Parliamentary Assembly
Assemblée parlementaire
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Provisional version

Committee on Legal Affairs and Human Rights

Threats to the rule of law in Council of Europe member states: asserting the Parliamentary Assembly's authority

Report*

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A. Draft resolution

1. The Assembly recalls its previous texts upholding the rule of law in the member states of the Council of Europe, in particular Resolutions 1738 (2010), 1685 (2009), 1645 (2009), 1606 (2008), 1551 (2007) and Recommendations 1955 (2010), 1856 (2009), 1832 (2008) and 1792 (2007). It stresses that this list is by no means exhaustive, and that serious problems related to the rule of law exist in other member and observer states.

2. The Assembly considers that assessing the actual implementation of these texts, which provide examples of issues of variable nature and gravity concerning states representing different legal systems and cultures, will contribute to asserting its authority in all member, observer and applicant states.

3. The Assembly regrets that a number of recommendations addressed to member states in these reports, in order to safeguard and strengthen the rule of law have still not been implemented by the states concerned:

3.1. In the Russian Federation, the Assembly's recommendations, notably those regarding the cases of the former leading executives of Yukos, the Magnitsky case (including the first call, in Resolution 1685 (2009), to free Sergei Magnitsky, when he was still alive), and the "spy mania" cases of prominent academics and environmental whistleblowers given long prison terms for purported violations of state secrecy (Resolution 1551 and Recommendation 1792 (2007) have remained largely unimplemented, despite the release of Mikhail Khodorkovsky and Platon Lebedev from prison shortly before the end of their prison terms. The rule of law in the Russian Federation continues to be threatened by a climate of intimidation vis-à-vis lawyers, journalists and human rights activists.

3.2. In Ukraine, the Assembly's call to hold to account the perpetrators and the instigators and organisers of the murder of journalist Georgiy Gongadze (Resolution 1645 and Recommendation 1856 (2009) was implemented only in part. Three Interior Ministry officers and their commander, General Pukach, have been found guilty of the murder. But their former Minister committed suicide in doubtful circumstances and the accusations launched by General Pukach against the former President and the former head of the Presidential Administration were not followed up effectively.

3.3. In Germany, the Assembly's recommendation to introduce elements of judicial self-administration, to limit the right of ministers to issue instructions to prosecutors in individual cases and to increase judges' and prosecutor's salaries in line with the dignity and importance of judicial office (Resolution 1685 (2009)) have not been implemented. Germany still lacks judicial self-administration and remains one of the Council of Europe member states with the lowest salaries of judges and prosecutors in relation to the average salary at the national level.

* Draft resolution adopted unanimously by the committee on 10 December 2014.

3.4. Regarding France, the Assembly is pleased to note that, in line with Resolution 1685 (2009), the institution of the investigating judge was not abolished; that the right of defense lawyers' access to suspects held in police detention has been considerably improved; and that the right of Ministers to give instructions to prosecutors has been further limited by law. Regrettably, the Assembly's call to strengthen the role of the elected representatives of judges and prosecutors vis-à-vis the politically appointed members of the High Judicial Council was not heard. France also remains one of the countries with the lowest per capita resources allocated to the judiciary and the lowest salaries of judges and prosecutors in relation to national average salaries. Finally, judges and prosecutors have complained about frequent attempts by politicians to interfere with their independence.

3.5. In Belarus, the Assembly's calls to stop abuses of the criminal justice system for the persecution of political opponents, to hold to account the senior officials named by the Assembly as suspects in the series of high-profile disappearances, and to abolish the death penalty have not been heard. Even after the release of Vaclav Havel Prize Winner Ales Bialiatski, several political opponents remain unfairly imprisoned, the investigations in the high-profile disappearances cases remain pending without any results, and executions have continued.

4. The Assembly considers that lessons for strengthening the rule of law in all Council of Europe member states can be drawn from the above examples. In particular, it invites the competent authorities of all member, observer and applicant states to ensure that the judiciary is:

4.1. fully independent, in law and practice, in order to successfully resist both politically motivated prosecutions of political opponents, journalists and civil society activists and cover-ups of crimes committed or instigated and organised by politicians ; and

4.2. sufficiently well-funded, in terms of resources allocated to the judiciary per capita of the population and of the social status of the holders of judicial office, in order to provide meaningful access to high-quality justice for all.

5. The Assembly calls on all member, observer and applicant states to give due consideration to its texts, which reflect the views of a majority of the democratically elected representatives of the Council of Europe's 47 member States.

B. Explanatory report

1. Introduction

1.1. Procedure to date

1. The motion for a resolution on "The rule of law in Council of Europe member states: upholding the authority of the Assembly's recommendations"[1] was transmitted to the Committee on Legal Affairs and Human Rights for report on 21 June 2010.[2] At its meeting on 16 September 2010, the Committee appointed me as rapporteur. On 8 March 2011, it considered an introductory memorandum[3] and authorised me to undertake fact-finding visits to France, Germany and the Russian Federation.[4] At its meetings in Strasbourg on 14.4.2011 and in Oslo on 6-7 June 2011, at the request of the Russian delegation, the Committee held an exchange of views on the interpretation of the rapporteur mandate and the intended scope of the report and decided to modify the title of the report from "The rule of law in Council of Europe member states: upholding the authority of the Assembly's recommendations" to "Threats to the Rule of Law in Council of Europe member states: asserting the Parliamentary Assembly's authority".

2. On 7 June 2011 in Oslo I contributed to the parliamentary seminar on "The reinforcement of the Rule of Law in Europe", organised by the Norwegian parliamentary delegation to the Council of Europe in cooperation with the Norwegian Helsinki Committee (NHC) and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, alongside Mr Bjorn Engesland, Secretary General of NHC, Mr William Browder, CEO, Hermitage Capital, United Kingdom; Mr Tom Mayne, Global Witness, United Kingdom.

3. On 7 September 2011, in Paris, I organised a round table on the case of Sergey Magnitsky with the participation of Ms Elena A. Panfilova, General Director, Center for Anti-corruption Research and Initiative, Transparency International, Moscow and Ms Yevgenia M. Albats, Editor-in-Chief, The New Times, Moscow; the Russian delegation had been invited to nominate an expert to present the authorities' point of view but chose not to avail itself of this possibility. The information report I presented to the Committee on this occasion[5] was declassified on 3 October 2011.

4. On 8 September 2011, I carried out my fact-finding visit to Paris, where I met with members of the French PACE delegation, senior officials at the Ministry of Justice, with the General Prosecutor at the Paris Court of Appeals, and with the bureaus of the Union Syndicale des Magistrats (USM) and of the Syndicat de la Magistrature (SM).

5. From 22 to 24 February 2012, I carried out my fact-finding visit to Kyiv, where I met with members of the Ukrainian PACE delegation, the Minister of Justice, the Prosecutor General and a number of NGO representatives and journalists. On 12 March 2012, I informed the Committee on the results of this visit.

