Parliamentary **Assembly**
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Doc. 11031
25 September 2006

Fair trial issues in criminal cases concerning espionage or divulging state secrets

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party

Summary

The Committee on Legal Affairs and Human Rights recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction, and other abuses of authority.

A series of high profile espionage cases against scientists, journalists and lawyers in the Russian Federation resulting in harsh prison terms have had a chilling effect on these professional groups. The climate of "*spy mania*" fuelled by these cases and controversial statements of senior government representatives are obstacles to the healthy development of civil society in this country. The Committee is also concerned that the United States Administration as well as German, Swiss and Italian authorities have also threatened, or even attempted to prosecute media editors, journalists or other "*whistleblowers*" for alleged breaches of official secrecy, in particular in the context of recent reports on unlawful CIA activities.

The Committee proposes a number of fundamental principles in order to guarantee the fairness of trials in cases involving alleged breaches of official secrecy, and finds that numerous violations of these principles appear to have occurred in the "spy mania" cases in the Russian Federation, as presented in detail in the explanatory report.

The Committee therefore urges all member states of the Council of Europe to refrain from prosecuting any scientists, journalists and lawyers who engage in generally accepted professional practices and to rehabilitate those already sanctioned. It appeals in particular to the competent bodies of the Russian Federation to set Mr Sutyagin, Mr Danilov and Mr Trepashkin free without further delay, and in the meantime to provide them with adequate medical care.

A. Draft resolution

1. The Parliamentary Assembly finds that the State's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information, international scientific cooperation and the work of lawyers and other human rights defenders.

2. It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction, and other abuses of authority.

3. Scientific progress critically depends on the free flow of information among scientists, who must be able to cooperate internationally and participate in the scientific process without fear of prosecution.

4. Lawyers and other human rights defenders must also be able to perform their indispensable role in establishing the truth and holding perpetrators of human rights violations to account without the threat of criminal prosecution.

5. The Assembly notes that legislation on official secrecy in many Council of Europe member states is rather vague or otherwise overly broad in that it could be construed in such a way as to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders.

6. At the same time, prosecutions for breach of state secrecy are very rare in most Council of Europe member and observer states and generally lead to mild sentences, if any. Mr Shayler, a British former secret agent who had published details of his work, was handed a partly suspended sentence of six months, whereas a German court in July 2006 dismissed altogether the indictment against Mr Schirra, a journalist who had published information from leaked BND files. For its part, the European Court of Human Rights found "disproportionate" an injunction against the publication in the United Kingdom of newspaper articles reporting on the contents of a book ("Spycatcher") that allegedly contained secret information, as the book was readily available abroad.

7. By contrast, a series of high profile espionage cases against scientists, journalists and lawyers in the Russian Federation have caused much hardship to the individuals concerned and their families and have had a chilling effect on other members of these professional groups. The climate of "*spy mania*" fuelled by these cases and controversial statements of senior government representatives are obstacles to the healthy development of civil society in this country.

8. The Assembly is also concerned that the United States Administration as well as German, Swiss and Italian authorities have recently threatened, or even attempted to prosecute media editors, journalists or other "*whistleblowers*" for alleged breaches of official secrecy, in particular in the context of recent reports on unlawful CIA activities (cf. Resolution 1507 (2006) and Recommendation 1754 (2006)) and other secret service scandals.

9. It calls on the judicial authorities of all countries concerned and on the European Court of Human Rights to find an appropriate balance between the State interest in preserving official secrecy on the one hand and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand.

10. The Assembly notes that criminal trials for breaches of State secrecy are particularly sensitive and prone to abuse for political purposes. It therefore considers the following principles as vital for all those concerned in order to ensure fairness in such trials:

10.1. Information that is already in the public domain cannot be considered as a state secret, and divulging such information cannot be punished as espionage, even if the person concerned collects, sums up, analyses or comments on such information. The same applies to participation in international scientific cooperation, and to the exposure of corruption, human rights violations, environmental destruction or other abuses of public authority ("*whistleblowing*");

10.2. Legislation on official secrecy, including lists of secret items serving as a basis for criminal prosecution must be clear and, above all, public. Secret decrees establishing criminal liability cannot be considered compatible with the Council of Europe's legal standards and should be abolished in all member states;

10.3. Secret service bodies, whose role is to protect official secrets and who are typically victims of any breaches, must not be given the task of carrying out criminal investigations and prosecutions against alleged perpetrators of such breaches. The Assembly regrets that the Russian Federation has still not fulfilled its accession commitment to change the law on the FSB in this respect (cf. Resolution 1455 (2005), para. 13.x.a.);

10.4. Trials should be speedy, and long periods of pre-trial detention should be avoided;

10.5. Courts should be vigilant in ensuring a fair trial with particular attention to the principle of equality of arms between the prosecution and the defence, in particular:

10.5.1. The defence should be adequately represented in the selection of experts advising the court on the secret nature of relevant information;

10.5.2. Experts should have a high level of professional competence and should be independent from the secret services;

10.5.3. The defence should be allowed to question the experts before the jury and challenge their testimony through experts named by the defence, including experts from other jurisdictions;

10.6. Proceedings should be as open and transparent as possible, in order to boost public confidence in their fairness; at the very least, the judgments must be made public;

10.7. Changes of judges and juries should be permitted only in very exceptional and well-defined circumstances, and explained fully in order to avoid the impression of "*forum shopping*" or lack of independence of the courts;

10.8. The question whether the information that was divulged is already in the public domain should always be a question of fact to be decided by the jury and, upon an affirmative answer by the jury, the judge must in all cases direct an acquittal.

11. The Assembly finds that in a number of high-profile espionage cases in the Russian Federation, including those of Mr Sutyagin and of Mr Danilov, there are strong indications that the above-mentioned principles (para. 10) were not respected, and notes that the prison sentences handed down (14 and 15 years respectively) are in any case out of line with the practice of other Council of Europe member states; in particular:

11.1. as in the earlier cases of Mr Nikitin, Mr Pasko (cf. Resolution 1354 (2003)) and Mr Moiseyev, the proceedings against Mr Sutyagin and Mr Danilov took many years, which the defendants spent mostly in detention, while the FSB carried out criminal investigations;

11.2. judges and juries were changed repeatedly, without adequate reasons being provided;

11.3. the defence was unable to question the experts advising on the secret nature of the information concerned before the jury;

11.4. some of the experts appear to have lacked the necessary independence;

11.5. the proceedings lacked openness; in the Danilov case, even the judgment itself was secret. In several cases, the courts appear to have relied on a secret decree (No 055-96) as a basis for imposing criminal sanctions.

12. The Assembly warmly welcomes the statement of the Public Chamber of the Russian Federation dated 30 June 2006 recognising the inappropriateness of the existing legislation on state secrecy and regretting the negative impact of its harsh application on the morale of the scientific community.

13. The Assembly invites the international scientific community to establish a typology of accepted practices for international scientific cooperation relating to potentially sensitive information.

14. It urges all member states to refrain from prosecuting any scientists who engage in such accepted practices, and to rehabilitate all those who have been sanctioned for engaging in such practices.

15. The Assembly appeals in particular to the competent bodies of the Russian Federation to use all available legal means to set Mr Sutyagin, Mr Danilov and Mr Trepashkin free without further delay, and in the meantime to provide them with adequate medical care.

B. Draft recommendation

1. Referring to Resolution … (2006), the Parliamentary Assembly invites the Committee of Ministers to:

1.1. urge all member states to :

1.1.1. examine existing legislation on official secrecy and amend it in such a way as to replace vague and overly broad provisions with specific and clear provisions thus eliminating any risks of abuse or unwarranted prosecutions;

1.1.2. apply legislation on official secrecy in a manner that is compatible with freedom of speech and information, with accepted practices for international scientific cooperation and the work of lawyers and other human rights defenders;

1.2. look into ways and means of enhancing the protection of "*whistleblowers*" and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of authority, in all Council of Europe member states;

1.3. urge the Russian Federation to rehabilitate, in a spirit of openness and tolerance, those journalists, scientists, lawyers and human rights defenders condemned in recent years for breaches of official secrecy, who appear to have become victims of the over-zealous application of this legislation.

C. Explanatory memorandum

by Mr Christos Pourgourides, Rapporteur

> "*There are serious reasons to believe that the current state secret protection system is to a large degree an inheritance from the totalitarian regime and is conceptually unable to be effectively used in a democratic market economy. This situation allows wide manipulations of the concept of state secret.*"[1]

Contents:

I. Introduction
- i. Proceedings to date
- ii. Interpretation of the mandate

II. Fair trial issues most likely to be relevant in espionage cases or cases involving state secrets
- i. ECHR Article 6
  - a. Hearing with a reasonable time
  - b. Public nature of the hearing and the judgment
  - c. Equality of arms
  - d. Independent and impartial tribunal
  - e. Presumption of innocence
  - f. Proper notification of the accusation to the defendant
- ii. ECHR Article 7(1)
- iii. ECHR Article 10

III. Application to these principles to the cases at hand
- i. Issues falling under Article 6 ECHR – right to a fair trial
  - a. Hearing with a reasonable time
  - b. Public nature of the hearing and the judgment
  - c. Equality of arms
    - Alleged close relationship between the prosecutor's office and the FSP
    - Alleged lack of independence of the experts
  - d. Alleged lack of independence and impartiality of the courts
  - e. Alleged violations of the presumption of innocence
  - f. Alleged insufficient notice of the accusation
- ii. Lack of clarity, partial secrecy and broad interpretation of espionage laws (Article 7 ECHR)
  - a. A short survey of relevant legislation in 23 Council of Europe member countries
  - b. The situation in the Russian Federation in particular
- iii. Harsh application of official secrecy laws in Russia and the freedom of expression : the big chill
- iv. Courts protecting freedom of speech and information lenient application of state secrecy laws in recent British and German cases

IV. Conclusions

*****

I. Introduction

i. Proceedings to date

1. At its meeting on 28 February 2005, the Parliamentary Assembly decided to refer to the Committee on Legal Affairs and Human Rights, for report, the motion concerning 'Fair trial issues in criminal cases concerning espionage or divulging state secrets' (Doc. 10426, Reference No 3052). At its meeting on 3 March 2005, the Committee appointed me as Rapporteur and decided to consider the issues raised in the motion on the case of Igor Sutyagin in the Russian Federation (Doc. 10086 (2004)) within the framework of this broader report, which is *a priori* not country-specific.

