

ECHR, RUSSIA, AND CHECHNYA: TWO IS NOT COMPANY AND THREE IS DEFINITELY A CROWD

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I. INTRODUCTION

This Note critiques the Russian Federation's defiance of the judgments issued by the European Court of Human Rights<sup>1</sup> ("ECHR" or the "Court") and reviews and recom-

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\* I am deeply grateful to Professor Mary Holland for her invaluable guidance, comments, feedback, and patience. Special thanks are also due to Aaron Bloom, Lea Newfarmer, and Graham Dumas for their help with developing and editing this Note.

1. The Court was established pursuant to Protocol 11 to the European Convention for Human Rights. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the

mends steps for the ECHR to take to increase Russia's compliance with the Court's judgments. Seeking to exhibit compliance with an ever-increasing number of judgments against it, Russia pays monetary judgments awarded by the Court in a timely fashion. At the same time, Russia violates the spirit and letter of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention" or "Convention") by ignoring the substance of the ECHR judgments, failing to implement measures that are necessary to punish wrongdoers and prevent human rights violations in the future, and engaging in techniques, including intimidation of human rights applicants, attorneys, and activists, that are designed to dissuade Russian nationals, including Chechen residents, from accessing the ECHR.

This dual treatment of the ECHR is especially apparent in Russia's response to and handling of cases arising from human rights violations in Chechnya: while ECHR-awarded compensation is promptly delivered to the aggrieved applicants, no additional measures are taken to bring perpetrators to justice or to prevent ongoing human rights violations. Instead, applicants and their attorneys are at risk of reprisal and measures are implemented to discourage applicants from utilizing the ECHR system and processes. Although there are a number of mechanisms that the Council of Europe and the ECHR can employ to force Russia to substantively address human rights violations, including the suspension of its voting rights, expulsion, and the possibility of bringing infringement proceedings, filing of an interstate application against Russia is the tool that is most likely to achieve the desired results in light of the precedents and the current political climate.

Part II of this Note introduces the ECHR, its jurisdiction, and its processes. Part III provides a statistical overview of the types of complaints that have been filed against Russia, including claims of inhuman treatment and torture, denial of the right to life, interference with the right to a fair trial, the disregard of property rights, and lack of effective domestic remedy. Part IV discusses the Russian government's recognition, in certain respects, of the impact of ECHR judgments on the perceptions of the international community. Such recognition

has prompted the Russian authorities to generally comply with the Court's awards of (modest but symbolic) damage payments.

Part V focuses on how, despite this apparent respect for the ECHR's goals and compliance with its judgments, Russia has failed to address the more important implications of ECHR judgments and even worked to undermine the purposes of the Court. Specifically, instead of seeking to fully redress human rights violations and prevent similar violations from recurring, the Russian government has endeavored to curtail access to the Court by (i) unreasonably postponing ratification of Protocol No. 14, (ii) intimidating ECHR applicants, their attorneys, and other human rights activists, and failing to investigate instances of intimidation, disappearance, and even murder, and (iii) denying ECHR applicants and the Court complete access to domestic investigative files. Russia's dual treatment of the ECHR will be explored in light of several ECHR cases and judgments documenting human rights violations in Chechnya.

Finally, Part VI evaluates the importance of the ECHR for Russian nationals, including Chechen residents, and proposes some remedies that might be pursued against Russia for its failure to harmonize its practices with the governing rules of the Convention. While the ECHR might make use of any one of the available tools, including suspension of voting rights, expulsion, and infringement proceedings, filing of the interstate complaint against Russia is the most optimal solution in light of the precedents and pressures it might exert on Russia.

## II. BRIEF OVERVIEW OF THE ECHR, ITS JURISDICTION, AND PROCESSES

To explore the potential importance of the European Court of Human Rights to Russian nationals, including Chechen residents, as well as its inherent limitations, it is important to understand some basic features of the ECHR, its jurisdiction, and its processes.

The ECHR, headquartered in Strasbourg, France, is charged with adjudicating most human rights complaints in

Europe.<sup>2</sup> The Court is a subsidiary organization of the Council of Europe, one of several pan-European bodies that have “transformed the governance of much of the continent.”<sup>3</sup> The Council’s membership currently comprises all of Europe except for Belarus.<sup>4</sup>

The ECHR functions as the primary judicial mechanism<sup>5</sup> for the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>6</sup> which is “widely considered [to be] one of the strongest international human rights treaties in force.”<sup>7</sup> The Convention provides for the protection of several fundamental rights, including a right to liberty and security,<sup>8</sup> right to life,<sup>9</sup> prohibition of torture,<sup>10</sup> right to a fair trial,<sup>11</sup> and, importantly, a right to an effective remedy.<sup>12</sup> With jurisdiction over “all matters concerning the interpretation and application of the Convention,”<sup>13</sup> the Court has been called “the most powerful human rights system currently in existence in the world today.”<sup>14</sup>

Disputes filed before the Court are limited to complaints against member states.<sup>15</sup> The Court is empowered to receive

2. See Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 3-4 (2005) (explaining the origin of the ECHR and its role alongside other pan-European organizations).

3. *Id.* at 3.

4. *Council of Europe in Brief: 47 Countries, One Europe*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (last visited Nov. 14, 2010).

5. See, e.g., Tarik Abdel-Monem, *The European Court of Human Rights: Chechnya’s Last Chance?*, 28 VT. L. REV. 237, 258 (2003).

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 221, *amended by* by Protocols 11 & 14 [hereinafter European Convention].

7. Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, 12 HUM. RTS. BRIEF 9, 9 (2005).

8. European Convention, *supra* note 6, art. 5.

9. *Id.* art. 2.

10. *Id.* art. 3.

11. *Id.* art. 6.

12. *Id.* art. 13.

13. *Id.* art. 32(1).

14. Jeffrey Kahn, *Russia’s “Dictatorship of Law” and the European Court of Human Rights*, 29 REV. CENT. & E. EUROPEAN L. 1, 2 (2004).

15. See Eur. Ct. of Human Rights [ECHR], *The ECHR in Fifty Questions*, question 20 (2010), available at <http://www.echr.coe.int/NR/rdonlyres/>

cases filed by member states against each other<sup>16</sup> or by any individual, group of individuals, or nongovernmental organizations (“NGOs”) against any member state.<sup>17</sup> The right given to individuals to petition the ECHR is otherwise “virtually unheard of in international law, which is typically more concerned with sovereign states than with individuals.”<sup>18</sup>

Applications must meet certain requirements to be declared admissible by the Court.<sup>19</sup> First, cases can only be brought to the Court after domestic remedies have been exhausted. In other words, individuals who complain that their rights under the Convention have been violated must have first attempted to redress those violations in their home country’s courts. Russia often defends on this ground, claiming that this requirement has not been fulfilled by the ECHR applicants. Second, an applicant’s allegations must concern one or more of the rights defined in the Convention. Third, applications must be lodged within six months following the last judicial decision in the case, which will usually be a judgment by the highest court in the home country. Finally, the applicant must be, personally and directly, a victim of a violation of

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5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ\_ENG\_A4.pdf [hereinafter *ECHR in Fifty Questions*] (“Cases can only be brought against one or more States that have ratified the Convention. Any applications against third States or individuals, for example, will be declared inadmissible.”); *see also The Court: Basic Information on Procedures*, ECHR ¶ 1.1, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Procedure+before+the+Court/> (last visited Nov. 14, 2010) (“Any Contracting State . . . or individual claiming to be a victim of a violation of the Convention . . . may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State . . .”).

16. *See* European Convention, *supra* note 6, art. 33 (“Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.”).

17. *See* European Convention, *supra* note 6, art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals 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. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”).

18. Kahn, *supra* note 14.

19. *See* European Convention, *supra* note 6, art. 35 (explaining the admissibility criteria).

the Convention, and the respondent state must be a party to the Convention.<sup>20</sup>

If the application is admitted, the Court eventually reviews it and subsequently issues its judgment. The ECHR's finding that the member state has violated one or more articles of the Convention triggers "an inherent duty" of member states to provide reparation.<sup>21</sup> The basic provision governing the execution of the judgments of the ECHR is article 46 of the Convention which provides that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."<sup>22</sup> The ECHR generally issues declaratory judgments only.<sup>23</sup> The two exceptions to this general rule are interim measures,<sup>24</sup> and, if full reparation is not possible, "just satisfaction,"<sup>25</sup> i.e. monetary compensation. When the Court finds that a certain member state committed a violation and the applicant sustained damages as a result of this violation, the Court awards the applicant monetary damages, which, as mentioned above, may include compensatory

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20. See *id.* art. 34; see also *ECHR in Fifty Questions*, *supra* note 15, Question 26 (laying out the admissibility criteria).

21. Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 *TEX. INT'L L. J.* 359, 379 (2004).

22. Article 46 of the Convention further provides that "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." European Convention, *supra* note 6, art. 46.

23. See *id.* arts. 42, 44.

24. ECHR RULES OF COURT R. 39(1) [hereinafter *RULES OF COURT*], available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>; see also *ECHR in Fifty Questions*, *supra* note 15, question 33, ("When the Court receives an application it may decide that a State should take certain measures provisionally while it continues its examination of the case. This usually consists of requesting a State to refrain from doing something, such as not returning individuals to countries where it is alleged that they would face death or torture.").

25. European Convention, *supra* note 6, art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."); *RULES OF COURT* R. 60; see also *ECHR in Fifty Questions*, *supra* note 15, Question 42 ("When the Court finds against a State and observes that the applicant has sustained damage, it awarded the applicant just satisfaction, that is to say a sum of money by way of compensation for that damage.").

and pecuniary damages and attorney's fees and other costs.<sup>26</sup> A separate body—the Committee of Ministers—ensures that any sum awarded by the Court is actually paid to the applicant. As discussed in Part III below, to date, Russia has an excellent track record with respect to satisfying the Court's monetary judgments, but continuously fails to fulfill the main purposes of the Court's decisions—ensuring that wrongdoers are reprimanded and that no future human rights violations take place.

### III. STATISTICAL OVERVIEW OF CASES FILED WITH THE ECHR AGAINST RUSSIA: PUTTING THINGS IN PERSPECTIVE

The flood of applications filed by Russian citizens with the ECHR confirms that the ECHR is both perceived as and actually is important to the advancement of human rights in Russia. Briefly, the Russian Federation signed the Convention on February 28, 1996,<sup>27</sup> and ratified it on May 5, 1998, thereby becoming a member of the Council of Europe.<sup>28</sup> As with other member states, the Court can accept applications against Russia if they satisfy the following three conditions: (1) the applicants exhausted domestic remedies by complaining to Russian law-enforcement agencies and courts about violations of their rights; (2) the applicants filed their applications with the ECHR within six months of exhausting domestic remedies; and (3) the applicants claim violation of rights guaranteed by the Convention.<sup>29</sup>

At first, most of the nearly 6,300 complaints submitted against Russia through 2001 were rejected as inadmissible on technical grounds.<sup>30</sup> This was in part due to the failure of Russian human rights attorneys and applicants to comply with ba-

26. ECtHR President of Court, *Practice Direction: Just Satisfaction Claims*, ¶ 6 (Mar. 28, 2007).

27. Chart of Signatures and Ratifications of the European Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CL=ENG> (last visited Nov. 22, 2010).

28. Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J.L. REFORM 641, 642 (2002).

29. Alexei Trochev, *All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia*, 17 DEMOKRATIZATSIYA 145, 147-48 (2009).

30. Kahn, *supra* note 14, at 4-5.

sic ECHR filing and drafting requirements because of their lack of knowledge and experience.<sup>31</sup> In fact, between May 1998 and June 2001, “not a single Russian case was declared admissible” by the ECHR.<sup>32</sup>

Recognizing the Court’s importance to the advancement of human rights in Russia, Russian lawyers persevered and looked for ways to hone their legal skills. Over the next several years, groups of international lawyers traveled to Russia to train Russian lawyers in “the legal mechanics” of how to properly file cases before the ECHR.<sup>33</sup> As a result, beginning in or around 2002,<sup>34</sup> the ECHR started admitting complaints against Russia and has since routinely ruled against it in almost every case, finding Russia liable for violations of the articles on protection of life, prohibition against torture and inhuman treatment, and others.<sup>35</sup> Specifically, as of January 1, 2009, Russia was held liable for violations of the Convention in 94 percent of the cases; the Court found no violation in only 3 percent of the cases.<sup>36</sup>

The importance of the ECHR to Russian citizens has since continued to grow: to wit, Russia is Europe’s leader in complaints filed against a member state.<sup>37</sup> Specifically, as of October 31, 2010, Russia was responsible for 40,050 out of 141,450

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31. *Id.* at 5.