6. On 2 October 2012, the Committee held an exchange of views with Ms Morshchakova, former judge at the Russian Federation's Constitutional Court.

7. On 11 December 2012, the Committee, in the context of this report and that of Mr György Frunda[6] on "Strengthening the protection and role of human rights defenders in Council of Europe states" decided to seize the Venice Commission for an opinion on two recent Russian laws: the law on Non-Commercial Organisations, adopted on 13 July 2012, requiring collaborators of NGOs receiving funding from abroad to register as "foreign agents" and the law on Treason and Espionage of 23 October 2012, widening the scope of the criminal provisions on "treason".

8. On 9 March 2013, the Committee, in view of a statement by the Rapporteur, invited the Russian delegation to cooperate in the organisation of a fact-finding visit to Russia.

9. On 3 March 2014, the Committee agreed to invite Mr Yuriy Lutsenko, former Minister of Interior of Ukraine, for an exchange of views. The exchange of views scheduled for the June 2014 part-session of the Assembly could not take place due to the difficult situation in eastern Ukraine.

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[1] Doc. 12252 of 10 May 2010.
[2] Reference no. 3684.
[3] Document 2011(11) dated 25 February 2011.
[4] An additional visit to Ukraine was authorised on 3 October 2011.
[5] "Threats to the rule of law in Russia: the case of Sergey Magnitsky, Document 2011(34) dated 30 August 2011.
[6] In the meantime replaced by Ms. Mailis Reps (Estonia/ALDE).

10. The expiry date of my mandate was extended three times (first until June 2013, then June 2014 and finally to the end of 2014). The purpose of the extensions was to give the Russian delegation sufficient time to cooperate in the organisation of the information visit authorized by the Committee already back in March 2011.

11. On 25 June 2014, I informed the Committee that I had come to the conclusion that despite several attempts from my side and appeals from the Committee and three of its successive chairpersons, the Russian delegation would definitely not cooperate in the organization of the information visit and that I would therefore present a report on the basis of the information collected in other ways (in particular the hearings with Russian and other experts before the Committee).

12. In October and November 2014, I received detailed answers to my written questions on the implementation of Resolution 1685 by Germany from Mr. Christian Lange, Secretary of State at the Federal Ministry of Justice, and submissions from Mr. Christoph Frank, President of the Federation of German judges and prosecutors (*Deutscher Richterbund*) and from Mr. Martin Wenning-Morgenthaler, Speaker of the Federal Bureau of the *Neue Richtervereinigung* (NRV).

1.2. Scope of the mandate

13. As it is stated in the motion underlying this report, the Parliamentary Assembly regularly addresses recommendations to the Committee of Ministers and to member states regarding different aspects of the rule of law.

14. The Assembly's recent texts in this area focus in particular on the following issues:

- the functioning of the judiciary (in particular independence, fairness of criminal trials, the fight against corruption), and

- particular challenges stemming from such issues as the fight against terrorism, the protection of state secrets and different aspects of co-operation with the European Court of Human Rights.

15. At the level of the Council of Europe, the Assembly has – as a key statutory body - an important role to play in ensuring compliance with European standards, not least in view of the dual mandate of its members at the national and European levels. As indicated in the motion, the Assembly should therefore place greater emphasis on the follow-up given to the texts it has adopted, assessing their impact and ensuring their effective implementation.

16. Consequently, it is my understanding of this rapporteur mandate that it is my task to assess the impact of the Assembly's texts in this field and to promote their effective implementation.

17. Before taking the initiative to launch the motion, I had asked the research service of the German Bundestag to prepare a collection of the most important resolutions and recommendations of the Parliamentary Assembly on issues pertaining to rule of law issues between 2005 and 2010.[7] The study consists of a compilation of a large number of Assembly texts covering key aspects of the rule of law in many member states.

18. As I explained in the introductory memorandum, I cannot, for practical reasons, cover in the present report all the Assembly's texts in this wide field. I therefore proposed to undertake a selection according to the following criteria:

- I left aside those resolutions which were adopted in the framework of the Assembly's monitoring procedure, as this procedure, through its system of recurrent, country-by-country reports, has its own built-in follow-up mechanism.

- I also left aside specific issues that are already covered by ongoing thematic rapporteur mandates such as that by Christos Pourgourides (and now by Klaas de Vries) on implementation of Strasbourg Court judgments (work with respect to which the Assembly remains seized).[8]

[7] Wissenschaftliche Dienste Deutscher Bundestag, Dokumentation, Rechtsstaatlichkeit in den Resolutionen und Empfehlungen der Parlamentarischen Versammlung des Europarats 2005-2010, Katharina Lübbe/Jan Flasche, 20 pages (WD 2 – 3000 – 051/10).

[8] See Doc. 12455. See also Rec. 1955 (2011) and Res. 1787 (2010).

19. I therefore looked, as a matter of priority, at the follow-up given to those resolutions and recommendations which had been most recently adopted by the Assembly and which related specifically to the subject-areas touched upon in the text of the motion, i.e., the functioning of the judiciary (in particular independence, fairness of criminal trials, and fight against corruption).

20. At the time of the preparation of the introductory memorandum, the Assembly's most recent texts on this subject were (in reverse chronological order):

- "Legal remedies for human rights violations in the North Caucasus region" (Rapporteur: Dick Marty, Switzerland/ALDE);[9]

- "Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states" (Rapporteur: Sabine Leutheusser-Schnarrenberger, Germany/ALDE);[10]

- "Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine – the Gongadze case as an emblematic example" (Rapporteur: Sabine Leutheusser-Schnarrenberger, Germany/ALDE);[11]

- "Abuse of the criminal justice system in Belarus" (Rapporteur: Christos Pourgourides, Cyprus/EPP),[12] and.

- "Fair trial issues in criminal cases concerning espionage or divulging state secrets" (Rapporteur: Christos Pourgourides, Cyprus/EPP);[13]

21. The countries concerned by these reports happen to be (in alphabetic order) Belarus, France, Germany, the Russian Federation and Ukraine. It is obvious that the above list of rule of law-related reports to be followed up is by no means exhaustive, and that serious problems related to the rule of law exist in other member and observer states.

22. But in my view, assessing the actual implementation of these texts, which provide examples of issues of variable nature and gravity concerning states representing different legal systems and cultures, will contribute to asserting the Assembly's authority in all member, observer and applicant states.

23. I shall cover the countries concerned in the following order, on the basis of the nature and gravity of the issues encountered in the four member States and last but not least in Belarus, as a non-member state.

24. Concretely, in the Russian Federation, Ukraine, Germany, France, and in Belarus, I have followed developments after the adoption of the Assembly's above-mentioned reports on key issues pertaining to the independence of the judiciary raised in these reports, i.e., in particular:

- in the Russian Federation: issues of the independence of the courts (including recent developments in the cases of Mikhail Khodorkovsky and Sergey Magnitsky), as regards the North Caucasus, progress achieved in the fight against impunity by the new investigative and prosecutorial structures described in Mr. Marty's report, and the current status of the "spy cases" raised in Mr. Pourgourides report;

- in Ukraine, the progress and outcome of the judicial investigation of the emblematic Gongadze case;

- in Germany: progress in judicial self-administration at the Federal and *Länder* levels;

- in France: the proposed abolition of the institution of the investigating judge and status of the public prosecutor's office and of the defense; and

- in Belarus, the development of the criminal justice system since the Assembly's last report in 2008.