2. In April 2005, I consulted with a number of non-governmental human rights organisations with whom the Committee of Legal Affairs and Human Rights has long-standing working relations, including Amnesty International, the International Helsinki Federation, Human Rights Watch, Memorial, and the International

[1] Statement of the Board of the Public Chamber of the Russian Federation, Moscow 30 June 2006, para. 2. (unofficial translation).

Commission of Jurists, asking for information of interest for the fulfilment of this mandate, and in particular for information on individual cases involving prosecutions in which fair trial principles may have been violated[2].

3. The feedback received then, as well as that following a second round of information requests in mid-2006 to specialised professional organisations such as the Human Rights Committee of the National Academy of Sciences, the American Physical Society, the Scholars at Risk Program and the Science and Human Rights Program of the American Association for the Advancement of Science, indicates that as far as member states of the Council of Europe are concerned, the cases of concern are all in the Russian Federation. In light of Mr Marty's report on unlawful CIA activities, in particular of information regarding pressure on the media in this context in the United States, Germany, Switzerland and Italy, I am proposing to include in the draft resolution also concerns on developments in those countries. The Assembly must apply the same standards everywhere.

4. In June 2005, the Committee on Legal Affairs and Human Rights discussed the introductory memorandum[3], agreeing on the proposed course of action. In September 2005, I undertook a fact-finding visit to Moscow (programme attached). I should like to seize the opportunity to thank the Russian delegation for its hospitality and the efficient organisation of the programme of meetings.

5. On 7 June 2006, the Committee had an exchange of views with Dr. Andrew J. Coates (Mullard Space Science Laboratory [MSSL], United Kingdom). Professor Michaïl Pavlovich Sychev (Bauman Technical University, Moscow) was also invited but was unable to participate in the meeting.

ii. Interpretation of the mandate

6. The scope of the mandate follows from the two motions that the Committee has decided to deal with in one report. The motions present a number of fair trial issues that have allegedly been raised in a number of relevant cases, named in the motions by way of examples. I have examined those issues in the most general terms possible, using the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) as points of reference.

7. It is not for me to make any attempt at influencing ongoing proceedings before the national courts or the European Court of Human Rights. The full respect for judicial independence is one of the principles of the rule of law that the Assembly wholeheartedly subscribes to. As is proper for any serious legal approach, I was nevertheless obliged to refer to individual cases that have been brought to my attention in order to determine whether credible patterns of alleged violations of the ECHR could be discerned, which would support drawing certain conclusions, including proposed changes to the existing legislation or practice. This approach was presented in the explanatory memorandum and accepted by the Committee in June 2005. The Assembly has often taken up individual cases, or groups of cases of alleged human rights violations that are of particular importance, and expressed views from the point of view of a parliamentary human rights body, without prejudice to ongoing national or European court proceedings[4].

8. The present memorandum is based on information provided by different international and Russian non-governmental organisations and, as far as the Russian cases are concerned, by the competent authorities (Prosecutor General's office, FSB, Ministry of Justice, State Duma Legal Affairs Committee) whose representatives I met during my visit to Moscow, as well as the scientific expert who testified before our committee at the meeting of 7 June 2006. The comparative analysis of legislation governing the protection of official secrecy is based on information provided by the ECPRD[5].

---

[2] In view of the fact that the Sutyagin case, as well as a number of other high-profile cases addressed to the Assembly in an open letter of the Russian Committee for the Protection of Scientists concern the Russian Federation, I asked specifically for cases in Council of Europe countries other than the Russian Federation.

[3] Document AS/Jur (2005) 35 dated 17 June 2005.

[4] Recently, for example, in the cases of leading Yukos executives (Rapporteur: Sabine Leutheusser-Schnarrenberger (Germany/ALDE)), of Mr Pasko (Rapporteur: Rudolf Bindig (Germany/SOC)), Mr Nikitin (Rapporteur: Erik Jurgens (Netherlands/SOC) and Mr Gongadze (Rapporteur: Sabine Leutheusser-Schnarrenberger (Germany/ALDE) and Mr Pasat (Rapporteur: Gultakin Hajiyeva (Azerbaijan/indep.).

[5] European Centre for Parliamentary Research and Documentation, a network of national parliamentary research services co-organised by the Parliamentary Assembly of the Council of Europe and the European Parliament. Copy of the collection of the very informative replies received following my information request from 24 member parliaments is available from the Committee Secretariat. This also applies to the Russian legislation in the field, copy of which I received from the Russian delegation and of which relevant parts were translated into English at the Council of Europe.

II. Fair trial issues most likely to be relevant in espionage cases or cases involving state secrets

i. ECHR Article 6

a. Hearing within a reasonable time

9. Article 6(1) ECHR states that "*everyone is entitled to a fair and public hearing within a reasonable time.*" In assessing whether the delay has been unreasonable, the Court considers the complexity of the case, the applicant's conduct and that of the competent authorities, and the importance of what was at stake for the applicant in the litigation.[6] The complexity of the case is especially relevant to the espionage and state secrets cases. The government could potentially use the complex nature of such cases as a pretext to unduly delay the trial. In fact, respondent states have invoked the complexity of the case as a defence to the violation of Article 6 paragraph 1 in at least four espionage cases.[7] In *Dobbertin v. France*, the appellant was charged with being in communication with agents of a foreign power[8]. In the proceedings before the European Court of Human Rights, the respondent state cited the "*exceptional complexity*" of the case as one of the reasons for the prolonged proceedings.[9] The Court ruled, however, that despite the "*real difficulties arising from the highly sensitive nature of the offences charged*," there had been a violation of Article 6(1) of the ECHR.[10]

b. Public nature of the hearing and the judgment

10. Article 6(1) of the ECHR also provides that in all cases judgments must be pronounced in public, although the public may be excluded from the trial in cases involving national security.

11. In *Szucs v: Austria*, the Court reiterated the requirement that the court judgments be publicly available. In that case, the Court ruled that where the judgments of the courts are not available to the general public but only to those individuals given permission by the Court, there has been a violation of Article 6(1).[11]

12. The Court has applied this principle to a case involving national security in *Hadjianastassiou v. Greece*, holding that the sensitive nature of the materials does not affect the requirement that "the courts must indicate with sufficient clarity the grounds on which they based their decision."[12]

c. Equality of arms

13. The principle of equality of the parties is an inherent element of a fair hearing under Article 6(1). In *Rowe and Davis v. UK*, the ECtHR stated that "*it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence*."[13]

14. Of paramount importance for the cases involving national security issues is the independence and impartiality of the prosecutor's office and of the expert witnesses used in the trials. Where the independence of the prosecutors and those conducting the investigation is doubtful in the light of the domestic regulations in force, the concrete evidence of the prosecutor's lack of independence can be deduced from the biased manner in which the investigation was conducted.[14]

d. Independent and impartial tribunal

15. Article 6 requires an 'independent and impartial tribunal' to preside over the trials. This means that the presiding judge has to behave objectively and does not favour either side because "*there cannot be a fair trial before a biased court*."[15] In jury trials, this means a fair and unbiased process of selecting the jury members. In *Morris v. United Kingdom*, the Court has held that the requirements of Article 6 were not

---

[6] *Gast and Popp v. Germany*; No. 293567/95, 25 February 2000, paragraph 70.
[7] *Gast and Popp v. Germany*; *Timar v. Hungary*; *Viezzer v. Italy*; *Dobbertin v. France.*
[8] *Dobbertin v. France*, paragraph 9.
[9] *Dobbertin v. France*, paragraph 40.
[10] *Dobbertin v. France*, paragraph 42.
[11] *Szucks v. Austria*, 135/1996/754/953, 24 November 1997, paragraph 44.
[12] *Hadjianastassiou v. Greece*, 69/1991/321/393, 16 December 1992, paragraph 33.
[13] *Rowe and Davis v. UK*, No. 28901/95, 16 February 2000, paragraph 60.
[14] *Bursuc v. Romania*, No. 42066/98, 12 October 2004, paragraph 107.
[15] Francis G. Jacobs, *The European Convention on Human Rights*, 2nd edition 1996, p. 104.

satisfied when two junior officers presided over the applicant's court-martial. The Court observed that these officers were subject to the army discipline and not shielded from external pressure, concerns that would not be present if the applicant was tried by a civilian jury.[16]

e. Presumption of innocence

16. Pursuant to Article 6(2), everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The Court has held that adverse pre-trial publicity can be a basis for a violation of Article 6(2). In *Allenet de Ribemont v. France*, the Court observed that while the authorities must inform the public of the criminal investigations in progress, they need to do so "*with all the discretion and circumspection necessary*."[17]

17. The issue of pre-trial publicity is especially important in cases tried by lay juries as the publicity could lead to a corruption of the jury pool.[18] This is an especially sensitive matter in the context of the espionage/state secrets cases, which usually get a lot of publicity.

f. Proper notification of the accusation to the defendant

18. As the European Court of Human Rights recalls in its recent judgment of *I.H. and Others v. Austria*[19], ECHR Article 6 para. 3 (a) points to the "*need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. […] In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.*"[20]

19. Given that cases involving espionage or divulging state secrets are usually complex regarding both the factual basis of the accusation and its legal qualification, the Court's emphasis of this point is of particular relevance to this category of cases.

ii. ECHR Article 7(1)

20. Under Article 7(1), the crimes, whether common-law or statutory, have to be defined with reasonable precision.[21] In *S.W. v. UK*, the Court observed that any crime should be defined distinctly in the law so that an individual understands what acts would entail criminal responsibility. "*This requirement is satisfied where the individual can know from the wording of the relevant provision … what acts and omissions will make him criminally liable*."[22]

21. It follows that laws entailing criminal liability must be public, i.e. readily accessible to the individuals concerned. Moreover, criminal law should not be interpreted broadly to the prejudice of an accused person.[23]

22. Article 7(1) is particularly relevant to the espionage/state secrets cases where the sensitive nature of the materials at issue sometimes leads to unclear or broadly defined state secrets laws.

iii. ECHR Article 10

23. Under Article 10(1), everyone has the right to freedom of expression. That right, however, can be limited in the interests of national security.[24] The right protected by Article 10 is therefore particularly relevant to cases involving state secrets as the divulging of such secrets may fall within the national security restriction on the freedom of expression.

