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Member states' duty to co-operate with the European Court of Human Rights

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

Summary

As all states parties to the European Convention on Human Rights (ECHR) have undertaken not to hinder in any way the effective exercise of the right of individual applications (Article 34 of the Convention), the Committee is deeply worried about the fact that a number of cases involving the alleged killing, disappearance, beating or threatening of applicants initiating cases before the Court have still have not been fully and effectively investigated by the competent authorities. On the contrary, in a significant number of cases there are clear signs of lack of willingness to effectively investigate the allegations and in some cases the intention of whitewashing is clearly apparent.

Illicit pressure has also been brought to bear on lawyers who defend applicants before the Court, and who assist victims of human rights violations in exhausting national remedies before applying to the Court. Such pressure has included trumped-up criminal charges, discriminatory tax inspections and threats of prosecution for "abuse of office". Similar pressure has been brought to bear on NGOs who assist applicants in preparing their cases.

The Committee therefore urges all member states to fully co-operate with the Court and in particular to cease acts of intimidation against applicants and their lawyers. Furthermore, they should take robust action to prosecute and punish the perpetrators and instigators of such acts, in such a way as to send out a clear message that such action will not be tolerated by the authorities.

It also encourages the Court to continue taking an assertive stand in counteracting pressure on applicants and their lawyers, as well as on lawyers working on the exhaustion of internal remedies, including by an increased use of interim measures, and the granting of priority to relevant cases. As regards the lack of co-operation of member states in the establishment of facts, concrete measures proposed by the Committee include increased recourse, in appropriate cases, to factual inferences and the reversal of the burden of proof.

A. Draft resolution

1. The Parliamentary Assembly stresses the importance of the European Court of Human Rights (hereinafter "the Court") for the implementation of the European Convention on Human Rights (hereinafter "the Convention") in all member states of the Council of Europe. The right of individuals to apply to the Court is a central element of the human rights protection mechanism in Europe and must be protected from interference at all levels.

2. The Court requires the co-operation of all states parties at all stages of the procedure and even before a procedure has formally begun. In view of the subsidiary nature of the Court's intervention, and its lack of investigatory resources in the countries concerned, national authorities have a positive duty to co-operate with the Court as regards the establishment of facts.

3. The Assembly is satisfied that, in general, co-operation of states with the Court functions smoothly. It commends the national representatives before the Court for their important contribution to maintaining constructive working relations between the competent national authorities and the Court.

4. As most states co-operate smoothly with the Court, it is especially important, as a matter of equal treatment of all member states, to take appropriate steps towards resolving the remaining problems. The Assembly therefore thanks the Committee of Ministers for having taken up the issue of member states' duty to co-operate with the Court in its Resolution ResDH(2006)45 adopted on 4 July 2006.

5. As all states parties to the Convention have undertaken not to hinder in any way the effective exercise of the right of individual applications (Article 34 of the Convention), the Assembly is deeply worried about the fact that a number of cases involving the alleged killing, disappearance, beating or threatening of applicants initiating cases before the Court have still have not been fully and effectively investigated by the competent authorities. On the contrary, in a significant number of cases there are clear signs of a lack of willingness to effectively investigate the allegations and in some cases the intention of whitewashing is clearly apparent.

6. Illicit pressure has also been brought to bear on lawyers who defend applicants before the Court and who assist victims of human rights violations in exhausting national remedies before applying to the Court. Such pressure has included trumped-up criminal charges, discriminatory tax inspections and threats of prosecution for "abuse of office". Similar pressure has been brought to bear on NGOs who assist applicants in preparing their cases.

7. Such acts of intimidation have prevented alleged victims of violations from bringing their applications to the Court, or led them to withdraw their applications. They concern mostly, but not exclusively, applicants from the North Caucasus region of the Russian Federation. Cases of intimidation concerning other regions of the Russian Federation, as well as from Moldova, Azerbaijan, and – albeit less recently - Turkey have also been brought to the attention of the Parliamentary Assembly.

8. In a significant number of cases, the competent authorities of several countries have failed to co-operate with the Court in its investigation of the facts. These cases include the persistent non-disclosure of case files or other relevant documents and even the refusal to allow a planned fact-finding visit of the Court to proceed.

9. The Assembly notes that the Court has developed a number of instruments to counteract lack of co-operation by states parties, both regarding interferences with the right of individual application and lack of co-operation in the establishment of facts. In particular, Rule 44 of the Rules of the Court, adopted in 2004, clarifies and strengthens the Court's position as regards failure to co-operate.

10. The Assembly encourages the Court to continue taking an assertive stand in counteracting pressure on applicants and their lawyers as well as on lawyers working on the exhaustion of internal remedies.

11. The Court has allowed exceptions from the need to exhaust internal remedies in cases where such remedies are either ineffectual or impractical. The Assembly believes that the requirement of

exhausting internal remedies ought to be applied with considerable flexibility in the cases of applicants who are subjected to intimidation or other illicit pressure in order to prevent them from pressing charges against the perpetrators before the local courts or from exhausting all internal remedies.

12. In certain cases the Court has also given priority to cases involving applicants subjected to undue pressure. In view of experience showing that the period between the registration of an application with the Court and its communication to the authorities of the respondent state may be particularly dangerous for applicants in terms of the exercise of pressure, the Assembly encourages the Court to do its utmost to shorten this period. Granting priority treatment to such cases may provide a disincentive for those tempted to apply undue pressure.

13. The Court has also used the instrument of interim measures (Article 39 of the Rules of the Court) in order to prevent irreparable damage. The Assembly commends the Court for finding that such interim measures are binding on states parties. It considers that this instrument may have still wider potential uses for protecting applicants and their lawyers who are exposed to undue pressure. The Court may find it useful in this respect to examine the practice of the Inter-American Court and Commission on Human Rights, which have used interim measures to enjoin the authorities to place applicants under special police protection in order to shield them from criminal acts by certain non-state actors.

14. As regards national authorities' co-operation in the establishment of facts, the Court has extended – on a case-by-case basis – the notion of "necessary facilities" that states must put at the disposal of the Court for the effective conduct of investigations (Article 38 paragraph 1(a) of the Convention), to include submitting documentary evidence to the Court, as well as identifying, locating and ensuring the attendance of witnesses at hearings, and making comments on and replying to questions asked by the Court.

15. Finally, in appropriate cases in which the applicant has succeeded in making a *prima facie* case, the Court has made inferences from a respondent state's refusal to co-operate in the establishment of facts, including presumptions of fact or the reversal of the burden of proof.

16. The Assembly commends the Court for its assertiveness in developing case law concerning member states' duty to co-operate in the establishment of facts. In view of further harmonising the application of this case law, it encourages the Court to consider laying down key principles in its Rules of Procedure, similar to the Inter-American Court and Commission on Human Rights.

17. The Assembly therefore calls upon the competent authorities of all member states to:

17.1. refrain from putting pressure on applicants, potential applicants, their lawyers or members of their families, aimed at obliging them to refrain from submitting applications to the Court or withdrawing those applications which have already been submitted;

17.2. take positive measures to protect applicants, their lawyers or members of their families from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner;

17.3. thoroughly investigate all cases of alleged crimes against applicants, their lawyers or members of their families and to take robust action to prosecute and punish the perpetrators and instigators of such acts in such a way as to send out a clear message that such action will not be tolerated by the authorities;

17.4. assist the Court in fact-finding by putting at its disposal all relevant documents, including the complete case-file concerning criminal or other proceedings before the national courts or other bodies, and by identifying witnesses and ensuring their presence at hearings organised by the Court;

17.5. sign and ratify, insofar as they have not already done so, the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights.

18. The Assembly is of the view that member states' co-operation with the European Court of Human Rights would benefit if the Court were to continue to develop its case law to ensure full implementation of the member states' duty to co-operate with the Court, in particular by:

18.1. taking appropriate interim measures, including new types thereof, such as ordering police protection or relocation of threatened individuals and their families;

18.2. urgently notifying applications to respondent states in cases where the Court is informed of credible allegations of undue pressure on applicants, lawyers or family members;

18.3. granting priority to such cases;

18.4. taking up cases of alleged unlawful pressure on applicants and lawyers with the representatives of the state concerned and, as appropriate, alerting the Committee of Ministers to any persistent problems;

18.5. wherever possible continuing to process applications that have been withdrawn in dubious circumstances;

18.6. applying with considerable flexibility, or even waiving, the requirement of exhaustion of internal remedies for applicants from the North Caucasus region (Chechen and Ingush Republics, Dagestan, North Ossetia) until substantial progress has been made in establishing the rule of law in this region;

18.7. making use of presumptions of fact and reversing the burden of proof in appropriate cases, including in cases in which there is prima facie evidence of undue pressure having been exercised on applicants or their lawyers.

19. The Assembly invites the Council of Europe Commissioner for Human Rights to monitor the implementation of the states' duty to co-operate with the Court.

20. It also invites national parliaments to include all aspects of states' duty to co-operate with the Court in their work aimed at supervising the compliance of governments with obligations under the Convention, and to hold the executive or other authorities accountable for any violations.

B. Draft recommendation

1. The Parliamentary Assembly refers to its Resolution … (2007) on member states' duty to co-operate with the European Court of Human Rights.

2. Whilst commending the Committee of Ministers for having taken up different aspects of the states' obligation to co-operate with the European Court of Human Rights (Resolutions ResDH(2001)66 and ResDH(2006)45), the Assembly regrets that the Committee of Ministers has as yet failed to address the allegations of unlawful pressure on applicants to the Court, their lawyers, members of their families or the NGOs assisting them.

3. It therefore invites the Committee of Ministers to address a recommendation to all member states inviting them to take the necessary measures in order to prevent applicants who have initiated proceedings before the Court, their lawyers, members of their families, or the NGOs assisting them from being subjected to unlawful pressure or reprisals, and to ensure that perpetrators and instigators of such acts are brought to account.

4. It further invites the Committee of Ministers to monitor the implementation of this recommendation.

C. Explanatory memorandum, by Mr Christos Pourgourides, Rapporteur

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A. Introduction

i. Procedure

1. The motion for a resolution on member states' duty to co-operate with the European Court of Human Rights (Doc 10387 dated 3 January 2005) was transmitted to the Committee on Legal Affairs and Human Rights for report on 24 January 2005 (Reference No 3040). At its meeting on 25 January 2005, the Committee appointed Mr Pourgourides as Rapporteur. At its meeting on 3 October 2005, the Committee considered an Introductory Memorandum presented by the Rapporteur (AS/Jur (2005) 43)).

2. On 29 June 2006 a public hearing was held with the attendance of Mr Vincent Berger, Jurisconsult of the European Court of Human Rights; Mrs Karinna Moskalenko, Director of the Centre for International Legal Protection, ICJ Commissioner for the Russian Federation (Moscow); Professor Bill Bowring of the European Human Rights Advocacy Centre (EHRAC) (London); and Dr Francesco Crisafulli, Agent of the Italian Government to the European Court of Human Rights[1].

[1] See AS/Jur (2006) PV 07 for the minutes of this hearing.

ii. Importance of the member states' duty to co-operate with the European Court of Human Rights

3. The European Convention on Human Rights (hereinafter the "Convention") and its protocols, which enshrine basic human rights for almost all individuals in Europe[2], and provides access to individuals, after the exhaustion of internal remedies, to the European Court of Human Rights (hereinafter "the Court"), is the cornerstone of the system of the protection of human rights in Europe. The Convention, by recognising the right of individual application, has given individuals the status of subjects of international law. But the effectiveness of the right of individual application largely depends on the states parties' co-operation with the Court at all stages of the procedure, including, as shown below, before an application reaches the Court. The functioning of the various mechanisms employed by the Court in carrying out its task of examination of an individual application can only be maintained with the assistance of the member states.

4. The Parliamentary Assembly has always attached a very high value to the right of individual application by "any person claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto" (Article 34 of the Convention). In recent discussions on reforms needed to safeguard the Court's effectiveness in the face of the high and rising number of applications, the Assembly has vehemently opposed any proposals to restrict the right of individual application in the name of efficiency or expediency.

5. The Committee of Ministers has in its turn repeatedly stressed the importance of the states' duty to co-operate with the Court. In a resolution adopted on 4 July 2006, the Committee of Ministers, while emphasising that respect of the obligation to co-operate with the Court is of fundamental importance for the proper and effective functioning of the Convention system, called upon the contracting states to ensure that all measures be taken so that relevant authorities may comply with requests for assistance from the Court under Article 38 and to ensure that authorities effectively seized with such requests strictly comply with them[3]. But the Committee of Ministers' resolution does not address the issue of undue pressure on applicants to the Court, their lawyers, or members of their families.

iii. Interpretation of the mandate

6. In line with the above-mentioned motion, the present report focuses on problems related to the practical implementation of the right of individual application. It will not cover the execution of the Court's judgments – although this is naturally a key duty of the states parties – as this subject is covered by a special mandate of our colleague Erik Jurgens. It will also not cover the member states' duty to implement the necessary general measures to reduce the flow of new applications to the Court at the source, by addressing the root causes of human rights violations, as emphasised at the 2005 Third Summit of the Heads of State and Government of the Council of Europe. This important issue will be covered by our colleague Marie-Louise Bemelmans-Videc in her future report on the Implementation of the Third Summit Declaration and Action Plan.

7. The main issues to be covered by the report are the duty of states to co-operate in the Court's investigation of the facts (Article 38 ECHR) and the duty not to interfere with the right of individual application (Article 34 ECHR). Other issues to be covered in this context include the duty to comply with interim measures decided by the Court (Rule 39 of the Court's Rules of Procedure) and the 1996 European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (hereinafter: European Agreement), which places specific obligations on states parties regarding correspondence between applicants and the Court, and travel arrangements.

[2] Except for individuals claiming to be the victim of a violation by Belarus, which is not yet a member state of the Council of Europe.
[3] ResDH(2006)45; see also ResDH(2001)66.

II. Key issues related to the member states' duty to co-operate with the ECtHR

i. Overview

8. The states' duties to co-operate with the Court flow principally from articles 34 and 38 of the Convention, Rule 39 of the Court's Rules, and from the European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights.

9. Article 34 ECHR states that "the High Contracting Parties undertake not to hinder in any way the effective exercise of [the right of individual petition]". In *Bilgin v. Turkey*, the Court has held that Article 34 prohibits improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy as well as direct coercion and flagrant acts of intimidation.

10. Under Rule 39 of the Rules of the Court, the Court may "indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or of the proper conduct of the proceedings before it." In considering requests for interim measures, the Court has applied a threefold test: (1) there must be a threat of irreparable harm of a very serious nature; (2) the harm threatened must be imminent and irremediable; and (3) there must be a *prima facie* case.[4]

11. Under Article 38 ECHR, after the Court declares an application admissible, it undertakes an investigation "for the effective conduct of which the states concerned shall furnish all necessary facilities." In a number of its decisions, the Court has held that Article 38 bestows upon the states parties the duty to disclose and produce witnesses, and the duty to produce evidence.

12. The European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (European Agreement)[5] places specific obligations on states parties regarding correspondence between applicants and the Court, and travel arrangements. Under Article 3, the parties must respect the rights of applicants and their representatives to correspond freely with the Court. The correspondence of detained persons must be dispatched without undue delay and no adverse consequences must follow from the applicant's petition to the Court. In addition, Article 4 of the European Agreement requires the Contracting Parties to allow free movement and travel of the applicants and their representatives for the purpose of attending and returning from proceedings before the Court.

ii. Article 34 – duty to refrain from pressuring applicants or potential applicants

a. Indirect acts or contacts amounting to violation of Article 34

13. In its case law, the Court has identified three types of indirect acts and contacts that amount to a violation of Article 34. First, there are instances in which the questioning of the applicants about their applications by the state authorities constitutes a form of undue pressure on the applicants.[6] Second, obstructing an applicant's ability to freely communicate with the Court violates not only the European Agreement, but also Article 34 of the Convention. Last, the initiation of criminal or disciplinary proceedings against the lawyers of the applicants can sometimes amount to a breach of Article 34.