[9] Assembly Doc. 12276 of 4 June 2010. See also Res. 1738 and Rec. 1955 (2010).
[10] Assembly Doc. 11993 of 7 August 2009. See also Res. 1685 (2009).
[11] Assembly Doc. 11686 of 11 July 2008. See also Res. 1645 and Rec. 1856 (2009).
[12] Assembly Doc. 11464 of 12 October 2007. See also Res. 1606 and Rec. 1832 (2008).
[13] Assembly Doc. 11031 of 25 September 2006. See also Res.1551 and Rec. 1792 (2007).

25. Since the preparation of the introductory memorandum defining the scope of my report, a lot of time has passed, and the Assembly has adopted several other pertinent reports.[14] But in order not to overstretch my mandate, which has already given rise to lengthy discussions with the Russian delegation, I have decided to limit myself to following up only those reports and issues flagged in the introductory memorandum, as approved by the Committee.

26. Also, over time, several of these issues have become the subject of separate reports, which have either already been finished (such as the Magnitsky affair dealt with by Andreas Gross[15] and certain cases of politically-motivated prosecutions in Ukraine dealt with in the report by Pieter Omtzigt on "Keeping criminal and political responsibility separate"),[16] or which are still under preparation (such as the report by Michael McNamara on the human rights situation in the North Caucasus).[17] Finally, the situation in Belarus has been the subject of an excellent report by Andres Herkel,[18] for which I prepared an Opinion[19] on behalf of this Committee. In this context, I raised key points concerning the abuse of the criminal justice system in this country.

27. As far as these subjects are concerned, in order to avoid overlaps and interference with other colleagues' work, I will limit myself to some short comments. This said, the present report provides an excellent opportunity for the Assembly to take a step back from its day-to-day work on topical issues and gain an overview of the follow-up given, over a considerable length of time, to a number of key reports covering different threats to the rule of law in Council of Europe member states.

2. Russian Federation

28. Regarding the Russian Federation, my fact-finding activities have been hampered by the consistent refusal of the Russian delegation to cooperate in organizing the fact-finding visit authorized by the Committee in early 2011. Despite several discussions in the committee, and between myself, the successive chairpersons of our committee and different members of the Russian delegation, I was unable to obtain the necessary cooperation. After the refusal of the Azerbaijani delegation to cooperate with our former colleague Christoph Strässer, this is the second time that a delegation has failed to cooperate with a duly appointed rapporteur of this Assembly. I leave it up to the Committee and the Assembly to draw the necessary consequences from this uncooperative behaviour.

29. Faced with the refusal of the authorities to cooperate with me, I invited representatives of civil society for exchanges of views with the Committee and asked them to provide us with information on the topics falling under my mandate.

30. Concerning the Yukos affair, the Committee, on 2 October 2012, held an exchange of views with Ms Tamara Morshchakova, former judge and Vice-President of the Russian Federation's Constitutional Court and member of the Presidential Council for the Development of Civil Society and Human Rights. Ms Morshchakova presented the independent legal experts' report produced on behalf of the Presidential Council for the Development of Civil Society and Human Rights published in December 2011. This report dealt essentially with the second prosecution and conviction of Mikhail Khodorkovsky and other leading former Yukos officials for the "theft" or embezzlement of most of the oil produced by Yukos, in addition to the earlier conviction for evading the payment of taxes due for the sale of the same oil. The report was based on a thorough analysis by a panel of 10 legal experts representing different specialisations (criminal law, business and company law, constitutional law and human rights law) of the final judgment delivered in this case, the record of the court's hearings and the case materials. The purpose was not to adjudicate the case

[14] For example, the report by Kimmo Sasi (EPP/Finland) on Urgent need to deal with new failures to co-operate with the European Court of Human Rights (Resolution 1991 (2014)); or that by Mailis Reps (ALDE/Estonia) on Corruption as a threat to the rule of law (Resolution 1943 (2014); or the report by Marieluise Bemelmans-Videc (EPP/Netherlands) on Guaranteeing the authority and effectiveness of the European Convention on Human Rights (Resolution 1856 (2012).
[15] Refusing the impunity of the killers of Sergey Magnitsky (Rapporteur: Andreas Gross, SOC/Switzerland), Resolution 1966 (2014).
[16] Keeping political and criminal responsibility separate (Rapporteur: Pieter Omtzigt, EPP/Netherlands), Ass. Doc. 13214 dated 28 May 2013, Resolution 1950 (2013).
[17] See Ass. Doc. 13064 dated 14 November 2012 Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)? On 19 March 2013, the Committee appointed Michael McNamara (SOC/Ireland) as Rapporteur. On 25 June 2013, Mr. McNamara also presented an introductory memorandum (AS/Jur 2013(26)) and co-sponsored a hearing before the Committee with three lawyers from the region (Sapiyat Magomedova, Rustam Matsev, and Batyr Akhilgov). The fact-finding visit to the region authorized on the same occasion has not yet taken place.
[18] Ass. Doc. 12820 (9 January 2012), Resolution 1857 (2012) and Recommendation 1992 (2012).
[19] Ass. Doc. 12840 (24 January 2012).

again, but to develop recommendations addressed to the competent authorities, which should form a basis for a dialogue between the authorities and civil society. The experts had focused on questions of criminal substantive and procedural law, company law and human rights, including comparisons with standards applied in the case law of other courts in Europe, by Jeffrey Kahn. The experts had concluded that the accusations of embezzlement were not founded, as such an offence could be only committed by a non-owner and that the criminal court wrongly refused to refer to the case law of the Russian commercial courts; according to more than 60 precedents of the civil courts, the actions in question performed by the legitimate directors could not be criminal acts. These precedents had been applied to other, similar companies in Russia, but not to the management of Yukos. In the two Yukos cases, the accused had been indicted and convicted for two privatization mutually exclusive criminal offenses. The two judgments were contradictory. Following the first trial, the company had to pay the amount of unpaid taxes and was liquidated. In the second case, the defendants were convicted for the theft of goods which belonged to them (and for the sale of which they were found not to have paid enough tax).The experts also made several recommendations to the Russian government: to introduce lay members in commercial courts, to reduce the use of pre-trial detention in cases concerning commercial activities, to review the execution of criminal sanctions and the conditions of release on parole and to amend the presidential decree on presidential pardon and amnesty.

31. We all know that Mikhail Khodorkovsky and Platon Lebedev were released, shortly before the end of their terms, in December 2013, respectively in January 2014. The third former Yukos executive covered in the Assembly's reports, Mr Pichugin, is still in prison. I met Mr. Khodorkovsky shortly after his arrival in Berlin. He highly appreciated the Assembly's work in favour of his release. But he has been reluctant to speak up publicly, to avoid causing harm for his associates still in prison.