24. In its case law, the Court has looked at the particular restrictions on the freedom of expression closely to determine whether they are "*necessary in a democratic society*."[25]

---

[16] *Morris v. United Kingdom*, No. 38784/97, 26 February 2002.
[17] *Allenet de Ribemont v. France*, 3/1994/450/529, 27 October 1994, paragraph 38.
[18] Francis G. Jacobs, *The European Convention on Human Rights*, p. 105.
[19] Application no. 42780/98, Judgment of 20 April 2006.
[20] (footnote 19), para. 30, 31.
[21] Francis G. Jacobs, *The European Convention on Human Rights*, p. 122.
[22] *S.W. v. UK*, 47/1994/494/576, 27 October 1995, paragraph 35.
[23] *Kokkinakis v. Greece*, 3/1992/348/421, 19 April 1993.
[24] ECHR, Article 10(2).
[25] ECHR, Article 10(2).

25. In *Vereniging Weekblad Bluf! v. the Netherlands*, the respondent argued that the seizure of the copies of the applicant's newspaper was lawful under the national security restriction of Article 10. The Court ruled that the seizure violated Article 10.[26] First, the information that the government sought to protect was "*insufficiently sensitive to justify preventing its distribution*."[27] Second, the information was made public anyway so that "*the protection of the information as a State secret was no longer justified*."[28] This case is an important precedent for other cases that concern divulging of state secrets as it shows that the Court takes a close look at any restriction on the freedom of expression.

III. Application of these principles to the cases at hand[29]

i. Issues falling under Article 6 ECHR – right to a fair trial

a. Hearing within a reasonable time

26. **Igor Sutyagin**, a researcher at the United States-Canada Institute in Moscow, was detained by Russian authorities on 27 October 1999, and charged with espionage.[30] It was alleged that Mr Sutyagin had handed over information on sensitive military technology to foreign nationals. Mr Sutyagin, who argued that he had not had any access to secret information and had only used open sources for his publication, languished in pre-trial detention for nearly eleven months before a full set of charges was first brought against him. Upon the initial dismissal of his case by the court, Mr Sutyagin was not released but stayed in prison while the FSB conducted additional investigations. Mr Sutyagin was presented with a revised, 5-count charge on 29 July 2002. The new trial did not begin until 3 November 2003, when it had to be postponed until 18 November due to non-appearance of a prosecution witness. On 18 November 2003, the court ordered yet another recess due to the alleged necessity of a medical examination of Mr Sutyagin. On 25 November, when the trial was scheduled to resume, Mr Sutyagin was not brought to the court, allegedly due to a quarantine in the prison. At this point, the trial was postponed indefinitely. Mr Sutyagin's lawyers assert that on 5 December 2003, the prison administration confirmed that the quarantine had been lifted. However, the trial did not resume despite Mr Sutyagin's petitions to this effect, until March 15, 2004, i.e. with another delay of over four months.[31] The verdict was finally pronounced on 5 April 2004, and two days later, Mr Sutyagin was sentenced to fifteen years in prison. This decision was affirmed by the Supreme Court of the Russian Federation on 17 August 2004. All told, Mr Sutyagin was held in detention for a period of four and a half years prior to any decision on his case. During that time, numerous applications for release were rejected, the court relying in part on an Italian visa granted to Mr Sutyagin and which expired in November 1999, to support its view that Mr Sutyagin posed a flight risk. The length of the accused's detention prior to the announcement of the verdict does seem to present a question under the "reasonable time" requirement of Article 6(1).

27. The case of **Valentin Danilov**, head of the Thermo-Physics Center at Krasnoyarsk State Technical University, is another example of extremely protracted proceedings. The FSB first started investigating him in 2000, accusing him of sharing secret information with China. Mr Danilov, whose defence – paralleling the Sutyagin case – was that he had only used material that was in the public domain - was arrested in February 2001. A first treason trial ended in December 2003 with the jury clearing Mr Danilov of all charges. Following an appeal by the prosecution on procedural grounds, the Supreme Court ordered a retrial, which led to Mr Danilov's conviction almost a year later, on 25 November 2004.

28. A military journalist who had exposed environmental violations and corruption in the Russian Navy, **Grigory Pasko** was first detained by Russian authorities on 20 November 1997. He was detained until his acquittal of treason through espionage by the court of first instance on 20 July 1999.[32] He had by this point spent twenty months—over a year and a half— in pre-trial custody. After both sides appealed, the trial

[26] *Vereniging Weekblad Bluf ! v. the Netherlands*, No. 44/1993/439/518, 27 January 1995.
[27] *Vereniging Weekblad Bluf ! v. the Netherlands*, paragraph 41.
[28] *Vereniging Weekblad Bluf ! v. the Netherlands*, paragraph 45.
[29] As explained above (para. 7), it is not my intention to pass judgment on these cases, as would be the task of a court of law. However, in order to draw political conclusions on a serious basis, it is necessary to look at concrete facts. Much of the following information was submitted to me by lawyers and representatives of non-governmental organisations, and made available to all committee members last year as an appendix to the introductory memorandum. I have not received any comments questioning the veracity of any of these factual observations, and I was able to verify myself some of the facts relating to the Russian cases during my fact-finding visit to Moscow.
[30] Mr Sutiagin was charged under Article 275 of the Criminal Code of the Russian Federation.
[31] « Case Study : Igor Sutyagin,» *Human Rights Watch*, October 2003.
[32] Mr Pasko was acquitted of treason, but convicted of "*abuse of his official authority" by this court*. "*Abuse of official authority*" was not, however, one of the crimes with which Mr Pasko was originally charged.

court's decision was vacated and the case sent back for a new trial, at which Mr Pasko was convicted of one count of violating state secrecy and re-imprisoned. The final appellate verdict was pronounced six months later, on 25 June 2002. It thus took four years and seven months for final determination of Mr Pasko's case.

29. **Valentin Moiseyev**, a former diplomat who had been charged with divulging classified information to South Korean intelligence, also endured a lengthy pre-trial detention totalling 2 ½ years.[33]

30. There is clearly a pattern of unreasonable lengthy proceedings in espionage cases in the Russian Federation, a pattern which contributes to the impression that the defendants are being unfairly persecuted rather than prosecuted in accordance with the rule of law.

b. Public nature of the hearing and the judgment

31. Mr **Sutyagin's** lawyers stated that even the judgment in that case was declared secret by the Moscow City Court and that the lawyers were not allowed to make copies of the judgment or to take it outside an especially designated part of the court building. The same is true for the trial and judgment in Mr **Danilov's** case. This seems to be in contradiction with the rulings of the European Court of Human Rights in the *Szucs v: Austria* and *Hadjianastassiou v. Greece* cases cited above.[34] Mr **Moiseyev's** trial was also closed to the public.

32. In my meeting with representatives of the "*Public Committee for the Protection of Scientists*" in Moscow, I was told that it is standard practice in so-called spy cases to insert "*secret*" materials into a file which would otherwise not require confidentiality, and to then classify the whole file as secret. The purpose was to ensure that only hand-picked judges (with security clearances) could consider the cases[35] and to limit public attention by preventing journalists from attending the court hearings. I regard the notion of security clearance for judges as totally unacceptable. By definition, such clearance involves the FSB, which, with the pretext of lack of security clearance can choose the judge it wants to try the case.

c. Equality of arms

- **Alleged close relationship between the prosecutor's office and the FSB**

33. It should be recalled that on accession to the Council of Europe in 1996, the Russian Federation undertook to revise the law on federal security services in order to bring it into line with the Council of Europe principles and standards within one year of accession.[36] More than 10 years after Russia's accession, this has still not been done.[37] The FSB still has its own detention centres, including the Lefortovo pre-trial detention centre in Moscow.[38] However, as the Monitoring Committee report indicates, "*the main problem with the FSB is not that it is still authorised to run a number of pre-trial detention centres but that it retains to date a number of specific investigation powers seriously affecting individuals' rights which it should not have.*" Apart from its normal secret service activities, the FSB "*also performs law enforcement duties that are traditionally … entrusted to specialized departments of the police or the public prosecutor's office.*"[39] Article 10 of the Law on Organs of the Federal Security Service allows the FSB to investigate a very broad list of offences which includes espionage. The Monitoring Committee has noted that "*there is a serious risk of overlap with the investigative powers of the Prokuratura.*"[40]

---

[33] I had the pleasure of meeting Mr Moiseyev during my visit to Moscow ; he currently works with the "*Centre for International Protection*" founded by Karinna Moskalenko.

[34] See paragraphs 11 and 12 above.

[35] I was informed at my meeting with the "*Public Committee for the Protection of Scientists*" that one of the judges having dealt with several of the "*spy mania cases*" (name omitted) had recently defended a thesis before the FSB training institute on "*anti-terrorist investigations*" and is now holder of an advanced diploma of the FSB school.