32. *Id.* at 5.

33. *Id.* at 1.

34. The first decision against Russia by the Strasbourg Court was issued in 2002. Zoia Svetova & Georgii Tselms, *Chempiony po Bezzakoniiu: Mezhdunarodnyi Sud v Strasburge Zavalen Zhalobami iz Rossii* [Champions at Lawlessness: International Court in Strasbourg Overwhelmed with Complaints from Russia], MOSCOW HELSINKI GROUP (May 2008), <http://www.mhg.ru/publications/B27AAA4>. In that application, a retired man named Burdov from the Rostov region complained about Russia’s failure to compensate him for his participation in clean-up of the Chernobyl accident. *Id.* The Court ordered that he be compensated in the amount of 3,000 Euro. *Id.* Between 2002 and the end of 2008, 643 judgments were issued in cases against Russia. ECHR, *Statistics for Russia on 1 January 2009* at 1 (2009), available at <http://www.echr.coe.int/NR/rdonlyres/B21D260B-3559-4FB2-A629-881C66DC3B2F/0/CountryStatistics01012009.pdf>.

35. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT’L & COMP. L. 511, 528 (2008).

36. *Statistics for Russia*, *supra* note 34.

37. Kahn, *supra* note 35, at 536 (“Russia accounts today for more than one-fourth of the Court’s docket and has also led the league tables in volume of petitions submitted to the Court for several years.”)



pending applications (28.3 percent).<sup>38</sup> In 2007, out of the 79,427 petitions pending before the ECHR decision body, 20,296 (26 percent) were complaints against Russia.<sup>39</sup> And in 2006, some 20 percent of all applications pending before the Court were against Russia (as compared with 12 percent and 10 percent against the next states in line—Romania and Turkey, respectively).<sup>40</sup> Russia was also the absolute leader in 2003, 2004, and 2005.<sup>41</sup> While some unnamed “experts” claim that the number of cases pending against Russia is average given the size of Russia’s population,<sup>42</sup> more reliable sources state that the number of cases filed against Russia is “out of proportion to its population.”<sup>43</sup>

Nonetheless, the number of cases that are admitted against Russia is miniscule when compared to the number of cases actually filed against it, hinting at the complexities associated with the deceptively simple admissibility requirements. In 2009, out of 33,073 applications lodged against Russia, 6,961 of them were declared inadmissible or struck out.<sup>44</sup> Only 392

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38. *Pending Applications Allocated to a Judicial Formation*, ECHR (Oct. 31, 2010), [http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending\\_applications\\_chart.pdf](http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf). Turkey was next in line with 11.3 percent of pending cases, followed by Romania (8.6 percent) and Ukraine (7.6 percent). *Id.*

39. Registry of the ECHR, *Survey of Activities 2007*, at 53 (2008). To compare, Turkey was next in line with a total of 9,173 cases (12 percent) pending against it. *Id.* at 53.

40. Registry of the ECHR, *Survey of Activities 2006*, at 3 (2007).

41. Registry of the ECHR, *Survey of Activities 2005*, at 34-35 (2006).

42. Lenkakoutnakova, *Russia in Lead in 2009 by Number of Claims Submitted to ECHR*, EURASIA LIFT (Feb. 4, 2010, 13:53), <http://eurasi-alift.wordpress.com/2010/02/04/russia-in-lead-in-2009-by-number-of-claims-submitted-to-echr/>.

43. Clifford J. Levy, *European Court Rulings Seem to Rankle Kremlin*, N.Y. TIMES, Mar. 28, 2009, at A8.

44. ECHR, *Analysis of Statistics 2009*, at 48 chart 79 (2010), available at [http://www.echr.coe.int/NR/rdonlyres/89A5AF7D-83D4-4A7B-8B91-6F4F-A11AE51D/0/Analysis\\_of\\_statistics2009.pdf](http://www.echr.coe.int/NR/rdonlyres/89A5AF7D-83D4-4A7B-8B91-6F4F-A11AE51D/0/Analysis_of_statistics2009.pdf). Article 37(1) of the European Convention stipulates that “The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

were declared “admissible” and 575 judgments were delivered.<sup>45</sup> In 2008, 2,982 applications were similarly declared inadmissible or struck out.<sup>46</sup> As a result, during the time period beginning with Russia’s joining the ECHR and ending on January 1, 2010, 36,083 applications filed against Russia were declared inadmissible, and 815 judgments were issued against Russia.<sup>47</sup>

Importantly, statistics indicate that Russia is a persistent violator that fails to substantively remedy some of the same recurrent human rights abuses. Specifically, as of the end of 2009, out of the 815 judgments finding at least one violation against Russia, most of the violations involved one or more of the following: the right to a fair trial (article 6); protection of property (article 1 of Protocol No. 1); right to liberty and security (article 5); inhuman or degrading treatment (article 3); the right to an effective remedy (article 2); and lack of effective investigation (article 2).<sup>48</sup>

By way of example, perhaps the most egregious instance of Russia’s violation of article 2 of the Convention—failure to investigate—is the case of Anna Politkovskaya, who worked as a journalist for the *Novaya Gazeta* and wrote on and did human rights work with respect to Chechnya. Ms. Politkovskaya was killed near the entrance to her apartment building on October 7, 2006.<sup>49</sup> Investigation into her murder was unreasonably delayed despite numerous requests by her relatives.<sup>50</sup> As a re-

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45. *Analysis of Statistics 2009*, *supra* note 44 (judgments include applications that have been filed in prior years). Also, 13,666 applications were allocated to a judicial formation; 1,029 were communicated to the government. *Id.*

46. *Id.* Two hundred sixty-nine judgments were issued and 10,146 applications were allocated to a judicial formation. *Id.*

47. ECHR, *Country Facts Sheets 1959-2009*, at 65 (2010), available at [http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS\\_ENG\\_MAI2010.pdf](http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf).

48. ECHR, *Violation by Article and by Country 1959-2009*, at 2 (Dec. 31, 2009), available at [http://www.echr.coe.int/NR/rdonlyres/E26094FC-46E7-41F4-91D2-32B1vEC143721/0/Tableau\\_de\\_violations\\_19592009\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/E26094FC-46E7-41F4-91D2-32B1vEC143721/0/Tableau_de_violations_19592009_ENG.pdf). The violations above are listed in descending order from most frequently claimed. For instance, 475 cases involved violation of the right to a fair trial, and 122 cases involved lack of effective investigation.

49. *Biographiia Anny Politkovskoi [Biography of Anna Politkovskaya]*, NOVAYA GAZETA (2006), <http://politkovskaya.novayagazeta.ru/bio.shtml>.

50. Rapporteur, Parliamentary Assemb. of Council of Eur. [PACE], Comm. on Legal Affairs & Hum. Rts., *Allegations of Politically Motivated Abuses*

sult, the two Chechen brothers who, according to the prosecution, were allegedly involved in organizing the murder but did not actually kill Ms. Politkovskaya, were acquitted at trial and the case was returned to the prosecution for reinvestigation.<sup>51</sup>

Over three years later, killers still remain at large and Ms. Politkovskaya's family is losing hope that perpetrators are ever going to be brought to justice.<sup>52</sup> In her 2009 report, PACE Rapporteur Mrs. Sabine Leutheusser-Schnarrenberger found it particularly egregious that FSB Colonel Ryagusov, who had passed Ms. Politkovskaya's address to her killers, has not been accused of participating in the murder despite the strong evidence against him.<sup>53</sup> Russian authorities' failure to adequately investigate the murder of Ms. Politkovskaya is "an example of the professional ineptitude of the prosecution authorities, which had grown used to obtaining condemnations practically at will, without the need to properly investigate a case and put strong evidence before the court."<sup>54</sup>

Statistics further indicate that Russia's failure to fundamentally implement changes requested by the ECHR in its judgments is a continual drain on the ECHR resources, resulting in a long wait, backlogs, and other strains on the whole system. In general, in 2009 the ECHR decided a total of 35,460 applications<sup>55</sup> representing an increase of 9.7 percent in relation to 2008.<sup>56</sup> The current ECHR backlog of approxi-

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of the Criminal Justice System in Council of Europe Member States, Doc. 11993, ¶ 114 (2009) (by Sabine Leutheusser-Schnarrenberger) [hereinafter *Allegations 2009*], available at <http://assembly.coe.int/Documents/WorkingDocs/doc09/edoc11993.pdf>.

51. Anatolii Karavaev, *Tri goda spust'ia* [Three Years Later], VREMIA NOVOSTEI, Oct. 7, 2009, available at <http://dlib.eastview.com/browse/doc/20726541>.

52. *Id.*

53. *Allegations 2009*, *supra* note 50, ¶ 114.

54. *Id.* For articles on the development of Ms. Politkovskaya's case, see *Delo Anny* [Anna's Case], NOVAYA GAZETA (Dec. 1, 2008), <http://www.novaya-gazeta.ru/data/2008/89/35.html> (in Russian). To learn more about Ms. Politkovskaya, see *Sobytiia posle gibeli Anny Politkovskoi* [Events After the Death of Anna Politkovskaya], NOVAYA GAZETA, <http://politkovskaya.novayagazeta.ru/pub/pub-other.shtml> (last visited Oct. 20, 2010) (in Russian).

55. The Court decided 2,395 applications by judgment and 33,065 by an inadmissibility or strike-out decision. ECtHR, *2009 Statistics Compared to 2008*. (2009), available at <http://www.echr.coe.int/NR/rdonlyres/C28DF50A-BD B7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf>.

56. *Id.*

mately 119,300 represents an increase of over 23 percent since 2008.<sup>57</sup> Moreover, as of December 31, 2009, Russia alone is responsible for a total of 33,568 backlogged applications (28 percent).<sup>58</sup> ECHR's budget, however, in comparison with 2008, remained almost unchanged— 56.62 million euro. Its 2010 budget is currently set at a comparable figure of 58.59 million euro.<sup>59</sup>

#### IV. RUSSIA'S COMPLIANCE WITH ECHR JUDGMENTS— "JUST SATISFACTION"

At first blush, Russia's prompt payment of "just satisfaction" (compensation or costs and expenses) to victims of the violations found by the Court, in spite of an ever-increasing number of judgments issued against the state, appears to signal respect for the values and judgments of the ECHR. While these payments to victims are important symbolically, the actual amounts are very small. Russia's payments mask the ways the Russian government has ignored or even actively undermined the goals of the ECHR as discussed in greater detail in Part V below.

To begin, article 41 of the Convention provides, "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford *just satisfaction* to the injured party."<sup>60</sup> "Just satisfaction" can include, where appropriate, pecuniary and non-pecuniary damages or costs and expenses, including attorney's fees. The payment of just compensation is a "strict obligation," which is always clearly defined in the judgment, if it is applicable.<sup>61</sup> Therefore, the

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57. *Id.*

58. *Analysis of Statistics 2009*, *supra* note 44, at 140.

59. *The Court: The Budget of the Court*, ECHR. <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Budget/> (last visited on Oct.20, 2010). Pursuant to article 50 of the Convention, the Court does not have its own budget, but is funded through the general budget of the Council of Europe. *Id.*

60. European Convention, *supra* note 6, art. 41 (emphasis added).

61. *Execution of Judgments of European Court of Human Rights: Obligation to Comply with Judgments*, COUNCIL OF EUR., [http://www.coe.int/t/dghl/monitoring/execution/Presentation/About\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp) (last visited on Oct. 27, 2010).

most obvious way to demonstrate compliance with the ECHR judgments is prompt payment of “just satisfaction” (constituting, normally, a sum of money) awarded by the Court. As a result, Russia’s basic response to the ECHR judgments has consistently been prompt payment of the awarded compensation and costs.<sup>62</sup> Thus, perhaps surprisingly, in light of the number of judgments awarded against Russia, Russia’s record in this respect is relatively satisfactory.