32. It is also well-known that the European Court of Human Rights, in July 2013, eight years after Mr. Khodorkovsky's and Mr. Lebedev's conviction for fraud and tax evasion in 2005, ruled - in a nutshell - that the trial against them was unfair, but that there was not enough evidence to support the claim that it was politically-motivated.[20] It should not be forgotten that the second trial and conviction of Mr. Khodorkovsky, in December 2010, on the basis of the same facts for which he had been convicted in 2005 but this time qualified as theft, is still pending before the Strasbourg Court. In this case, the sheer absurdity of the conviction, in flagrant violation of the *ne bis in idem* principle and mutually exclusive with the first conviction, makes the political motivation far more flagrant than in the first case.

33. In October 2012, Mr. Pichugin also won a judgment of the European Court of Human Rights[21] finding that his conviction for murder was based on an unfair trial. One year later, on 23 October 2013, the Presidium of the Supreme Court of the Russian Federation rejected the request to repeal his sentence.[22] The execution of this judgment is still pending in the Committee of Ministers.

34. The Moscow-based NGO "Center for Legal and Economic Studies" was involved in the above-mentioned public examination of the "second Yukos case" under the auspices of the Presidential Human Rights Council. Its leadership was subsequently accused by the Investigative Committee of having somehow used Yukos money from abroad to illegally influence related judicial proceedings. Several experts who participated in the public examination were summoned to testify as witnesses, their premises were searched and documents and computers seized. Throughout most of 2013, rumours circulated in the press about a so-called "third Yukos case" against the experts and other suspected supporters of Mikhail Khordorkovsky for "obstruction of justice" and "money-laundering". On 19 December 2013, President Putin replied to the question of possible criminal prosecutions of experts within the framework of this case that he did not see particular perspectives in the third case of Yukos, or any "particular threats to anyone".[23] But the Investigative Committee, according to my information, refuses to return materials to the experts and has not made any official statement about the results of the investigation, which may mean that it is still pending. As the result of the remaining legal uncertainty, several experts have left Russia and still prefer to stay abroad.

35. Regarding Sergei Magnitsky, the Assembly, in Resolution 1685 (2009), called for his release from pretrial detention when he was still alive. We all know that Sergei was not released, but died in prison under horrific and highly suspicious circumstances[24]. In view of some initial resistance against placing this case on

[20] See KHODORKOVSKIY AND LEBEDEV v. RUSSIA (Applications nos. 11082/06 and 13772/05), judgment of 25 July 2013 (in particular, on Article 18, paragraphs. 897-908).
[21] See PICHUGIN v. RUSSIA (Application no. 38623/03), judgment of 23 October 2012.
[22] See http://www.alexey-pichugin.com/index.php?id=690.
[23] See http://rapsinews.ru/incident_news/20131219/270169830.html#ixzz3EsqfuFvs
[24] See the report by Andreas Gross (Switzerland/SOC) on "Refusing impunity for the killers of Sergei Magnitsky", doc. 13356 (18 November 2013), paras. 115-144, available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20345&lang=EN&search=bWFnbml0c2t5IGdyb3Nz

the Assembly's agenda as a separate report, I organised exchanges of views before our Committee with Mr. Magnitsky's former client William Browder and with Elena Panfilova (Head of Transparency International Russia) and Evgenia Albats (Editor-in-Chief of the "New Times", Moscow) and presented an information note[25] in the framework of my mandate to follow up Resolution 1685. I am pleased that this was followed by a full-fledged investigative report, for which I can only congratulate our colleague Andi Gross. His findings speak for themselves. The case of Sergei Magnitsky, and the massive fraud he had denounced is clearly only the tip of the iceberg of a far-reaching system of fraud and corruption. Unfortunately, Resolution 1966 (2014) on the Magnitsky case adopted in January 2014 has also failed to be implemented. As Mr. Gross indicated in a follow-up memorandum presented to the Committee at its meeting during the October 2014 part-session,[26] all appeals made by Mr. Magnitsky's family after the adoption of Resolution 1966 have failed. They were aimed at closing the posthumous case against him and prosecuting the perpetrators of the crime against Mr. Magnitsky and of the crime he had denounced. The Committee therefore rightly concluded that the condition in Resolution 1966 for calling for targeted sanctions against those responsible has been fulfilled.

36. Regarding the North Caucasus, the follow-up of Dick Marty's report on Legal remedies for human rights violations in the North Caucasus (Resolution 1738 and Recommendation 1955 (2010)) is the subject of a separate report under preparation by Michael McNamara. I can only say that according to my own contacts in Russia and in the region, the dramatic human rights crisis described by Dick Marty is far from resolved. I therefore consider it urgent to keep this topic on the agenda whilst waiting for the Rapporteur's fact-finding visit to the region to take place, for example by discussing the situation in the committee on the basis of up-to-date information provided by reliable NGO's.

37. During the summer and autumn of 2014 I requested information in view of the finalisation of this report from a number of non-governmental interlocutors in Russia. In light of the feedback I received, it is my impression that due to the deteriorating political and human rights climate in the Russian Federation, it may actually be preferable for some of my Russian interlocutors that I do not publish any detailed information highlighting their situation, as this may cause them more harm than good.

38. Therefore, leaving out a considerable amount of detail, except for the elements above, which have already been in the public domain, I limit myself to summing up my findings in the following general terms: in the Russian Federation, the Assembly's recommendations, notably those regarding the cases of the former leading executives of Yukos oil, the Magnitsky case (including the first call, in Resolution 1685 (2009), to free Sergei Magnitsky, when he was still alive), and the "spy mania" cases of prominent academics and environmental whistleblowers given long prison terms for purported violations of state secrecy (Resolution 1551 and Recommendation 1792 (2007) have remained largely unimplemented, despite the release of Mikhail Khodorkovsky and Platon Lebedev from prison shortly before the end of their prison terms. Regarding the Assembly's call in the "spy mania" report to review relevant legislation in order to clarify and restrict the scope of the laws which have led to the imprisonment of bona fide whistleblowers, the new laws on espionage and high treason adopted at the end of 2012 seem to go in the opposite direction[27]. In sum, the rule of law in the Russian Federation continues to be threatened by a climate of intimidation vis-à-vis lawyers, journalists and human rights activists.