[36] PACE Opinion No. 193 (1996), On Russia's request for membership of the Council of Europe, ¶xvii: that the Russian Federation intends "*to revise the law on federal security services in order to bring it into line with Council of Europe principles and standards within one year from the time of accession: in particular, the right of the Federal Security Service (FSB) to possess and run pre-trial detention centres should be withdrawn*."

[37] cf. *Honouring of obligations and commitments by the Russian Federation*, Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Mr David Atkinson and Mr Rudolf Bindig, 2 June 2005 (hereinafter Monitoring Committee Report).

[38] Monitoring Committee Report, pp. 45-46; the status of the Lefortovo pre-trial detention centre is also criticised in Assembly Resolution 1418 (2005) based on the report by Sabine Leutheusser-Schnarrenberger on "*The arrest and prosecution of leading Yukos executives*".

[39] Monitoring Committee Report, p. 46.

[40] Monitoring Committee Report, p. 46.

34. In Recommendation 1402 (2000), the Parliamentary Assembly explicitly indicated that, while internal security services such as the FSB play a vital and legitimate role "*in protecting national security and the free order of the democratic state,*" nonetheless, "*internal security services should not be allowed to run criminal investigations.*"[41]

35. Human rights groups question the independence of the prosecutor's office and hence the fairness of trials in the recent spy cases in the Russian Federation. In their open letter to the Parliamentary Assembly, the members of the Public Committee for the Protection of Scientists allege that "*whole paragraphs from statements by FSB generals end up in court sentences*".[42]

36. Mr **Trepashkin**, a former FSB officer turned human rights lawyer, who defended the interests of several victims of the Moscow apartment building bombings, was first arrested – for illegal possession of a firearm - a week before he was scheduled to appear in court and present material potentially embarrassing for the FSB. Mr Trepashkin has consistently maintained that the weapon was planted by the FSB. He was later acquitted of this charge, and accused and finally convicted of having divulged official secrets whilst employed with the KGB/FSB.

37. This example shows that the FSB can hardly be considered a neutral party in the case, to whom it would be reasonable to assign the task of assembling a prosecution for divulging classified information. The FSB has a vested interest in the outcome of these types of cases because the FSB is charged with protecting state secrecy. This implies that, if and when a breach of state secrecy occurs, the FSB, whose competence is thereby called into question, is in the first line as a "*victim*" of the crime, as an injured party[43].

38. In my informative meeting with senior FSB officials in Moscow[44], I repeatedly asked whether the FSB had ever been criticised by the President for exceeding the limits set by the law in the context of the prosecution of the recent high-profile espionage cases. The answer was that whilst the President had indeed at times criticised the FSB, his criticism concerned the failure to prevent certain terrorist attacks, and the thorny issue of corruption. As regards the FSB's powers of criminal investigation, their legal basis was explained to me in some detail, and I was assured that the procedures and limits laid down in the legislation were strictly respected, as demanded by the President. I was also told that "*in the well-known case of Igor Sutyagin, a committee of experts whose conclusion served as the basis for the judicial decision was made up of 24 specialists, each with at least 20 years' experience behind him*".[45]

39. Regarding my question why the recent re-arrest of Mr **Trepashkin** had been carried out by FSB agents and not, as would normally be the case after the revocation of a parole decision, by regular police, I was given evasive answers, despite my insistence[46]. In view of the circumstances of Mr Trepashkin's re-imprisonment and the ill-treatment to which he has been subjected (which made Amnesty International fear for his very life[47]), I have serious misgivings as to the fairness of Mr Trepashkin's treatment by the authorities[48]. A letter I wrote to the Russian authorities in early 2006 asking to be allowed to visit Mr Trepashkin in prison has unfortunately remained unanswered. My efforts to visit Mr. Sutyagin in prison during my visit to Moscow were also unsuccessful. Various officials gave me different reasons why I could not visit Mr Sutyagin in prison. On purpose I leave the matter at that in an effort to keep matters as neutral as possible.

---

[41] Recommendation 1402 (1999), §§1, 6.
[42] Open letter of the Public Committee for the Protection of Scientists, April 23 , 2004, p. 10.
[43] Mr Raykevich, Deputy head of the FSB's industrial counterespionage section said at the meeting with senior FSB representatives in Moscow:" *We look into all maters considered to be current topics for examination, such as failings in our work, because the main task of our service and my section in particular is to protect secrets. In these cases information has leaked out and, consequently, the assessment of those heading our service is that there have been failings in our department's work.*" (Transcript of the meeting of the PACE rapporteur, Christos Pourgourides, with representatives of the Russian FSB (Moscow 22 September 2005), on file with the Committee Secretariat, page 5).
[44] my interlocutors were: Mr A.V. Dashko, Head of the Treaties and Legal Directorate of the FSB, Mr N.A. Oleshko, Head of the Investigations Directorate of the FSB, Mr A.P. Raykevich, Deputy Head of the FSB's industrial counterespionage section; I was accompanied by our Committee colleague Mr Grebennikov, and the Secretary of our Committee.
[45] Transcript, page 4.
[46] Transcript, pages 9-10.
[47] cf. AI appeal of 4 May 2006, http://www.amnestyusa.org/countries/russian_federation/reports.do
[48] detailed information on the background of Mr Trepahskin's case can be found on the website http://eng.trepashkin.ru/reaction/81075.html.

40. The case of Professor **Oskar Kaybishev** also seems to raise issues putting into question the neutrality of the investigation conducted by the FSB[49].

- **Alleged lack of independence of the experts**

41. In the case of **Grigory Pasko**, Ministry of Defence experts advising the court on official secrecy issues worked closely with the respective branches of the FSB, their jobs depending on the special security clearance issued by the FSB.[50]

42. In the case of **Valentin Danilov**, experts testified that the materials divulged by Mr Danilov contained state secrets. According to Eduard Kruglyakov, the deputy head of the Nuclear Physics Institute in Novosibirsk, the experts who advised the prosecutors in Mr Danilov's case were also used in Mr Babkin's case even though the two were working in different subject areas (plasma physics and hydrodynamics). An article in Novaya Vremya identified Mr M. Sychev and S. Panin, Professors at Bauman Technical University (Moscow), as the two experts who had testified in Mr **Babkin's**[51] and Mr **Danilov's** trials. The two professors allegedly testified as experts both in plasma physics (Danilov) and in hydrodynamics (Babkin). Mr M. Sychev is in fact a Professor for a third subject - Spacecraft Machinery and Rockets Carriers. These allegations, if true, may cast serious doubt on the qualification and independence of the experts in these cases and thus on the compliance of the trials with the norms of Article 6 of the European Convention of Human Rights.

43. In Moscow, I had a most informative meeting with a group of eminent scientists and human rights activists, including Mr Yuriy Ryzhov, former Ambassador to Paris and member of the Russian Academy of Sciences, and our former Committee colleague Sergey Kovalev. I was told that Russia's leading scientists in Mr Danilov's field of research were present at the meeting, with the exception of a Professor from Vladivostok who was unable to attend but had written a letter supporting the same position. They were all in agreement that the paper that Mr Danilov had been convicted of transmitting to Chinese scientists was based on standard scientific knowledge that was in the public domain well before Mr Danilov's alleged treason. I was given a copy of the paper in question and encouraged to transmit it to any Western European scientist working in the field, and told that I would undoubtedly receive the same answer.

44. Given the fundamental importance of this issue for the assessment of the fairness of Danilov trial, and with the explicit permission of our committee, I decided to test this claim. With the help of EPTA[52], I identified a leading British expert in the field, Dr. Andrew Coates, who came to testify before our Committee on 7 June 2006[53]. He fully confirmed that Mr Danilov's paper was based on materials that were in the public domain since the early 1990s and could thus not possibly constitute a state secret. In line with our earlier decision, I had also invited one of the Russian court's experts, Professor M. Sychev of Bauman Technical University, but he was unable to attend our meeting. I cannot but conclude from the result of our "test" that the selection of the experts testifying on the secret character of the information concerned must have been fundamentally flawed.

---

[49] I was told that Mr Kaybishev had founded in 1986 in the city of Ufa (Bashkiria) the Russian Academy of Sciences Institute on Problems of Metals Superplasticity, which he had headed for almost 20 years. The Institute had an ongoing cooperation, since 2000, with a South Korean company. FSB officials suspected that information transmitted (which, as I was told, had already been in the public domain beforehand) could have been used for WMD delivery systems. In a search of the director's office, officials reportedly stole RUR 1.6 million and threatened Professor Kaybishev that if he tried to go after them, he would be "dead and buried". Professor Kaybishev nevertheless pressed charges, and the FSB officer in question was reportedly convicted and given a suspended prison sentence of five years. At the same time, his colleagues continued to investigate the case against Mr Kaybishev, initiating numerous inquiries into the Institute's economic and financial activity, apparently without success. Professor Kaybishev was then charged with illegal exports, disclosure of state secrets, theft and forgery of documents. The trial, so I was told, was finished at the end of July 2006, and the judgment is expected in early August.

[50] Seven of the eight experts used in the case of Grigory Pasko worked for the Ministry of Defence and belonged to the "8th directorates" of their units in charge of intelligence and counterespionage activities who work closely with the respective branches of the FSB, Russian security service. These experts' jobs depended on the special security clearance issued by the FSB. As a result, Pasko's lawyers alleged, these experts were not independent from the body that initiated the case (cf. Resolution 1354 (2003) based on the report by Rudolf Bindig on the case of Grigorij Pasko (Doc 9926 of 25.11.2003); see also http://www.bellona.no/.

[51] Professor Babkin was charged with the transfer of "*Shkval*" rocket-torpedo technology to the USA and given a suspended sentence of 8 years. In the spring 2006, the Iranian navy presented the rocket-torpedo Shkval during manoeuvres in the Persian Gulf. I was informed in July that on the application of the Service for Execution of Sentences the Taganskiy Court of Moscow annulled Mr Babkin's criminal record on 9 June 2006, and that Professor Babkin has taken steps to be restored in his position of a university professor.