- Questioning of the applicants

14. In *Akdivar and others v. Turkey*, the (now defunct) European Commission of Human Rights noted that the authorities directly enquired with the applicants about their application to Strasbourg.[7] The Commission considered it inappropriate for the authorities to approach applicants in this way in the absence of their legal representatives "particularly where such initiatives could be interpreted as

[4] *Mamatkulov and Askarov v. Turkey*, Grand Chamber judgement of 4 February 2005. See also Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd ed., 2005, p. 38.
[5] CTS No 161; ratified by 34 member states as of 15 January 2007; signed but not yet ratified by Malta, Portugal, San Marino and "the former Yugoslav Republic of Macedonia"; neither signed nor ratified by Armenia, Azerbaijan, Bosnia and Herzegovina, Monaco, Poland, Russia and Serbia.
[6] Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd ed., 2005, p. 176.
[7] *Akdivar and others v. Turkey*, 99/1995/605/693, 30 August 1995, § 21.

an attempt to discourage them from pursuing their complaints."[8] The Court agreed with the Commission and found the state in breach of Article 25 of the Convention (currently Article 34).[9]

15. Similarly, in *Akdeniz and others v. Turkey*, the applicants submitted that they had been summoned and questioned about their applications to the Commission and one of them had been held for two nights by the police.[10] The Government submitted that the Public Prosecutor summoned the applicants to ask them for their knowledge of the case and not why they brought their applications.[11] The Court ruled that the authorities' actions constituted undue interference with the applicants' rights because they "went beyond an investigation of the facts underlying their complaints."[12]

16. However, questioning alone is not enough to amount to a breach of Article 34. To constitute a violation, such questioning has to be calculated to induce the applicant to withdraw or modify his complaint or otherwise interfere with the exercise of his right of individual petition. In *Matyar v. Turkey*, the applicant submitted that he was detained by gendarme officers, repeatedly questioned about his application and threatened.[13] The Government denied the allegations.[14] In this case, the Court did not find that the applicant had sufficiently substantiated his complaints of ill-treatment. The Court ruled that questioning the applicant about the events which were the subject-matter of his application did not necessarily constitute undue pressure and that there was an insufficient factual basis to conclude that the authorities intended to intimidate or threaten the applicant.[15]

17. Similarly, in *Ozkan v. Turkey*, the Court held that the questioning by the authorities did not amount to undue pressure of the applicant *Ekinci*.[16] In that case, the authorities conducted two independent investigations: one to verify whether the houses in the town of Ormanici had indeed been burned, and the other to establish whether or not the cause of deaths at issue in the application was linked to the security forces.[17] As a consequence, the Court observed that the authorities apparently questioned the applicant "because of her coincidental presence in Ormanici on that day," not due to her petition to the Court.[18]

- Obstructing the applicants' ability to communicate with the Court

18. The applicants' ability to communicate with the Court is protected as such by Articles 34 and 38 of the Convention, as well as by the European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights.

19. The Agreement, in its Article 3, lays down specifically the duty to respect the right of applicants, including persons under detention, to correspond freely with the Court. Article 4 protects the free movement and travel for the purpose of attending and returning from proceedings before the Court, and Article 5 grants applicants and their legal representatives certain immunities and facilities in order to ensure for them the freedom of speech and the independence necessary for the discharge of their functions. It is regrettable that several member states of the Council of Europe have still not ratified this instrument, which entered into force in 1999[19]. Failure to ratify this agreement does not, however, stop the Court from considering obstructions of the applicants' ability to communicate with the Court as violations of the Convention.

20. In *Shamayev and 12 others v. Georgia and Russia*,[20] upon the applicants' extradition to Russia, the Russian authorities did not allow the Court or the applicants' representatives to contact

[8] *Akdivar and others v. Turkey*, 99/1995/605/693, 30 August 1995, § 101.
[9] *Akdivar and others v. Turkey*, 99/1995/605/693, 30 August 1995, § 106.
[10] *Akdeniz and others v. Turkey*, No 23954/94, 31 May 2001, § 116.
[11] *Akdeniz and others v. Turkey*, No 23954/94, 31 May 2001, § 117.
[12] *Akdeniz and others v. Turkey*, No 23954/94, 31 May 2001, § 120.
[13] *Matyar v. Turkey*, No 23423/94, 21 February 2002, § 156.
[14] *Matyar v. Turkey*, No 23423/94, 21 February 2002, § 157.
[15] *Matyar v. Turkey*, No 23423/94, 21 February 2002, § 159.
[16] *Ozkan and others v. Turkey*, No 21689/93, 6 April 2004, § 422.
[17] *Ozkan and others v. Turkey*, No 21689/93, 6 April 2004, § 420.
[18] *Ozkan and others v. Turkey*, No 21689/93, 6 April 2004, § 421.
[19] Cf. footnote 6 above for state of ratifications
[20] *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, 12 April 2005.

the applicants. In September 2003, the Court organized a fact-finding mission to Russia, notifying the Government of the pending visit.[21] The Russian government, however, notified the Court on 20 October 2003, that the Stavropol Regional Court refused to grant the Court delegation access to the applicants.[22] The Strasbourg Court issued a reply, reminding the Government of its obligations under Articles 34 and 38 of the Convention.[23] In its judgement rendered in 2005, the Court held that the Russian Federation had violated Article 34 of the Convention by not allowing the applicants to freely communicate with their lawyers or with the Court and in refusing permission to the Court to interview the applicants.[24]

21. The Court held that interferences with an applicant's communication with the Court by mail may also be in breach of Article 34. For example, in *Klyakhin v. Russia*, the jailed applicant submitted that the prison administration refused to send his letters to the Court on several occasions and that his letter of 8 June 2000 had not been posted until October 2000 and without its enclosures.[25] The applicant also complained of the failure on the part of the authorities to hand over incoming letters from the Court promptly.[26] The Government denied the allegations.[27] The Court concluded that the discrepancy between its own correspondence record and that of the prison authorities provided sufficient evidence of the interference with the applicant's right to individual petition.[28]

22. However, opening and reading the applicant's correspondence with the Court does not by itself constitute a violation of Article 34. In *D.P. v. Poland*, the applicant complained that the opening of his letter to the Court breached Article 34.[29] The Government submitted that the applicant's correspondence was not delayed and that there was no interference with the content of the letter.[30] The Court agreed with the Government and ruled that the applicant was not hindered in the exercise of his right of petition to the Court.[31]

23. Similarly, in *Klamecki v. Poland*, the Court found that the authorities' censorship of the applicant's correspondence constituted a violation of Article 8 but it held that no separate issue arose under Article 34 since the "applicant did not allege any particular interference with his right of individual petition by the Polish authorities."[32]

24. Unfortunately, despite clear legal obligations, problems persist. I was confronted with a number of concrete instances of recent cases of "disappearance" of mail sent off from Russia. Such cases seem to be so frequent that certain human rights lawyers have resorted to sending employees in person to Strasbourg in order to register important pieces of correspondence with the Court, or to appealing to sympathetic diplomatic representations in Moscow for help in posting such correspondence from outside the Russian Federation. This is an unacceptable situation for a state party to the ECHR.

25. As regards the application of the above-mentioned 1996 Agreement, I should like to specifically commend the Court's "seat state", France, for its open and unbureaucratic approach in providing the necessary visas to applicants and their lawyers in their relations with the Court[33].

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[21] Registrar of the European Court of Human Rights, *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, Press Release No 455, September 19, 2003 [online].
[22] Registrar of the European Court of Human Rights, *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, Press Release No 528, October 24, 2003 [online].
[23] Registrar of the European Court of Human Rights, *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, Press Release No 528, October 24, 2003 [online].
[24] *Shamayev and 12 others v. Georgia and Russia*, No 36378/02, 12 April 2005, § 518.
[25] *Klyakhin v. Russia*, No 46082/99, 30 November 2004, § 116.
[26] *Klyakhin v. Russia*, No 46082/99, 30 November 2004, § 116.
[27] *Klyakhin v. Russia*, No 46082/99, 30 November 2004, § 117.
[28] *Klyakhin v. Russia*, No 46082/99, 30 November 2004, § 121.
[29] *D.P. v. Poland*, No 34221/96, 20 January 2004, § 89.
[30] *D.P. v. Poland*, No 34221/96, 20 January 2004, § 90.
[31] *D.P. v. Poland*, No 34221/96, 20 January 2004, § 92.
[32] *Klamecki v. Poland*, No 31583/96, 3 April 2003, §§ 157-159.
[33] I have not only heard no complaints, but was even given examples of good practices by several interested parties.

- Bringing proceedings against the applicants' representatives

26. In *Kurt v. Turkey*, the applicant maintained that the institution of criminal proceedings against her lawyer in connection with the statements he had made pertaining to her application was incompatible with Article 34 (formerly Article 25(1)).[34] The Government denied these allegations, insisting that the criminal proceedings had to do with the lawyer's involvement with the PKK, a terrorist organisation under the Turkish Criminal Code.[35] The Court disagreed, finding that the threat of prosecution concerned the allegations made by the lawyer in connection with the application.[36] As a result, the Court found Turkey to be in breach of Article 34.[37]

27. Even initiation of disciplinary proceedings against the applicant's counsel can violate Article 34. In *McShane v. United Kingdom*, the Royal Ulster Constabulary commenced disciplinary proceedings against the applicant's lawyer, alleging that she had disclosed witness statements to the applicant's representatives before the Court.[38] The Court found that even though the complaint was dismissed by the Law Society as unfounded, such proceedings could have "a chilling effect on the exercise of the right of individual petition" and therefore the United Kingdom was found to have violated Article 34.[39]

28. In Russia, attempts were made in 2004/2005 – after public threats to this effect by the spokesperson of the prosecutor's office – to have all members of Mr Khodorkovsky's legal team disbarred from the Moscow City Bar. In December 2005, the Russian representative before the European Court of Human Rights attempted to initiate disciplinary proceedings against lawyers at the Moscow-based "International Protection Centre" before the Moscow City Bar, which did not, however, follow the request. The Centre is defending many applicants to the European Court of Human Rights.

29. Similar indirect measures against applicants' legal representatives are unfortunately continuing. Ms Karinna Moskalenko, founder of the above-mentioned "International Protection Centre" has informed me in much detail, supported by many documents, of the procedures launched against the Centre by the Federal Tax Service. The Centre's members have brought numerous cases to the European Court of Human Rights, including many Chechen cases, but also other politically "sensitive" cases such as that of Mikhail Khodorkovsky and other "Yukos-related" issues[40] and cases of alleged victims of "spy mania"[41], in addition to organising human rights training and awareness-raising activities. Mrs Moskalenko is painfully aware of the risks she is running, and has gone to extraordinary lengths in order to avoid providing the authorities with any pretext to prosecute her or her colleagues for irregularities of any kind. But repeated, lengthy inspections by the tax service and other acts of harassment by the authorities[42] over the past year have exerted a psychological toll on Ms Moskalenko, and I am therefore particularly grateful that she accepted to give evidence during the Committee's hearing in June, in Strasbourg.

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[34] *Kurt v. Turkey*, 15/1997/799/1002, 25 May 1998, § 154.
[35] *Kurt v. Turkey*, 15/1997/799/1002, 25 May 1998, § 157.
[36] *Kurt v. Turkey*, 15/1997/799/1002, 25 May 1998, § 164.
[37] *Kurt v. Turkey*, 15/1997/799/1002, 25 May 1998, § 165.
[38] *McShane v. United Kingdom*, No 43290/98, 28 May 2002, § 147.
[39] *McShane v. United Kingdom*, No 43290/98, 28 May 2002, § 151.
[40] Cf. the report by our colleague Sabine Leutheusser-Schnarrenberger on "The arrest and prosecution of former Yukos executives", adopted in January 2005, Doc 10368 and Addendum.
[41] Cf. my report on "Fair trial issues in espionage cases" adopted by the Committee on Legal Affairs and Human Rights at its meeting in Nafplion in September 2006, Doc 11031.
[42] One example is the enquiry into Ms Moskalenko's activities by the Economic Crimes Department of the Russian Ministry of Internal Affairs on the basis of alleged economic (taxation) violations. Ms Moskalenko was informed on 20 December 2005 that this inquiry was based on a request from Mr Laptev, the Russian Representative with the European Court of Human Rights, who expressed suspicions regarding the validity of the power of attorney of a client held in detention, Mr Ryabov, who had also filed a complaint concerning fees owed according to the terms of the contract. Ms Moskalenko, attaching a statement by Mr Ryabov according to which "this can only be a provocation", filed an application with the Court for urgent measures by application of Rule 40 of the Rules of the Court (to inform the Russian authorities of the content of this complaint and ask them relevant questions). She was also worried that this inquiry could be used in order to monitor her communications, including those that are normally subject to counsel/client privilege, or even to serve as an excuse to have her arrested as a measure of restraint.

30. Another example presented by Ms Moskalenko is the case of Osman Boliev, a Dagestani human rights defender, who had been involved in submitting a complaint to the European Court. According to Ms Moskalenko, he was arbitrarily detained on 15 November 2005 and tortured in custody. On 13 February 2006, he was released pending trial, and on 18 May he was acquitted for lack of evidence. But only one month after his acquittal, he was again summoned for interrogation, and the judge who had acquitted him in February 2006 is facing dismissal procedures.

31. The refusal, in November 2006, of the Russian Federal Registration Service (FRS) to register as a foreign non-governmental organisation the Dutch-based Stichting Russia Justice Initiative (SRJI, formerly Chechnya Justice Initiative)[43], which specialises in legal advice and representation for applicants before the European Court of Human Rights, is another instance of indirect pressure on applicants to the Court. The reasons given in the letter of the FRS dated 15 November 2006 for the refusal to register this group, which enjoys an excellent reputation for the seriousness of its work and has won several high-profile Chechen cases before the Court in the last few months, have not convinced me.[44]

b. Direct coercion and flagrant acts of intimidation

32. Given that even indirect acts of intimidation, such as questioning of the applicants, may amount to a breach of Article 34, it goes without saying that direct coercion and intimidation violate the Convention.

33. In *Ilascu and others v. Russia and Moldova*, the applicants submitted that the statement by the President of Moldova, Mr Voronin, constituted a violation of Article 34.[45] At a press conference, Mr Voronin declared that "Mr Ilascu is the person who is keeping his comrades detained in Tiraspol." In that connection, Mr. Voronin suggested that Mr Ilascu should withdraw his application to the Court against the Russian Federation and Moldova, in exchange for the release of other applicants. Mr Ilascu refused to do so.[46] The Court held that making an improvement in the applicants' situation depend on the withdrawal of the application to the Court represents direct pressure intended to hinder the exercise of the right of individual petition.[47]

34. Reports of several human rights organisations, including Amnesty International, Human Rights Watch, and International Helsinki Federation, have alleged that harassment, coercion, and intimidation of Chechen applicants to the European Court of Human Rights constitute a major problem.[48]

35. In November 2006, I received a memorandum by the European Human Rights Advocacy Centre[49] detailing twenty-three concrete instances of pressure on applicants by different authorities on applicants from the Chechen Republic and other Republics in the North Caucasus region of the Russian Federation[50]. The acts of intimidation detailed in this memorandum range from oral threats to outright murder of the applicant or close relatives. Such threats are said to have emanated from a

[43] http://www.srji.org/en/.
[44] A detailed presentation of the grounds given in the letter of the FRS dated 15 November 2006 and the position of SRJI is given in a statement published by SRJI on 23 November 2006 (http://groups-beta.google.com/group/srji-newsletter-eng/browse_thread/thread/dfd354470af5f169)
[45] *Ilascu and others v. Moldova and Russia*, No 48787/99, 8 July 2004, § 476.
[46] *Ilascu and others v. Moldova and Russia*, No 48787/99, 8 July 2004, § 285.
[47] *Ilascu and others v. Moldova and Russia*, No 48787/99, 8 July 2004, § 482.
[48] Amnesty International, "The Risk of Speaking Out: Attacks on Human Rights Defenders in the Context of the Armed Conflict in Chechnya," http://web.amnesty.org/library/index/engeur460592004, last accessed 21/06/05; Human Rights Watch, "Russian Federation/Chechnya: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights," http://hrw.org/english/docs/2005/03/10/russia10298.htm, last accessed 21/06/05; International Helsinki Federation, "The OSCE-States Have Shirked Their Responsibility," http://www.ihf-hr.org/booklet/toc9.php; see also Peter Finn, Russian Appeals to Court Bring Intimidation, Death – Relatives of Missing and Dead Told not to Go to Rights Body, in: Washington Post, 3 July 2005; for more information, see Appendix I.
[49] a London-based group of human rights lawyers helping destitute victims of alleged human rights violations to bring their cases before the European Court of Human Rights. An EHRAC representative, Professor Bill Bowring, has participated in the hearing on the topic of this report in Strasbourg in June 2006.
[50] appended hereto; I am in possession of a much more detailed version of this memorandum, which EHRAC has made available to me on condition of strict confidentiality, due to their clients fear of further reprisals.

wide variety of persons in positions of authority, including members of federal or republic security forces (military, policy, FSB), as well as from officials of prosecutors' offices. None of the cases of killings of applicants or their relatives have, to date, been resolved. In line with the decision of the Committee on 6 November 2006, I submitted this memorandum to the competent authorities of the Russian Federation, asking for their comments regarding the progress made in solving these cases, and regarding measures that could be taken to address the fear of reprisals in general. I consider the comments received from the Russian authorities[51] at the end of December 2006 as not at all satisfactory. They clearly indicate a lack of willingness to carry out full and effective investigations and in some cases are even indicative of whitewashing.