3. Ukraine

39. During my fact-finding visit to Kyiv from 22-24 February 2012, during the reign of President Yanukovich, I met with the Prosecutor General and with the Minister of Justice, who assured me that they took the Assembly's work very seriously, both in the framework of country monitoring and of individual rapporteurships pertaining to specialised committees. Nevertheless, I returned from Ukraine quite concerned, regarding in particular the prosecution of former Interior Minister Yuryi Lutsenko, who had, *inter alia*, dismantled and held to account a "death squad" consisting of employees of his Ministry, which had committed a number emblematic crimes, including the murder of journalist Georgyi Gongadze. As the follow-up to the Assembly's report on the investigation of these crimes is part of my mandate, I felt duty-bound to pay special attention to the case of Mr. Lutsenko, a former ally of this Assembly. Mr Lutsenko was pardoned on 17 April 2013, after two and a half years in detention on politically-motivated, spurious charges. His case was covered in some detail in Pieter Omtzigt's report on "Keeping political and criminal responsibility separate".[28] I fully agree with his analysis. The Committee agreed to invite him for an exchange of views

[25] Document AS/Jur (2011) 34 dated 30 August 2011.
[26] Document AS/Jur (2014) 28 dated 25 September 2014.
[27] See http://www.amnesty.org/en/for-media/press-releases/russia-president-putin-due-sign-high-treason-bill-2012-11-02
[28] Ass. Doc. 13214 dated 28 May 2013.

during the June 2014 part-session, but due to the dramatic events in his country at this time, he was unable to attend.

40. In my report to the Committee on my fact-finding visit to Kyiv, I also mentioned that the Justice Minister found the conviction rate of 99.7% at the time unacceptably high. He estimated that it would fall by about one third under the new code of criminal procedure, then about to be adopted by the Verkhovna Rada. The Minister referred to a study examining a large number of convictions in the past two years. According to the study, the application of the new procedural rules, which would be in conformity with the ECHR, would have led to an acquittal in about 30% of these cases. I found this remarkable and would recommend the Monitoring Committee's Rapporteurs on Ukraine to follow this up and consider proposing that an amnesty or at least a retrial should be decreed for the cases in question.

41. The elucidation of the Gongadze case itself has made some progress since the adoption of the Assembly's report in 2009 that I have been asked to follow up. In 2008, three junior officials of the Ukrainian Ministry of Interior had been convicted for their role in the murder of this prominent journalist. Since my work started, their superior, General Pukach, has also been re-arrested after having absconded following his initial arrest. In January 2013, after a trial during which he provided horrific details of the crime and accused the former President, Leonid Kuchma, and the former head of the presidential administration, Volodymyr Lytvyn, of having ordered the crime, he was convicted for murder. After the alleged suicide, in 2005, of the former Interior Minister, Yuri Kravchenko, under the suspicious circumstances already described in the Assembly's 2009 report, the attempts of the Ukrainian judicial authorities to move further up the chain of command, as requested by the Assembly, have reached a stalemate. Whilst some doubts remain as to the role played by Mr. Kuchma, the prosecution's case against him collapsed in December 2011, when the court ruled that the "Melnichenko recordings"[29] could not be used as evidence because they had been obtained illegally. Mr. Kuchma, who denies having ordered the killing, is now playing the role of an elder statesman. He participated in the negotiations in Minsk about the resolution of the conflict in Eastern Ukraine. The only thing I feel able to do at this stage is to say that we must remain vigilant that General Pukach does not escape punishment for the crime he had admitted, whatever his motives may have been, which are still the subject of protracted appeals by the legal representatives of the victims.

4. Germany

42. In Germany, the call of the Assembly's former Rapporteur, Ms. Sabine Leutheusser-Schnarrenberger, to establish a High Judicial Council similar to those in most other member states of the Council of Europe, was not heard, including during Ms. Leutheusser-Schnarrenberger's second term of office as Federal Minister of Justice, after her departure from the Assembly. The reasons are political: with the exception of the Liberals and the Greens, the main political forces in Germany do not see a problem in the present situation, despite persistent calls by the judges' and prosecutors' professional organisations to introduce a dose of judicial self-administration.[30] The present situation, leaving the recruitment and promotion of judges and prosecutors in the hands of the ministers of justice (at the *Länder* and Federal levels) is not perceived as giving rise to much opportunity for abuse because of the federal structure of the German judicial system. Different political forces are in power in different *Länder* at different times so that no one minister or political party is likely to be in a position to exercise inappropriate political control over the judiciary as a whole. This said, the careers of judges and prosecutors in each *Land* may well depend to a certain extent on their political "colour" as well as their qualification and merits, which are notoriously difficult to assess. Strongly merit-based recruitment procedures[31] and the independence-minded *esprit de corps* of judges and prosecutors seem to ensure fairly good protection against undue political influence. Especially at the level of the highest (federal) courts, a complex system of checks and balances ensures rotation (political parties effectively "taking turns" in presenting candidates perceived as close to their respective "camps"). In some *Länder*, certain features of judicial self-administration already exist, in others, discussions on this issue continue. All in all, this has contributed to a reasonably balanced composition of the highest courts and a good level of independence of the judiciary as a whole. But I still find it regrettable that the majority of

[29] See "Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine – the Gongadze case as an emblematic example", Ass. Doc. 11686 dated 11 July 2008, Rapporteur Sabine Leutheusser-Schnarrenberger (ALDE/Germany), in particular Resolution 1645 (2009) paragraphs 6 and 11.1. and Report, paragraphs 56-72.

[30] In 2010, the DRB has even submitted a fully-fledged draft model law on judicial self-administration(available at: http://www.drb.de/cms/fileadmin/docs/sv_gesetzentwurf_100325.pdf (in German) ; the NRV has submitted similar proposals, see summary at https://www.neuerichter.de/details/artikel/article/nrv-selbstverwaltungskonzept-116.html); the NRV points out that an evaluation of the structure of the judiciary has been included in a number of coalition agreements see https://www.neuerichter.de/fileadmin/user_upload/bundesvorstand/pdfs/BuVo-2013-11-08_Brief_Koalitionsvereinbarungen__Evaluation_Justizstrukturen.pdf (in German).

[31] based on the applicants' ranking in the (anonymous) final exams administered by the Justice Ministries of the *Länder*

politicians and political parties in Germany are unwilling to give up some of their powers over the careers of judges and prosecutors in favour of judicial self-administration bodies that exist in practically every other member State of the Council of Europe.

43. I do not wish to argue that the judiciary should be completely cut off from the political sphere, as this could lead to excessive corporatism. But a dose of judicial self-administration, not excluding a reasonable representation of political representatives, as advocated by the Venice Commission, would be desirable, also as a matter of setting the right example. The DRB's submission rightly cites the explanatory report for Resolution 1685 in support of its argument that the structures of the administration of justice must be such that they cannot be abused even if they were to fall into the wrong hands.