[52] European Parliamentary Technology Assessment Network http://www.eptanetwork.org/EPTA/

[53] EPTA first directed me to a senior scientist at the European Space Agency (ESA); I was strongly disappointed that after a long wait, he was refused the necessary authorisation to testify before our Committee.

d. Alleged lack of independence and impartiality of the courts

45. This section concerns allegedly biased instructions given to juries by judges, changes in the composition of the juries, and discriminatory treatment of evidence provided by the defence.[54]

46. The lawyers of the accused as well as human rights organisations maintain that the requirement of an independent and impartial tribunal has not been fulfilled in the "*spy mania*" cases in Russia. In the cases of both Mr **Sutyagin** and Mr **Danilov**, the judges' instructions to the jury were phrased in such a way as to avoid asking whether the information disclosed was secret. Of the four questions posed to the jury in Mr Sutyagin's trial, none contained any reference to state secrets.[55] Whilst both men were specifically charged with divulging state secrets, the juries were not even asked whether any of the information transmitted was in fact secret; they were also not asked to determine from where Mr Sutyagin or Mr Danilov had obtained their information.

47. In addition, there have been allegations of improprieties in the jury selection process. In Mr **Sutyagin's** trial, the court replaced the jury after the trial began without giving the defence any reasons for the change. In an interview with the "*Ekho Moskvy*" radio station, Anna Stavitskaya, one of Mr Sutyagin's lawyers, stated that one of the jurors in the trial was a former staff member of the Russian security services, himself involved in an earlier spy scandal.[56] Similarly, in Mr **Danilov's** case, it is alleged that several of the jurors had previously had access to classified information and that one juror had a close relative working in law enforcement.[57]

48. Part of the delay in adjudicating Mr Sutiagin's case[58] was apparently due to the repeated, and unexplained, transfer of his case from one judge to another (in one case, after five months of proceedings). Despite requests from the defence for explanation for the transfer, no explanation was allegedly forthcoming. The lack of explanation raises suspicions that the prosecution was "*shopping*" for a favourable judge.

49. There are also indications that the Russian courts have treated the evidence presented by the parties unequally, giving preference to the prosecution. In Mr **Sutyagin's** case, for example, two expert statements asserting that Mr Sutyagin could have obtained his information entirely from open sources were ruled inadmissible because they did not contain a section describing the methodology of the study. The defence argued that the statement by the expert presented by the prosecution that was ruled admissible also did not contain a methodological section, raising doubts as to the court's impartiality. According to Eduard Kruglyakov, similar concerns were present in Mr **Danilov's** trial, where the court did not take into account a number of written testimonies from leading scientists who asserted that the information transmitted by Mr Danilov came from open scientific sources.[59]

50. Moreover, the defence was barred from questioning the experts advising the court on the secret nature of the information in Mr **Danilov's** case before the jury and from presenting evidence to the jury that the information Mr Danilov was accused of passing on had been openly published and long been available in the public domain. The representative of the Prosecutor General confirmed this during our meeting in Moscow and took the view that the discussion of such technical issues would only confuse the jury and should be seen as a legal issue to be decided by the judge. Given that the secret nature of the information constitutes an essential factual component of the crime for which Mr Danilov was charged, I cannot agree with this statement.

51. Similarly, as regards Mr **Sutyagin's** case, I was told that whilst three separate panels of experts were to look into the secret nature of different pieces of information published by Mr Sutyagin, the materials submitted by the defence showing that the information came from open sources were "*crossed*", i.e. transmitted to the wrong panels. This means that the evidence adduced by the defence that Mr Sutyagin's information came from open sources was not even considered by the panel of experts that ultimately

---

[54] In their open letter to the Parliamentary Assembly, various Russian human rights activists allege that "*whole paragraphs from statements by FSB generals end up in court sentences*." The open letter alleges that the dependence of the prosecutor's office on the FSB means that the accused are not afforded fair trials. (Open letter of the Public Committee for the Protection of Scientists, 23 April 2004, p. 10.).
[55] http://www.bellona.no/en/international/russia/envirorights/33269.html.
[56] "*Jury member in Sutyagin spy case served in secret services*," MosNews.com, 26 October 2004.
[57] « *Russia : Judge Jails Danilov for 14 Years*, » *The Moscow Times*, November 25, 2004.
[58] See paragraph 26 above.
[59] « Russia : Judge Jails Danilov for 14 Years, » *The Moscow Times*, November 25, 2004.

decided whether the information was secret or not. It should also be noted in this context that Mr Sutyagin, so I was told, did not have the security clearance required to gain access to state secrets.

52. One argument that was allegedly used by the prosecution to justify the treason charge was that Mr Sutyagin's personal analysis of the information had generated a state secret in his own mind, which he then passed on to foreigners. It was reflected in a comment made during one of our Committee discussions recalling that much of today's secret services' work consists in collecting and analysing open-source information with a view to briefing the political authorities. In my opinion, such summaries and analyses can only have the character of state secrets if they are produced by relevant state employees for precisely that purpose. If such a briefing is leaked, its content – albeit based on open sources - may indeed give an insight into the quantity and quality of information at the disposal of a country's leadership, and allow conclusions as to its possible position on the subject-matter. But the collection and analysis of open-source information by academic researchers such as Mr Sutyagin is in no way comparable – it is simply the essence of academic work, which cannot be made subject to criminal charges, e.g. for "treason".

e. Alleged violations of the presumption of innocence

53. Before verdicts were reached in several of Russia's high-profile spy cases, senior officials made statements in the press that could have prejudiced the court and the jury and violated the accused's rights. On December 19, 2000, before the court ruled on Mr **Sutyagin's** guilt, the director of the FSB Nikolai Patrushev stated that Mr Sutyagin was guilty of espionage.[60] High-ranking officers of the FSB also publicly denounced Mr **Pasko** as a spy before his conviction.[61] Answering a question about Mr **Moiseev's** case,[62] President Putin stated that Mr Moiseev was guilty no matter whether he worked for South Korean or North Korean intelligence.[63]

54. I am aware that the European Court of Human Rights, which rightly places great value on freedom of expression and information as a foundation of democratic society[64] does not easily find a violation of the presumption of innocence in the form of comments on a pending case in the media.[65] In my view, statements from senior FSB officials are particularly sensitive in that they also call into question the neutrality of this body, which, as we have seen, still plays an important role in the criminal investigation and prosecution of cases involving breaches of official secrecy.[66] In addition, the issue of pre-trial publicity is especially important in cases tried by lay juries as the publicity could lead to a corruption of the jury pool.[67]

f. Alleged insufficient notice of the accusation

55. In the cases at issue, most strikingly in that of Mr **Pasko**, but also in that of Mr **Sutyagin**, the accusation was apparently formulated unclearly both as regards the underlying facts and their legal qualification, and both the factual elements and their qualification were changed during the different stages of the proceedings. The details of these additions and substractions of facts held against the defendants and

---

[60] "In October 1999 an official of the Institute of the USA and Canada of the Russian Academy of Sciences, Sutyagin, was detained. In the course of investigation facts of espionage were revealed […] Preliminarily it is established that Handler obtained from Sutyagin secret information on the armed forces of Russia and transmitted it to intelligence agencies. Unfortunately, some journalists, who do not know about it, show Sutyagin in their publications as '*an honest and courageous citizen who advocates democratic freedoms*.' (Komsomolskaya Pravda, 234 (22458), pp. 8-9.).

[61] Nikolya Sotskov, head of the Pacific Fleet Branch of the FSB, claimed in a local newspaper that Mr Pasko was "*guilty of espionage*." (Vladivostok News, January 29, 1999.).

[62] Moiseev, a Russian diplomat, was accused of passing secret documents to a South Korean diplomat and charged with espionage. He was convicted in December 1999 after a closed trial. Editorial, *The Washington Post*, March 14, 2001, p. A24.

[63] Open letter of the Public Committee for the Protection of Scientists, April 23 , 2004, p. 2.

[64] cf. *Observer and Guardian v. UK*, No.13585/88, 26 November 1991, para.59(a): "*Freedom of expression constitutes one of the essential foundations of a democratic society.*"

[65] The Court has held that adverse pre-trial publicity can be a basis for a violation of Article 6(2). In *Allenet de Ribemont v. France*, the Court observed that while the authorities must inform the public of the criminal investigations in progress, they need to do so "*with all the discretion and circumspection necessary*." *Allenet de Ribemont v. France*, 3/1994/450/529, 27 October 1994, paragraph 38. But in its admissibility decision dated 9 December 2004 on Mr Moiseyev's application (no. 62936/00), the Court held that this particular complaint was manifestly ill-founded, arguing as follows: "*It is true that Mr Putin made a passing remark about the applicant's case in his interview published on 9 July 1999. Although it could indeed be interpreted as an allegation that the applicant had worked for a foreign intelligence service, the statement appears to have been deliberately left open-ended in anticipation of the outcome of the pending judicial proceedings. The Court considers that there was nothing to suggest that Mr Putin prejudged the assessment of the facts by the judicial authorities.*" (page 24).

[66] See paragraphs 33-35 above.

[67] Francis G. Jacobs, *The European Convention on Human Rights*, p. 105.

their different legal qualifications in terms of the criminal code needs to be examined more carefully, in light of the strict standard set by the European Court of Human Rights in its 2006 *I.H. and Others v. Austria* judgment.[68]

ii. Lack of clarity, partial secrecy and broad interpretation of espionage laws (Article 7 ECHR)

a. A short survey of relevant legislation in 23 Council of Europe member countries

56. In order to provide a wider basis for the assessment of the legal context, I have undertaken a modest comparative survey of legislation in Council of Europe member states concerning state secrecy.[69] The comparison focuses, in particular, on how the scope of state secrecy is defined by law.