In general, in a testament to how seriously member states take the ECHR’s judgments, they have largely honored their article 46<sup>63</sup> obligations and complied with the monetary judgments of the Court. In fact, this degree of compliance has generally been praised as “exemplary.”<sup>64</sup> In 2007, Russia set aside approximately U.S. \$4.2 million to pay the ECHR judgments—an elevenfold increase from 2003—showing, “on its face,” that Russia is willing to comply with the ECHR judgments.<sup>65</sup> As of December 31, 2007, 59 percent of all payments have been made on time, 7 percent of all payments have been made after the deadline, and 34 percent of cases were pending for control of payment (which means that the information as to payment is still to be assessed by the Court).<sup>66</sup> Out of 122 judgments with respect to which the deadline of payment was set to expire in 2007,<sup>67</sup> Russia paid 56 percent of all judgments on time; 19 percent of payments were received after the dead-

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62. See Alesia Lonskalal et al., *Nepravovoi Pretsedent [Unlawful Precedent]*, NOVYE IZVESTIYA, Mar. 18, 2010, available at <http://dlib.eastview.com/browse/doc/21516455> (“Russia’s only reaction to the ECtHR judgments becomes payment of the awarded compensation to the alleged victim.”).

63. See *supra* text accompanying note 22.

64. Abdel-Monem, *supra* note 5, at 265.

65. Kahn, *supra* note 35, at 539 (citing Asya Umarova & Laura Adamavo, *Chechnya: Human Rights Hopes Dashed*, INST. FOR WAR & PEACE REPORTING: CAUCASUS REPORTING SERVICE, Mar. 15, 2007, [http://www.iwpr.net/?p=crs&s=f&o=334109&aspc\\_state=henpcrs](http://www.iwpr.net/?p=crs&s=f&o=334109&aspc_state=henpcrs)).

66. Comm. of Ministers, Council of Eur., *Supervision of Execution of Judgments of the European Court of Human Rights First Annual Report*, 219 (2007) [hereinafter 2007 Committee of Ministers Report], available at [http://www.coe.int/t/e/human\\_rights/execution/CM\\_annreport2007\\_en.pdf](http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf).

67. Russia ranked second in judgments against it with a 2007 payment expiration date. *Id.* The only other country outnumbering Russia was Turkey, with 292 judgments set for payment on or before December 31, 2007. *Id.* at 222. In contrast, nine countries that produced 100 percent on-time compliance rates, collectively had twenty-nine judgments set for payment in 2007. *Id.* at 221-22.

line, and 25 percent of all cases were pending for control of payments.<sup>68</sup>

In fact, Russia is committed to improving its already relatively exemplary record of payment before the ECHR. According to the latest statistics available on the Committee of Ministers' website, Russia had 264 payments due at the end of 2009.<sup>69</sup> As of December 31, 2009, Russia made 26 percent of all payments on time,<sup>70</sup> was late with 20 percent of all payments, and 54 percent of payments were pending for "control of payment."<sup>71</sup> In other words, even though more judgments are handed down against Russia each year, Russia satisfies an even larger percentage of these judgments within the applicable time limit.

While this record is positive, it does not represent a real hardship, or even a real financial deterrent, for the state—for the most part, "even in the most egregious cases, the damages ordered by the Court are almost offensively small" compared to the human rights violations they are supposed to redress.<sup>72</sup> In 2008, for example, an average of 20,451 euro was awarded per case to satisfy the applicants' claims for damages against Russia.<sup>73</sup> In total, Russia ranked third in total just satisfaction awarded in judgments which became final in 2009 (amounting to 7,250,000 euro<sup>74</sup> out of the total amount of 53,600,785 euro awarded by the ECHR in 2009).<sup>75</sup> Thus, Russia pretty much "has paid every single judgment assessed against it . . ."<sup>76</sup> As a

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68. *Id.* at 221.

69. Comm. of Ministers, Council of Eur., *Supervision of Execution of Judgments of the European Court of Human Rights Third Annual Report*, 53 fig. 18 (2009) [hereinafter 2009 Committee of Ministers Report], available at [http://www.coe.int/t/DGHL/Monitoring/Execution/Source/Publications/CM\\_annreport2009\\_en.pdf](http://www.coe.int/t/DGHL/Monitoring/Execution/Source/Publications/CM_annreport2009_en.pdf).

70. *Id.* at 54. Payment is usually expected within three months after the judgment has become final and default interest can be imposed in case of late payment. 2007 Committee of Ministers Report, *supra* note 69, at 56.

71. 2009 Committee of Ministers Report, *supra* note 69, at 54 tbl.IV.

72. Kahn, *supra* note 35, at 539. Despite the fact that damages awarded by the Court are small, the highest awards of just satisfaction concerned cases against Moldova, Portugal, Albania, Italy, Romania, Spain, and the Russian Federation. See 2009 Committee of Ministers Report, *supra* note 72, at 58 fig.20.

73. *Id.* at 58 fig.20.

74. *Id.* at 56 fig.19.

75. Committee of Ministers Report, *supra* note 69 at 56.

76. Kahn, *supra* note 35, at 540.

result, Russia has been able to effectively prevent any remedial action on the part of the ECHR or Committee of Ministers and buy itself time to implement several domestic “measures” designed to curtail its nationals’ access to the Court. These “measures” are discussed in detail in Part V of this Note, *infra*.

## V. RUSSIA’S “COMPLIANCE” WITH ECHR JUDGMENTS—BEYOND “JUST SATISFACTION.”

In spite of its exemplary record with respect to satisfying the Court’s monetary judgments, Russia has failed to implement any substantive changes to redress the wrongs inflicted on the applicants and to ensure that similar human rights violations are not committed in the future. Moreover, instead of seeking to eradicate the troubling human rights violations found by the Court, the Russian government focused on adopting several techniques that curtail the victims’ access to the ECHR. Most egregiously, the Russian government delayed ratification of Protocol No. 14 to the Convention, has intimidated and interfered with other rights of ECHR applicants, their attorneys, and other human rights activists, has failed to investigate their disappearances and even murders, and has failed to provide all of the documents contained in the domestic investigation files to the ECHR applicants and the Court.<sup>77</sup> As detailed in Part V.D of this Note, nowhere are these violations more apparent than in cases involving human rights violations in Chechnya.

### A. “Individual” and “General” Measures

First and foremost, Russia has repeatedly failed to implement any of the substantive measures called for by the ECHR judgments that go beyond payment of compensation. Particularly, pursuant to article 46(1) of the Convention, member states must “undertake to abide by the final judgment of the Court in any case to which they are parties.”<sup>78</sup> This undertaking is not limited to punctual payments of the Court’s judgments but entails other “individual measures” that are designed to help remedy the wrongs that cannot be offset by awards of compensation to individual victims as well as “gen-

77. See *infra* Parts V(B)-(D).

78. European Convention, *supra* note 6, art. 46(1).

eral measures” that are designed to prevent similar human rights violations in the future.<sup>79</sup>

More specifically, “individual” measures can involve two-fold duties for respondent states: (1) payment of “just satisfaction” (monetary award)<sup>80</sup> and (2) depending on the circumstances, the basic obligation of achieving, as far as possible, *restitutio in integrum*. Achieving the latter may require further actions on the part of respondent states, such as reopening of unfair criminal and other proceedings, destroying information gathered in breach of the right to privacy, implementing an unenforced domestic judgment, or revoking a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of destination.<sup>81</sup>

In general, while respondent states have “considerable” latitude in terms of what measures they can pursue to remedy their violations (in addition to prompt payment of just satisfaction), the Committee of Ministers works to ensure that measures taken are appropriate in light of the Court’s judgment and the ECHR itself can order which measures should be taken in its judgments.<sup>82</sup> To that end, because reopening of unfair domestic proceedings is often seen as one of the most important ways to achieve *restitutio in integrum*, the Committee of Ministers adopted a Resolution calling member states to ensure “that there exist adequate possibilities of reexamination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention. . . .”<sup>83</sup>

Although on the surface Russia has complied with the Committee’s request, in reality, the state has once again found a way to appease the Court without implementing any changes

79. 2009 Committee of Ministers Report, *supra* note 69, at 18.

80. See Part IV, *supra*, for a discussion of Russia’s compliance with the requirement of “just compensation.”

81. 2009 Committee of Ministers Report, *supra* note 69, at 18.

82. *A Unique and Effective Mechanism: Obligation to Comply with Judgments*, COUNCIL OF EUR., [http://www.coe.int/t/dghl/monitoring/execution/Pres-entation/About\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Pres-entation/About_en.asp) (last visited Nov. 3, 2010).

83. Comm. of Ministers, Council of Eur., *Recommendation No. R (2000) 2 on the Re-examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights* (Jan. 19, 2000), available at <https://wcd.coe.int/ViewDoc.jsp?id=334147&Sector=secCM&Language=lanEnglish&Ver=original>.



in practice. Specifically, Russia's Constitutional Court has only recently ruled that *civil* matters may be reopened pursuant to ECHR judgments. Notably, this measure—reopening of domestic proceedings—has already existed for cases involving criminal matters.<sup>84</sup> However, the Constitutional Court noted that domestic courts which reopened proceedings did not need to follow ECHR judgments. Therefore, petitioners might still lose in domestic courts despite winning before the ECHR.<sup>85</sup> In practice, lower courts continue to ignore the ECHR judgment despite this recent Constitutional Court pronouncement and fail to view the ECHR judgments as “new circumstances” that would allow the civil proceedings to be reopened in domestic courts.<sup>86</sup>

With respect to “general” measures, respondent states have an obligation to prevent violations and to put an end to continuing violations. In some cases, “general” measures might also involve setting up remedies to deal with violations already committed.<sup>87</sup> Examples of “general” measures include review and remodeling of legislation, rules, and regulations, or updating judicial practice.<sup>88</sup> Unlike enforcement of just compensation, ensuring that respondent states adopt the necessary

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84. Anton Burkov, *With the Help of the Constitutional Court, Russia Started the Reform of the ECHR by Amending its Civil Procedure Legislation*, EU-RUSSIA CENTRE, Mar. 17, 2010, <http://www.eu-russiacentre.org/our-publications/column/constitutional-court-russia-started-reform-echr-amending-civil-procedure-legislation.html>.

85. See Olga Pleshanova & Anna Pushkarskaia, *Strasburgskii Sud Stal Dlia Rossii Povyshe* [*Strasbourg Court Became More Important for Russia*], KOMMERS., Mar. 1, 2010, available at <http://dlib.eastview.com/searchresults/article.jsp?art=12&id=21365834> (noting that the Constitutional Court's pronouncement is viewed by experts as a compromise since the Constitutional Court did not guarantee that Russian applicants who won before the ECHR will also win in domestic courts).

86. Aleksandr Kolesnichenko & Zinaida Titova, *Strasbourg – Ne Ukaz* [*Strasbourg is Not an Order*], NOVYE IZVESTIYA, Mar. 11, 2010, available at <http://dlib.eastview.com/searchresults/article.jsp?art=7&id=21470038> (discussing the case of former judge Olga Kudeshkina, who was not reinstated in her job following the ECHR judgment).

87. 2009 Committee of Ministers Report, *supra* note 69, at 18.

88. *Unique and Effective Mechanism*, *supra* note 82; see also 2009 Committee of Ministers Report, *supra* note 69, at 86 n.36 (noting that “general measures” may include “legislative or regulatory amendments, changes of case-law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned”).

“general” measures can be and generally is more difficult. The Committee of Ministers refers to this type of cases as “leading” cases—cases that “reveal a new systemic/general problem in a respondent state and which thus require the adoption of new general measures.”<sup>89</sup> In 2009, 7 percent of all cases pending execution of judgments against Russia were “leading” cases.<sup>90</sup> The number remained unchanged from 2008.<sup>91</sup> That means that the rest of the cases pending execution are so-called “repetitive” cases—cases that deal with repeat violations which should be prevented by the respondent government following the ECHR judgment.<sup>92</sup> Unsurprisingly and as evidenced in Part III of this Note, Russia is responsible for the largest percentage of such “repetitive” cases.