36. During our hearing in June, Ms Moskalenko (International Protection Centre, Moscow)[52] presented the example of Mr Knyazev[53], who had been involved in the mass self-mutilation by inmates of the penitentiary in Lgov in June 2005. The lawyers, who visited four former inmates of the Lgov colony in Chelyabinsk, collected testimony that inmates were severely beaten for having filed requests to initiate criminal proceedings against prison guards. Mr Knyazev, who had applied to the European Court of Human Rights, first sent a letter withdrawing his application, and then succeeded in smuggling out another letter "withdrawing his withdrawal" and informing the Court that he had been beaten for having lodged his application. I should like to commend the Court for having reacted very swiftly to the applications lodged by the Centre's lawyers, and in particular for communicating the case to the Government with several questions within days after the submission of a preliminary complaint in July 2005.

37. Other reports on intimidation of applicants concern Azerbaijan. A well-known human rights activist with long-standing experience in co-operation with the Council of Europe, has asserted that victims of alleged human rights violations who are held in detention are often exposed to reprisals for seizing the European Court of Human Rights. I have also received reports of intimidation by Army and Security officers in Turkey against alleged PKK members.

c. Intimidation to deter exhaustion of internal remedies

38. I have also been confronted with allegations of very severe acts of intimidation against Chechen victims of human rights violations and their legal representatives, intended to deter recourse to available internal remedies that must in principle be exhausted before an application can be made to the Court.

39. Ms Moskalenko[54] briefly presented three cases of pressure against lawyers trying to exhaust domestic remedies during our hearing in June. Mr Trepashkin, Mr Poddubny and Mr Brovchenko were all subjected to different types of pressure, criminally prosecuted, arrested and thus unable to represent their clients. For example, Mikhail Trepashkin[55] was prevented from participating in the proceedings in the Moscow City court in a case concerning apartment building explosions in Moscow and Volgodonsk in 1999, in which he represented the victims. Having been imprisoned on dubious charges, he was unable to represent his clients at the domestic trial, and could not submit this case to the European Court in good time[56].

40. The Court's case law allows for some flexibility in such cases. In *Aksoy v. Turkey*[57], the Court found that the requirement of exhaustion of domestic remedies must not be applied with undue formalism and that there exist "special circumstances" in which domestic remedies need not be exhausted, in particular when there is an administrative practice consisting of a repetition of acts incompatible with the Convention, and there is official tolerance by the state authorities of this practice, and such official tolerance would make proceedings futile or ineffective. If the allegations of cynical inaction or even overtly threatening behaviour of local law enforcement officials are correct, the Court would be likely to find "special circumstances" that would dispense a victim from first

[51] Appended hereto
[52] Cf. paragraphs 2 and 29 above.
[53] Detailed description of the case on file with the Rapporteur.
[54] Cf. footnote 54 above.
[55] his case is presented in more detail in my report on "Fair trial issues in espionages cases" (cf. footnote 43 above).
[56] Ms Moskalenko provided me with a memorandum with detailed information on all three cases.
[57] Judgment of 26 November 1996, §§ 52-57.

exhausting domestic remedies that would be ineffectual at best, and dangerous for the applicant and his family at worst.

41. In my opinion, threatening behaviour to deter the use of otherwise available internal remedies should also be recognised as a violation of Article 34 in its own right, in order to protect both the applicant's right of individual application, and the Court's role as a subsidiary recourse.

42. In view of the numerous, well-documented cases of intimidation and violence against victims of alleged human rights violations from the North Caucasus region of the Russian Federation, who have attempted to seek redress through local or regional law enforcement structures, the Court could consider waving the requirement of exhaustion of internal remedies systematically, until the situation in the region has improved. A good measure for the improvement of the situation in terms of the establishment of the rule of law would be if a significant number of members of law enforcement bodies were to be held criminally responsible for reprisals against persons seeking redress for human rights violations allegedly committed by officials of such bodies.

d. Intimidation as grounds for factual inferences

43. In appropriate cases, where allegations of undue pressure against applicants have been sufficiently corroborated, such acts of intimidation can, in my view, also provide grounds on which to base factual inferences as to the credibility of other submissions made by both parties, at least for the purposes of the decision on the admissibility of the application.

iii. Duty to comply with interim measures

a. Interim measures in other international human rights bodies

44. Several other international human rights bodies have developed a system of interim protection to avoid irreparable damage during the consideration of either the admissibility or the merits of individual applications. Such interim protection, which does not prejudge the final decision, exists in the UN Committee against Torture and the UN Human Rights Committee[58]. Similarly, in its landmark *LaGrand* decision[59], the International Court of Justice (ICJ) ruled that its own provisional measures have binding force.

45. The Inter-American Commission and Court of Human Rights and the African Commission and newly established Court on Human and Peoples' Rights also provide for interim measures in their Rules of Procedure, based on Article 63 (2) of the Inter-American Convention, which explicitly provides for this possibility.

46. The Inter-American Commission and Court of Human Rights have been faced with dramatic cases of lawlessness involving unofficial death squads, criminal gangs etc. threatening applicants. Article 29 of the Rules of Procedure of the Inter-American Commission foresees that, in serious and urgent cases and whenever necessary according to the information available, the Commission may

[58] now replaced by the UN Human Rights Council; in *Weiss v. Austria*, the applicant obtained an order of interim measures from the Human Rights Committee, suspending his extradition from Austria to the United States. Subsequently, an Austrian court ordered the applicant's surrender to the US authorities. The Committee held that by extraditing the applicant, before the Committee could address his allegation of irreparable harm, Austria breached its obligations under the ICCPR, and its first optional protocol. Interestingly, the Human Rights Committee inferred the binding nature of the interim measures from the treaty-based right of individual petition, similar to the ECtHR's reasoning in *Mamatkulov* (cf. § 50 below). Therefore, the Committee held that while its final views may not be binding on States, the indication of interim measures is binding because it stems from the core right to individual petition.

[59] *Germany v. United States*, ICJ, 27 June 2001. The LaGrand brothers, German nationals, were sentenced to capital punishment for murder in the United States. Germany instituted proceedings before the ICJ against the United States for violations of the Vienna Convention on Consular Relations (the LaGrands had not been informed of their consular rights) and made an urgent request for provisional measures. The Court ordered the United States to stay the execution. The US Solicitor-General argued that the order indicating provisional measures was not binding and Walter LaGrand was executed. The ICJ ruled that the provisional measures were in fact binding because their non-binding force would contradict the need to "safeguard, and to avoid prejudice to the rights of the parties as determined by the final judgment of the Court."

request that the state concerned to adopt precautionary measures to prevent irreparable harm to persons.

47. In the case of *Boyce and Joseph v. Barbados*, the Inter-American Commission asked the Court to pass an order requiring the state to "adopt, without delay, all of the necessary measures to preserve the life and physical integrity of Boyce and Joseph."[60] The two applicants, who were sentenced to death under Barbados' mandatory death sentence provision, claimed that their rights to life, due process, and to be protected from inhumane treatment and punishment were violated. The Court granted the Commission's petition and ordered Barbados to preserve the life of the applicants, effectively staying their execution.[61]

48. The Inter-American Court has also used the power given to it by Article 63(2) to order positive action by states. For example, in the *Aleman-Lacayo* case, the Inter-American Commission asked that the Court pass a measure requesting that the Government of Nicaragua adopt effective security measures to protect the life and personal integrity of Aleman-Lacayo, including providing Dr. Aleman-Lacayo and his relatives with the "name and telephone number of a person in a position of authority" who will be responsible for providing them with protection.[62] The Court granted the Commission's request and called upon the Nicaraguan Government to adopt "such measures as are necessary to protect the life and personal integrity of Dr Aleman-Lacayo".[63]

b. Interim measures in the European Convention system

49. In *Cruz Varas v. Sweden*, the Court still found that the failure to comply with the interim measures request did not violate Article 34 ECHR (at that time, Article 25 whose acceptance was facultative). However, the Court effectively overturned that judgment in the 2003 *Mamatkulov and Abdurasulovic v. Turkey* case. In the latter case, the Court held that "any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."[64]

50. In *Mamatkulov and Askarov v. Turkey*, the applicants, Uzbek nationals, were arrested in Turkey on suspicion of homicide and other crimes. Uzbekistan requested their extradition and the applicants filed an application with the Court, claiming that they would be subjected to torture in Uzbekistan. On 18 March 1999, the Court communicated to the Turkish Government that, pursuant to Rule 39 of the Rules of the Court, Turkey should not extradite the applicants before the meeting of the Court on 23 March 1999.[65] Nevertheless, Turkey extradited the applicants to Uzbekistan.[66] The Court determined that the applicants' rights were violated because the "level of protection which the Court was able to afford the rights which they were asserting under Articles 2 and 3 of the Convention was irreversibly reduced" through the extradition.[67] In noting the vital role of interim measures in avoiding irreversible situations, the Court concluded that the failure to comply in this case breached Article 34.[68]

51. In *Shamayev and 12 others v. Georgia and Russia*, the Court communicated interim measures to the Georgian Government to prevent extradition of the applicants to Russia.[69] Nevertheless, the Georgian authorities extradited five of the applicants.[70] As a result of the extradition, the applicants' rights of individual application had been violated. The Court concluded that Georgia thus failed to discharge its obligations under Article 34 as regards to the extradited applicants.[71]

[60] *Boyce and Joseph v. Barbados*, Inter-American Court of Human Rights, Order of 25 November 2004.
[61] *Boyce and Joseph v. Barbados*, Inter-American Court of Human Rights, Order of 25 November 2004.
[62] *Aleman-Lacayo* case, Inter-American Court of Human Rights, Order of 2 February 1996.
[63] *Aleman-Lacayo* case, Inter-American Court of Human Rights, Order of 2 February 1996.
[64] *Mamatkulov and Abdurasulovic v. Turkey*, Nos 46827/99 and 46951/99, 6 February 2003, § 110, subsequently confirmed by the Grand Chamber, in the same case, on 4 February 2005 (*Mamatkulov and Askarov),* § 129.
[65] *Mamatkulov and Askarov v. Turkey*, Nos 46827/99 and 46951/99, 4 February 2005, § 24.
[66] *Mamatkulov and Askarov v. Turkey*, Nos 46827/99 and 46951/99, 4 February 2005, §§ 25-27.
[67] *Mamatkulov and Askarov v. Turkey*, Nos 46827/99 and 46951/99, 4 February 2005, § 108.
[68] *Mamatkulov and Askarov v. Turkey*, Nos 46827/99 and 46951/99, 4 February 2005, § 129.
[69] *Shamayev and 12 others v. Georgia and Russia*, No 36378/02, 12 April 2005, §§ 11-12.
[70] *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, 12 April 2005, § 12.
[71] *Shamayev and 12 others v. Georgia and Russia*, No. 36378/02, 12 April 2005, § 479.

52. In the light of this case law, it appears unacceptable for Russia to have deported to Uzbekistan an asylum seeker, Rustam Muminov, on 24 October 2006 at 7.20 pm Moscow time, 20 minutes after the European Court of Human Rights had issued and notified to the Russian authorities an injunction to stop the deportation[72].

c. Possible use of interim measures for the protection of applicants to the Court

53. As the binding effect of the Court's interim measures is now recognised, such measures can be used to counter-act unlawful pressure on applicants to the Court, their lawyers, or members of their families. The Court could require respondent states to take positive action to protect applicants, as the Inter-American Commission and Court have done in the above-mentioned *Aleman-Lacayo* case[73].

iv. Duty to furnish necessary facilities for the effective conduct of the Court's investigation (Article 38 § 1 (a) of the Convention and Rule 44/A-C of the Rules of Court)

a. Overview

54. Article 38 § 1 (a) of the Convention provides that, if the Court declares an application admissible, it shall pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the states concerned shall furnish all necessary facilities.

55. The term "investigation" referred to in this Article must be understood as meaning not only on the spot investigations or fact-finding hearings occasionally carried out by the Court within the territory of the states parties, but also the Court's examination of the documents and other evidence at its seat in Strasbourg.

56. A survey of the Court's case law illustrates that the phrase "necessary facilities" mentioned in this Article has been held to include the submission to the Court of documentary evidence relating to the case, identifying, locating and ensuring the attendance of witnesses, and making comments on documents submitted and replying to questions asked by the Court. It is important to note that the list is not exhaustive but is being determined on a case-by-case basis.

57. Upon entry into force of Protocol No. 14, Article 38 § 1 (a) of the Convention will be clarified to the effect that the member states' obligation to co-operate with the Court exists not only after the case has been declared admissible but at any stage of the proceedings[74].

58. Similarly, Rule 44/A of the Rules of Court[75] stipulates that the parties to a case have "a duty to co-operate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting State not party to the proceedings where such co-operation is necessary"[76].

59. In its examination of a certain category of cases, the Court must first establish the facts before it can proceed to examine whether there has been a violation of the Convention. Cases in which this is needed include, in particular, applications concerning Articles 2 and 3 of the Convention (i.e. cases

[72] Cf. *Reuters* wire of 25.10.2006; the President of the Parliamentary Assembly René van der Linden wrote to the Chairman of the Russian delegation to PACE to ask for explanations.
[73] See above paragraph 48.
[74] See Article 14 of Protocol No 14. This is a logical consequence of the changes made to Articles 28 and 29 of the Convention by Protocol No 14, which encourage the taking of joint decisions on the admissibility and merits of individual applications. Since this provision applies even before the decision on admissibility has been taken, High Contracting Parties are required to provide the Court with all necessary facilities prior to that decision (see § 90 of the Explanatory Report to Protocol No 14).
[75] Rule 44/A entered into force on 13 December 2004.
[76] Extending the obligation to cooperate with the Court in a particular case to Contracting States not party to the proceedings where such cooperation is necessary is an important development for the Convention protection mechanism. The Rapporteur envisages that this Rule may prove to be particularly invaluable for the Court when examining cases concerning expulsions of applicants from one member State to another.

concerning the right to life and the prohibition of torture and inhuman or degrading treatment or punishment) and Article 5 (which covers incommunicado detentions and enforced disappearances). In the great majority of such cases, the facts are disputed between the parties and will therefore need to be established by the Court. By contrast, in cases concerning other articles of the Convention, the facts are often not disputed and the Court's task is limited to examining whether those undisputed facts amount to a violation of the Convention.