57. Generally speaking, one can identify three basic approaches: the first consists in a short and general definition of the notion of official or state secret (or equivalent), presumably to be filled in on a case-by-case basis. The second involves lengthy and more detailed lists of specific types of classified information. The third approach combines the other two by defining general areas in which information may be classified as secret, and then relying upon subsequent administrative or ministerial decrees to fill in more specifically which types of information are in fact to be considered as secret.

58. Our comparison includes the legislation of the following twenty-three countries, whose parliaments have responded to the ECPRD request (in alphabetic order): Austria, Belgium, Bosnia-Herzegovina, Denmark, Estonia, Finland, France, Georgia, Germany, Italy, Lithuania, Moldova, the Netherlands, Poland, Portugal, Romania, Russian Federation[70], Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey and the United Kingdom. Of these, fourteen - Austria, Belgium, Bosnia-Herzegovina, Denmark, Estonia, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland (civilian criminal code)[71], Turkey[72] and the United Kingdom – preferred the approach of broad, more generally worded statutory definitions of “*state secrets*.” Six - Finland, Lithuania, Moldova, Poland and Romania and the Russian Federation - laid down by statute more detailed lists of types of classified information. However, the legislation of eight States – France, Georgia, Lithuania, Moldova, Portugal, Russian Federation, Switzerland (military criminal code) and “the former Yugoslav Republic of Macedonia”– specifies explicitly that more detailed lists of classified information would be promulgated by other legal means (e.g. by administrative or ministerial decrees).

59. There are, of course, many other differences among the states’ legislation that I need not dwell on. Some states (Austria and Germany, for example) distinguish between “*official secrets*” and “*state secrets*”, whose violation is sanctioned more heavily. Most states also distinguish different degrees of secrecy (classified or restricted, secret, top secret, etc.). There are also differences in the harshness of penalties foreseen, which may be limited to fines in less serious cases. Some statutes distinguish between duties of civil servants and those of ordinary citizens. Some expressly penalise disclosure through negligence, others require criminal intent. For our specific purpose, these differences are immaterial.

60. As an example of a State that defines state secrecy in general terms, we can cite the Spanish Law of Official Secrets, Article 2: *matters, acts, documents, information, data and objects* can be declared *classified* if their “*knowledge by non-authorized persons could damage or put in risk the security and defence of the State.*” The German definition of state secrets—*“facts, objects or knowledge, which is only accessible to a restricted circle of people, and which must be kept secret from a foreign power in order to avoid the danger of a severe disadvantage for the external security of the Federal Republic of Germany*”—also falls into this category. This approach is perhaps taken to its extreme in the Dutch legislation, which specifies only “*information classified in the interest of the State or of its allies, [including] any object from which such information may be derived, or any such data.*”

[68] see para. 18 above.
[69] This review is based on legislation provided by the research departments of member states’ through an ECPRD (European Centre for Parliamentary Research and Documentation) request launched in June 2006 (cf. footnote 5).
[70] The Russian parliament did not respond to the ECPRD request, but there was no need in that I had received from Mr Grebennikov copies of the relevant laws, of which the Committee secretariat had relevant extracts translated into English.
[71] On the basis of the ECPRD materials, Switzerland belongs in this category as far as its general criminal code is concerned; the military criminal code uses a “*hybrid*” system involving general definitions completed by detailed lists published in other legal instruments.
[72] Turkish Penal Code, Article 328: “*information whose nature requires it to be kept secret for reasons relating to the security or internal or external political interests of the State*”; but the Turkish ECPRD correspondent indicated that the Ministry of Justice is currently preparing a “*State Secrecy Code*” with more detailed definitions.

61. The advantage of this form of legislation is its adaptability to the shifting and disparate factual situations that may arise. The disadvantage, of course, is that it can be very difficult to discern *ex ante* what exactly will be considered "*in the interest of the State or of its allies*," or whether "*knowledge by non-authorized persons*" might in some conceivable way "*damage or put in risk the security and defence of the State*." This form of legislation thus depends crucially on an adjudicatory body that can be relied on to interpret and apply the statute fairly, in view of the details of each case.

62. The reliance on the courts appears to be more limited in states that employ a more or less detailed list of information protected by state secrecy legislation. The Polish statute, for example, distinguishes not only between state and official secrets, but also between two categories of state secrets: secret and top secret. There are fifty-nine types of protected documents under the former, and twenty-nine under the latter. The Lithuanian statute describes twenty-eight types of "*state secrets*," and twenty-four types of "*official secrets*," whereas the Finnish statute lists thirty-two (without distinguishing state from official secrets), and the Romanian thirteen. Thus, determining if a given document or piece of information is a state secret would seem to require only deciding if it falls under one of the enumerated categories. For some categories, this is indeed not too difficult: the more specific the categorisation is, the less controversial a particular application of it is likely to be.

63. However, in some cases, the enumerated categories are themselves broad and/or in need of more substantial interpretation. For example, the Romanian statute includes "*national defence system and its basic elements, military operations, manufacturing technologies, technical specifications of arms and combat techniques used exclusively within the national defence system*" and "*scientific, technologic and economic activities and investments related to the national security or defence and of special importance for the economic, technical and scientific interests of Romania*." Clearly, such statutes are open to broader or narrower interpretations in each case, and so the appropriate application of the law will again depend on the vigilance of the courts.

64. Eight states - France, Georgia, Lithuania, Moldova, Portugal, Russian Federation, Switzerland (military criminal code), and "the former Yugoslav Republic of Macedonia" - have "*hybrid*" statutory schemes. Their general law on state secrets lists several broad, more or less detailed categories of state secrets, while requiring other entities (administrative bodies, ministries, etc.) to provide more detailed lists of restricted information. Article 413-9 of the French *Code Pénal*, for instance, specifies that national defence secrets include information that is "*liable to prejudice national defence or could lead to the disclosure of a national defence secret. A Decree of the Conseil d'Etat shall provide for the levels of classification of information, processes, articles, documents and computerized data or files which are in the nature of national defence secrets and the authorities in charge for the specification of the means to ensure their protection*." Similarly, the Russian Federation Law on State Secrets[73] provides in its Article 5 a long list of "*information constituting a state secret*". In addition, Article 9 specifies that an "*interministerial commission on the protection of state secrets shall draw up, on the basis of proposals from the state authorities and in accordance wit the list of information constituting a state secret, a list of information designated as a state secret*." Article 9 also requires the "*state authorities*" themselves (as distinct from the interministerial commission), within the scope of their expertise, to "*draw up detailed lists of information which is to be classified*". The relation between the three sets of lists remains unclear to me. Ministry of Defence Decree No. 55-96, under which MM. Nikitin, Pasko, and Sutyagin were prosecuted, belonged to the last category of lists by "*state authorities*". It was in part declared void by the Supreme Court of the Russian Federation, and recently abrogated altogether, but I was informed that it was replaced by another decree that is again not in the public domain.

65. Such a hybrid statutory scheme combining broader categories laid down in the statute and more or less detailed lists drawn up by the executive provides at least general notice of what areas may be subject to secrecy regimes and channels judicial discretion through detailed lists compiled by government experts, but without encumbering a national statute with dozens upon dozens of specific examples. The problem is that these secondary lists are not always publicly accessible. Whilst the Lithuanian law on state secrets requires explicitly that the lists drawn up by government agencies be made public, and all subsidiary decrees in the Swiss system of military penal law are published in the Official Collection of Federal Legislation, the Moldovan statute states explicitly that "s*tate administration bodies whose heads are empowered to refer information to state secret prepares a detailed departmental list of information that should be classified. These lists include information that is in the disposition of the mentioned above bodies and established the grade of their classification. These lists are approved by the chief of respective state administration bodies and* ***are not made public***."[74] The replies received from Georgia, "the former Yugoslav Republic of Macedonia" and Portugal do not indicate clearly whether whether similar lists are made public, or whether

[73] as last amended on 6 October 1997.
[74] bold lettering added.

any non-public lists can be used in court in support of criminal charges[75]. The Russian Law on State Secrets requires in its Article 9 that the "*interministerial list*" of information constituting a state secret shall be published, whereas when it comes to other such lists drawn up by "state authorities", "*the question of whether such lists should be classified shall be determined by their content*", thus leaving open the possibility that such all or part of such lists remain secret.

66. Relying upon publicly inaccessible lists effectively turns the content of the law on state secrets into a state secret itself. As already pointed out in Mr Bindig's report on the conviction of Grigory Pasko, this raises serious doubts as to the compatibility of such schemes with the principle of *nulla poena sine lege*, embodied in ECHR Article 7[76]. States have a legitimate interest in maintaining a zone of secrecy in sensitive areas. But the decision on where, and how, to describe that zone cannot itself be secret. Supplementary lists of information classified as state secrets must be publicly accessible.

67. The question whether information that is in the public domain can be a state or official secret has not been addressed expressly in any of the laws we compared. As shown above[77], it is a matter of logic that information in the public domain cannot be considered as secret.[78]

68. To sum up, each of these legislative approaches allows for reasonable responses to the difficult task of specifying in advance the types of information that the State has a legitimate interest in protecting, while nonetheless respecting the freedom of information and the need for legal security. But any administrative or ministerial decrees giving content to more generally worded statutes must at the very least be publicly accessible. Also, in the absence of a vigilant and truly independent judiciary, and of independent media that are ready to expose any abuses of power, all legislative schemes reviewed are liable to abuse.

b. The situation in the Russian Federation in particular

69. As we have seen in the comparative review of state secrecy legislation, the main difference between the legislative framework in Russia (and in Moldova and possibly Portugal[79]) and that in other responding countries is that the generally-worded statutory descriptions of things secret are filled in by ministerial decrees that are themselves secret.