While paying just satisfaction pursuant to the ECHR judgments, Russia has continuously failed to take steps to implement effective “individual” and “general” measures to remedy the situation at home as evidenced by the ever-growing numbers of petitions filed against Russia before the ECHR and mounting public approval of the ECHR as critical to greater respect for human rights in Russia.<sup>93</sup> Russia’s response to and handling of the investigation of Ms. Politkovskaya’s<sup>94</sup> murder is just one example of Russia’s ongoing efforts to avoid implementing “general” measures in light of numerous ECHR findings of violations of procedural aspects of articles 2, 3, and 13 of the Convention, concerning ineffective domestic investigations in Russia. Instead, while pacifying the Court and the Committee of Ministers with a steady flow of cash when it is

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89. 2009 Committee of Ministers Report, *supra* note 69, at 32.

90. *Id.* at 40 fig.11.

91. *Id.*

92. *See id.* at 32-33 (explaining that “clone” or “repetitive” cases are “those relating to a systemic or general problem already raised before the Committee of Ministers in one or several leading cases; these cases are usually grouped together (with the leading case as long as this is pending) for the purposes of the Committee of Ministers’ examination”).

93. According to a nationwide poll conducted by the Public Opinion Foundation in August 2008, 68 percent of all respondents considered necessary an international court to which they could direct complaints of rights violations by their government. *See* Grigorii Kertman, *Strasburgskii Sud i Rossiiskie Grazhdane [Strasbourg Court and Russian Citizens]*, FOND OBSHCHESTVENNOE MNENIE (Aug. 7, 2008), <http://bd.fom.ru/report/map/d083122>.

94. *See* Part III of this Note for details regarding Ms. Politkovskaya and her murder.

due, the Russian government “has made it a priority to stem the flow of potential complaints to the ECtHR and to do something about the complaints that have already been received by the [C]ourt.”<sup>95</sup> In other words, “[t]he [C]ourt appears to have increasingly rankled the Kremlin by issuing rulings that highlight corruption, torture and other official misconduct in Russia, including the pervasive practice of what is known here as ‘telephone justice’—a politician calling and instructing a judge how to rule.”<sup>96</sup> In turn, as discussed below, the Russian government designed means to subvert the Court’s effects domestically and to curtail access to the ECHR.

### B. *Protocol No. 14*

The story of Russia’s unreasonable delay in ratifying Protocol No. 14 to the Convention is an obvious example of how the Russian government looks for ways to sidestep the ECHR’s calls for real substantive reforms that could improve its human rights record. After an unreasonably long delay, international and domestic political pressures, significant concessions the country received from the Council of Ministers, and the desire to avoid taking on more substantive human rights reforms eventually worked to force the Russian government to ratify the Protocol. The lesson is thus twofold: while Russia does not appear to be earnestly committed to the ECHR’s values and goals, it can be forced to implement substantive reforms if enough pressures are exerted by the ECHR and its members.

To understand the importance of Protocol No. 14, it is important to briefly review its origins and implications. With complaints against Russia being filed in unprecedented numbers, the Council of Europe has begun to search for ways to conserve its strained judicial resources.<sup>97</sup> Protocol No. 14 was proposed and widely accepted as a plausible way to achieve this result.<sup>98</sup> It was designed to eliminate the excessive backlog of cases at the ECHR by simplifying the procedures by

95. Trochev, *supra* note 29 at 146.

96. Levy, *supra* note 43.

97. See Kahn, *supra* note 35, at 535 (“[T]he Council has . . . suffered great strain to its judicial system by expanding the jurisdiction of the European Court of Human Rights to include Russia.”).

98. *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Summary of the Treaty*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/EN/Sum->

which “clearly inadmissible” and “repetitive” cases are handled.<sup>99</sup> Specifically, inadmissibility decisions in “clearly inadmissible” cases, which are now taken by a committee of three judges, will be taken by a single judge. With respect to “repetitive cases,” it was proposed that they may be declared admissible and decided by a committee of three judges (instead of a seven-judge Chamber) under a simplified summary procedure.<sup>100</sup>

The Protocol was designed to shorten the time needed to deliver a decision (now five to six years for a “fast-track” case and up to twelve years for other cases).<sup>101</sup> It also introduced a new “admissibility criterion,” pursuant to which the Court could declare inadmissible applications where the applicant did not suffer a significant disadvantage provided that “respect for human rights” would not require the Court to go fully into the case and examine its merits.<sup>102</sup> In addition, Protocol No. 14 was intended to empower the Committee of Ministers, if it decided by a two-thirds majority to do so, to bring proceedings before the Court where a member state refused to comply with a judgment.<sup>103</sup>

Unfortunately, implementation of Protocol No. 14 required ratification by all of its members,<sup>104</sup> which meant that even one country’s failure to ratify the Protocol could effectively derail its passage. That would threaten the entire ECHR system, which was already struggling under its backlog of over 120,000 cases. Following Poland’s ratification of the Protocol

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maries/Html/194.htm (last visited Nov. 5, 2010) [hereinafter *Summary of Treaty*].

99. *Id.*

100. *Id.*

101. See Bill Bowring, *Russian and Human Rights: Incompatible Opposites?*, 2 GÖTTINGEN J. OF INT’L L. 257, 274-75 (2009) (summarizing main changes introduced by Protocol No. 14).

102. *Summary of Treaty*, *supra* note 98.

103. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, art. 16, *opened for signature* May 13, 2004, C.E.T.S. No. 194 [hereinafter *European Convention Protocol No. 14*].

104. Kahn, *supra* note 35, at 535 (“This protocol, which can only enter into force upon ratification of all member states, would unplug a huge bottleneck in the docket of the Court that Russia is largely responsible for creating.”).

on October 12, 2006,<sup>105</sup> Russia remained the only signatory to Protocol No. 14 that did not ratify it.<sup>106</sup> In response, the Commissioner for Human Rights described Russia's refusal to be an act of "sabotage against the European Court of Human Rights."<sup>107</sup>

In contrast to its apparent commitment to pay "just satisfaction" awarded by the ECHR judgments, Russia's government has couched its refusal to ratify Protocol No. 14 in antagonistic rhetoric criticizing the ECHR judgments as politicized attacks against Russia. On these grounds, Russia has delayed ratifying Protocol No. 14 for a number of years despite the consistent urging of the Parliamentary Assembly of the Council of Europe (PACE) President to ratify it as soon as possible.<sup>108</sup> Russia's State Duma (lower house of parliament) first voted 138 to 27 to refuse ratification of Protocol No. 14 on December 20, 2006.<sup>109</sup> At the time, Putin explained that the Duma was unhappy with some "purely political decision[s]" against Russia and thus was justified in refusing to ratify Protocol No. 14.<sup>110</sup> The ECHR responded that if it makes a decision *in favor* of a Russian citizen that should be viewed as a victory of sorts for Russia and not as a decision *against* Russia.<sup>111</sup> At

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105. *Chart of Signatures and Ratifications to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=1&DF=9/3/2007&CL=ENG> (last visited Nov. 5, 2010).

106. *Id.*

107. *Russia Witnessing Positive Trends In Protection of Human Rights*, RUSS. INFO. NETWORK (Oct. 4, 2007, 4:42PM), <http://news.rin.ru/eng/news/10948> ("The State Duma's refusal to ratify Protocol 14 was viewed at the Council of Europe as sabotage against the European Court of Human Rights, Hammarberg told Russian journalists in Strasbourg on Thursday.").

108. Press Release, PACE, PACE President Again Calls for Russia's Assent to Vital Reform of the European Court of Human Rights (July 2, 2007), available at [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=3067](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3067).

109. Ivan Rodin & Aleksandra Samarina, *Pouprazhnyalis' v Pluralizme [A Bit of Training in Pluralism]*, NEZAVISIMAA GAZETA (Dec. 21, 2006) <http://dlib.eastview.com/browse/doc/11230068> (discussing Duma's refusal to ratify Protocol No. 14).

110. *Politicheskii Barometr No. 79 [Political Barometer No. 79]*, DEMOS (Dec 8, 2007), <http://www.demos-center.ru/reviews/15999.html> [hereinafter *Political Barometer*].

111. *Id.*

the same time, vice-speaker Sergey Baburin defended the outcome by arguing that “[t]he [P]rotocol is contrary to main principles of justice. Moreover, our voluminous membership fees are being used for attacks on our country by the Council of Europe.”<sup>112</sup> One year after the 2006 vote, Putin warned that Russia was coming into “collision with a politicization of judicial decisions” issued by the ECHR.<sup>113</sup>

Increasing isolation within the ECHR community finally drove the State Duma to ratify the Protocol, but this decision should not be interpreted as reflecting a newfound commitment to the ECHR process. Specifically, after Russia continued to ignore the ECHR’s and PACE’s calls for ratification, on May 12, 2009, member states voted to implement the procedural reforms to the Court, known as Protocol No.14bis, in spite of Russia’s non-participation.<sup>114</sup> A vote in favor of the reforms by all states except Russia temporarily created a two-tiered system, whereby the new fast-track procedures outlined in Protocol No. 14 were to be applied to all applications from citizens from countries that ratified the temporary Protocol No.14bis,<sup>115</sup> while Russian nationals’ applications to the Court were to be considered using the existing procedures (which meant a delay of five to seven years before a case could be heard on the merits).<sup>116</sup> Since July 1, 2009, the Court has already delivered 727 decisions applying these new procedures

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112. *Council to Battle Russia on Protocol No. 14*, IRISH TIMES, May 12, 2009, at 10.

113. *Id.*

114. Press Release, Council of Eur., ECtHR: Protocol No.14bis Enters Into Force (Sept. 30, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1511365&Site=DC&ShowBanner=no&Target=self&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

115. *Id.* (“seven states have ratified Protocol No. 14bis (Denmark, Georgia, Iceland, Ireland, Monaco, Norway and Slovenia) and seven others have signed it, prior to ratification (Austria, France, Luxembourg, Romania, San Marino, Spain, and the ‘former Yugoslav Republic of Macedonia’). Using an alternative legal basis, nine states have made a declaration accepting that the corresponding procedures found in Protocol No. 14 be provisionally applied to the applications filed against them: Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, Netherlands, Switzerland and United Kingdom.”).

116. *Council to Battle Russia*, *supra* note 112.

to the states that have accepted the Protocol's immediate application.<sup>117</sup>

On January 15, 2010, the State Duma of the Russian Federation finally voted to ratify Protocol No. 14.<sup>118</sup> This was welcomed by Jean-Paul Costa—the ECHR President—who expressed satisfaction that the Protocol was going to finally come into effect with respect to all states.<sup>119</sup> The Federation Council approved it on January 27, 2010, and President Medvedev signed it into the law on February 4, 2010.<sup>120</sup>

However, there are reasons to believe that, rather than being an expression of Russia's commitment to the ECHR, this was a political move on the part of the Russian administration that had won important concessions in its negotiations over Protocol No. 14. The concessions seemed to outweigh the costs of reforms that would likely result in more speedy judgments against Russia.<sup>121</sup> It is plausible, as some Russian officials shared, that Russia "had dropped its opposition after the Council of Europe agreed to a provision stating that a 'Russian judge' would participate in any decisions concerning Russia."<sup>122</sup> To that end, Russia's Declaration to the Protocol No. 14 states that article 8 of the Protocol<sup>123</sup> "does not exclude the

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117. Council of Europe, *supra* note 114. ("369 applications concerned Germany, 131 the United Kingdom, 82 Switzerland, 57 the Netherlands, 38 Estonia, 17 Norway, 14, Ireland, 9 Luxembourg, 7 Denmark and 3 Liechtenstein.").

118. Press Release, ECHR, Russia Votes In Favour Of The Draft Law Ratifying Protocol No. 14 To The European Convention On Human Rights (Jan. 15, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=861082&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA3986492>.