44. The issue of the right of Ministers to give instructions to prosecutors in individual cases is not resolved either. Despite persistent calls of the judges' and prosecutors' professional organisations, Ministers of Justice continue to have the right to give such instructions. Ms. Sabine Leutheusser-Schnarrenberger, as Federal Minister of Justice, had publicly pledged not to make use of this right. Her successor, the social democrat Heiko Maas, has not made such a pledge. He publicly expressed his view that without the integration of the prosecution in the executive power, investigators would be under even stronger pressure of public opinion, presumably also of politicians, which is why he was skeptical whether separation from the executive would really make investigations more objective and fairer.[32] In the context of the discussions on opening investigations concerning alleged unlawful surveillance by foreign actors in Germany, the Minister clearly stressed the independence of the Federal Prosecutor, who must be able to decide on opening investigations according to the law, without pressure from either the Government or the opposition.[33] The bulk of day-to-day judicial work takes place in the *Länder*; most of whose Ministers of Justice continue to defend their prerogative to give instructions to prosecutors[34]. In actual fact, the issue is not so dramatic in Germany: the "principle of legality" obliges the prosecution to investigate and prosecute every criminal offense that comes to its attention. Failure to do so – or giving instructions to this effect - can be a serious criminal offense: the crime of obstruction of justice[35] is the systemic safeguard for the principle of legality and against illicit instructions not to prosecute. As regards instructions to prosecute, these are less problematic, as the case ends up before a court, which decides in full independence whether there is enough evidence for a crime (leading to the opening of the trial and possible conviction) or not (refusal to open a trial, or acquittal).

45. In practice, it is simply impossible for the prosecution to fully investigate each and every suspected criminal offense. The law itself provides for exceptions from the principle of legality. Certain offenses can only be prosecuted on the request of the victim[36]. In other minor cases, the prosecution has a fair amount of discretion in evaluating the opportuneness of pressing charges[37]. In view of the limited resources of the prosecution and the justice system in general, this exception from the principle of legality is turning almost into the rule. This is where ministerial instructions come in: while it is perfectly appropriate for ministers to indicate to the prosecution service how it shall exercise its discretion by indicating certain policies and criteria designed, for example, to fight prison overcrowding or to ensure equality before the law, the extension of the "principle of opportuneness" at the expense of the principle of legality has created possible openings for instructions in individual cases that may well violate equality before the law for party-political purposes. In its reply, the Ministry of Justice points out that any instructions for such purposes or motives would be illegal; Ministers made only very cautious use of the right to give instructions, which was also a safeguard for parliamentary control over the prosecution service. By contrast, the professional organisations of judges and prosecutors have long been campaigning for "cutting the link" between politics and the judiciary by ending the right of ministers to give prosecutors instructions on individual cases in order to prevent even the appearance of undue political influence.

46. I have seen the negative consequences, in a number of Council of Europe member States, especially in certain former Soviet republics, of prosecutors acting as instruments in the hands of the political elite,

[32] Opening speech at the Weimar Convention of Judges and prosecutors on 2 April 2014; summary and translation by the secretariat.
[33] From an interview of the Minister with Deutschlandfunk Radio on 4 June 2014 (cited in the Ministry's reply to my written questions, summary and translation by the secretariat).
[34] The NRV submission mentions the praiseworthy exception of Saxonia, whose Minister of Justice proposed at the 2013 Justice Ministers' Conference to set up a working group to discuss abolition of the ministerial right to give instructions; whilst this proposal was refused by the majority, the coalition agreement foresees that Saxonia shall continue to work in favour of the abolition of such ministerial instructions.
[35] Sections 258 and 258 a StGB/Criminal Code.
[36] See for example sections 185, 186 and 247 StGB (insult, defamation, theft within a household).
[37] The prosecution can terminate proceedings for example when the perpetrator's guilt appears to be minimal (Section 153 StPO/Code of Criminal Procedure), or when the State's interest in criminal prosecution can be satisfied by the voluntary acceptance of certain sanctions, such as the payment of a sum of money (Section 153a StPO).

putting behind bars political opponents whilst ensuring impunity for those in power[38]. I was therefore at first quite surprised to hear that in Germany, a constitutional argument is made *against* abolishing the minister's right to give individual instructions: namely that under the constitutional principle of democracy, the government must be accountable for the actions of any branch of the executive, which is said to include the prosecution service[39]. Others see the prosecution not as part of the executive, but as part of the judiciary, for whose decisions the government cannot and should not be held accountable (whereas the executive is indeed responsible for the proper organization of the judiciary and its resources). The Federal Constitutional Court has recognized that the prosecution is part of the judiciary, but it has also stressed its executive characteristics.[40]

47. In my view, democratic accountability of the prosecution could be preserved whilst minimizing the danger of politically-motivated abuses by laying down the simple rule that any individual instructions should be given in writing, and made public. If a minister can explain to parliament and ultimately to the voters why he or she gave a specific instruction to a prosecutor, chances are that the instruction was legitimate[41].

48. Contrary to the author of the report I have been asked to follow up, I am not an expert on the judiciary. I therefore do not feel comfortable with making any specific proposals. My objective is merely to contribute to re-launching the debate on judicial self-administration and prosecutorial independence in Germany and to urge the decision-makers to take into account the Council of Europe's experience – which clearly speaks in favour of a maximum of independence and transparency of the judiciary, both for judges and prosecutors. I am therefore pleased to note in the Ministry's reply that it continues to be open for discussion on the reform of the judiciary.[42] The Ministry also stresses that the historically-evolved structure of the judiciary in Germany and its independence in practice enjoys a good reputation internationally.[43]

49. As regards resources allocated to the judiciary, Germany looks good in terms of the total annual budget allocated to all courts and public prosecution per inhabitant[44], but judges' and prosecutor's salaries, in relation to the national average, are still the second-lowest in Europe.[45] This said, I was informed that the judiciary still has no difficulty in recruiting and retaining top-level lawyers in sufficient numbers[46].

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[38] See for example the statement by former Ukrainian Prosecutor General Pshonka cited by Pieter Omtzigt (note 16 above, paragraph 28 footnote 19): "Of course, I am a member of the President's team. The President took a big responsibility and declared it in his decrees, in his decisions, so that we would indeed have a rule of law state, so that we have professional laws, and, of course, I – as a Prosecutor General – am a member of the team for the execution of all the decisions taken by the President"(unofficial translation; source: http://news.liga.net/news/politics/505261-pshonka-schitaet-sebya-chlenom-komandy-yanukovicha.htm).

[39] See for example the presentation of the historical evolution by Erardo C. Rautenberg, Zuordnung der Staatsanwaltschaft zur Judikative, Neue Justiz 2003, pages 169 pp (available at: http://www.gewaltenteilung.de/tag/zuordnung-der-staatsanwaltschaft-zur-judikative) (in German).

[40] Judgment of 20 February 2001, 2 BvR 1444/00 (para. 49).

[41] The NRV pointed out to me that a similar solution is alreadyforeseen by law in the *Land* of Schleswig-Holstein.

[42] The reply draws attention to a comparative study by a commission with representatives of the Länder and Federal Ministries of Justice moderated by Prof. Albrecht, which had also been discussed in a working group of the Council of Europe's Consultative Council of European Judges – CCJE-GT on 23 June 2014. The discussions had shown that the multiple models of judicial self-administration in different European countries could not easily be compared using uniform criteria.

[43] See World Economic Forum Global Competitiveness Report 2013-2014 (available at: http://www.weforum.org/issues/global-competitiveness), page 415 (point 1.06); The 2014 EU Justice Scoreboard (available at: http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm), pages 28 pp.