60. In order to carry out adequately its task of establishing the facts, the Court has devised it own rules of evidence pertaining, in particular, to the issue of the burden of proof. According to the Court, its proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation)[77]. In the inter-state case of *Ireland v. the United Kingdom*, the Court stated that "[i]n the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*"[78].

61. The Court's approach to the issue of burden of proof corresponds to its role as an international court whose ability to function largely depends on the co-operation of the parties to a case. For example, the Court cannot, as a rule[79], approach the domestic authorities of a member state directly to compel the submission of domestic documents.

62. A further justification for the Court's unique rules pertaining to the distribution of the burden of proof in its proceedings is the fact that, in certain cases where an individual applicant accuses state agents of violating his or her rights under the Convention, solely the respondent Government will have access to information capable of corroborating or refuting those allegations[80]. In such circumstances, requesting the applicant to bear the burden of proof throughout the Court's proceedings would not only be unfair to the applicant, but would also prevent the Court from ascertaining the truth, thereby undermining the protection afforded by the Convention. This is particularly true in cases in which there appear not to have been any effective domestic investigations into the applicant's allegations and in which the Court must therefore establish the facts itself, on the basis of specific documents, such as records of witness statements, medical, forensic, police and military reports, etc.

63. Although applicants are expected to submit to the Court evidence in support of their allegations, in circumstances where they are unable to obtain certain documents and where it is obvious that such documents can only be obtained with the assistance of the national authorities, the Court may request the representatives of the respondent state to obtain them from the national authorities and make them available to the Court. Furthermore, in some cases, in the light of the information in its possession, the Court itself may identify and request further documents from the respondent state.

64. Although the Court will usually request the respondent state to submit the complete domestic file, it may also identify and request particular documents. Expurgating the file before submitting it to the Court cannot be reconciled with the Government's obligations under Article 38 § 1 (a) of the Convention[81].

65. In case of a failure to submit the requested documents, or when not submitted in due time, the Court expects the respondent Government to provide a convincing explanation. In this connection,

[77] See *Timurtaş v. Turkey*, no. 23531/94, § 66, ECHR 2000-VI.
[78] *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64, § 160.
[79] It must be stressed that such practical difficulties or diplomatic considerations will not necessarily prevent the Court from bypassing diplomatic channels to obtain information or documents if it perceives that those channels are inadequate and are hindering it in its task of establishing the facts in a given case. This was done, for example, in the case of *Dizman v. Turkey* where, in the absence of any replies by the respondent Government to the Court's requests for documents and information, the Registry of the Court was able, by contacting directly the domestic court where a number of police officers allegedly responsible for the ill-treatment to which the applicant had been subjected were being tried, to find out the information it needed in order to be able to continue the examination of the application (no. 27309/95, § 62, 20 September 2005).
[80] *Timurtaş v. Turkey*, cited above,§ 66.
[81] *Tanış and others v. Turkey*, no. 65899/01, § 203, 2 August 2005.

"clerical errors and problems of communication between the national authorities"[82] do not constitute a convincing explanation for any failure or delay in providing the Court with the requested documents.

66. Similarly, the allegedly secret nature of a document is not, on its own, sufficient to absolve a state from its obligation under Article 38 of the Convention. Thus, in the case of *Timurtaş v. Turkey*, which concerned the disappearance of the applicant's son after he had been taken into the custody of the security forces, the applicant submitted to the Commission a photocopy of a military document showing that his son had been taken into custody. The authenticity of the photocopied document was contested by the respondent Government but the Court was not satisfied by the Government's explanation that the original of that document – which the Commission had requested so that it could compare it to the photocopied document – contained military secrets and could therefore not be submitted to the Commission. The Court stated that it was insufficient for the Government to rely on the allegedly secret nature of that document which, "in the Court's opinion, would not have precluded it from having been made available to the Commission's delegates – during the fact-finding hearing held in Turkey –, none of whom are Turkish so that they could have proceeded to a simple comparison of the two documents without actually taking cognisance of the contents"[83].

67. Another example of the constructive manner in which the Court takes account of any national security concerns harboured by a respondent Government is the case of *Akkum and others v. Turkey*. In this case the Court observed that the Commission, when requesting the respondent Government to submit a report on a military operation, also informed the respondent Government that "if they were not in a position to submit this document, the Government were invited to provide a formal written explanation of the national security interests militating against making the document available to the Commission". Unfortunately, the requests made by the Commission – and subsequently by the Court – in respect of this military report were completely ignored by the respondent Government[84].

68. It is also not sufficient for a respondent Government to claim, in order to justify a failure to submit a particular document to the Court, that the document in question had been examined by the national authorities who had established that the applicant's allegations were baseless. Thus, in the case of *Çelikbilek v. Turkey* the Court stressed that the evaluation of the evidence and the establishment of the facts was the responsibility of the Court, and it was for the Court to decide on the evidential value of the documents requested[85].

69. Finally, non-disclosure of documents to the Court cannot, in my opinion, be justified by national provisions prohibiting disclosure of data pertaining to preliminary investigations. Articles 34 and 38 of the Convention override any national provisions to this effect.[86]

70. Although the Court has no power to compel witnesses to appear before it to give evidence, Article 38 of the Convention has been interpreted as obliging states to identify, locate and ensure the attendance before – a delegation of – the Court of any persons whom the Court wishes to hear as a witness. The obligation is stricter if the proposed witness is a civil servant because Governments are

[82] *Tepe v. Turkey*, no. 27244/95, § 131, 9 May 2003 and *Tekdağ v. Turkey*, no. 27699/95, § 60, 15 January 2004.
[83] *Timurtaş v. Turkey*, cited above, § 67.
[84] *Akkum and Others v. Turkey*, No 21894/93, § 187, ECHR 2005-II (extracts); the consequences of the respondent Government's failure in this particular case will be examined below.
[85] *Çelikbilek v. Turkey*, No 27693/95, § 71, 31 May 2005.
[86] In a letter dated 11 July 2005 co-signed by representatives of the European Human Rights Advocacy Centre and the Stichting Russian Justice Initiative to the President of the European Court of Human Rights, the advocates complained about the systematic refusal by the Russian authorities to disclose any documents relating to preliminary investigations, arguing that Article 161 of the Code of Criminal Procedure prohibits such disclosure. They point out that the refusal is systematic in Chechen cases, but not in cases concerning applications from other regions of the Russian Federation. This letter, copy of which was sent to me and several other members of our Committee, was transmitted by the then Committee Chair, Serhiy Holovaty, to the Chairman of the Russian delegation to PACE, for comments by the competent Russian authorities. In his reply dated 10 November 2005, the Chairman of the Russian Delegation to PACE reiterated the argument that Article 161 of the Code of Criminal Procedure as well as Articles 23, 24 of the Constitution protecting information on a person's private life prohibit the disclosure of data from a preliminary investigation to the European Court.

considered as having a duty to ensure that their own officials contribute to the investigation, as required by the Court[87].

71. In *Aktas v. Turkey*, the Government failed to trace the doctor who pronounced Yakup Aktas (the circumstances of whose death were at issue in the application) dead.[88] The Court noted that according to an official document, Yakup Aktas died on the way to the hospital and was pronounced dead on arrival, in which case the name of the doctor ought to be a matter of record.[89] As a result of the Government's failure to produce the witness, as well as other breaches, the Court found Turkey to be in violation of Article 38(1).[90]

72. In *Orhan v. Turkey*, the Government did not furnish the military operations records, which were "fundamental to Government's position" in this case.[91] Similarly, in *Aktas v. Turkey*, the Government did not produce the requested photographs with the negatives of the Yakup Aktas' body.[92] In both instances, the Court held that Article 38(1) had been breached.

73. Ascertaining the relevance and importance of a particular witness or other evidence is a matter for the Court to decide. In *İpek v. Turkey* the Court carried out a fact-finding mission in Turkey with a view to establishing the accuracy of the applicant's allegations that, during a military operation, his two sons had been taken into custody and had subsequently disappeared. Amongst the witnesses summoned by the Court was an army general who had overseen the military operation. The Government, stating that their authorities did not deem it necessary for the general to attend the hearing, refused to summon him. The Court, concluding that the Government had fallen short of its obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts, held "in the clearest possible terms that it is for the Court to decide whether and to what extent a witness is relevant for its assessment of facts"[93].

74. As mentioned earlier, a respondent Government's failure to reply to specific questions by the Court or to make comments on the circumstances of the case when requested by the Court, is also regarded by the Court as incompatible with the obligation in Article 38 § 1 (a) of the Convention. For example, in the case of *Nevmerzhitsky v. Ukraine* the Court's finding that the respondent Government had failed in its obligation under this Article was based upon, *inter alia*, the failure of the Government to provide "thorough and detailed information as to the legal basis of the applicant's continued detention throughout the whole period he was detained" and "detailed information and comment on the conditions of the applicant's detention in the isolation cell and his general conditions of detention, his medical treatment and the medical assistance provided to him"[94].

b. Consequences of the failure to co-operate in breach of Article 38 § 1 (a) of the Convention and Rule 44/A-C of the Rules of Court

75. The Court has held on numerous occasions that it is of the utmost importance for the effective operation of the system of individual application instituted under Article 34 of the Convention that states should furnish all necessary facilities to make possible a proper and effective examination of applications[95].

76. A failure on a Government's part to submit the necessary information which is in their hands without a satisfactory explanation, or a failure to submit it in due time, thereby prejudicing the establishment of the facts of the case[96], gives rise to the following consequences:

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[87] See, *mutatis mutandis*, *Tekin v. Turkey,* no.22496/93, Commission report of 17 April 1997, § 71. Lying under oath of a Government witness in the proceedings before the Commission did not in itself, however, entail a failure on the part of the respondent state to comply with its obligations under Article 38 § 1 (a), see *Timurtaş v. Turkey*, cited above, § 71.
[88] *Aktas v. Turkey*, No 24351/94, 24 April 2003, § 274.
[89] *Aktas v. Turkey*, No 24351/94, 24 April 2003, § 274.
[90] *Aktas v. Turkey*, No 24351/94, 24 April 2003, § 346.
[91] *Orhan v. Turkey*, No 25656/94, 18 June 2002, §§ 268-69.
[92] *Aktas v. Turkey*, No 24351/94, 24 April 2003, § 276.
[93] *İpek v. Turkey*, no. 25760/94, § 121, ECHR 2004-II (extracts).
[94] *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 76, 5 April 2005.
[95] See, *inter alia*, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV.
[96] See *Orhan v. Turkey*, no. 25656/94, § 266, ECHR 2002.

- *Drawing of inferences*

77. In its judgment in the case of *Timurtaş v. Turkey* the Court held for the first time that a respondent Government's failure to co-operate with the Court gives rise to the drawing of inferences as to the well-foundedness of the applicant's allegations and will also reflect negatively on the level of compliance by a respondent state with its obligations under Article 38 § 1 (a) of the Convention[97].

78. In the case of *Khashiyev and Akayeva v. Russia*[98], the Court found that "[i]t is inherent in proceedings related to cases of this nature, where an individual applicant accuses state agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on the Government's part so submit such information which is in their hands without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations."

79. Rule 44/C § 1 of the Rules of Court[99] provides that "where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate". This rule reflects the approach adopted by the Court in *Timurtaş* and is likely to further improve the consistency of the Court's case law on this matter[100].

- *Shifting of the burden of proof*

80. Failures to co-operate may even lead to a complete reversal of the burden of proof. This approach was adopted by the Court for the first time in its judgment in the case of *Akkum and others v. Turkey* which concerned, *inter alia*, the killing of the applicants' relatives during a military operation. In this case the Court was unable to establish the circumstances of a number of allegations made by the applicants. Noting that this failure emanated from the respondent Government's refusal to submit to the Court certain documents, the Court held: "It is appropriate, therefore, that in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise"[101].

81. Such express shifting of the burden of proof was also applied in the case of *Çelikbilek v. Turkey*, which concerned the alleged killing of the applicant's brother during his detention in police custody. According to the established case law of the Court, where an applicant is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused, failing which an issue will arise under Article 3 of the Convention[102]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies[103].

82. This shifting of the burden depends, however, on the applicant showing that the individual in question was indeed taken into custody. In *Çelikbilek* the applicant was unable to provide documentary evidence that his brother had been detained by police. The respondent Government were requested by the Commission, and subsequently by the Court, to submit custody records of the police station where, according to the applicant, his brother had been detained and killed. Despite a number of reminders, the respondent Government failed to do so. The Court, referring to the above-mentioned judgment in *Akkum and others v. Turkey*, stated that, where the Government fails to

[97] *Timurtaş v. Turkey*, cited above, §§ 66 and 70.
[98] Nos 57942/00 and 57945/00, 24 February 2005, § 137.
[99] Entered into force on 13 December 2004.
[100] cf. Luluyev and Others v. Russia (69480/01) §§ 80-85, and Imakayeva v. Russia (7615/02) §§120-127.
[101] *Ibid* § 211.
[102] *Selmouni v. France* [GC], No 25803/94, § 87, ECHR 1999-V.
[103] *Salman v Turkey* [GC], No 21986/93, § 99, ECHR 2000-VII.

disclose crucial documents in its exclusive possession, thus placing obstacles in the way of the establishment of the facts by the Court, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegation made by the applicant. It therefore held that the applicant's brother had indeed been arrested and detained by agents of the state as alleged by the applicant. In the absence of any explanation from the Government as to how he was killed while he was in the hands of security forces, the Court found a violation of Article 2 of the Convention[104].

83. It must be stressed, however, that the Court expects the applicant to make a *prima facie* case before it is prepared to shift the burden onto the respondent Government[105].

- Positive obligation to carry out investigations

84. According to the Court's established case law, Article 2 imposes a positive obligation on states by requiring that there should be an effective official investigation when individuals allegedly have been killed as a result of the use of force[106]. A failure to carry out such an investigation will result in a violation of Article 2 of the Convention, referred to as a "procedural violation". In examining whether an effective investigation has been carried out in a particular case, the Court has regard to documents drawn up in the course of the domestic investigation.

85. In its examination of the question whether an effective investigation had been conducted into the killing of the applicant's partner in the case of *Velikova v. Bulgaria*, the Court observed that a number of documents concerning the investigation into the killing had not been submitted to it by the Government. Reiterating the importance of a respondent state's duty to co-operate under Article 38 § 1 (a) of the Convention, the Court left open the question whether the respondent state had complied with its obligations in this case and proceeded to infer that the material submitted to it by the respondent Government contained all information about the investigation; other investigative steps that might have been taken at the domestic level were not taken into account by the Court as it did not have access to material documenting such steps. The Court, noting a number of serious deficiencies in the domestic investigation, concluded that there had been a violation of Article 2 of the Convention on account of a lack of an effective investigation[107].

III. Conclusions and recommendations

86. As illustrated above, the Court has found different ways to minimise the negative effects which a respondent Government's failure to co-operate might have on the Court's task of establishing the facts of the case at hand and has thereby ensured, to a certain extent, that applicants are not disadvantaged on account of the member states' superior position as regards access to evidence.

87. Nevertheless, I consider that there is room for improvement in this respect. In this connection, I should like to refer to the Rules of Procedure of the Inter-American Commission and Court of Human Rights which expressly deal with the issue of the obligation to co-operate. According to Rule 39 of the Rules of Procedure of the Inter-American Commission of Human Rights:

> "The facts alleged in the petition, the pertinent parts of which have been transmitted to the state in question, shall be presumed to be true if the state has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion."

88. Similarly, Rule 38 (2) of the Rules of Procedure of the Inter-American Court of Human Rights provides that:

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[104] *Çelikbilek v. Turkey*, cited above, §§ 70-72.
[105] See *Toğcu v. Turkey*, No 27601/95, § 95, 31 May 2005, in which the Court, on account of the highly conflicting versions of events proffered by the applicant concerning the disappearance of his son, decided not to shift the burden on to the respondent Government despite the latter's failure to submit to the Court a number of crucial documents.
[106] See, *inter alia*, *McCann and others v. the United Kingdom*, judgment of 27 September 1995, Series A No 324, p.49, § 161.
[107] *Velikova v. Bulgaria*, §§ 77-84.

