of an “administrative practice” is a critical one. It allows the Court to review and recognise facts in a context which establishes that a member State is systematically

²⁶ See also *El Masri v Republic of Macedonia*, Application no. 39630/09, 3 December 2012, §231.

²⁷ See, for example, *Delgado Paez v Columbia* (195/85), §5.5, in which the HRC determined that the right to security was independent of the right liberty under Article 9(1) and that it was violated where the State failed to take steps to address threats to the life of persons in their jurisdiction. See also *Jayawardene v Sri Lanka* (916/00).

breaching its obligations and to determine whether that practice is consistent with the effective protection of individuals' rights under the Convention. In assessing whether an administrative practice exists²⁸, the Court has reviewed the pattern of treatment of individuals²⁹. The Court has also had regard to a variety of evidence in establishing whether an administrative practice exists, including: (a) statistical data; (b) original documentary evidence; and (c) evidence gathered and published by non-governmental and international governmental organisations.³⁰ In applying the concept of administrative practice in the context of individual applications the Court may have regard to, *inter alia*, other judgments it has issued against the member State or pending applications.³¹ The Court has adopted a similar facts based approach to assessing whether an administrative practice exists in the context of individual applications (as in *Caraher*) as it has in inter-State cases. Individual cases must be understood and assessed in their wider context if the Court is to be able to address effectively systemic practices which are inconsistent with the positive rights, under the Convention including the right to security of person.

22. For all of the reasons given in Section B above, the Special Rapporteur is very concerned by the evidence emanating consistently from Azerbaijan of the authorities arbitrarily or improperly exercising their powers in order to silence critical voices and limit freedom of speech. In *Mammadov*, the Court found that Azerbaijan had violated Articles 5 and 18 of the Convention through the unlawful arrest and detention of an individual who is a political opponent and journalist. The cumulative facts suggest that there is a targeted and systematic administrative practice of the State's authorities interfering with the security and/or the liberty of the person of journalists and human rights defenders through the use of arbitrary arrests, criminal charges and/or detention to stifle their free expression. The Court should:
- a. determine whether in fact an administrative practice exists in Azerbaijan; and
 - b. assess whether the facts of the Application give rise to a breach of Article 5(1) read together with Article 10 of the Convention by reason of the Applicant's right to security of person having been and continuing to be violated as part of such an administrative practice against journalists (and other critics of the State) in Azerbaijan with the effect of stifling freedom of expression.
23. The assessment of whether there has been a violation of Article 18 read with Article 10 of the Convention raises similar issues to those raised in relation to the existence in fact of an unlawful administrative practice.³² Article 18 of the Convention states: "*The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.*"³³ The Court has made clear that a "*mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention*" is insufficient to prove a claim

²⁸ *Georgia v Russia (1)*, Application no. 13255/07, judgment of 3 July 2014, §128

²⁹ *Georgia v Russia (1)*, Application no. 13255/07, judgment of 3 July 2014; see also §§128 & 182-183.

³⁰ *Georgia v Russia (1)*, Application no. 13255/07, judgment of 3 July 2014, §§130-146, 172-178 & 185-188. See also §§195-205.

³¹ *Caraher v United Kingdom*, Application no. 24520/94, Decision of 11 January 2000. See also *Botazzi v Italy*, Application no. 34884/97, judgment of 28 July 1999 §23.

³² See, for example, *Georgia v Russia (1)*, Application no. 13255/07, judgment of 3 July 2014, §224.

³³ Article 18 may only be relied upon in conjunction with another Convention right: see *Gusinskiy v. Russia*, no. 70276/01, §75, ECHR 2004-IV.

that Article 18 was violated.³⁴ Prosecutions or other actions against public figures, political opponents and others will frequently have political consequences. Such public figures are not immune from prosecution if there are serious and sufficiently substantiated charges against them.³⁵ There is, as the Court has stressed, a rebuttable presumption that public authorities in the member States act in good faith.³⁶

24. However, the inclusion of Article 18 in the Convention, as the Court has recognised, addresses the position where the authorities may have a “hidden” and improper agenda in exercising their powers.³⁷ In assessing whether there has been a violation of Article 18 the Court will consider all of the “*material circumstances*”.³⁸ Those circumstances may include at least the following:
- a. The status or position of the applicant, for example, as a human rights defender, member of the political opposition and/or member of the press.³⁹
 - b. Evidence of the interaction between the applicant and the State over time. In particular, evidence of a past history of: (i) the applicant publicly criticising the State’s authorities; (ii) the applicant reporting on or otherwise exposing facts or activities of the State which suggest that the authorities have acted unlawfully or improperly; (iii) the State’s authorities or representatives making threats against the applicant, whether of violence or other forms of legal/administrative intimidation; (iv) allegations or criminal proceedings against the applicant that coincide with or appear responsive to the applicant’s legitimate activities.⁴⁰
 - c. The timing and context of the specific actions of the State which are the subject of the application.⁴¹
 - d. The nature of the allegations made, if any, by the State against the applicant and the credible basis for those allegations.⁴²
 - e. The nature of the violation(s) of the Convention underlying the Article 18 complaint; in *Mammadov* the Respondent State failed to discharge the burden of proving that there was ‘reasonable suspicion’ for detaining the applicant.⁴³ Where the applicant is a well-known critic of the State, such a failure raises a *prima facie* concern that the State had an ulterior purpose for the arrest and detention of the applicant because the State has failed to demonstrate that it acted in good faith.⁴⁴ While such a *prima facie* concern is not in of itself sufficient to justify a conclusion that Article 18 was breached, this is sufficient to rebut the general assumption of good faith, placing the legal onus on the State to demonstrate that it did not have an improper purpose.⁴⁵