119. *Id.*

120. *Russia Finally Ratifies Strasbourg Court Reform*, NEW EUR., Feb. 7-13, 2010 at 14.

121. Judith Crosbie, *A Low-Key Diamond Anniversary*, EUR. VOICE, Apr. 30, 2009, available at 2009 WLNR 15618850.

122. *Russian Ratifies ECHR Reform After Role Gained in Court Cases*, WORLD BULL. (Jan. 15, 2010, 1:40 PM), [http://www.worldbulletin.net/news\\_detail.php?id=52683](http://www.worldbulletin.net/news_detail.php?id=52683).

123. Article 8 of Protocol No.14 amends article 28(3) of the Convention in relevant part as follows: "If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure

right of a High Contracting Party concerned, if the judge elected in its respect is not a member of the committee, to request that he or she be given the possibility to take the place of one of the members of the committee.”<sup>124</sup> In addition, the Russian government announced that it was pleased that the ECHR would not be investigating complaints that have not been formally accepted nor would it be granted new powers of enforcement of judgments.<sup>125</sup>

Although observers were pleased that Russia finally agreed to ratify Protocol No. 14, it seems as though the government did so in an attempt to avoid more serious human rights obligations. There is some speculation that Russia is hoping that ratification of Protocol No. 14 could show its good faith to the world in hopes of the dismissal of the recent \$100 billion Yukos lawsuit that has been postponed for the third time due to unavailability of Russian representatives.<sup>126</sup>

Additionally, major Russian companies are likely going to be seeking to finance debt restructuring and capital improvements. Since “concerns over the management of Russian companies remain,” ratifying Protocol No. 14 may be a signal to the investment community that Russia wants “to play nice.”<sup>127</sup>

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under paragraph 1.b.” European Convention Protocol No. 14, *supra* note 103, art. 8.

124. *List of Declarations Made with Respect to Treaty No. 194*, COUNCIL OF EUR. (Oct. 21, 2010), <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=194&CM=1&DF=9/3/2007&CL=ENG&VL=1> (providing text of Russia’s Declaration (deposited on Feb. 18, 2010) to Protocol No. 14).

125. See Ellen Barry, *Russia Ends Opposition to Rights Court*, N.Y. TIMES (Jan. 15, 2010), <http://www.nytimes.com/2010/01/16/world/europe/16russia.html> (noting that one of the members of the United Russia Party felt reassured by written commitments to this effect).

126. Bill Bowring, *The YUKOS Case at Strasbourg and Russia’s Ratification of Protocol 14*, EU-RUSSIA CENTRE (Feb. 11, 2010), <http://www.eu-russiacentre.org/our-publications/column/YUKOS-case-strasbourg-russias-ratification-protocol-14.html>; see also Olga Pleshanova & Viktor Khamraiev, *Protokol o Zaderzhanii Dela YUKOSa [Protocol on Holding Up the YUKOS Case]*, KOMMERS. (Jan. 13, 2010), <http://www.kommersant.ru/doc.aspx?fromsearch=1ceffdb8-b1ef-41ed-b5d5-4eda53762924&docsid=1302525> (hinting that there is speculation that the government supports ratifying Protocol No. 14 because of the YUKOS case and citing sources that deny these allegations). See also *infra* text accompanying notes 175-90.

127. *Truthiness Abounds in Russia’s Ratification of Protocol 14*, COMM. FOR RUSS. ECON. FREEDOM (Jan. 15, 2010), <http://russiafreedom.wordpress.com/2010/01/15/truthiness-abounds>.



There is also some speculation that because the ECHR is soon expected to issue its decisions on the two appeals from Mr. Khodorkovsky,<sup>128</sup> Russia might want to appear agreeable to the ECHR to avoid a “significant embarrassment for the Kremlin.”<sup>129</sup> In the meantime, President Medvedev announced that he is interested in “perfecting” the Russian justice system to ensure that the number of applications to the ECHR decreases significantly.<sup>130</sup>

Only time will tell whether Protocol No. 14 was a victory for Russia, in light of several substantive concessions that effectively weakened the original reform, or a victory for the ECHR. At the very least, Russia’s eventual ratification of Protocol No. 14 demonstrated that the ECHR and its members are capable of exerting enough pressures on Russia to force it to accept a fundamental reform, such as Protocol No. 14.

C. *Intimidation of and Interference with Other Rights of ECHR Applicants, their Attorneys, and other Human Rights Activists.*

One of the most egregious ways Russian authorities (or their agents or supporters) in effect curtail access to the ECHR is by intimidating applicants, their human rights attorneys and other human rights activists, who are often indispensable in gathering supporting evidence and in bringing human rights violations to light. In other cases, Russian authorities fail to investigate their disappearances and even murders, essentially demonstrating Russia’s complicity in these grave human rights violations. While statistical evidence in this regard is unavailable, anecdotal evidence as compiled in reports published by human rights organizations, Council of Europe’s Parliamentary Assembly’s reports and resolutions, and newspaper articles is abundant and, in many cases, shocking.

Intimidation of applicants and attempts to exert influence on their attorneys is itself a violation of the Convention. Specifically, “[t]he right of individuals to apply to the Court is a

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128. See *infra* Part V.

129. Levy, *supra* note 43.

130. *Ispol'zovanie Polozhenii Evropeiskoi Konventsii po Pravam Cheloveka dlya Zashchity Interesov Fizicheskikh i Iuridicheskikh Lits v Sudakh Rossii* [Using Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts], SUTIAZHNIK (Mar. 22, 2010), <http://sutyajnik.ru/news/2010/03/1462.html>.

central element of the human rights protection mechanism in Europe and must be protected from interference at all levels.”<sup>131</sup> Member states have an obligation to cooperate with the Court’s investigation of alleged violations of the Convention<sup>132</sup> and the duty not to interfere with the individual right to file applications with the Court.<sup>133</sup> In addition, rule 39 of the Court’s Rules of Procedure imposes the duty to comply with any and all interim measures adopted by the Court, which generally deal with stay of deportation or execution proceedings, but technically may include a request to stop intimidation and harassment of the ECHR applicants or their attorneys.<sup>134</sup> Finally, the 1996 European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (“European Agreement”) places specific obligations on member states not to hinder correspondence and travel between the protected persons (i.e., applicants, their representatives, or witnesses) and the Court.<sup>135</sup>

In direct contradiction to the above-listed obligations, Russia has repeatedly attempted to intimidate and deter applicants to the ECHR, their human rights attorneys, and human rights activists who assist them. In 2007, the Parliamentary As-

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131. *Member States’ Duty to Co-operate with the European Court of Human Rights*, PACE, ¶ 1 (Feb. 9, 2007), <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11183.htm> [hereinafter *Member States’ Duty*].

132. See European Convention, *supra* note 6, art. 38 (“The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which *the High Contracting Parties concerned shall furnish all necessary facilities.*”) (emphasis added).

133. See European Convention, *supra* note 6, art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals 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. *The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*”) (emphasis added).

134. RULES OF COURT, *supra* note 24, r. 39(3) (“The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.”). 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 of a violation. See *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R., ¶ 104.

135. European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights art. 3-4, Mar. 5 1996, C.E.T.S. No. 161 [hereinafter *European Agreement*].

sembly of the Council of Europe (“PACE”) issued a report, in which Russia figured prominently, that expressed concern regarding the prevalent interference with various human rights of applicants and their representatives, including coercion and intimidation.<sup>136</sup> This concern was exacerbated by Russia’s refusal to sign and ratify the European Agreement.<sup>137</sup> In its report, the Parliamentary Assembly, with reprimand, recited some of the horrific instances of “direct coercion and flagrant acts of intimidation,”<sup>138</sup> as well as “intimidation to deter exhaustion of internal remedies,”<sup>139</sup> that can be attributed to the Russian authorities.

Moreover, the persecution of everyone involved in human rights causes, including human rights activists, creates a culture in which even the most outrageous assassinations, like that of activist Anna Politkovskaya<sup>140</sup> and Natalya Estemirova, are left uninvestigated and unpunished, fomenting the widespread belief that the murders, if not carried out directly by

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136. *Member States’ Duty*, *supra* note 131, ¶¶ 6-7.

137. *See Member States’ Duty*, *supra* note 131, ¶ 17.5 (urging state members to “sign and ratify, insofar as they have not already done so, the [European Agreement]”). For a list of all parties who signed and/or ratified the European Agreement as of Nov. 1, 2010, see *Signatories and Ratifications, European Agreement Relating to Persons Participating in Proceedings of the European Court Of Human Rights*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=161&CM=1&DF=1/11/2010&CL=ENG> (last visited Nov. 26, 2010). As of November 1, 2010, 36 member states had signed and ratified the European Agreement; 6 member states signed but had not ratified; Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Russia, and Serbia neither signed nor ratified. *Id.* The European Agreement applies to individual petitioners as well as their representatives and witnesses. European Agreement, *supra* note 136, art. 1(1). The Agreement instructs the Contracting Party to respect the rights of applicants, their representatives, and witnesses “to correspond freely with the Court.” *Id.* at art. 3(1). In addition, contracting Parties shall “undertake not to hinder the free movement and travel” of parties protected under the Agreement. *Id.* art. 4(1).

138. *Member States’ Duty*, *supra* note 131, ¶ 32-37. The report notes that “[r]eports . . . [that] have alleged harassment, coercion, and intimidation of . . . applicants to the European Court of Human Rights constitute a major problem.” *Id.* ¶ 34.

139. *Member States’ Duty*, *supra* note 131, ¶ 38-42. The report acknowledges 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.” *Id.* 38.

140. *See supra* Part III.

the state, are condoned by it. Most recently, Natalya Estemirova, an award-winning Russian human rights activist<sup>141</sup> and researcher working for the Russian human rights organization Memorial, was abducted on the morning of July 15, 2009, as she was leaving her apartment in Grozny, Chechnya.<sup>142</sup> Natalia Estemirova's work was "crucial in documenting human rights violations in the region, such as torture and other ill-treatment, unlawful killings and enforced disappearances, since the start of the second Chechnya war in 2000," prompting her colleagues to allege that she was killed because of her human rights activities.<sup>143</sup> While the Russian President demanded that the criminals who killed several Russian journalists, including Ms. Estemirova, be punished,<sup>144</sup> no progress has been made to date.<sup>145</sup>

The Russian government has also employed a number of different methods which essentially amount to denial of, and interference with, individuals' right to counsel, and often turn into flagrant harassment of attorneys who are brave enough to take on controversial or human rights cases. In their review of

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141. Ms. Estemirova was awarded the European Parliament's Robert Schumann Medal 2005 and the first Anna Politkovskaya Award in 2007 (awarded by the human rights organization Reach All Women in War). Commissioner for Human Rights of the Council of Europe, *Report by Thomas Hammarberg Following his Visit to the Russian Federation (Chechen Republic and the Republic of Ingushetia) on 2-11 September 2009*, ¶ 14 (Nov. 24, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1543437> [hereinafter *Hammarberg Report*].

142. *Id.* Witnesses reported they saw Ms. Estemirova being pushed into a car shouting that she was being abducted. Her remains were found the next day in neighboring Ingushetia with gunshot wounds. *Human Rights Activist Natalia Estemirova Murdered in Russia*, AMNESTY INT'L (July 15, 2009), <http://www.amnesty.org/en/news-and-updates/news/human-rights-activist-natalia-estemirova-murdered-in-russia-20090716>.

143. *Id.*

144. Kira Vasil'eva, *Goriachaia Tochka [Hot Spot]*, NOVYE IZVESTIYA (Feb. 18, 2010), <http://dlib.eastview.com/browse/doc/21318089>.