> "In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested."

89. The Inter-American Commission and Court have a wide discretion in applying these rules and generally make prudent use of them, although the Commission has relied on Rule 39 in several contentious cases. The Inter-American Court has applied Rule 38 both for procedural aspects and with regard to the merits. The Commission and the Court do not normally rely solely on these rules to assess the facts of a case, even if they could. They consistently tend to complement even acknowledged facts with relevant evidence obtained from the applicant or by other means, depending on the circumstances of the specific case[108].

90. In my opinion, a similar Rule could be inserted in the Rules of the European Court of Human Rights, in addition to Rule 44 adopted in 2004. Such a rule may contribute to ensuring greater consistency in the Court's approach to the issue and, by laying out clearly the consequences of failure to co-operate, provide an incentive to states to fulfil their duties even more promptly.

91. Like the above-mentioned Rules of Procedure of the Inter-American Commission and Court, such a Rule should leave sufficient room for the Court's discretion, having regard to the plausibility and credibility of the applicant's allegations[109] and to any other evidence that may be in the Court's possession.

[108] This brief description of the practice of the Interamerican human rights bodies is based on a contribution kindly provided by Mr Olger L Gonzalez Espinoza, a member of the Inter-American Court's Registry.
[109] E.g. whether the evidence submitted by the applicant amounts to prima facie proof; see *Toğcu v. Turkey*, cited above, § 95.

Appendix I

November 2006

Memorandum on Threats to Applicants to the European Court of Human Rights in Cases from Chechnya

European Human Rights Advocacy Centre (EHRAC)
Memorial

1. Akhmadova and Others v. Russia, Application No 13670/03

From 6-10 March 2002, federal forces conducted a large cleansing operation in the village of Starye Atagi and detained dozens of individuals. In September 2002, eleven family members of nine of the disappeared men applied to the European Court (No. 13670/03). All applicants have actively searched for their relatives for more than a year and have appealed to numerous official bodies. In May 2003, the procuracy began to investigate the case more actively. Just a few months later, in July 2003, two of the applicants in this case received handwritten notes forwarded to them from military officials that read, "If something happens to our guys, you will be punished." The applicants have not informed the Court of these events out of fear for repercussions.

On 31 May 2005, a large number of policemen arrived at the house of one of the applicants, Arzu Akhmadova. They searched the house and checked all documents. Arzu's son, Magomed Akhmadov (b. 1981), was not home at that time as he stopped by a friend's house on his way from lectures at the university. On the same day, several policemen stopped the bus that Magomed usually takes and checked identification papers. The policemen left the house after approximately three hours.

In the night between 21 and 22 of May 2006 the village police detained Lemy Akhmadov, Magomed's half-brother. He was released after about one hour. He told his relatives that he had been questioned about the whereabouts of Magomed.

On 23 May Arzu Akhmadova went to the police officer to find out what he wanted. She requested that he give her a document explaining why they are looking for Magomed. The police officer refused to give her anything in written form and said that if they bring him a weapon, he would forget about Magomed.

2. Case No 2 v. Russia

AA applied to the ECtHR in 2002 in connection with the abduction and subsequent disappearance of her son in January 2000.

In January 2005 officials from the prosecutor office's of the republic of Chechnya arrived at AA's house and asked for her son, who had submitted the application to the ECtHR. The officials took AA's son aside and advised him to withdraw the application. If not, he was told he would have problems with the authorities. The officials went to his house several times and their demands became more and more insistent. A few days later in January 2005, they took him to the prosecutor's office where they dictated a letter for him to write to the General Prosecutor of the Russian Federation. In this letter, he stated that he and the rest of his family were happy with the investigation and asked the General Prosecutor to help him withdraw the application submitted to the ECtHR.

3. Baisayeva v. Russia, Application No 74237/01

Federal forces detained Asamart Baisaeva's husband Shakhid Baisaev on 3 March 2000 after the friendly-fire destruction of Russian military convoy near the village of Pobedinskoe. Mr. Baisaev has not been seen since. Russian forces filmed the incident as well as the period immediately following the incident, when Mr. Baisaev was held in detention by Russian federal forces. Mrs. Baisaeva was able to obtain a copy of the cassette. Despite this overwhelming evidence of her husband's detention by federal forces and subsequent "disappearance," Mrs. Baisaeva's appeals to the local procuracy proved fruitless, and she applied to the European Court in October 2001 (No. 74237/01). In

December 2001, officials from the procuracy visited Mrs. Baisaeva at her home and drove her to the Grozny city procuracy for questioning. There, two officials spoke with her, and one told her that she should not persist in further investigations into the disappearance of her husband and the search for his body. He implied that, if she did, something might happen to her children.

In April 2002, Mrs. Baisaeva was driving home when a military vehicle of the UAZ type overtook her on the road. Men in masks asked her, "Citizen Baisaeva, tell us, where are you taking your case? Do you want your husband to return home and die a natural death? You won't die [because of this], but your children will be cut to pieces."

4. Bazayeva v. Russia, Application No 57949/00

In 1999 Libkan Bazayeva's property was destroyed during the bombardment of a convoy of civilians escaping from Grozny. In 2000 she lodged an application before the European Court (No. 57949/00), which was declared admissible in December 2002. On 19 October 2003 about 20 to 25 men in camouflage uniforms searched the applicant's house in Grozny (at that time it had been offered for free to a family which had lost their own house). Mrs. Bazaeva was not at home at the time. According to eyewitnesses, the law enforcement officials were looking for her. The applicant does not know of the reason for the search as it was conducted without a search warrant.

In the judgment (Isayeva, Yusupova and Bazayeva v Russia) delivered on 24 February 2005 the Court found Russia in violation of Article 2 (to protect right to life / failure to carry out an adequate and effective investigation), Article 1 of protocol No. 1 and Article 13.

5. [Text deleted]

6. Bitieyeva and Others v. Russia, Application No 36156/04

On 27 March 2004 at around 2:00 a.m., armed and masked men in camouflage uniform on a number of military vehicles—evidently Russian troops—abducted eleven men from their homes in Duba-Yurt, Chechnya. Shortly after departing Duba-Yurt, the armed men released three of their detainees: Elmurzaev Ibragim, Elmurzaev Umar, and Elmurzaev Suleiman. On 9 April 2004, nine fresh dead bodies were discovered near the village of Serzhen-Yurt. Family members of the abducted men identified eight of them as their relatives. On 6 October 2004, the Applicants submitted a preliminary application to the ECtHR, *Bitiyeva and Others v. Russia*, 36156/04.

On the night between 1 and 2 April 2005, several armed people in uniform and masks broke into the Elmurzayev family's house and abducted Suleiman and Said-Khusen Elmurzayev.

The abducted men were placed in a white Niva and a car of the brand UAZ. Leaving the house, one of the cars broke down and they went to a car repair shop close by where they forced the owner to repair their car. Leaving the car shop, they travelled through a checkpoint nearby manned by soldiers.

On 8 May 2005, Said-Khusen's body was discovered in a river.

An investigation has been opened into the abduction and subsequent murder and disappearance, but the applicants are not aware of any outcome of the investigation.

7. Chitaev v. Russia, Application No 59334/00

In January 2001, Adam Chitaev, an applicant to the Court in 2000 (No. 59334/00, communicated to the Russian government on 28 August 2003), gave an interview to Radio Liberty in Moscow about his detention and torture in early 2000. Upon his return to Chechnya after the interview, the police began to threaten him, saying, "Don't go making trouble." A month earlier, Mr. Chitaev's brother, Rashid, had sent a request to the local procurator, asking for the return of a computer that had been confiscated at the time of the detention of his brothers Adam and Arbi. After this letter, police officers and procuracy officials visited him and told him to "withdraw the request immediately, or you will regret it."

In November 2001, the applicants' representatives wrote a letter to the procuracy requesting information as to whether a criminal case had been opened into the detention and torture of the Adam

and Arbi Chitaev. In January 2002, the applicants and other members of their family were called to the procuracy that had received this letter. A procuracy official spoke with Mr. Adam Chitaev and waved the letter in front of him, saying, "If you are going to make trouble, everything will end up worse for you. They jailed [Gregorii] Pasko,[110] and, [compared to him], who are you? You are a Chechen, living in Chechnya, where there are fewer rights than anywhere else. Where are you sending your complaints? Who do you think you can put pressure on? What, you don't know our system? Have they even arrested a single policeman here?" The official threatened to open a criminal case against him and his brother if he refused to sign a statement saying that during his detention in 2000, there had been no procedural violations against him. Out of fear for himself and his family, Adam Chitaev signed the statement.

On 3 September 2005, Adam Chitaev, residing in the city of Ust-Ilismk of Irkutsk region, was detained. He was not allowed to see his lawyer or notify his relatives about his whereabouts and was held for three days and asked to appear before the Prosecutor's office in Chechnya. When he finally managed to locate the person in charge of his case, he was informed that Adam and his brother were investigated in connection with a criminal case opened against them. The investigation is ongoing.

The family has later been approached by representatives of the authorities with an offer to give them an unofficial amnesty.

8. Dokuyev v. Russia, Application No 6704/03

In February 2001, V. A. Dokuyev and his son were detained by representatives of the Russian government. V. A. Dokuyev was released the following day, but his son was not released and subsequently disappeared. On 14 February, Dokuyev and his family lodged an application with the ECtHR, *Dokuyev v. Russia*, 6704/03. The case was communicated to the Russian government on 6 September 2005.

On 25 October 2005 penal investigator Kohayev R.M. came to his house and explained that he had received a letter from the Russian Government requesting him to obtain new testimonies from the Applicants in connection with his application to the European Court.

While questioning the applicant, penal investigator Kohayev R.M. wrote down the testimony himself. He did not ask the Applicants whether they had lodged an application with the European Court. After the interview the investigator asked the Applicants to sign the testimonies without reading them.

In its Memorandum from 29 November 2005 the Russian Government, referring to the interrogation of the family members, states to the Court that *"…V.A. Dokuyev explained that members of his family and he have not applied to the European Court", "… M.V. Dokuyeva referred to as one of the applicants in the reference of the European Court, informed that she had not applied to the mentioned organization*" and "*it has been established the persons referred to as applicants in the present application have in fact not applied to the European Court, Therefore the application lodged on behalf of them is a counterfeit and shall be stuck out of the list of cases in accordance with Article 37 of the Convention."*

The applicants in the case strongly deny having ever said anything to that effect. The applicant has submitted a complaint to the RF Prosecutor General about the penal investigator's behaviour and he has asked that the testimonies obtained on 25 October 2005 should be disregarded.

9. Case No 9 v. Russia

Two relatives of BB were killed in March 2000 during a bombardment of their village in Chechnya. BB's house and farm were completely destroyed. In an attempt to exhaust domestic remedies she

[110] Grigory Pasko, an investigative journalist for the Russian Pacific Fleet's newspaper, was arrested in November 1997 and accused of high treason in the form of espionage for his reporting on the Pacific Fleet's nuclear dumping practices. After several trials and appeals, in December 2001, Pasko was acquitted on nine out of ten charges, but convicted to four years of hard labor for treason. After serving two-thirds of his sentence, Pasko was released on parole in January 2003. He continues to appeal to have his conviction overturned.
See http://www.bellona.no/en/international/russia/envirorights/pasko/

applied to the district prosecutor's office in 2001. Officials in the prosecutor's office told her that if she pursued her complaint she would 'disappear.' In 2002 Ms. BB applied to the district court. Soon thereafter, Russian soldiers on an armoured personnel carrier came to her house and tore up her application to the district court. One of the soldiers told the applicant, "If you continue to complain about us, we'll get you wherever you may be." After some other abusive phrases the soldiers left. The applicant did not pursue any domestic remedies afterwards, fearing for her life.

In 2004 the applicant was called to a district court, where she was interrogated by a judge, notwithstanding that a judge of a district court is not empowered to collect evidence and question persons on his/her own motion and outside any proceedings pending before him or her. The questions asked by the judge concerned the date when the application was lodged with the European Court of Human Rights, who assisted her in doing so and whether she applied to any domestic court. The questioning did not relate to the criminal investigation into the killing of the applicant's family and bombardment of her house and farm, because the document which was produced as a result of the questioning, cannot, as a procedural rule, be added to the criminal case-file.

10. Case No 10 v. Russia

In September 2002, eight inhabitants of a village in Chechnya were detained during a military operation. The eight detainees subsequently disappeared. The applicants subsequently lodged an application with the ECtHR.

On one night in May 2006 at around 11 pm, the applicant CC, the father of one of the disappeared and one of the applicants in the case, was detained and taken to the police station for questioning. There he was accused of storing weapons. After about one and a half hours, CC was taken to a different location where he spent the night. At around 5 pm on the next day he was taken home. He was not subjected to physical abuse, but the conditions in the detention place were poor and he became ill afterwards to the extent that he ended up in hospital. Applicant CC was later released from the hospital.

11. Imakayeva v. Russia, Application No 7615/02

On 17 December 2000, 23-year-old Said-Khusein Imakaev was driving between the villages of Starye Atagi and Novye Atagi when a group of Russian servicemen stopped his car at a roadblock and detained him. Said-Khusein has not been seen or heard from since. In February 2002, Said-Khusein's parents filed an application with the European Court of Human Rights. Four months later, on 2 June 2002, Russian federal forces detained Imakaev's father, Said-Magomed Imakaev, at his home in the presence of his family. Said-Magomed subsequently also "disappeared." That same month, Marzet Imakaeva, mother of Said-Khusein Imakeav and wife of Said-Magomed Imakaev, filed an application to the European Court regarding her husband's disappearance. The cases of Said-Khusein Imakaev and Said-Magomed Imakaev are in one dossier, *Imakaeva v Russia*, no. 7615/02. The case was referred to the Russian government on 11 June 2002.

Soon thereafter, Russian authorities began harassing Marzet Imakaeva about her application to the European Court. On 24 July 2002, a local procuracy official questioned Mrs. Imakaeva about her application, asking where she had obtained the money to do such a thing. When Mrs. Imakaeva explained that she did not pay any legal fees, the procuracy official told her, "In Russia, everything is paid." In early August 2002, a military official also questioned Mrs. Imakaeva about her application and told her, "It is said that a Russian needs fifteen thousand dollars or more to get to the European Court. Tell me honestly, how many thousand [dollars] did you pay?" The military official then used his false assumption regarding the Imakaev family's ability to pay a large sum for the application to the European Court to accuse the family of financing rebel groups and thereby justify or explain the detention of Said-Magomed Imakaev.

Out of concern of her family, Marzet Imakayeva eventually decided to move to the USA where she currently resides.

On 9 November 2006, the Court held Russia responsible for the Death of Marzet's son and husband.

12. Case No 12 v. Russia

DD submitted an application to the ECtHR in 2004 in connection with torture that he had been subjected to by representatives of the authorities in October-November 2003.

Since the beginning of 2005, a local policeman and officials of the prosecutor's office have approached DD's relatives on several occasions demanding that he come to the prosecutor's office and sign a statement to the effect that he wants the criminal investigation to be closed. The officials said that it is impossible to solve the crime because the perpetrators are current employees of the security forces in Chechnya and investigating the case will create problems for the investigators. The investigators suggested that DD leave Chechnya because it is dangerous for him to be there. They told the applicant that if he did not withdraw the complaint there was a real risk that he might be abducted by Kadyrov's men.

Out of fear of persecution DD has changed his place of residence in Russia several times.

13. Goncharuk v. Russia, Application No 58643/00

In January 2000 Russian forces advanced into Grozny and by 17 January they were stationed in the Staro-Promyslovski district of Grozny. On 20 January 2000 Russian troops killed tens of civilians living in this district, including Elena Goncharuk's neighbours and two women who were hiding in the cellar of her house. She was wounded herself. She is the only known witness of the killings that took place in Staro-Promyslovski on 20 January 2000. In 2000 she applied to the European Court (No. 58643/00).