[44] European Commission for the Efficiency of the Judiciary, 5th Evaluation report on European judicial systems, 2014 edition (2012 data), page 51: Germany holds the 4th place, after Switzerland, Monaco and Luxembourg; in relation to GDP, Germany's budgetary effort for the judiciary is still slightly above average (0.338 % of GDP, the average being 0.277%) (page 52).

[45] a German judge at the start of career earns 0.9 times and at the Supreme Court 2.3 times the national average salary; the European average stands at 2.3 times and 4.2 times respectively. The only Council of Europe member state where judges and prosecutors' relative salaries are even lower than in Germany is Armenia (at 0.4 and 0.7 times the national average salaries,), see 5th Evaluation Report, pages 302 (beginning of career) and 310 (end of career).

[46] A case is pending before the Federal Constitutional Court in Karlsruhe brought by judges and prosecutors claiming that their low salaries violate the constitutionally-guaranteed right to a salary that is commensurate with the importance of their office (see SPIEGEL, Das Bundesverfassungsgericht entscheidet, ob Richter zu wenig verdienen, available at: https://magazin.spiegel.de/digital/index_SP.html#SP/2014/49/130630561 ("12 Euros net per hour"); the ruling is expected in early 2015.

5. France

50. Due to the refusal of the Russian delegation to cooperate with me, much time has elapsed and some of the topics I was mandated to cover in this report have simply become outdated. This is especially true for the controversial proposal announced by then President Sarkozy in 2009 to abolish the institution of the "*juge d'instruction*" in France. This proposal has been abandoned in the meantime, after the change of majority. But problems remain due to the lack of resources, and a draft law promoting cooperation between juges d'instruction[47] was considered in 2013, however, it has to this day not been adopted.[48]

51. Regarding the *Conseil Supérieur de la Magistrature (CSM)*, after two reforms in 2008 and 2010[49] the *magistrats* (judges and prosecutors) ended up being in the minority.[50] This fact was widely criticized, including by the Parliamentary Assembly. In addition, the limited powers of the CSM with respect to the nomination of the prosecutors remain problematic. During his presidential election campaign in 2012, François Hollande had made promises to increase the independence of the judiciary. But a draft law intended, *inter alia*, to re-establish the majority of *magistrats* in the different compositions of the CSM and improving the nomination process of the "political" appointees within the CSM was never adopted.[51]

52. Regarding the status of the French prosecutors, the European Court of Human Rights has found on several occasions, *inter alia* in the cases of Moulin v. France (2011) and Vassis and others v. France (2013), that the French prosecutors are not "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 (3), because they lack independence from the executive power.

53. On a positive note, a Law on the independence of the prosecutors outlawing individual instructions of the Minister of Justice was adopted on 16 July 2013.[52] Another issue raised in Resolution 1685 (2009) and in my introductory memorandum has also been resolved in a positive way, namely the improvement of the right of access of defense lawyers to their clients in police custody (*garde à vue*), a reform adopted in 2011 under the previous Government[53] and further developed in 2014 in a law transposing into French law EU Directive 2012/13 of 22 May 2012.[54]

54. The budgetary situation of the French Justice remains critical. The available resources are lower than the European average, as shown by the latest evaluation report of the European Commission for the Efficiency of Justice (CEPEJ). Some courts are unable to pay the appointed experts and service suppliers.[55] The CEPEJ report also notes that the budget available for the French legal aid programme remains very low and that the number of judges, prosecutors and support staff in the French judicial system remains below the European average, in relation to population size.[56] On 10 September 2014, the Minister of Justice announced a further reform with the title "*la justice du 21^{e} siècle*"[57] aimed at modernizing the French judiciary and adapt it to everyday life.

55. The representatives of French judges and prosecutors with whom I have consulted complain strongly about attacks in the media by politicians with respect to specific cases (for example with respect to

[47] Observations by the USM dated 2 October 2013.
[48] Observations by the USM dated 2 October 2013.
[49] On 23 July 2008, a constitutional change took place whereas on 22 July 2010 there was a change in organic law.
[50] Observations by the USM dated 6 June 2013; for the different compositions within the CSM see page 6 of this note.
[51] Communiqué of the USM dated 20 June 2013 and Communiqué of the USM dated 22 July 2013.
[52] See "Le parlement adopte la loi sur l'indépendance du parquet", Le Monde of 16 July 2013, available at: http://www.lemonde.fr/societe/article/2013/07/16/le-parlement-adopte-la-loi-sur-l-independance-du-parquet_3448585_3224.html (in French).
[53] Law of 14 April 2011, available (in French) at: http://www.vie-publique.fr/actualite/panorama/texte-vote/loi-du-14-avril-2011-relative-garde-vue.html.
[54] Law of 15 May 2014 (loi portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil du 22 mai 2012, see http://www.justice.gouv.fr/la-garde-des-sceaux-10016/droit-a-linformation-dans-le-cadre-des-procedures-penales-26703.html). This law, in line with the EU directive, improves the right of persons in police detention and their lawyers to access the investigation file.
[55] Communiqué of the USM dated 20 September 2012.
[56] 5th Evaluation report on European judicial systems (Edition 2014 (data 2012)), pages 48 (legal aid budgets) and 162 (number of judges and 269 (number of prosecutors) in relation to population. The number of judges per 100.000 inhabitants in France is 10.7, against a European average 21; the number of prosecutors per 100.000 inhabitants in France is 2.9, against a European average of 11.8; and the legal aid budget per inhabitant in € in France is € 5.60, against a European average at € 8.03. French judges and prosecutors also continue to be among the lowest-paid in Europe, in comparison with the national average salary (a French judge at the start of career earning 1.1 times and at the Supreme Court 3.2. times the national average salary; the European average stands at 2.3 times and 4.2 times respectively.
[57] http://www.justice.gouv.fr/la-justice-du-21e-siecle-12563/.

investigations against former President Sarkozy). The highest representatives of the executive reacted by stressing the need for respect towards the *magistrats*. The "*mur des cons"* affair[58] has prompted further criticism by politicians, who have put into question the traditional right of French judges and prosecutors to belong to trade unions, which is guaranteed by the French Constitution and Article 11 of the European Convention on Human Rights.[59]

56. In my view, the very combativeness of French judges and prosecutors, their spirit of *résistance* against any undue interferences with their work, is the best guarantee for the continued independence of the French judiciary. But in order to keep resisting, judges and prosecutors need the protection of a solid legal and institutional framework against undue political and media pressure.

6. Belarus

57. In Belarus, when I look at Resolution 1606 (2008), not much progress can be noted in terms of reducing the abuse of the criminal justice system.