145. *See id.* Oleg Orlov, the head of Memorial, accused the Chechen President Ramzan Kadyrov of being implicated in the murder – "not for executing the killing or giving the order (the exact identities of the perpetrators and those behind the killing remain unknown), but rather for fostering a culture of lawlessness and violence in Chechnya." Tanya Lokshina, *Chechnya: President Wins Estemirova Defamation Trial*, HUM. RTS. WATCH (Oct. 7, 2009), <http://www.hrw.org/en/news/2009/10/07/chechnya-president-wins-estemirova-defamation-trial>. Unfortunately, the only outcome of Orlov's statement was a defamation trial, which President Kadyrov unsurprisingly won. *Id.*

the new Russian Criminal Code<sup>146</sup> and its practical effects, Jeffrey Kahn and William Burnham observed that these methods include, among others, refusing to contact the counsel because the suspect cannot recall a specific phone number or address and failing to advise the counsel where his/her client is being held. Russian authorities also engage in “changing” the entrance requirements to various establishments on an almost daily basis and appointing new lawyers should the retained counsel be unable to appear on a particular date.<sup>147</sup> Similarly, in *Shamayev and 12 others v. Georgia and Russia*,<sup>148</sup> the Court found Russia to be in violation of article 34 of the Convention for not allowing detained applicants to communicate with their representatives and the Court.<sup>149</sup> The PACE Rapporteur also admonished Russia for “a number of concrete instances of . . . ‘disappearance’ of mail sent off from Russia,” to the Court<sup>150</sup> calling it “an unacceptable situation for a state party to the ECHR.”<sup>151</sup>

Another well-known tactic involves forcing defense attorneys to submit as witnesses in their clients’ cases.<sup>152</sup> This tactic can be an effective removal remedy since the Russian law states that a witness in a criminal case cannot also act as an attorney in that same matter.<sup>153</sup> Many lawyers expressed their “fear that the state is intent on dominating the work of defense attorneys as it does judges and prosecutors.”<sup>154</sup> As a result of these actions, applicants are effectively prevented from exhausting do-

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146. Russia’s New Criminal Code was adopted in 2002. For an excellent review of major changes and the Code’s implementation, see generally William Burnham & Jeffrey Kahn, *Russia’s Criminal Procedure Code Five Years Out*, 33 Rev. Cent. E. Eur. L. 1 (2008).

147. *Id.* at 41, 44.

148. *Shamayev v. Georgia*, 2005-III Eur. Ct. H.R.

149. *Id.* ¶ 518.

150. *Member States’ Duty*, *supra* note 131, ¶ 24; *see also* Klyakhin v. Russia, App. No. 46082/99, ¶ 121 (Eur. Ct. H. R. Nov. 30, 2004) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=708556&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (finding a violation of article 34 given the discrepancy between the Court’s record of correspondence and that of prison authorities).

151. *Member States’ Duty*, *supra* note 131, ¶ 24.

152. *See* Peter Finn, *Defense Attorneys Targeted in Russia: Prosecutors Seek to Kick Rivals Off Cases*, WASH. POST, Aug. 14, 2005, at A1 (describing the intimidation of Russian attorney Svetlana Zayets).

153. *Id.*

154. *Id.*

mestic remedies, paving way for Russia to file a preliminary objection arguing non-exhaustion of domestic remedies. This tactic is particularly appalling in light of President Medvedev's criticism that the Russian court system is too liberal insofar as it does not require individuals to exhaust many domestic remedies before they can proceed with filing their applications in the ECHR.<sup>155</sup>

Several prominent human rights attorneys who often represent Russian applicants before the ECHR have also been targeted either by the Russian government or its representatives or agents. They are "frequently subjected to searches and seizures and other forms of pressure in violation of Russian and European legal provisions."<sup>156</sup> Some of these attorneys even had no choice but to seek redress in the ECHR. Stories of several prominent Russian human rights attorneys—Mikhail Trepashkin, Karinna Moskalenko, Boris Kuznetsov, and Stanislav Markelov—and of the difficulties, intimidation, and harassment they encountered because of representing ECHR applicants or openly speaking out against the Russian government and its human rights violations, illustrate ways in which the Russian government works to discourage investigation of human rights offenses and applications to the ECHR.

In the case of Mikhail Trepashkin, a former Federal Security Service (FSB) officer and an attorney who represented individuals seeking compensation after the 1999 Moscow "apartment bombings,"<sup>157</sup> the Russian government went as far as arresting him on likely fabricated charges, denying him pre-trial release, and holding him in terrible conditions during his detention. Specifically, Mr. Trepashkin was detained on a suspicious weapons possession charge (which he denied) right before the trial where he allegedly planned to present evidence proving that the state's Special Forces were involved in

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155. Irene Omel'chenko, *Upolnomocheni dlia Vstrechi s Prezidentom* [Ombudsman's Meeting with the President], ROS. GAZ., June 11, 2008, at 1, available at <http://www.rg.ru/2008/06/11/medvedev-lukin.html>.

156. *Allegations 2009*, *supra* note 50, ¶ 4.3.6.

157. The apartment bombings incidents refer to a number of bombings of apartment buildings in Moscow and Volgograd in September 1999. See Ekaterina Zapodinskaia, *Bortsa s Chechenskimi Banditizmom Zastavili Uvolit'sia iz FSB* [Fighter of Chechen Bandits Forced to Quit FSB], KOMMERS., Apr. 8, 1998, <http://trepashkin.info/>.

these bombings.<sup>158</sup> He was finally released on November 30, 2007—three years after the sentencing.<sup>159</sup>

Moreover, because the Russian government refused to address his complaints regarding excessive delays and terrible conditions during his detention, Mr. Trepashkin had no choice but to seek redress before the ECHR. After his first complaint regarding his pre-trial detention was addressed,<sup>160</sup> Mr. Trepashkin filed his second complaint on March 13, 2005. On January 22, 2009, the following claims were declared admissible by the ECHR: article 3 claims (inhuman and degrading treatment) concerning the conditions of his detention and transportation between December 1, 2003 and July 23, 2005, and article 5(4)<sup>161</sup> (lack of liberty and security) claims concerning the speediness of the review of his appeal and his absence from the appellate hearing despite his requests. Moreover, the Court also decided to pursue the examination of Mr. Trepashkin's claims that the Russian government had interfered with his right to counsel—article 6(3)<sup>162</sup> (right to a fair trial) claims concerning the lack of time and facilities for the

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158. On May 19, 2004 Mr. Trepashkin was sentenced to four years in prison on two charges – unlawful possession of ammunition and disclosure of State secrets. *Spravka: Trepashkin Mikhail Ivanovich, [Profile: Trepashkin Mikhail Ivanovich]*, KOMMERS., Sept. 7, 2009, <http://www.kommersant.ru/factbook/note.aspx?objectid=57066> The latter charge allegedly involved his disclosure of certain classified materials during his service in the FSB. *Trepashkin v. Russia* (No. 2), App. No. 14248/05, at 2 (Eur. Ct. H.R. Jan. 22, 2009) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847618&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

159. *Spravka, supra* note 158.

160. On July 19, 2007, the ECHR unanimously held that there had been a violation of article 3 (prohibition of degrading treatment) of the Convention concerning the applicant's pre-trial detention conditions between October 22 and December 1, 2003, and awarded Mr. Trepashkin damages in the amount of EUR 3,000. Press Release, ECHR, Chamber Judgment *Trepashkin v. Russia* (July 19, 2007), *available at* <http://cmiskp.echr.coe.int/tkp197/>.

161. Article 5(4) provides in relevant part, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." European Convention, *supra* note 6, art. 5(4).

162. Article 6(3) provides in relevant part:

Everyone charged with a criminal offence has the following minimum rights:

preparation of his defense and his inability to meet with his lawyers in private<sup>163</sup> and article 34<sup>164</sup> claims that the prison administration put pressure on him in connection with his complaint to the ECHR.<sup>165</sup> Unfortunately, given the current ECHR backlog of over 120,000 cases,<sup>166</sup> it might be years before the final decision is issued in Mr. Trepashkin's case.

A relatively new technique—instigating disbarment and other disciplinary proceedings against human rights attorneys for their alleged failure to zealously represent their clients within the bounds of law—has recently been tried against prominent human rights attorney and ECHR practitioner Karinna Moskalenko. Ms. Moskalenko's story demonstrates the Russian government's relentlessness in finding new methods of intimidation and deterrence.<sup>167</sup> In fact, in addition to

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(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

*Id.* art. 6(3).

163. *Trepashkin*, App. No. 14248/05, at 38.

164. Article 34 of the Convention provides, "The Court may receive applications from any person, non-governmental organisation or group of individuals 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. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." European Convention, *supra* note 6, art. 34.

165. *Trepashkin*, App. No. 14248/05, at 39.

166. Joop Meijnen, *European Court Could Succumb to Deluge of Cases*, NRC HANDELSBLAD, Feb. 24, 2010, [http://www.nrc.nl/international/Features/article2491422.ece/European\\_court\\_could\\_succumb\\_to\\_deluge\\_of\\_cases](http://www.nrc.nl/international/Features/article2491422.ece/European_court_could_succumb_to_deluge_of_cases).

167. Moskalenko was subject to disbarment proceedings in 2007, although the attempt failed. *People: Karinna Moskalenko*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/people/m/karinna\\_moskalenko/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/m/karinna_moskalenko/index.html) (last visited Nov. 27, 2010) [hereinafter *People*]. She has also he has taken many cases involving alleged rights abuses against Chechens to the ECHR. Allan Cowell, *French Police Doubt Rights Lawyer Was Poisoned*, N.Y. TIMES, Oct. 28, 2008, <http://www.nytimes.com/2008/>



facing threats of disciplinary proceedings before the Moscow Bar, the Russian government's Federal Tax Service launched investigations against Ms. Moskalenko's International Protection Center seeking to close it.<sup>168</sup> The attempt to disbar her eventually failed but the tax investigation put an incredible burden on her Center, which, as a result, was threatened with bankruptcy and closure.<sup>169</sup> Even more shocking was the November 2008 occurrence: Ms. Moskalenko "found a small amount of liquid mercury in her car in Strasbourg . . . a dose that was not meant to be lethal, but that put her own health and that of her family, including two young children she had recently adopted, at serious risk."<sup>170</sup>

At the same time, these ongoing personal attacks, threats, and efforts to interfere with legal practices of human rights attorneys have only made some of them, including Ms. Moskalenko, more outspoken and blunt regarding Russia's human rights violations and attempts to silence victims' advocates. In one of her statements, Ms. Moskalenko openly accused the Russian authorities of intimidating human rights lawyers.<sup>171</sup> In her testimony before the Commission on Security and Cooperation in Europe, Ms. Moskalenko aptly summarized the current human rights situation in Russia:

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10/28/world/europe/28poison.html?\_r=1. A search of the ECHR judgments database (HUDOC) revealed that Ms. Moskalenko represented applicants in approximately 30 cases that have been decided by the ECHR. *See also* Karinna Moskalenko, Testimony for the Commission on Security & Cooperation in Europe, 2 (June 23, 2009) [hereinafter Testimony], available at [http://www.csce.gov/index.cfm?Fuseaction=Files.Download&FileStore\\_id=1325](http://www.csce.gov/index.cfm?Fuseaction=Files.Download&FileStore_id=1325) ("Even I have been victim to several types of intimidation, including the threat of disbarment by the Prosecutor General in Moscow apparently for negligently defending my client.").

168. *See Member States' Duty*, *supra* note 131, ¶¶ 28-29 (discussing instances of "indirect measures" against applicants' legal representatives); *see also* Peter Finn, *Russia's Champion of Hopeless Cases is Targeted for Disbarment*, WASH. POST, June 2, 2007, at A16 (noting Moskalenko's fears that tax inspection threatens to close the Moscow branch of her organization).

169. *Defense Team – Karinna Moskalenko Biography*, KHODORKOVSKY & LEBEDEV COMM'NS CTR., <http://www.khodorkovskycenter.com/defense-team/karinna-moskalenko> (last visited Nov. 26, 2010).

170. *Allegations* 2009, *supra* note 50, ¶ 86. French authorities later attempted to explain the incident by proposing that mercury had leaked out of a broken thermometer that was transported in the car by its previous owner but no final reports have been made public. Cowell, *supra* note 167.

171. *People*, *supra* note 167.