The applicant submitted that certain persons looked for her and wanted to punish her for relating her story. She submitted that from 2001 to 2004 her father in Kazakhstan, a friend in Ingushetia and sister in Stavropol region were contacted by various persons asking about her whereabouts. The applicant suffered from the consequences of her wounds and was afraid of approaching the authorities for fear that her whereabouts may become known to her persecutors.[111] Since 2000 the applicant has been in fear for her life and has moved several times in order to protect herself.

On 9 November 2003 two men went to her home and asked for Mrs. Goncharuk by name. According to the descriptions given by her neighbours, she believes these two men to be the same men that visited her home in Nazran during 2001. Mrs. Goncharuk was not at home this time. However, some days later, whilst her partner was waiting at a bus stop, a car pulled over and two men attacked him. After the beating, the two men said, "Elena is a very dangerous woman and you should not be with her." Notably, this incident occurred shortly after the applicant's representatives tried to find her in connection with her application to the European Court and two weeks after the Court had requested further information on her case.

The European Court declared the application admissible on 18th May 2006.

14. Khambulatova v. Russia, Application No 33488/04

Aminat Khambulatova applied to the ECtHR on 14 September 2005 in connection with the killing of her son by the security forces in Chechnya.

On 12 May 2006, second lieutenant Khashayen of the ROVD (local police division) came to Khambulatova's house and in a threatening manner demanded that she write a letter permitting them again to exhume her son's body. Khambulatova insisted that the exhumation be conducted in the presence of independent experts. The police officer said that there are no independent experts available and that the police would conduct the exhumation with or without her consent. Alternatively, the police officer suggested that she could withdraw the criminal case. After the visit, Khambulatova was taken to the Savelyevsky hospital due to a worsening in her state of health.

Khambulatova submits that the lieutenant was perfectly aware that exhuming a corpse was undesirable according to Chechen traditions and religion and that he was putting pressure on her.

[111] Admissibility decision of Goncharuk v Russia, 18 May 2006, p. 4

Due to the pressure from the authorities, Aminat Khambulatova sold her apartment and property and at the beginning of September 2006 moved with her family abroad. Currently she lives in Poland.

15. Case No 15 v. Russia

EE applied to the ECtHR in connection with the abduction and subsequent disappearance of her husband in Ingushetia in 2004.

EE has on several occasions received threats from officials of the security forces because of her attempts to seek redress. She was asked to stop searching for her husband and to drop her application concerning the inaction of the Prosecutor for not conducting a preliminary investigation about the whereabouts of her husband. During a district court hearing in 2005, in which the court heard complaints by the applicant that the prosecutor had been negligent in investigating her claims, the investigator threatened the applicant with criminal prosecution if she continued to complain about the prosecutor's office. The judge advised the applicant not to file complaints against the prosecutor's office negligence until the end of the investigation.

In private conversations with the applicant, the investigator of the prosecutor office admitted the fact that the abduction had been conducted by FSB officials, but that he was powerless and that he was not able to arrest the perpetrators.

Concerned about her security, EE eventually left Russia.

16. Case No 16 v. Russia

In 2000, federal forces detained the wife of FF, who worked in Chechnya. About a year later, her body was discovered with signs of extra-judicial execution. Immediately after his wife's detention, FF searched extensively for his wife and appealed to numerous official institutions, but received very little information. Several months after his wife's disappearance, FF applied to the European Court. Soon after his application, FF was called to the procuracy where officials told him, "Cut it out! If you continue, you might also 'disappear' just like your wife." FF continued to actively pursue the case before the European Court and domestic institutions, and, as a result, was fired from his job in 2003 and has not been able to find work anywhere in Chechnya since. As a result, **FF is considering withdrawing his application to the Court.**

17. Case No 17 v. Russia

The applicant, GG, complained about the disappearance of his brother to the European Court in 2001. The applicant's brother was detained in October 2000 and then detained by the ROVD. The applicant's brother has since then "disappeared".

In early 2004 several persons wearing masks and camouflage uniforms burst into the applicant's mother's house in her village and demanded to see the applicant. The only person present, the applicant's nephew, was ordered to lie on the floor. A rifle was aimed at his head. However, the members of the Security Service of the President of the Chechen Republic saw the men burst into the house and arrived to disarm them. The men in the camouflage uniforms produced their FSB identity cards and left the applicant's mother's house. They demanded that the applicant's elder brother should come to the local FSB office. Several days later, during his visit to the FSB, the applicant's elder brother was told by the FSB officer that a criminal case had been opened against the applicant. No further details were given.

Later in 2004 a member of the Security Service of the President of the Chechen Republic came to the applicant's mother's house and brought a note from the applicant, saying that the applicant was detained in the Chechen Republic (on the Khankala military base near Grozny). Nothing has been heard about the fate of GG since then.

18. Makhauri v. Russia, Application No 58701/00

On 21 January 2000 Kheedi Makhauri witnessed the looting of houses in the Staro-Promyslovski district of Grozny by Russian armed forces. At the time she was with two other women. All three women were immediately arrested and driven to the outskirts of Grozny. The Russian soldiers killed the two women and shot the applicant several times. The soldiers poured gasoline over the three bodies and left. Minutes later Kheedi was found by some passers-by and helped to safety. She was taken to a refuge nearby and then transferred to another location, as they feared she could be easily found. Hours later soldiers came looking for the "injured woman". She left the region and in late 2000 applied to the European Court (No. 58701/00). Members of the Russian federal armed forces regularly visited her home looking for her. Her neighbours presumed that the soldiers knew about her case. The applicant viewed this fact as a real threat to her life.

The applicant submits that due to the multiple threats and unlawful actions from the authorities (unwarranted searches in her apartment and unlawful detention of her family members), she was forced to move abroad in 2005. Currently she lives in Poland. Kheedi Makhauri did not apply to the prosecutor's office regarding the oral threats and unlawful actions from the law enforcement bodies, as she feared for her personal safety and safety of her family members.

19. Medova v. Russia, Application No 25385/04

Zalina Medova submitted an application to the ECtHR in connection with the abduction and disappearance of her husband, Adam Medov, in July 2004. In April 2005 the Court gave priority to the application under rule 41.[112]

In January 2005, Medova started experiencing problems with the authorities. A person introducing himself as a major from the Federal Security Service (FSB) offered Medova through her relative, progressively, 10 000 roubles, 10 000 US Dollars and 30 000 US Dollars, in exchange for her withdrawal of the complaint to the European Court. The relative relayed this to her by telephone. On one occasion the applicant met with a man claiming to be an officer of the FSB, in a meeting arranged informally through her relative. During that meeting the officer told her about threats "to put her out of the way," allegedly overheard by him from his superiors and of which he tried to warn her as a friend.[113]

The same person told the applicant that her husband was dead, and promised to help her find out the location of the body.[114]

During the last conversation, on 8th March 2005, the applicant was offered 30 000 US Dollars. Her relative told her that he had persons from the FSB standing next to him and told her that it was their "final warning."[115]

Medova was in the end forced to leave the country out of concern for her safety and she now lives in Berlin, Germany.

20. Case No 20 v. Russia

In 2000 HH was arrested during a sweep operation. He was detained and subjected to torture. Some months later he submitted an application to the European Court. In 2003 HH's representatives re-established contact with him and he confirmed that he was willing to proceed with his case. An appointment was made for him to meet his representatives but he did not attend. A week later HH called his representatives and said that he had changed his mind and wanted to withdraw his case. He intimated that it was bringing him "trouble" and that he feared severe repercussions. HH referred to "having been warned" and instructed his representatives **to withdraw his application to the European Court.**

[112] Letter # ECHR-LE4.1R from the ECtHR to K.Koroteev, "Memorial", dated 4 April 2005
[113] Statement of facts prepared by the Registry, 4 April 2005.
[114] ibid
[115] ibid.

21. Case No 21 v. Russia - withdrawn

In the spring of 2001, during a massive “cleansing operation” in central Chechnya, “Rashid R.” and “Suleman S.” were among many men detained by federal forces. The bodies of Rashid R. and Suleman S. were recovered later in a mass grave. Close relatives of the men submitted an application to the European Court. Soon after the application, the relatives faced verbal threats from federal officials who visited them on multiple occasions. As a result of these threats, the applicants became afraid for their lives and the lives of their remaining family members and **formally withdrew their application to the European Court**.

22. Case No 22 v. Russia

KK’s husband was abducted by federal forces during a large cleansing operation in the spring of 2001. His body was later found bearing evidence of extra-judicial execution. KK submitted an application to the European Court in 2002. Soon thereafter, federal servicemen apprehended KK, took her to the military commandant’s office and beat her severely before releasing her. In separate incidents in 2003, military servicemen visited the homes of KK’s relatives and neighbours and asked for KK by name. They also asked, “Why is she writing those letters? What are you looking for?” KK noted that, immediately prior to these incidents, her representatives had sent letters to the local procuracy requesting information about the investigation into the incidents involving her husband.

23. Case No 23 v. Russia

In 2001, Russian federal troops on two armoured personnel carriers and several other vehicles came to a village in Chechnya. After a brief shoot-out in which at least one officer and two locals were wounded, the servicemen detained several inhabitants and took them to a military base. An application was submitted to the European Court in 2004.

In April 2005, a group of armed and masked men in uniform burst into the house of one the families. The men did not introduce themselves. One of them wore a black uniform, the rest standard military uniforms. The men checked the identity papers of the various people in the house, and then asked for the head of the household. The men told the head of the household to dress warmly, took him to an Uaz car that was waiting in the street, and then drove away.

On the second day after the abduction, the applicants informed the prosecutor’s office. In the next few days, an investigator accompanied by military servicemen visited the family, took testimony from eyewitnesses, including neighbours, took pictures of the house and courtyard, and made a crime-scene sketch. The investigator apparently also checked detainees’ lists. The applicants have since inquired about the results of the investigation but have been told that investigators do not know the whereabouts of the first applicant’s husband.

Appendix II

Moscow, 27 December 2006

Comments by the Office of the Prosecutor General of the Russian Federation on the "Memorandum on Threats to Applicants to the European Court of Human Rights in cases from Chechnya"
(Rapporteur: Mr C. Pourgourides, Cyprus)

1. Akhmadova and others v. Russia (Application No 13670/03)

From March 6 to March 13, 2002, in the settlement of Starye Atagi a special operation was held to detain members of illegal armed units who murdered four officers of the Federal Security Service of Russia.

On March 7, 2002 at about 2 p.m. in house 81 on Nagornaya street in Starye Atagi a combat took place and 4 members of illegal armed units were killed. The house went on fire and the bodies suffered severe thermal action.

On March 9, 2002, 3 km away from Starye Atagi on a motor road a picket of the Ministry of the Interior was shot from a passing car VAZ-21099. The picket engaged in shooting and brought the car on fire killing 3 members of illegal armed units. The bodies suffered severe thermal action.

After the special operations, the residents of Starye Atagi filed applications about 11 missing local residents: Akhmadov A.P., Kanaev S-S.S-Kh., Djamaev I.I., Kuntaev I.A., Chagaev I.A., Pokaev E.Sh., Magomadov I.S., Isambaev M.Kh., Baysarov A.Sh., Khadzhaev T.S., Zakaev A-N.M.

On March 13, 2002, the prosecutor's office of Groznensky district of the Chechen Republic initiated a criminal case under paragraph "a" part 2 article 105 of the Criminal Code of the Russian Federation (murder of two and more persons) and sent it for further investigation to the military prosecutor's office.

During investigation, they exhumed the remains of the members of illegal armed groups killed in combat. According to the molecular genetic examination, the exhumed remains belong to Akhmadov A.P., Kanaev S-S.S-Kh., Djamaev I.I., Chagaev I.A., Pokaev E.Sh., Magomadov I.S.

The whereabouts of 5 residents of Starye Atagi are unknown. The preliminary investigation into the case is underway.

Such lengthy investigation is caused by the contradictions in the evidence of the military and locals about the events in question and complexity of molecular and genetic examination.

Akhmadova Arzu (born in 1949) who was questioned December 15, said that on March 6, 2002, her son Akhmadov Aslan was taken in an unknown direction by unknown armed persons. The criminal case was initiated. It is currently investigated by the military prosecutor's office. She filed an application regarding the abduction of her son to the European Court of Human Rights (ECHR). No one visited her at home or threatened her because of this application to the ECHR. She doesn't know where the information regarding such threats comes from.

In June 2001, the prosecutor's office of Groznensky district carried out an enquiry regarding the unauthorized search in the Akhmadovs' house. During inspection, Akhmadov P.A., his wife Akhmadova A., and sons Akhmadov L.P., Akhmadov R.P. explained that the servicemen had simply checked their documents, there had been no search and no questions about the application to the ECHR had been asked. Akhmadova P.A. doesn't see any link between this visit and her application to the ECHR.

2. Case No 2 v. Russia

No comments due to the absence of basic data about the applicant.

3. Baysaeva v. Russia (Application No 74237/01)

On May 10, 2000, the prosecutor's office of Grozny initiated a criminal case under part 1 article 126 of the Criminal Code regarding kidnapping of Baysaev Shakhid Raduevich (born in 1939) by unknown persons in camouflage near the settlement of Podgornoe of Staropromyslovsky district of the Chechen Republic.
Till now, neither the whereabouts of Baysaev Sh.R. nor his death have been established.

Criminal proceedings have been repeatedly suspended under paragraph 1 part 1 article 208 of the Code of Criminal Procedure of Russia (non-identified criminal defendant) and renewed.

During inquiry, Baysaeva A.M. (born in 1958) confirmed the facts listed in the Memorandum. July 19, 2006, the prosecutor's office of Staropromyslovsky district of Grozny checked if any pressure was exercised versus her because of her complaint to the ECHR as she stated in her application to the Parliament of the Chechen Republic. After the check on 28th of July, 2006, a regulation was issued not to initiate a criminal case. The regulation was revoked on the 15th of December 2006, and the documents were sent for another check. During the check, the argument of Baysaeva A.M. wasn't confirmed, therefore on the 16th of December 2006, the prosecutor's office of Staropromyslovsky district of Grozny refused to initiate a criminal case regarding the pressure on Baysaeva A.M. based on paragraph 2, part 1, article 24 of the Code of Criminal Procedure of Russia (no corpus delicti).

4. Bazaeva v. Russia (Application No 57949/00)

On October 29, 1999, about 2 p.m. near the settlement of Shaami-Yurt of the Chechen Republic two aircrafts fired missiles at the train of cars, among which there was a car of the Chechen Republican Committee of Red Cross and refugees.

In the missile attack 16 relatives of the applicants and other citizens were killed, 11 people were wounded, 14 vehicles were damaged.

On May 3, 2000, the military prosecutor's office initiated a criminal case based on the results of the inspection into the death of citizens that had been investigated by the military prosecutor's office of Northern Caucuses military district.

On April 30, 2004, the case was closed under paragraph 2 part 1 article 24 of the Code of Criminal Procedure of Russia (no corpus delicti).

On February 24, 2005, the ECHR ruled that human rights of the residents of the Chechen Republic were violated when killing agents were used on October 29, 1999 in Shaami Yurt. The regulation to close the criminal case dated November 14, 2005 was revoked and investigation proceeded.

Currently, a general forensic enquiry is underway.

In 2004, the prosecutor's office in Staropromyslovsky district of Grozny initiated a check of the facts stated in the Memorandum. During enquiry, Bazaeva L. (born in 1945) confirmed the facts stated in the Memorandum and explained that she related the visit of law enforcement officers to her home in Grozny on October 19, 2003 to her professional activities. She is the head of the branch of Human Rights Center Memorial in the Ingush Republic. Based on the results of the enquiry on June 21, 2004, initiation of the criminal case was rejected due to the absence of criminal event according to part 2 article 139 and part 2 article 330 of the Criminal Code of Russia.