70. In fact, In bringing recent espionage cases to trial, the FSB has also relied on secret and retroactive decrees that were not known to the general public or to the accused at the time they committed the alleged crime.[80] In Mr **Sutyagin's** case, for example, human rights activists maintain that the expert assessments were based on a secret Ministry of Defence Decree No. 055-96 and that the defence was not even allowed to consult the decree in preparation of his defence, much less could he refer to it in assessing the legality of his actions beforehand. Similarly, In the case of Mr **Pasko**, a secret decree was used as a basis for the conviction[81]. I was informed by Russian human rights lawyers that while the Supreme Court of the Russian Federation, in Mr **Nikitin's** case, had indeed declared ten paragraphs of the secret decree 055-96 invalid,

---

[75] The Portuguese reply states: "*Institutions responsible for classifying information or documents as reserved in accordance with legal provisions may issue norms on which types of documents are classified and the degree of classification. These are not published in the official journals and are, therefore, not accessible to the ordinary citizen. However, the persons cleared to read and process classified documents are aware of the aforementioned norms. […] We are not aware of any cases of non-public texts being used in court in support of accusations of espionage or breach of official secrecy.*"

[76] Doc 9926, 25 September 2003, para. 13: "*Whatever the situation regarding the validity of decree no. 55:96 at the time of the final judgment of the Military Collegium on 25 June 2002, the treatment of this issue by the military courts seems to show that its fundamental importance has not been fully realised. The rule "nulla poena sine lege", which is a fundamental principle of criminal justice laid down in Article 7 of the ECHR, requires that any citizen subjected to criminal sanctions must be in a position to know which acts are punishable or not. The very concept of "secret decrees" serving as a basis, even indirectly, of criminal convictions, is most unusual in a state subjected to the rule of law.*"

[77] cf. para. 52.

[78] The Finnish Act on the Openness of Government Activities explicitly provides that "*everyone shall have the right of access to an official document in the public domain.*" The Finnish legislation is exemplary in specifying clearly and in detail the conditions under which a government document enters the public domain.
The German ECPRD correspondent wrote in reply to my question to this effect - without providing a reference - that "*facts which are obvious or which can easily be established from generally available sources are not secrets*". Both the German and Austrian statutory definitions of "state secret" specify that information must be accessible only to a restricted number of people in order to qualify as a state secret.

[79] See footnote 75 above.

[80] Monitoring Committee Report, paragraph 227.

[81] cf. Resolution 1354 (2003), para. 4, and para. 13 of the explanatory memorandum (Doc 9926 of 25.11.2003); the decree in question was repealed after the incriminated acts, but before the ruling against Pasko, and was still held against him.

the remainder (almost 800 paragraphs) were still applied in several of the cases at hand. The decree has recently been replaced by another one, with the same heading, whose content has again not been made public.

71. In view of this untenable situation, I particularly welcome the following statement of the Board of the Public Chamber of the Russian Federation[82] dated 30 June 2006, which states that

> "*There are serious reasons to believe that the current state secret protection system is to a large degree an inheritance from the totalitarian regime and is conceptually unable to be effectively used in a democratic market economy. This situation allows wide manipulations of the concept of state secret.*"[83]

iii. Harsh application of official secrecy laws in Russia and the freedom of expression: the big chill

72. Article 10 ECHR specifically states that freedom of expression is to be enjoyed "*regardless of frontiers*." Russian human rights activists have alleged that, in the recent spy cases, the defendants were *de facto* prosecuted for contact with foreigners. These criminal cases, in conjunction with statements of senior state officials alluding to criminal sanctions for certain contacts with foreigners[84] have had a serious chilling effect on freedom of expression and on international scientific cooperation.

73. This has also been recognised by the Public Chamber of the Russian Federation, whose Board concluded in its previously cited Statement of 30 June 2006 that

> "*The law enforcement practice that more often than not ignores the specificity of scientific work in today's democratic Russia can have negative influence on domestic fundamental and applied science.* ***Limitation of professional contacts of Russian scientists with their foreign colleagues***[85] *(except for cases when such limitation is caused by interests of national security envisaged by the law) and cultivation of distrust and suspicion in the scientific community can have a negative impact on the development of the most advanced branches of sciences, atmosphere of scientific creative work, and the psychological climate in research teams*."[86]

74. This statement is all the more remarkable as it emanates from a body whose members are presidential appointees.

75. I have asked many interlocutors in Moscow what may be the reasons for this harshness. The answers I was given differ widely.

76. Our former colleague Sergey Kovalev and other human rights activists place the "*spy mania*" cases in the context of other recent high-profile cases, in which different groups of society have been addressed warnings by the "*Siloviki*"[87] re-asserting their power, after they had to go into hiding during the Yeltsin years. As Mr Kovalev put it: given the genetic fear of the Russian people of the KGB, after six decades of dictatorship, there was no need to rebuild the "*Gulag*" – it was enough to wave a piece of barbed wire.

---

[82] A body set up on the initiative of the President in 2005 with 126 members representing "*national regional and inter-regional non-governmental organisations and associations of non-commercial organisations*", the first 42 members having been appointed by presidential decree, the rest by cooptation. Its creation has been widely criticised as an attempt to control civil society (cf. for example MosNews 1 October 2005; Nikolai Petrov, The blessing and curse of the Public Chamber, Carnegie Moscow Center, 24 July 2005).

[83] Statement of the Board of the Public Chamber, Moscow 30 June 2006, para. 2 (unofficial translation).

[84] In a speech made in the State Duma on April 19, 2000, President Putin stated that "*if it is discovered that the Foreign Affairs Minister has been maintaining contacts with representatives of foreign states outside the framework of his official duties, then he, like … any other citizens of the Russian Federation, will be subjected to certain procedures in accordance with criminal law. I should further point out that the recent measures by the Federal Security Service show that this is entirely possible"* (Open letter of the Public Committee for the Protection of Scientists, April 23 , 2004, p. 3). In an interview with Interfax, the deputy head of the counterintelligence department of the FSB, Lieutenant-General Volobuev stated that "*those Russian citizens who work with odd foreign customers in 'Sutyagin's mode' must think of possible collisions with the law and stop in time without bringing the matter to the dock*." (Interfax, February 26, 2001). More recently, the "*spy stone*" scandal, in which State-controlled media, in a sensationalist style, drew links between prominent human rights groups and the British secret service, has contributed to keeping up the "*spy mania*" atmosphere in Russia (cf. for example Mark Oliver in the "Guardian" of 23 January 2006; an NGO view can be found on www.bellona.org : "*FSB casts first stone in war on NGO's*".)

[85] highlighting added.

[86] Statement of the Public Chamber (footnote 1), para. 1.

[87] lit.: the "*power people*", an expression used to describe the members of the security apparatus.

Through the Gusinsky case[88], Mr Kovalev said, all media were warned: if you do not toe the line, Gazprom will buy you. Through the Khodorkovsky case, all industrialists were told: if you meddle in politics, you will be robbed of your assets and sent to prison. Through the "*spy mania*" cases, scientists and would-be "*whistleblowers*" were warned not to act too independently. Mr Kovalev predicted that next in line would be non-governmental organisations, the new law in this field having prepared the ground for the coming onslaught.

77. Some of the senior scientists I spoke with were of the opinion that the espionage cases against their peers may simply be an expression of the mediocrity of mid-level law enforcement officials, who have not understood that times have changed and that the free flow of information is an important prerequisite for healthy economic development. These cases were an expression of the transition problems in this huge country with many centres of power, which is still in the process of learning the ropes of modern democratic and market-oriented development. The mediocrity of the law enforcement apparatus and the weakness of the courts also leave room for different types of corruption. One explanation I heard for some of the cases against successful scientists was that they may have refused to "*share*" their earnings. Others may have been motivated by a desire for career advancement.[89] The FSB as a whole, so I was told, badly needed some presentable successes after having been criticised by the President for its failures in preventing some terrible terrorist acts on Russian territory.

78. The official position is that the recent accumulation of high-profile espionage cases, which are motivated by the intention to enforce the law and to reassert the legitimate interests of the state is a simple coincidence.

79. Personally, I do not wish to speculate about the reasons for this wave of doubtful criminal prosecutions for breaches of state secrecy, although I originally did have a certain sympathy for the thesis that these cases are still symptoms of a difficult transition process, but events have forced me rather to adopt Mr Kovalev line of thought. Mr Kovalev's predication of an onslaught on non-governmental organisations is regrettably coming true. The harassment of the Moscow-based human rights NGO International Protection Centre and its founder, Russian lawyer Karinna Moskalenko, as well as various other measures against NGO's, clearly indicate that the authorities are indeed waving to the Russian people, through selected court cases, a piece of barbed wire.

iv. Courts protecting freedom of speech and information: lenient application of state secrecy laws in recent British and German cases

80. Recent cases concerning breaches of official secrecy in the United Kingdom and Germany provide a good perspective on the role of courts in protecting freedom of information from overly zealous law enforcement.

81. **David Shayler** was a member of the British MI5 from November 1991 until October 1996. He signed a confidentiality agreement both upon accepting the post and upon resigning it. Nevertheless, Mr Shayler eventually went to the press with information originating from his tenure in the security service, at which point the Crown successfully prosecuted him for breach of official secrecy. In this case, the confidential nature of the information Mr Shayler made public was not contested by the defence. Mr Shayler received a six month prison sentence, and was released after seven weeks.

82. In the well-known "**Spycatcher**" case, a civil injunction against the publication, in the United Kingdom, of newspaper articles detailing the contents of a book featuring alleged inside information on the British special services, which had been upheld by the British courts, was found by the European Court of Human Rights to be disproportionate and therefore in violation of Article 10 ECHR.[90] The Strasbourg Court based itself largely on the fact the book in question was freely available in other countries (and could be mail-ordered from other countries for shipment into the UK) so that national security considerations could not be invoked by the Crown to justify the restriction of freedom of speech.

---

[88] Mr Gusinsky won a case before the European Court of Human Rights, which found Mr Gusinsky's arrest to be in breach of Article 5 ECHR because it was motivated by the authorities' intention to put pressure on Mr Gusinsky to sell his NTV television network to Gazprom.