Human rights in Russia is not getting better, it is getting worse. Despite President Medvedev's proclamations, the reality for people on the streets, in the courts or in prison, is that human and civil rights are severely compromised, if they exist at all. The justice system is not impartial and does not seek to uphold the rights of defendants, but instead, it actively works in a political fashion to subvert the rule of law and remove rights. This situation must change.<sup>172</sup>

Examples that support Ms. Moskalenko's allegations are abundant. In general, the Russian government seeks to silence anyone it perceives to be a political threat, whether it be because of the individual's human rights work, as in the case of the journalist Ms. Politkovskaya or human rights activist Ms. Estemirova, or because of the individual's economic power, as in the case of Yukos oil executive Mr. Khodorkovsky or HSBC—whose cases are discussed below. The Russian authorities' response to and handling of these high profile cases support Ms. Moskalenko's accusations, demonstrate the Russian government's disrespect for the rule of law, and belie any claim that Russia is truly committed to fulfilling its obligations under the Convention.

The case of Ms. Moskalenko's prominent client, Mr. Khodorkovsky, exemplifies how, in the words of Ms. Moskalenko, the Russian government often works to "remove rights." No one is allowed to hold either economic or political power but the Russian government itself. Mr. Khodorkovsky's case also demonstrates how the Russian government continues to ignore the ECHR's calls for substantive changes in Russia's policies and procedures.

Briefly, the facts of this rather complicated ordeal are as follows.<sup>173</sup> Mikhail Khodorkovsky was arrested on October 25, 2003, at gunpoint on charges of tax evasion, fraud, and embezzlement in connection with his majority ownership in the

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172. Testimony, *supra* note 167, at 1.

173. The facts stated here are a brief summary of those presented by the Court in its admissibility decision in *Khodorkovskiy v. Russia* (dec.), App. No. 5829/04, at 2-14 (Eur. Ct. H.R. May 7, 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=850719&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

Yukos Oil Company<sup>174</sup>—a major oil company in Russia. Despite several requests for him to be released on bail, Mr. Khodorkovsky was held in pre-trial detention until the trial. On May 31, 2005, he was found guilty of the charges brought against him and sentenced to nine years' imprisonment. On appeal, the term of his imprisonment was reduced to eight years.

In 2004 Mr. Khodorkovsky filed his first application for relief with the ECHR. The case was ruled to be admissible on May 20, 2009.<sup>175</sup> Specifically, the ECHR found that “in the light of the parties' submissions, [several claims enumerated

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174. By way of a brief background, Khodorkovsky became associated with Yukos Oil in the late 1990s subsequently helping the company to repay its debts and to become a multibillion-dollar corporation. *Id.* at 3. Yukos Oil soon turned into the largest privately owned oil company in Russia and as a result became the State-owned Rosneft's major competitor. *Id.* As his fortune grew, Khodorkovsky also became involved in politics. *Id.* He made significant financial donations to some of the opposition parties and gave several interviews in which he spoke out against the Russian governments and its anti-democratic stance on many important issues. *Id.* According to Mr. Khodorkovsky and his attorneys, in response, the Russian government began to search for ways to silence him and to thwart his activities. *Id.* For example, one of the top Yukos managers, and Mr. Khodorkovsky's personal friend, Mr. Lebedev, was arrested on July 2, 2003. *Id.* Around the same time, several other key Yukos “players” were arrested as well (charges varied), while others chose to flee Russia with many settling in the United Kingdom. *Id.* As it has already been mentioned above, Mr. Khodorkovsky, who had chosen to stay and defend himself if necessary, was then arrested in October. *Id.* On January 22, 2004 Mr. Lebedev filed a petition with the ECHR alleging several violations of the European Convention; some claims under article 5 were declared admissible on May 18, 2006. *Lebedev v. Russia*, App. No. 4493/04, ¶ 4 (Eur. Ct. H.R. Oct. 25, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824930&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. On October 25, 2007, the ECHR issued its final judgment, finding Russia to be in violation of article 5 of the European Convention in view of the applicant's unauthorised detention for a certain period of time and on account of the delay in review of detention orders and absence of Mr. Lebedev from some detention hearings. *Id.* ¶¶ 91, 102, 108, 115. The Court awarded Mr. Lebedev 3,000 euro in non-pecuniary damages and 7,000 euro to cover the pro rata portion (given that most of his claims were declared inadmissible) of Mr. Lebedev's costs and expenses. *Id.* ¶¶ 122-32.

175. *Khodorkovsky Case is to be Considered by the European Court of Human Rights*, KHODORKOVSKY & LEBEDEV COMM'NS CTR., (May 21, 2009), <http://www.khodorkovskycenter.com/news-resources/stories/khodorkovsky-case-be-considered-european-court-human-rights>.

in] the complaint raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits”<sup>176</sup> of the following alleged violations: article 3<sup>177</sup> (inhuman and degrading treatment given the poor conditions in which Mr. Khodorkovsky was detained and the poor conditions in the courtroom);<sup>178</sup> article 5<sup>179</sup> (unlawful arrest and subsequent detention due to various “irregularities” in the detention proceedings, including several extensions of his pre-trial detention often on the initiative of the court and the court’s refusal to consider the defense’s arguments that release on bail would be appropriate);<sup>180</sup> and article 18<sup>181</sup> (his

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176. *Khodorkovskiy*, No. 5829/04, at 24.

177. Article 3 of the European Convention, *supra* note 6, reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

178. *Khodorkovskiy*, No. 5829/04, at 22-25.

179. Article 5 of the European Convention, *supra* note 6, reads in relevant part as follows:

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . .
- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

180. *Khodorkovskiy*, No. 5829/04, at 25-35.

181. Article 18 of the European Convention, *supra* note 6, reads as follows: “The restrictions permitted under [the] Convention to the said rights and

arrest, detention and prosecution were politically motivated<sup>182</sup>). Yet, even after the ECHR judgment, Mr. Khodorkovsky continued to face harassment and persecution by the government, which denied his parole under flimsy pretenses and brought new, equally unlikely charges against him.<sup>183</sup>

Mr. Khodorkovsky has since filed several additional petitions with the ECHR, all of which are still pending. His claims include, among others, a request to the ECHR to rule on the fairness of his first trial, as well as violations of law made in the course of the investigation of new criminal allegations.<sup>184</sup> Re-

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freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

182. Mr. Khodorkovsky’s claim is supported by several decisions by the courts of United Kingdom and Cyprus granting refugee status to several Yukos managers and refusing Russia’s extradition requests because prosecution was perceived as being politically motivated. *Khodorkovskiy*, No. 5829/04, at 35-36.

183. New allegations were filed against Mr. Khodorkovsky on February 5, 2007. See Testimony, *supra* note 167, at 1-2 (discussing the history of the Khodorkovsky case). As a result, Mr. Khodorkovsky continued to be detained in prison when he would have been eligible for parole after having served half of his original eight-year sentence. *Id.* at 1. Mr. Khodorkovsky was refused parole in August 2008 (for which he became eligible after serving five years in prison) on “flimsy” pretenses that he had allegedly refused to keep his hands behind his back during one of his walks and failed to participate in vocational training in sewing. *Id.* The new charges include embezzlement and laundering of stolen property, alleging that both Mr. Khodorkovsky and Mr. Lebedev, see *supra* text accompanying note 174 (Mr. Lebedev was one of the top Yukos managers and Mr. Khodorkovsky’s personal friend), embezzled the entire production of Yukos over a six-year period. Testimony, *supra* note 167, at 2. The second trial of the two men began on May 31, 2009. On December 30, 2010, Messrs. Khodorkovsky and Lebedev were found guilty of embezzlement and money laundering. They were sentenced to 14 years in the colony, which will be counted from October 2003. Khodorkovsky and Lebedev sentenced for 14 years, Khodorkovsky & Lebedev Comm’ns Ctr, <http://khordorkovskycenter.com> (last visited March 4, 2011).

184. *Current Trial Background*, KHODORKOVSKY & LEBEDEV COMM’NS CTR., <http://www.khodorkovskycenter.com/previous-trials-proceedings/ecthr-cases> (last visited Nov. 27, 2010). Another Yukos-related case that is pending before the ECHR was filed by Mr. Bruce Misamore and other former Yukos executives claiming that Russia owes them more than \$100 billion dollars. See Loren Steffy, *Houstonian Fights Kremlin*, HOUS. CHRON., Aug. 23, 2009, (Business), at 1 (discussing Misamore’s history with YUKOS and the background of his claims). The case was heard by the ECHR on March 4, 2010. See Press Release, Eur. Court of Human Rights, Chamber Hearing on OAO

cently, Ms. Moskalenko reiterated that throughout the first trial “[w]itnesses were intimidated, important evidence was excluded, and Mr. Khodorkovsky’s and Mr. Lebedev’s<sup>185</sup> access to their own lawyers was severely limited, even prohibited at times.”<sup>186</sup> She continued to explain that little has changed since then and that “[t]he violations that occurred during the first trial . . . now continue throughout the second trial [including cruel treatment of potential witnesses during the investigative period].”<sup>187</sup> Ms. Moskalenko fears that the second trial is designed to keep Mr. Khodorkovsky in prison indefinitely.<sup>188</sup>

Potential contenders for economic power in Russia are often able to assemble large legal teams to represent them and their claims. In such cases, the Russian government resorts to several techniques that are utilized simultaneously to wipe out the potential contender and the legal team. The case of Hermitage/HSBC serves as a prime example. Until 2006, Hermitage/HSBC has been the largest foreign investor in the Russian stock market. Hermitage/HSBC alleged a \$230 million fraud scheme against certain members of the Russian government and certain Russian institutions following the 2007 raid of Hermitage’s Moscow corporate office and its local attorneys’ office and several subsequent judgments handed down against HSBC/Hermitage by different Russian courts.<sup>189</sup> The \$230 million alleged fraud was for the refund that some entity, filing on behalf of the then-nonfunctioning HSBC/Hermitage, received for allegedly overpaid taxes from the Russian government. In response to this lawsuit, a number of bankruptcy pe-

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Neftyanaya Kompaniya YUKOS v. Russia (March 4, 2010), *available at* <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=61537579&skin=hudoc-pren&action=request> (stating date of the chamber hearing and discussing the background of the case). The result is expected at some “later date.” *Id.*

185. Mr. Lebedev was one of the top Yukos managers and Mr. Khodorkovsky’s personal friend. *See supra* text accompanying note 174.

186. Testimony, *supra* note 167, at 2.

187. *Id.* at 1-2.

188. *Id.* at 2. Ms. Moskalenko’s suspicions are confirmed by the assessment by “independent experts” that the Russian Government withdrew its support for the draft law in part because it would result in Mr. Khodorkovsky’s freedom. Allegations 2009, *supra* note 156, ¶ 68.

189. Declaration of Neil Micklethwaite at ¶¶ 7-11, *In re Hermitage Capital Mgmt. Ltd.*, No. M19-116 (S.D.N.Y. July 28, 2009), *available at* <http://www.robortamsterdam.com/Hermitage%20Micklethwaite%20Declaration.pdf>.

titions were filed by the Russian authorities in Russian courts to liquidate the Hermitage Companies.<sup>190</sup>

From the beginning, all lawyers acting for HSBC/Hermitage in Russia have been intimidated and targeted by police with searches and questioning as witnesses—in violation of the lawyer-client privilege. On August 20, 2008 police raided the Moscow offices of all law firms representing HSBC/Hermitage, including those of the Moscow-based United States firm, Firestone Duncan, and those of independent lawyers—Eduard Khairetdinov, Vladimir Pastukhov and Vadim Gorfel.<sup>191</sup> In the course of these searches, the police seized powers of attorney authorizing these lawyers to represent HSBC in court hearings scheduled for that week. This appeared to be a clear “attempt to obstruct HSBC’s efforts to frustrate on-going frauds.”<sup>192</sup>

Furthermore, at the end of August 2008, all lawyers independently representing HSBC/Hermitage, who had “succeeded in uncovering fraudulent claims against the HSBC companies and who were in the process of challenging false bankruptcy proceedings,” received summonses from the Kazan police to appear for questioning as witnesses—in violation of article 8 of the Russian Law on Lawyers which prohibits the questioning of lawyers regarding cases in which they provide legal assistance.<sup>193</sup> Another lawyer—Mr. Sergei Magnitsky of Firestone Duncan—was arrested in November 2008 after he testified against a Russian Interior Ministry official who was allegedly involved in the raid on Hermitage’s offices and in the fraud.<sup>194</sup> Mr. Magnitsky was charged with participating in the tax evasion at two subsidiaries of Hermitage Capital Management.<sup>195</sup> He died on November 16, 2009, four days after his last court appearance, in Butyrskaya prison after nearly a year of imprisonment in Moscow. His 37-year-old heart allegedly stopped due to complications of pancreatitis, a condition he had developed during his incarceration for which he was allegedly refused treatment.<sup>196</sup> Russia’s President Medvedev has

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190. *Id.* at ¶ 11.