5. Case No 5 v. Russia

No comment because of the absence of facts.

6. Bitieva and others v. Russia (Application No 36156/04)

During an enquiry, the following persons were questioned: Murtazov L-A.A., Sataeva A.D., Khamidova M.S.-A., Khadzhimuradova P.A., Betieva M.M., Osmaeva Z.Kh. They explained that on March 27, 2004, at about 2 p.m. in the settlement of Duba-Yurt of Shalinsky district, unknown armed persons kidnapped their relatives Elmurzaev B.L., Elmurzaev I.S.-Kh., Elmurzaev Sh.Kh., Shaipov L.A., Murtazov A.A., Khadzhimuradov Kh.I., Khadzhimuradov I.I., Osmaev Z.U. The prosecutor's office recognized them as complainants and later they filed an application to the ECHR. The servicemen and law enforcement officers didn't make any threats to them.

On March 5, 2004, the prosecutor's office of Oktiabrskiy district of Grozny initiated a criminal case under paragraphs «а», «г» and «ж» article 126 of the Criminal Code of Russia (kidnapping by a group of persons by previous concert; use of weapons or other means used as weapons; against two or more persons).
The criminal investigation is in process.

7. Chitaev v. Russia (No 59334/00)

On April 17, 2000, the interregional prosecutor's office of the Chechen Republic in Achkhoy-Martan initiated a criminal case against brothers Chitaev Arbiy A. and Chitaev Adam S. Under «а» and «ж» part 2article 126 (kidnapping by a group of persons by previous concert; against two or more persons), article 208 (organization of an illegal armed unit or participation in an illegal armed unit) of the Criminal Code of Russia.
On January 20, 2001 this criminal case was closed based on paragraph 2 part 1 article 209 of the Code of Criminal procedure of Russia (failure of evidence against defendants).

According to the available information, Chitaev Arbi Salaudovich (born in 1964) moved with his family to Germany early 2001. His whereabouts are unknown. Chitaev Adam Salaudievich (born in 1967) moved outside the Chechen Republic in 2003 and lives with his family in Ust-Ilimsk of the Irkutsk region. During enquiry, the Chitaevs' relatives – Chitaev S.I. and Chitaev D.S. explained that they were unaware about the complaint to the ECHR or related threats to their family members.

8. Dokuev v. Russia (Application No 6704/03)

On August 12, 2001, the prosecutor's office in Shalinsky district of the Chechen Republic initiated a criminal case under paragraph «а» part 2 article 126 of the Criminal Code of Russia about kidnapping of Dokuev M.V.

On November 21, 2005, the preliminary investigation into the case was suspended based on paragraph 1 part 1 article 208 of the Code of Criminal Procedure of Russia (criminal defendant not identified).

Dokueva Z.A. and Dokueva R.V. (mother and sister of the kidnapped person) stated that after the kidnapping of Dokuev Magomed Vakhidovich on February 12, 2001, they filed an application to the ECHR. No threats were made to them in this connection by the servicemen or law enforcement officers.

The law enforcement agencies of Russia continued the investigation and operational search action to establish the whereabouts of Dokuev Magomed and perpetrators of the crime.

9. Case No 9 v. Russia

The information stated in paragraph 9 of the Memorandum coincides with the circumstances stated in A.M. Elsanova's application to the ECHR. The prosecutor's office initiated the enquiry into the matter according to the procedure described in articles 144 – 145 of the Code of Criminal Procedure of Russia.

It was established that Elsanova A.M. complained to the ECHR about the actions of "federal servicemen" when from March 16 to March 26, 2000, in the settlement of Nikhaloy of Shatoiskiy

district of the Chechen Republic her relatives (brother and niece) were killed in a bomb strike, and her kettle and farmhouse were destroyed.

She also complained about the threats she received because of her application to the Court from unidentified servicemen.
As the criminal event couldn't be established, the initiation of the criminal case was rejected based on paragraph 1 part 1 article 24 of the Code of Criminal Procedure of Russia.

On November 15, 2005, the ECHR rejected Elsanova's complaint due to the obvious insufficiency in terms of paragraphs 3 and 4 of article 35 of the Convention.

10. Case No 10 v. Russia

No comments due to the absence of basic data about the applicant.

11. Imakaeva v. Russia (Application No 7615/02)

On June 28, 2002, the prosecutor's office of Shalinsky district of the Chechen Republic initiated a criminal case based on elements of crime under subparagraphs «а», «г», «ж», part 2 of Article 126 of the Russian Code of Criminal Procedure (kidnapping of a person by a group of persons by previous concert, with employment of weapons or objects used as weapons, in respect of two or more people).
In the course of the investigation it was established that on June 2, 2002, about 6 a.m. in the settlement of Novye Atagi of the Chechen Republic unidentified persons in camouflage outfits, with guns, searched the house property belonging to the Imakaevs, situated in Ordzhonikidze st., 11. After that S.-M.U.Imakaev was carried away in an unknown direction and his whereabouts have not been established till now.

On June 9, 2004 criminal proceedings under paragraph 1, part 1, Article 24 of the Russian Code of Criminal Procedure were stopped (due to the absence of criminal event).

On November 16, 2004 the prosecutor's office of Shalinsky district of the Chechen Republic initiated a criminal case based on elements of crime under part 1 of Article 105 of the Russian Criminal Code (murder).
On October 19, 2006 the European Court stated violation of Articles 2, 5, 8, and 13 of the Convention and ruled that compensation be paid to the applicant.

M.Sh.Tsamaraeva (M.Imakaeva's sister) and P.Yu.Osmaeva, (M.Imakaeva's distant relative) were questioned and explained that M.Imakaeva did file an application with the ECHR, however they were not aware of threats to her related to this complaint from representatives of law-enforcement agencies. M.Imakaeva is currently living in the USA. It appears from the explanation of the officer of the prosecutor's office of Shalinsky district of the Chechen Republic, who interrogated M.Imakaeva, that issues related to her lodging a complaint with the ECHR were not discussed during the interrogation at all.

12. Case No 12 v. Russia

No comments due to the absence of basic data about the applicant.

13. Goncharuk v. Russia (Application No 58643/00)

The whereabouts of E.V.Goncharuk have not been established till present time. Open reluctance of E.V.Goncharuk to co-operate with the investigative agencies makes it difficult to establish the true circumstances of the case and the persons who had committed offence against her. E.V.Goncharuk's ignoring the criminal proceedings together with her application filed with the ECHR on inefficiency of the investigation is bewildering since E.V.Goncharuk's evidence could be of significant influence to the course and results of the investigation of the criminal case. Moreover, investigators are not able to inform E.V.Goncharuk of the ruling on recognizing her as the injured party in the case and explain to her rights under Article 42 the Russian Code of Criminal Procedure.

As appears from the materials of the criminal case, E.V.Goncharuk did not file complaints about inefficient investigation either with the prosecutor's office or with other investigative bodies of the Russian Federation, or with the court.

Materials of the case do not contain any intelligence of E.V.Goncharuk being threatened in connection with her complaint to the European Court.

The statements of E.V.Goncharuk that from 2001 to 2004 she had been searched for by unknown persons can be explained by the fact that Russian law enforcement agencies were taking active measures to establish her whereabouts.
Investigation is under way.

14. Khambulatova v. Russia (Application No 33488/04)

On March 18, 2004 in the course of operational search action within the frameworks of "Vikhr-Antiterror"in Naursky district of the Chechen Republic operation law enforcement officers detained Temur Rizvanovich Khambulatov, born in 1980, and brought him to Naursky local police precinct. An improvised explosive device (200 grams TNT equivalent explosive yield) was found and seized at T.R.Khambulatov's place of residence.

When convoyed to the local police precinct of Naursky district T.R.Khambulatov tried to snatch out the machine-gun from one of the Federal Security Service officers and escape but was apprehended with use of physical force.

Later, in the criminal investigation office of Naursky local police precinct, when being interrogated by a criminal investigation officer, the state of T.R.Khambulatov's health suddenly deteriorated and, despite the medical aid of a paramedic from the precinct aid post, he died.
The military prosecutor's office carried out the check of military servicemen's actions during the apprehension of T.R.Khambulatov, and based on results of it declined to initiate criminal proceedings under paragraph 2, part 1 of Article 24 of the Russian Code of Criminal Procedure due to the absence of elements essential to the offence in these actions.

According to forensic medical examination the cause of T.R.Khambulatov's death was secondary cardiomyopathy, complicated by development of pulmonary heart disease. The detected condition could have been the result of some chronic intoxication, or the consequence of a previous infection, or metabolic disorder. Forensic medical examination did not establish direct causal relation between the bodily injury, which if speaking of living persons should be classified as minor harm to the health, and the death of T.R.Khambulatov.

On June 29, 2004 the prosecutor's office of Naursky district initiated a criminal case based on the fact of T.R.Khambulatov's death under paragraph «a», part 3 of Article 286 of the Russian Code of Criminal Procedure. Subsequently the case was transferred to the prosecutor's office of the Chechen Republic.

On May 6 2006 A.Khambulatova filed a statement to the prosecutor's office of the Chechen Republic concerning the exhumation of her son's body provided that the second forensic medical examination be carried out by independent experts. On May 22, 2006 A.Khambulatova once again filed statement to the prosecutor's office of the Chechen Republic, insisting on repeated forensic medical examination by independent experts. On June 2, 2006, being additionally interrogated as the complainant in criminal case #40046 A.Khambulatova reiterated her demands. At the end of August 2006 A.Khambulatova left the territory of the Russian federation and her exact whereabouts are not known. On September 6, 2006 the court of Zavodskoy district of the city of Grozny permitted exhumation of the body of A.Khambulatova's son, which presently cannot be carried out due to the lack of information as to the exact place of burial.

Officer of the police precinct of Savelievskaya village of Naursky district of the Chechen Republic V.A.Khadzhoyan was questioned and explained that on May 12, 2006 he came to A.Khambulatova in order to serve her a subpoena to appear at the prosecutor's office. He and A.Khambulatova did not mention the exhumation of her son's body. He did not exert any pressure on A.Khambulatova.
Investigation of the case is continuing.

Preliminary investigation agencies did not receive any complaints or applications related to the facts of pressure exerted on persons who have applied to the European Court of Human Rights during the course of investigation of this criminal case.

15, 16, 17. Cases Nos 15, 16, 17 v. Russia
No comments due to the absence of basic data about the applicants.

18. Makhauri v. Russia (Application No 58701/00)

On January 22, 2000 in the city of Grozny L.A.Dzhabrailova and a woman called Nura were murdered and Kh.Sh.Makhauri was wounded.

On May 31, 2000 the military prosecutor's office initiated a criminal case based on elements of crime subparagraphs «а», «ж», part 2, Article 105 of the Russian Criminal Code (slaughter of two or more people by a group of people, a group of people by previous concert or an organized group).
As it was established that military servicemen were not implicated in this crime, on December 26, 2003 the case was transferred within the investigative jurisdiction of the prosecutor's office of the Chechen Republic.

On April 11, 2004 the prosecutor's office of Staropromyslovsky district of the city of Grozny initiated a criminal case based on the fact of murder of L.Dzhabrailova, N.Tovsultanova and the wound of Kh.Sh.Makhauri and A.Sh.Pokaev under subparagraphs «а», «ж», part 2, Article 105 of the Russian Criminal Code (slaughter of two or more people by a group of people, a group of people by previous concert or an organized group).

Neighbours and acquaintances of Kh.Makhauri – B.I.Sokuev, I.M.Magomadov, M.B.Muskhadzhieva, D.A.Akhmetkhanova, and M.A.Davletmurzaeva, questioned during the check, explained that they were not aware of the facts of pressure on Kh.Makhauri, including the search, exerted by representatives of government agencies of the Russian Federation in connection with her application to the ECHR. Kh.Makhauri is currently living outside the territory of the Republic.

Based on the results of the check on December 16, 2006 the prosecutor's office of Staropromyslovsky district of Grozny refused to initiate a criminal case due to the absence of the criminal event.

19. Medova v. Russia (Application No 25385/04)

Based on the fact of kidnapping of A.K. Medov and A.I. Kushtonashvili on July 22, 2004 the prosecutor's office of Republic of Ingushetia initiated a criminal case under paragraph «а», part 2, Article 126 of the Russian Criminal Code.

The implication of officers of the Federal Security Service of Russia for the Chechen Republic in the kidnapping of citizens A.K.Medov and A.I.Kushtonashvili was not established.
Investigation of the case is continuing.

Preliminary investigation agencies did not receive any complaints or applications related to the facts of pressure exerted on persons who have applied to the European Court of Human Rights during the course of investigation of this criminal case.

20, 21, 22, 23. Cases Nos 20, 21, 22, 23 v. Russia

No comments due to the absence of basic data about the applicants.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10387, Reference No 3040 of 24 January 2005

Draft resolution adopted with one vote against and *draft recommendation* adopted unanimously by the Committee on 22 January 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György **Frunda**, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya **Atanasova**, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad **Becerril**, Mrs Marie-Louise **Bemelmans-Videc**, Mr Giorgi Bokeria, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mrs Ingrīda Circene (alternate: Mr Boriss **Cilevičs**), Mr Telmo Correia (alternate: Mr João **Mota Amaral**), Mrs Lydie Err, Mr Valeriy Fedorov, Mr Aniello Formisano (alternate: Mrs Maria-Luisa **Boccia**), Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Serhiy **Holovaty**, Mr Michel **Hunault**, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Željko Ivanji, Mr Sergei **Ivanov**, Mrs Kateřina **Jacques**, Mr Antti **Kaikkonen**, Mr Karol **Karski**, Mr Hans **Kaufmann**, Mr András **Kelemen**, Mrs Kateřina **Konečná**, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mr Eduard **Kukan**, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper (alternate: Mr Krzysztof **Lisek**), Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Tony Lloyd, Mr Humfrey **Malins**, Mr Pietro **Marcenaro**, Mr Alberto Martins (alternate: Mr Ricardo **Rodrigues**), Mr Andrew McIntosh, Mr Murat Mercan, Mrs Ilinka **Mitreva**, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić (alternate: Mr Žarko **Obradović**), Mrs Carina **Ohlsson**, Ms Ann **Ormonde**, Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria **Postoico**, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano (alternate: Mr Andrea **Manzella**), Mr Armen **Rustamyan**, Mrs Rodica Mihaela **Stănoiu**, Mr Christoph **Strässer**, Mr Mihai **Tudose**, Mr Øyvind **Vaksdal**, Mr Egidijus Vareikis, Mr Miltiadis **Varvitsiotis**, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krysztof **Zaremba**, Mr Vladimir Zhirinovsky, Mr Miomir Žužul (alternate: Mr Slaven **Letica**)

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, Mrs Maffucci-Hugel, Ms Heurtin

Parliamentary **Assembly**
Assemblée parlementaire

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

Doc. 11183 Addendum
1 October 2007

Member states' duty to co-operate with the European Court of Human Rights

Addendum to the report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party

I. Introduction

1. The report on "Member states' duty to co-operate with the European Court of Human Rights" was adopted by the Committee on Legal Affairs and Human Rights during the January 2007 part-session. A slot on the agenda of the Assembly's plenary became available only at the October part-session. In view of the importance of the subject for the effective protection of human rights in Europe, and of the gravity of the issues and individual cases raised in the report, the Rapporteur found it necessary to present a factual update to the Assembly in the form of the present addendum.

2. New developments since the end of January 2007 include:

- New judgments of the European Court of Human Rights pertaining to the issues raised in the original report;
- New developments (or their absence) in the individual cases presented in the original report and its appendix;
- New cases of suspected pressure on or reprisals against applicants to the Court.

II. New developments since the adoption of the draft resolution and draft recommendation by the Committee on Legal Affairs and Human Rights

i. New judgments of the European Court of Human Rights

3. The following new judgments of the European Court of Human Rights were signalled to the Rapporteur as being related to the topic of the report.