³⁴ *Khodorkovskiy v Russia*, Application no. 5829/04, judgment of 31 May 2011 (“*Khodorkovskiy I*”) §255; *Khodorkovskiy and Lebedev v. Russia*, Application nos. 11082/06 & 13772/05, judgment of 25 July 2013 (“*MBK*”), §903.

³⁵ *Khodorkovskiy I* §258.

³⁶ *id*; *Mammadov v Azerbaijan*, Application no. 15172/13, judgment of 22 May 2014, (“*Mammadov*”), §137.

³⁷ *Khodorkovskiy I* §255.

³⁸ *Mammadov* §142.

³⁹ See, for example, *Mammadov* §§6-67, 92, 142; *Khodorkovskiy I* §257.

⁴⁰ *Mammadov* §§6-8, 92 & 142.

⁴¹ *Mammadov* §§6-67, 92 & 142.

⁴² *Mammadov* §§92 & 142.

⁴³ §§92-101.

⁴⁴ *Mammadov* §§141.

⁴⁵ *Id*.

- f. Evidence that the courts, executive or administrative branches of the State have adopted a practice of ‘rubber-stamping’ decisions of the authorities without proper consideration of the evidence.⁴⁶
 - g. Evidence of the relevant State’s authorities abusing the permissible restrictions on fundamental rights in other cases and/or on a widespread and systematic basis. To that end, relevant evidence includes reporting by *inter alia* human rights organisations, international institutions and/or other institutions even though it remains for the Court to assess for itself the merits of the particular case based on all of the available evidence.⁴⁷
25. Having assessed all of the relevant facts and circumstances, the Court will determine whether they “*indicate that the actual purpose of the impugned measures was to silence or punish the applicant*” or the State was acting in good faith.⁴⁸
26. The Special Rapporteur recognises that the Court applies a “*very exacting standard of proof*” in applying Article 18, but as is clear from the above, in satisfying that standard of proof it is essential that the Court has regard to all of the relevant factual circumstances, including whether there is evidence of a widespread and systematic administrative practice of abusing permissible restrictions on fundamental rights to silence opponents, critics and/or the press. Indeed, such evidence of widespread abuses of the permissible restrictions by the authorities of a member State should encourage the Court to apply a high level of scrutiny not only to the facts giving rise to the claim violations of other Convention rights, but also to the State’s explanation of the purpose or purposes for which it claims to have acted in the particular case.
27. Finally, in participating in any legal proceedings the Special Rapporteur must note the following. In the performance of his mandate as United Nations Special Rapporteur, he is accorded certain privileges and immunities as an expert on mission pursuant to Article VI of the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946. This application to submit a third party intervention is made by the United Nations Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations.

Filed for the Special Rapporteur by his representatives in this Intervention



JP Gardner



G Facenna



J Morrison

Monckton Chambers, Gray’s Inn, London

13 January 2016

⁴⁶ *Mammadov* §§116-119.

⁴⁷ See, by analogy, *Mammadov* §§140; *Khodorkovskiy I* §259.

⁴⁸ *Mammadov* §143.

**IN THE EUROPEAN COURT OF HUMAN RIGHTS
FIFTH SECTION**

**Application no. 30778/15
Khadija Rovshan Gizi Ismayilova
Against Azerbaijan
lodged on 8 June 2015**

**INTERVENTION OF THE UNITED NATIONS SPECIAL RAPPORTEUR
ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF
OPINION AND EXPRESSION**

**Under Article 36 of the European Convention on Human Rights
and
Rule 44 of the Rules of Court**

Letter of Authority

I, Professor David Kaye, of the University of California Irvine School of Law, 401 E. Peltason Drive, Suite 1000, Irvine, CA 92697-8000, USA, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression mandated by Human Rights Council resolution 7/36, hereby appoint:

Piers Gardner;

Gerry Facenna; and

Julianne Morrison;

Barristers, of Monckton Chambers, 1-2 Raymond Buildings, Gray's Inn, London WC1R 5NR UK, to represent me in my intervention under Article 36 of the Convention and Rule 44 of the Rules of Court.

Signed:



Dated: 08.01.2016