58. Contrary to the Assembly's specific requests,[60] the so-called "Anti-Revolution Law"[61] has not been repealed. This law introduced changes to the criminal code (including article 193-1), which criminalise activities of non-registered civil society organisations. The law remains on the books, although I was informed that it has not been applied for some time. There has also been no moratorium on executions. On the contrary, to the extent that this can at all be verified in view of the secrecy shrouding the death penalty in practice, the practice of capital punishment is continuing unabated. The Assembly's General Rapporteur on Abolition of the death penalty, Marietta Karamanli, and her predecessors, Renate Wohlwend and Marina Schuster were unfortunately obliged to "name and shame", in the form of public statements, a number of executions throughout the period under observation.[62]

59. Concerning a particularly egregious case, I invited the mother of a condemned young man, for a hearing before this Committee during the Assembly's January 2012 part-session in Strasbourg. Ms Lyubou Kavalyova, gave the Committee a tragic account of the fate of her son and of a friend of his, alleged terrorists, who had been convicted for a bombing in a metro station in Minsk in April 2011. They were sentenced to death by the Supreme Court of Belarus, following a clearly unfair trial. Her son's confession had been extracted by beatings and psychological pressure, while there was no evidence of their guilt. On the contrary, her son and his friend had a strong alibi. The CCTV-camera tapes were manipulated and still did not show clearly what they were purported to show. Immediately after the sentence was passed, what little evidence there was and that could have been disproved in a possible new, unbiased investigation, had been destroyed. The date of the forthcoming execution had not been revealed to her. Whilst she had not been able to see her son for more than a few minutes at a time, she had been offered a three-hour visit – on the day the authorities knew she would be in Strasbourg in order to plead for help. But despite all pleas, including directly to President Lukashenko, the two young men were executed shortly afterwards.

60. Contrary to the Assembly's exhortations, Presidential decree no. 643 modifying administrative procedures related to foreign travel of Belarusians, which had been used to limit travel of opposition and civil society activists has not been revoked or modified. But I was informed that most opposition figures were withdrawn from the database of individuals banned from leaving Belarus.

61. The issue of political prisoners is still not resolved in Belarus, as the Assembly last noted in Resolution 1857 (2012). Arbitrary convictions of political opponents, following unfair court proceedings, under general criminal provisions (for example, embezzlement, fraud, counterfeit or tax evasion) or convictions under the above-mentioned "anti-revolution law" have continued. The most prominent victim of this practice, the well-respected human rights activist Aleh Bialiatski, the first laureate of the Vaclav Havel Human Rights Prize in 2013, has thankfully been released, after almost three years in prison.[63] But several other persons who

[58] A polemic "wall of shame" in the premises of the left-leaning *Syndicat de la Magistrature* (SM) featuring mostly conservative politicians, see the commentary by Nicolas Blot (USM) and Evelyne Sire-Marin (SM) in Le Monde dated 7 May 2013 (link: Article) and the Communiqué by the USM dated 25 April 2013.
[59] Communiqué by the USM dated 4 May 2014 subsequent to the proposal of Mr Eric Ciotti, deputy, of a law which shall ban trade unions within the judiciary.
[60] Resolution 1606 (2008), para. 8.
[61] Law No. 71-3of 15December 2005.
[62] The most recent being the execution of Alyaksandr Hrunou in early November 2014 (see joint statement by Marietta Karamanli (SOC/France) and Andrea Rigoni (ALDE/Italy), available at: http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5278&lang=2&cat=5.
[63] See report on Mr Bialiatski's meeting with PACE President Anne Brasseur on 2 July 2014 http://spring96.org/en/news/71883/print.

would appear to fulfil the Assembly's criteria for the definition of political prisoners under Resolution 1900 (2012) are still in detention.[64]

62. The criminal justice system in Belarus is also misused in order to force political opponents, civil society activists and independent journalists out of the country. Former political prisoners, having been forced to sign confessions, are placed under burdensome "preventive supervision" measures after their released. Allegations of tax crimes, traffic offenses etc. are on the list of instruments to threaten opponents of the regime with (re-) imprisonment. Therefore, many prominent members of the opposition left the country, especially after 2010. In October 2014, human rights activist Elena Tonkacheva, a Russian citizen residing in Belarus since 30 years, was expelled from Belarus with a three-year ban on re-entry, formally on the ground of a minor traffic (speeding) offense.

63. Last but not least, a comment on the use of targeted sanctions against those personally responsible for human rights violations in Belarus. Let us remember that the Assembly, in Resolution 1606 (2008) had urged

> "judges, prosecutors and police officers in Belarus to avoid, to the best of their ability, participating in abuses of the criminal justice system and to bring to bear their courage and imagination in order to mitigate the effects of the abusive legislation on its victims".

64. A number of cases documented by human rights defenders, such as that of Ales Bialiatski,[65] show that the officials in question did not in fact heed the Assembly's advice.

65. Also, the senior officials named by the Assembly in its Resolution 1371 (2004) as suspects in four high-profile disappearances[66] have still not been held to account before a court of law.

66. Under these circumstances, it is coherent that targeted sanctions imposed by the European Union and the United States against known human rights violators are still in force against a number of Belarusian officials[67].

7. Conclusion

67. Having examined, to the extent possible, the follow-up given by member states to a number of relevant resolutions and recommendations of the Parliamentary Assembly, I can only conclude that the authority of the texts adopted by the Assembly is fairly limited. This is not really a surprise, given that the Assembly's texts are not legally binding. But the public attention generated by a well-researched report and the persuasiveness of the arguments can have some influence on decision-making processes. After all, the texts adopted by the Assembly do reflect the views of a majority of the democratically-elected representatives of the people of all 47 member states. This can also carry some weight before the European Court of Human Rights, in particular when it is trying to establish the presence of a "European consensus" to back its interpretation of the Convention.

68. As to the issues concerning the Russian Federation, the authorities failed to provide me with their official views, as I could not meet with them. But even on the basis of information already in the public domain, I have been able to draw some worthwhile conclusions. The exercise of assessing the actual implementation of the Assembly's relevant reports, which provide examples of different types of threats to the rule of law concerning different judicial systems and legal cultures may well contribute to asserting the Assembly's authority in all member, observer and applicant states. My conclusions in this respect are summed up in the preliminary draft resolution preceding this report.

69. I should like to conclude by stressing that the refusal of the Russian delegation to cooperate with me has made my work much more difficult. Such behaviour, similar to that of the Azerbaijani authorities vis-à-vis the Assembly's rapporteur on the issue of political prisoners, Mr. Christoph Strässer, should not be left without consequences. I leave it up to the Assembly to take this matter into account.

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[64] See the list kept by Human Rights Centre "Viasna" (Spring), available at: http://spring96.org/en/news/49539.
[65] See for example the compilation by Human Rights Center "Viasna", available at: http://spring96.org/en/news/60676.
[66] Mr. Sheyman, former Head of the Presidential Administration and former Prosecutor General; Colonel Pavlichenko, of the Interior Ministry; and Mr. Sivakov, former Interior Minister (see document 10062/2004, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10456&lang=EN).
[67] See http://www.treasury.gov/resource-center/sanctions/Programs/pages/belarus.aspx (regarding US sanctions) and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:288:0069:0124:EN:PDF (regarding EU sanctions)