Musayeva and others v. Russia

4. In the Chamber Judgment Musayeva and Others v. Russia[2], the Court, which found violations, inter alia, Article 2 of the European Convention on Human Rights ("ECHR") (right to life – responsibility on account of the killings of the applicant's relatives and on account of the authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the killings), condemned the

[1] See Doc 11183.
[2] Application No 74239/01, judgment of 26 July 2007, cf. press release No 531 issued by the Registrar on the same date.

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Russian Federation for a failure to comply with Article 38 § 1 (a) of the Convention in that the Russian Government refused to submit the documents requested by the Court.

5. The Court had on several occasions requested the Government to submit a copy of the investigation file opened into the killings of the applicants' relatives. In reply, the Government had produced only copies of procedural decisions instituting, suspending and reopening criminal proceedings, those of investigators' decisions taking up the criminal case and letters informing Mrs Musayeva of the suspension and reopening of the criminal proceedings in the case. Having regard to the importance of cooperation by the Government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court found that the Russian Government had fallen short of their obligations under Article 38 § 1 (a) ECHR.

Musayev and Others v. Russia[3]

6. In this judgment, adopted unanimously, the Court explicitly "noted the difficulties for applicants to obtain the necessary evidence in support of allegations in cases where the respondent Government are in possession of the relevant documentation and fail to submit it. Where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to the lack of such documents, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3 (see Toğcu v. Turkey, No 27601/95, § 95, 31 May 2005, and Akkum and Others v. Turkey, No 21894/93, § 211, ECHR 2005-II)."

7. It seems that the case law presented in the original report, developed by the Court when it was first confronted with such issues in Turkish cases, has now become firmly established in the Court's practice, a development that can only be welcomed.

Other cases of failure to submit necessary documentation to the Court

8. Since the end of January 2007, the following other judgments deal with the failure of the authorities to submit the necessary documentation to the Court: Alikhadzyhiyev v. Russia (Application No 68007/01), Akhmadov and Sadulayeva v. Russia (Application No 40464/02), Baysayeva v. Russia (Application No 74237/01), Chitayev and Chitayev v. Russia (Application No 59334/00). Since all these cases concern the Russian Federation and no other country has the same problems, there seems to be a structural problem regarding the Russian Federation, which ought to be addressed urgently.

Bitiyeva and X v. Russia

9. In the case of Bitiyeva and X v. Russia[4], the first applicant, Zura Bitiyeva, had complained to the Court about ill-treatment during her and her son's detention in the notorious Chernokozovo prison in 2000. On 21 May 2003, Ms Bitiyeva, her husband, their son, and her brother were killed at Ms Bitiyeva's house, by a group of eleven men wearing special forces uniforms and travelling in two UAZ-45 vehicles during curfew hours. X, Ms Bitiyeva's daughter, the second applicant, also complained about intimidation and harassment subsequent to her own application to the Court. She currently lives in Germany, where she sought asylum.

10. The Court found violations of Article 2 of the Convention by the Russian Federation both on account of the killings of Ms Bitiyeva and her relatives, and in respect of the failure to conduct an effective investigation into the circumstances of their deaths. The Court also found that the Russian Government had failed to comply with their obligations under Article 38 § 1 (a) to furnish all necessary facilities to the Court in its task of establishing the facts. But the Court found that there had been no violation of Article 34 (right of individual application).

11. The Russian human rights NGO "Memorial" had implied that the killings were in retaliation for Ms Bitiyeva's active commitment to revealing crimes carried out by the military and her complaint to the Court. During the investigation, Ms Bitiyeva's daughter, X (the second applicant), was granted victim status more than two years after she requested it in November 2003. X felt intimidated by a security check and questioning about illegal possession of arms in May 2004. Following her complaint about intimidation, an inquiry was carried out. Despite reassurances by the investigator, she again felt intimidated due to the nature

[3] Applications Nos 57941/00, 58699/00 and 60403/00.
[4] Chamber judgment of 21 June 2007, Application Nos 57953/00 and 37392/03, cf. press release No 434 issued by the Registrar.

of his questions, which also concerned her application to the Court. In view of the generally poor security situation, she stated that she perceived any contact with representatives of the law as a threat.

12. The Court's reasoning in rejecting a finding of a violation of Article 34 ECHR reflects its unease: the Court, using inferences from the lack of explanation given for the killings and the failure to investigate, had no difficulties holding the Russian Federation responsible for the killings as such - which, as the Court recognises, invariably have a "chilling effect" on other potential applicants. But as it did not find direct evidence to link the killings with Ms Bitiyeva's application to the Court, it did not find a violation of the right of individual application[5]. Similarly, the Court did not find a violation of Article 34 concerning the intimidation and harassment about which the second applicant, Ms X, had complained[6]. In view of the terrible experience of the massacre of her family, and the long time it took for Ms X to be granted victim status in the investigation of the massacre, the Court found it "understandable" that Ms X perceived any contact with the law enforcement authorities as dangerous and threatening. But the Court found that the authorities, which are indeed expected to investigate any complaints of intimidation, must have the possibility also to question the alleged victims of such acts.

13. In my opinion, the Court was right in not finding a violation of Article 34 either in the massacre of the first applicant and her family, or in the contacts between the law enforcement authorities and the second applicant, as they are described in the statement of facts. A Court cannot make findings of fact without sufficient evidence.

14. But I nevertheless disagree with the Court not finding a violation of Article 34 at all. The Court has justified in clear, strong terms that the authorities failed to carry out a proper investigation of the killings, whose victims were undisputedly an applicant to the Court and three members of her family, and which had a "chilling effect" on potential applicants to the Court. As it is almost always impossible to prove with sufficient certainty in court proceedings the motive of an act of reprisal, it should be enough for finding a violation of Article 34 that the crime in question, for which the authorities' responsibility is established and which they did not properly investigate, had as a victim an applicant to the Court or members of the applicant's family. In my opinion, Article 34 requires that the authorities properly investigate any criminal acts against applicants to the Court, their families or even their lawyers, failing which the Court should find a violation of Article 34, in addition to that of Article 2. The finding of a violation of Article 2 alone does not fully cover the aspect of the crime that a victim had previously made an application to the Court and that the crime and the authorities' failure to investigate has objectively a chilling effect on potential applicants.

ii. New developments in the individual cases presented in the original report and its appendix

15. With the exception of the Bitiyeva judgment presented in some detail above, I have only been informed of very few new developments regarding the individual cases that I presented in the original report and its appendix. This is bad news, as I would have expected that at least in some of these cases perpetrators of crimes and acts of intimidation against applicants to the Courts, their families and their lawyers would have been identified and prosecuted.

16. The harassment of human rights lawyer Karinna Moskalenko, who *inter alia* represents before the European Court of Human Rights such politically sensitive cases as that of Mikhail Khodorkovsky, and those of many Chechen victims of human rights violations allegedly committed by security forces, has continued after the adoption of the original report in January, though Mrs Moskalenko finds that it has somewhat

[5] Cf. Bitiyeva v. Russia, cited above, § 164. "As to the first element of the complaint, the Court finds that there is no direct evidence to support the second applicant's assertion that the killings of the first applicant and of her family members were related to her application to the Court. A breach of Article 34 cannot be found on a mere supposition. The Court does recognise, however, that the brutal and unresolved killing of the first applicant after she had lodged a complaint in Strasbourg alleging serious human-rights violations by State agents would have inevitably had a "chilling effect" on other current and prospective applicants to the Court, especially for the residents of Chechnya. It can only express its deepest regret and disappointment that there has been no effective investigation which could have elucidated the circumstances of the first applicant's killing (see §§ 144-151 above). However, it does not consider that it should make a separate finding of a breach of the respondent State's obligations under Article 34 in this respect, having already found a double violation of Article 2 and of Article 13. […]."

[6] Cf. Bitiyeva v. Russia, cited above, § 166: "[…] It transpires from the applicant's statements that she perceives any contact with the law-enforcement bodies as dangerous. This might be understandable in view of the second applicant's personal experience and the overall security situation in Chechnya, but leaves the State authorities without appropriate recourse if they wish to investigate the complaints and to ensure protection from the alleged threats. In short, the Court is not satisfied that the questioning of the second applicant in July and September 2004 constituted undue interference with her right of petition to the Court."

abated in recent months. She has provided me with a detailed account of a series of incidents in which she and some of her colleagues were intimidated and harassed on February 4, 6 and 7 at the airports of Domodedovo (Moscow) and Chita, on their way to and from a visit to their client Khodorkovsky. The account, supported by a number of documents and witnesses, is credible and has me wonder why certain officials act in such a way – Mrs Moskalenko and her colleagues will surely not be deterred by such actions, which let the authorities appear in an embarrassing light.

17. The disbarment procedures against Mrs Moskalenko have also come to a standstill. The application, justified by the authorities' claim that she had not defended her client Khodorkovsky effectively because she was too frequently absent from Russia (to be understood: in Strasbourg) has been rejected by the Moscow Bar Association after Mr Khodorkovsky himself declared himself satisfied with Mrs Moskalenko's work.

18. Similarly, the criminal investigations for tax fraud and "overcharging" of clients against Mrs Moskalenko and the NGO "Centre of Assistance to International Protection" that she had founded has, according to Mrs Moskalenko, currently been "placed on the back burner", though the investigations have cost her and her colleagues much time and energy, and they are still hanging over them like a "sword of Damocles".

19. An unambiguous piece of good news is the fact that the NGO "Stichting Russia Justice Initiative", which is advising many applicants to the European Court of Human Rights and whose registration troubles under the new NGO law were mentioned in the original report, is now properly registered and has relaunched its work - with some success as shown by recent judgments of the European Court of Human Rights in cases brought by this group[7].

20. Another new development in a case mentioned in the original report[8] concerns that of Mr Muminov. An inquiry in Russia has in the meantime ascertained that Mr Muminov was expelled from Russia to Usbekistan on 24 October 2006 at 11.50 pm and not, as originally believed, at 7.20 pm, i.e. not twenty minutes, but approximately five hours after the Court's decision under Rule 39 ordering a stay of the expulsion. Whilst this makes the actual violation of the duty to cooperate worse, it is commendable that a serious inquiry has taken place and that a criminal case has been opened against the police officer in charge of Mr Muminov's expulsion.

iii. New cases of suspected pressure on or reprisals against applicants to the Court

21. Lawyers form the "Centre of Assistance to International Protection" have informed me of several fresh cases of interference with the right of individual petition against prison inmates in the Russian Federation, concerning Mr Pavlenko, serving his sentence in prison # IK-6 at Melekhevo (Vladimir Region), and Mr Yury Zavorokhin, who is serving his sentence in prison # 382/12 at Gubakha (Perm Region) and Mr Oleg Likhachev and Mr Igor Manukhin, both serving their sentence in prison # IK-3 in Krasnokumskoye (Stavropol Region)[9]. Whilst Mr Pavlenko complained about severe ill-treatment by named senior prison officials, leading to the death of one convict and long sufferings of Mr Pavlenko himself, the other inmates describe in some detail the practical obstacles placed in the way of their correspondence with the Court by prison officials (requests for bribes, refusal of purportedly required forms, threats of reprisals).

22. The Russian NGO Human Rights Centre "Memorial" suffered what activists see as an attempt at intimidation in connection with the publication, by Memorial, of a manual for applicants to the European Court of Human Rights. The prosecutor's office started a "check" into the activities of HRC "Memorial" in connection with the publication of this particular book. "Memorial" was asked to submit all the documents relevant to the publication (contract with the printers, financial documents, etc.). Memorial's President Oleg Orlov brought the case to the attention of the Ombudsman, Mr Lukin, who intervened with the Prosecutor General. He was reportedly told that the prosecutor's office was primarily interested in the printer's shop. Indeed, "Memorial" was then left alone and the prosecutor's office started to "check" the activities of the printer's shop. As a result, when "Memorial" recently contacted the same printer with the intent of publishing their new report, the printer refused, claiming that they were too dangerous a client.

23. Another particularly serious case of alleged reprisals against applicants to the Court was published by the Czech NGO "Prague Watchdog" on 19 July 2007[10]. A Chechen prisoner, 25 year-old Azamat Uspayev, died in prison of injuries resulting from an accidental fall from the second floor, shortly after he filed

[7] http://www.srji.org/en/.
[8] § 52.
[9] They explicitly agreed to have their names included in this addendum.
[10] Prague Watchdog Communiqué of 19 July 2007.

a case with the European Court of Human Rights. When Azamat's father went to collect his son's body, he found out that on that day his son and two other Chechen inmates, who suffered severe injuries, had been severely and cruelly beaten. On 30 July 2007, I wrote to the Head of the Russian delegation with PACE asking through him for a copy of the coroner's report and any other forensic expert's report that might have been established at the request of the family of the deceased, and to inform me of any other measures taken by the competent authorities in order to establish the responsibilities for the death and injuries sustained by the three inmates in question. I have not received any reply to date.

24. Human rights lawyers of the "European Human Rights Advocacy Centre" (EHRAC) based in the United Kingdom recently informed me of a case in which the respondent Government contacted "vulnerable" applicants (state employees) with a view to negotiating a friendly settlement without passing through, or even informing their legal representatives[11]. In response to a complaint to the Court, the EHRAC lawyers were informed that the Court cannot prohibit the Government from contacting the applicants even if they are represented. In my opinion, when applicants are represented by lawyers, the respondent Governments should channel all communications through them, as a matter of minimising the risk of undue pressure. I have introduced an amendment to our draft resolution reflecting this point, which is not in contradiction with the Court's position: while the Court cannot oblige Governments to pass through the applicants' lawyers, the Assembly can appeal to them to do so as a matter of good cooperation, and in accordance with well-established practice when power of attorney is provided to a lawyer.

III. Conclusions

25. This short update shows that the report adopted by the Committee on Legal Affairs and Human Rights in January is still quite representative of the situation. The draft resolution and draft recommendation do not require any modifications in light of the recent developments presented in this addendum.

26. The new judgments of the European Court of Human Rights concerning the member states' duty to cooperate show that the Court's case law on the duty to submit documentation, failing which it reserves the possibility to resorts to factual inferences has become solidly established. All such cases decided so far in 2007 concern the Russian Federation, whilst the case law in question was originally developed in Turkish cases. This shows that Turkey has done her homework in this respect, whilst the Russian Federation should urgently address the systemic issue that is quite apparent from the accumulation of cases.

27. The new and continued cases of harassment, intimidation and even, in one case, of the killing of applicants to the Court, members of their families, or their lawyers and of NGO's working with them are totally unacceptable. As it is said in the draft resolution, such cases must be prevented and where they continue to occur, thoroughly investigated and punished. Strong signals from the law enforcement authorities are urgently required in order to counteract the widespread feeling of despair among victims of human rights violations and their relatives that I have encountered in researching this report. This fear, which threatens to undermine the authority of the Court, was caused by cases such as those I have presented, and by the fact that these cases have not been properly investigated and prosecuted.

28. Last but not least I should like to raise also in the context of this report the cases of the two Russian scientists, Mr Sutyagin and Mr Danilov. In Resolution 1551 (2007) adopted in April following my report on "Fair trial issues in cases concerning espionage or divulging state secrets", the Assembly had appealed to the competent bodies of the Russian Federation "to use all available legal means" to set these gentlemen "free without further delay". I have received credible information that they both fell victim to "provocations" leading to a severe worsening of their conditions of detention, and consequently, of their state of health, close to the time of the debate concerning the above-mentioned report in the Assembly. They had also lodged applications with the European Court of Human Rights. It does not matter whether these "provocations" were a reaction to the Assembly's resolution, or to the applications lodged by the applicants with the Court – both would be totally unacceptable. I am therefore addressing a solemn appeal to the competent authorities to right these wrongs, and to our colleagues of the Russian delegation with PACE to intervene on their behalf, for the sake of justice and in defence of the authority of the Assembly and the Court.

[11] Case of Ledyayeva and others v. Russia, Nos 531578/99, 53247/99, 53695/00 and 56850/00.