[89] Mr Putin had reportedly made a passing remark during a state visit to China that this country's impressive progress in space exploration may have been helped by stolen Russian secrets. Certain officials may have thought to ingratiate themselves by catching a Chinese spy, and fortuitously (for them) came across Mr Danilov's cooperation with Chinese partners in the field of satellite technology, which had been subject to a local FSB authorisation procedure.

[90] See *Observer and Guardian v. the United Kingdom,* No. 13585/88, 26 November 1991, and *The Sunday Times v. the United Kingdom,* No. 13166/87, 26 November.

83. In Germany, **Bruno Schirra**, a journalist for the “Cicero” magazine, quoted from a secret file of the federal office for criminal investigations (*Bundeskriminalamt*) on the Jordanian terrorist Abu Mussab al-Sarkawi in an article published in March 2005. In the autumn of 2005, police investigators performed a highly publicised search of the offices of “Cicero” and Mr Schirra’s home. Otto Schily, then Federal Minister of the Interior, publicly warned the media against taking advantage of security leaks.[91] The ensuing public outcry against this attack on press freedom led to a nationwide discussion on the topic. The decision of the Potsdam court of 17 July 2006 refusing to open criminal proceedings against Mr Schirra has been described in the media as a disaster for the prosecution, putting an end to the perceived “*orchestrated campaign*” against the press.[92]

84. Whilst the court’s legal interpretation may be debatable[93], the factual argument - that the secret was no longer one because the document had been cited earlier, in a book by French journalist Jean-Charles Brisard published in November 2004 – shows very clearly that information which is already in the public domain cannot be considered as an official secret.

85. In comparison to the lenient treatment of persons accused of breaches of official secrecy in the recent British and German cases, the punishments meted out in the Russian courts - especially in Mr Danilov’s and Mr Sutiagin’s – prison terms of 15 and 14 years respectively – seem excessively harsh.

IV. Conclusions

86. Following the analysis of key fair trial issues in criminal cases concerning espionage or divulging state secrets in terms of the relevant provisions of the European Convention on Human Rights and the case law of the Strasbourg Court, I applied these principles to a number of individual cases to which my attention had been drawn following requests addressed to human rights groups and specialised professional organisations concerning all member states of the Council of Europe.

87. Clearly, as far as Europe is concerned[94], the problem concerns mainly the Russian Federation, where a number of individuals were given strikingly harsh sentences, and whose scientific and journalistic communities appear to be intimidated to such an extent that even the newly established Public Chamber of the Russian Federation has recently expressed concerns in this respect.[95] But we have noted that the executive has also attempted to discipline and intimidate the media on grounds of breaches of official secrecy in other countries in Europe, such as Germany, as well as in the United States, in particular in connection with the publication of allegations on secret detentions and other illegal practices of the CIA.[96] I have therefore found it useful to include, in the draft resolution, a reminder of the key principles that must be respected in order to ensure fairness of trials in such sensitive cases, in all member states, and calling on the courts to be vigilant against any attempts to stifle freedom of expression and of information through abuse use of official secrecy laws.

88. As regards the concrete cases at hand, and without usurping the role of a court of law, we cannot but note that there are strong indications that serious human rights violations have occurred in these cases. The only logical conclusion is to urge the competent authorities to set free without further delay the persons concerned, who were condemned by what appears to be the overly harsh application of fundamentally flawed statutory rules and procedures.

---

[91] “*The State will not tolerate being treated in such a way*” (quoted by Holger Stark, in: Spiegel-online 17 July 2006).

[92] See footnote 79; http://www.rbi-aktuell.de/cms/front_content.php?client=1&lang=1&idcat=31&idart=8617; Reporters without Borders (http://www.rsf.org/article.php3?id_article=16786) and the International Press Institute (http://www.ifex.org/alerts/content/view/full/70697/?PHPSESSID=) also criticised the action taken by the German authorities.

[93] the journalist could not be an accessory to the breach of official secrecy committed by the journalist’s unknown “*source*”, because this breach was already completed when the journalist first received the leaked document. This interpretation would strongly restrict the scope of aiding and abetting the breach of official secrecy by journalists and would make the proposal *de lege ferenda* by opposition parties to decriminalise aiding and abetting by journalists of breaches of official secrecy unnecessary.

[94] some replies received from professional organisations working on a world-wide level have also indicated serious cases concerning China, Pakistan, Iran, and the Middle East; concerning Europe, they were very much aware of the well-known Russian cases covered in this report, but of no others.

[95] Statement of 30 June 2006 (above footnote 1).

[96] cf. Dick Marty’s report on alleged secret detentions and unlawful interstate transfers involving Council of Europe member states adopted during the June 2006 part-session, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1507.htm, para. 3.

89. The draft resolution, in its paragraph 8, deliberately leaves the question open by which means the victims of "*spy mania*" shall be helped. Recent positive developments show that different means exist, and can work.

90. A good example is the case of Professor Babkin, in which the court reportedly annulled his condemnation – a suspended sentence of 8 years – following an application by the Service for the Execution of Sentences.[97] In the case of Mr Soyfer, the FSB found the strength not only to drop the charges, but to apologise to Mr Soyfer. In the course of the proceedings against Mr Shchurov and Mr Khvorostov, charges against Mr Khvorostov were dropped, and Mr Shchurov was given a fairly lenient suspended sentence of two years. In this context, I should like to express my admiration for the work of the Public Committee for the Protection of Scientists, whose work behind the scenes has helped to prevent much further damage.

91. The wish to help is also evident from the previously cited statement of the Public Chamber of 30 June 2006, which further finds that:

> *"With regard to cases of this category, it is necessary to summarize the case-law and receive clarification from the Supreme Court of the Russian Federation as this does not exist now and has never been done. In view of the fact that appeals of scientists Messrs Sutyagin and Danilov, who were convicted of high treason, under the judicial review procedure are now pending at the Supreme Court of the Russian Federation, we would like to emphasize that the position of the Supreme Court of the Russian Federation with respect to such questions as the competence of experts and the role of jury in determination of the real secrecy of the alleged information will set a precedent for the destiny of Russian scientists."*[98]

92. My aim – and I am confident that this is shared by our Committee and the Assembly as a whole - is to encourage decision-makers in the Russian Federation to find ways and means to repair the damage done to a number of individuals and to Russian society as a whole, and to avoid further damage being done. I also wish to encourage courts in all Council of Europe countries to stand up for freedom of expression and information. This is the purpose of the draft resolution and recommendation that I am submitting herewith.

---

[97] see footnote 51 above.
[98] Statement (footnote 1), para. 4.

APPENDIX

Programme of the Rapporteur's visit to Moscow on 21-23 September 2005

Wednesday 21 September 2005

Meetings with NGOs:
- **Public Committee for the Protection of Scientists**
- **Centre for International Legal Protection**
- **Representatives of different human rights NGOs (including Moscow Helsinki Group, All-Russia Movement for Human Rights, Memorial)**

Thursday 22 September 2005

10 h – 11 h 30 **Meeting with representatives of the Federal Security Service and deputies of the State Duma**

12 h – 13 h 30 **Meeting at the Office of the Prosecutor General of the Russian Federation**

14 h – 15 h **Working lunch with members of the Russian Delegation to the PACE**

Friday 23 September 2005

10 h – 11 h 30 **Meeting at the Federal Penitentiary Service**

14 h 30 - 15 h 30 **Meeting with the Chairman of the State Duma Legal Affairs Committee, Mr V. Krasheninnikov**

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10426, Reference No 3052 of 28 January 2005

Draft resolution adopted unanimously and *draft recommendation* adopted with one vote against by the Committee on 15 September 2006

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr Adrien Severin, Mr György **Frunda** (Vice-Chairpersons), Mrs Birgitta Ahlqvist, Mr Athanasios **Alevras**, Mr Rafis Aliti, Mr Alexander **Arabadjiev**, Mr Miguel Arias, Mr Birgir Ármannsson, Mr José Luis Arnaut, Mr Abdülkadir **Ateş**, Mr Jaume Bartumeu Cassany, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Giorgi Bokeria, Mrs Olena Bondarenko (alternate: Mr Vitaliy **Shybko**), Mr Erol Aslan **Cebeci**, Mrs Pia **Christmas-Møller**, Mr Boriss **Cilevičs**, Mr Domenico Contestabile, Mrs Herta Däubler-Gmelin, Mr Marcello Dell'Utri, Mrs Lydie Err, Mr Jan Ertsborn, Mr Václav Exner, Mr Valeriy Fedorov (alternate: Mr Alexey **Alexandrov**), Mr Jean-Charles **Gardetto**, Mr Jószef Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mr Holger Haibach, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Michel Hunault (alternate: Mr Yves **Pozzo di Borgo**), Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko **Ivanji**, Mr Sergei Ivanov, Mr Tomáš Jirsa, Mr Antti Kaikkonen, Mr Yuriy Karmazin, Mr Karol Karski, Mr Hans Kaufmann, Mr András **Kelemen**, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Tony **Lloyd**, Mr Humfrey Malins, Mr Andrea **Manzella**, Mr Alberto Martins, Mr Tito Masi, Mr Andrew **McIntosh**, Mr Murat **Mercan**, Mr Philippe Monfils (alternate: Mr Luc **Van den Brande**), Mr Philippe Nachbar, Mr Tomislav Nikolić, Ms Ann Ormonde (alternate: Mr Paschal **Mooney**), Mr Rino Piscitello, Mrs Maria Postoico, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine, Mr Armen Rustamyan, Mr Michael Spindelegger, Mrs Rodica Mihaela **Stănoiu**, Mr Christoph Strasser (alternate: Mr Johannes **Pflug**), Mr Petro Symonenko, Mr Vojtech Tkáč, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis **Varvitsiotis**, Mrs Renate Wohlwend, Mr Krysztof **Zaremba**, Mr Vladimir Zhirinovsky, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Ms Heurtin