191. Allegations 2009, *supra* note 156, ¶ 87.

192. *Id.*

193. *Id.* ¶ 88.

194. Biography of Sergei L. Magnitsky, L. & ORD. IN RUSS., <http://lawandorderinrussia.org/magnitsky/biography/> (last visited March 31, 2010).

195. *Id.*

196. *Id.*

now ordered Russia's chief prosecutor and justice minister to investigate the case, but no findings have been made to date.<sup>197</sup>

Russia's targeted persecutions of lawyers attempting to defend clients' basic human rights include failures to investigate or even complicity in their assassinations and murders. Following the January 19, 2009, murder of human rights attorney Stanislav Markelov,<sup>198</sup> Dick Marty, the PACE Rapporteur on the human rights situation in the North Caucasus, remarked that Mr. Markelov's "untiring efforts to combat the impunity of those responsible for human rights violations in Chechnya . . . cost him his life . . . [s]how[ing] that the remedies against human rights violations are still fraught with pitfalls and dangers."<sup>199</sup> Finally, some lawyers, such as Mr. Boris Kuznetsov, an attorney for a member of the Federation Council, were forced to abandon their work and seek asylum abroad to avoid persecution from the Russian government for the work they have done on behalf of their clients.<sup>200</sup>

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197. *Id.*

198. Michael Schwartz, *Leading Russian Rights Lawyer is Shot to Death in Moscow, Along with Journalist*, N.Y. TIMES, Jan. 20, 2009, at A6. Anastasia Baburova, a 25-year-old *Novaya Gazeta* journalist who was with Mr. Markelov on that day, was also killed. *Id.*

199. *Statement by Dick Marty, PACE Rapporteur on the Human Rights Situation in the North Caucasus, on the Murder of Stanislav Markelov*, PACE (Jan. 20, 2009), <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2115>. Mr. Markelov's death is said to be connected to his public announcement that he might be filing an appeal to the ECHR on behalf of the victim's family against the early release from prison of Colonel Budanov, who had been convicted of the rape and murder of a young girl in Chechnya. *See id.* (noting that Markelov died shortly after announcing that he planned to appeal against Budanov's release). Mr. Markelov was also involved in investigating the circumstances of many cases opened as a result of Ms. Politikovskaya's research. *V Tsentre Moskvy Ubit Advokat Stanislav Markelov i Tyazhelo Ranena Sotrudnitsa "Novoi Gazety" [Stanislav Markelov is Killed in the Center of Moscow]*, NOVAYA GAZETA, (Jan. 19, 2009), <http://www.novayagazeta.ru/news/387201.html>.

200. Mr. Kuznetsov had discovered that his client had been unlawfully wiretapped. Allegations 2009, *supra* note 156, ¶ 93. His first complaint to the Supreme Court was ignored. *Id.* He then appealed to the Constitutional Court, enclosing a copy of a classified memorandum to support the allegations that the eavesdropping had indeed taken place. *Id.* As the memorandum was "classified as secret," Mr. Kuznetsov was prosecuted for divulging of a state secret, and forced to flee abroad. *Id.* Despite the fact that Mr. Kuznetsov did not make the statement public but only submitted it to the



To conclude, all of these subtle and not so subtle techniques, methods, and actions signal that the Russian government is not fully committed to the ECHR values and ideals and repeatedly violates and seeks to circumvent the covenants and spirit of the Convention in spite of ever-increasing ECHR rulings against it.

#### D. Case Study—“Chechen Cases”

The “Chechen Cases” exemplify the simultaneous importance and problems with the Russian government’s participation in the ECHR. A comparative review of some of the early Chechnya-related ECHR decisions and the latest Chechnya-related ECHR decision and Russia’s handling of and response to these judgments confirm that “the [Russian] government does not comply with the [ECHR] judgment[s], but only pays compensation.”<sup>201</sup> Nonetheless, access to the ECHR is perceived as being imperative if Russia is to be ever held responsible for its military’s human rights violations in Chechnya and forced to implement substantive reforms to eradicate them.

A brief historical introduction to the Russian-Chechen conflict is in order. The second armed conflict in Chechnya began in September 1999, and by March 2000, Russia’s federal forces had gained control over most of Chechnya in its battle against the insurgency.<sup>202</sup> While the counter-terrorism operation in Chechnya officially ended on April 16, 2009, the Russian Federal and Chechen authorities carried out over a hundred special operations in the first half of 2009.<sup>203</sup> Even more troubling, since the end of 2008, NGOs have reported an in-

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Court as part of his pleadings, the Prosecutor General’s reply was limited to quoting legislation according to which lawyers, too, must respect official secrets they come in contact with in the course of their work, and insisting that such secrets are “divulged” if that information enters the domain of “other people”—which, by implication, include the members of the Constitutional Court of the Russian Federation.” *Id.*

201. Lonskaia et al., *supra* note 62; see also Amnesty Int’l, *Rule without Law: Human Rights Violations in the North Caucasus*, 8 (2009) (explaining that ECHR “judgments have not been fully implemented to ensure justice for the applicants, and non-repetition of the violations in the future”).

202. Hum. Rts. Watch, *Who Will Tell Me What Happened to My Son? Russia’s Implementation of European Court of Human Rights Judgments in Chechnya*, 7 (2009), available at <http://www.hrw.org/en/node/85744> [hereinafter Human Rights Watch I].

203. Hammarberg Report, *supra* note 141, at 2.

creasing number of abductions and disappearances in Chechnya where Russian law enforcement officials are alleged to have been involved.<sup>204</sup>

On June 6, 2003 the Russian State Duma adopted Decree no.4124-III, which granted an amnesty for criminal acts (except for serious intentional crimes, such as murder) committed by the participants in the Russian-Chechen conflict in the period between December 1993 and June 2003.<sup>205</sup> As a result, victims of human rights violations and their families in Chechnya often did not get any justice from the Russian government.<sup>206</sup> As Senator Christopher Smith remarked in May 2002, most charges filed against the Russian military personnel for human rights violations “eventually melt like snow in the noonday sun.”<sup>207</sup>

Instead, complainants are often at risk of reprisals from authorities.<sup>208</sup> Desperate, some people turned to the ECHR for help. Unfortunately, “in doing so some have suffered [more] reprisals, ranging from harassment and threats to, in some cases, death or enforced disappearance.”<sup>209</sup>

In general, early cases filed with the ECHR were from victims of Russian federal forces’ use of bombing and shelling, targeted operations in which individuals were abducted from their homes, and large-scale ‘mop-up’ [“zachistki”] operations in which large numbers of civilians were detained or killed during what were ostensibly searches for rebel fighters.<sup>210</sup> Later cases included claims of excessive use of force by law enforcement officials, deaths in custody, use of torture and ill-

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204. *Id.* at 2-3 (“The estimate of the prosecutorial authorities is that a total of 3,074 persons went missing in 2000-2009. Moreover, the Chechen authorities have located and marked some 60 graves where an estimated 3,000 unidentified bodies have been buried.”).

205. *Khashiyev & Akayeva v. Russia*, App. Nos. 57942/00 & 57945/00, ¶ 98 (Eur. Ct. H.R. Feb. 24, 2005) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=718910&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

206. *Id.* ¶¶ 110-14.

207. Abdel-Monem, *supra* note 5, at 258.

208. Amnesty Int’l, *supra* note 201, at 4.

209. *Id.*

210. Phillip Leach, *The Oversight of the European Court of Human Rights in Cases from the North Caucasus*, ¶ 3 (Sept. 11, 2009) (unpublished paper) *available at* [http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/PL%20Paper%20for%20CLAHR%2011\\_9\\_09.pdf](http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/PL%20Paper%20for%20CLAHR%2011_9_09.pdf).

treatment in custody, extrajudicial executions, arbitrary detentions, secret detentions, enforced disappearances, threats to human rights defenders, the targeting of relatives of suspected members of armed opposition groups, and the forced evictions of internally displaced people.<sup>211</sup>

As discussed below, the ECHR routinely rules against Russia in all of these cases. Yet, although the Russian government diligently pays compensation pursuant to the ECHR judgments, its failure to address the underlying causes and to prevent similar human rights violations from recurring in the future reveals the extent to which the Russian government is willing to sabotage the ECHR process, punish victims for trying to use the ECHR system, and curtail access to the ECHR.

Nonetheless, ECHR judgments in Chechen cases are important insofar as they serve as an indictment of the ways that Russia's legal system does not comply with the Convention and shed light on the way that the Russian government tries to stonewall and subvert the ECHR's own proceedings—a deliberate strategy of non-cooperation with the ECHR. Moreover, victims of human rights violations in Chechnya, their legal representatives, and human rights activists who assist them believe in the imperativeness of continuous access to the ECHR because at the moment it is the only international legal institution that has continued to condemn Russia's actions in Chechnya in its judgments and that, as discussed in Part VI of this Note, *infra*, has the power to pressure Russia into stopping human rights abuses in Chechnya.

Perhaps not surprisingly, the situation in Chechnya has been a point of contention between the ECHR and Russia since the very start. On December 19, 2002, for the first time, six claims against Russia concerning events that took place during the war in Chechnya in 1999-2000 were ruled admissible to the ECHR.<sup>212</sup> The Russian government has generally denied any wrongdoing on the part of its military.<sup>213</sup> Yet, as early as 2005, there was recognition that “the potential for

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211. Amnesty Int'l, *supra* note 201, at 8.

212. Press Release, ECHR, Six Complaints Against Russia Concerning Events in Chechnya Declared Admissible (Jan. 16, 2003), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Chechnya%20%7C%20Russia%20%7C%20complaints%20%7C%20six&sessionId=48377854&skin=hudoc-pr-en>.

213. Abdel-Monem, *supra* note 5, at 275.

thousands of cases [involving Chechnya], each one representing different facts to be determined as to liability and as to “just satisfaction” damages seem[ed] very realistic.”<sup>214</sup> At the time, some 150 cases filed by Chechen civilians waited processing in the ECHR,<sup>215</sup> and the number could conceivably have been greater if it were not for possible dangers awaiting prospective applicants.<sup>216</sup> For example, in 2005, one reporter, relying on reports made by human rights attorneys and groups and statements of relatives, conveyed that “[i]n at least five instances, applicants to the [C]ourt were themselves killed or had disappeared.”<sup>217</sup>

Since then, the ECHR has handed down around 120 decisions involving human rights violation in Chechnya, and Russia was found to have violated at least one article of the Convention in all but three of them.<sup>218</sup> In general, while the ECHR has acknowledged Russia’s right to respond to a situation of conflict,<sup>219</sup> because no emergency or martial law has been declared in Chechnya and no derogation has been made under article 15 of the Convention,<sup>220</sup> the ECHR generally evaluated events in Chechnya “against a normal legal back-

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214. McKaskle, *supra* note 2, at 65 n.375.

215. See Emma Gilligan, *Chechen Victims Can Get Money, But a Tribunal Would Be Even Better*, CHI. TRIB., Mar. 20, 2005, at C7 (“Between the advocacy center, Memorial and the Chechnya Justice Initiative, some 150 cases from Chechen civilians now await processing in the European Court.”).

216. See Peter Finn, *Russians’ Appeals to Court Bring Intimidation, Death; Relations of Missing and Dead Told Not to Go to Rights Body*, WASH. POST, Jul. 3, 2005, at A15 (relying on a statement by a human rights attorney who claims that “two-thirds of potential applicants he sees decline to go forward with their cases when warned about the dangers of appealing to the court.”).

217. *Id.*

218. This number has been computed by visiting the ECHR’s Research Portal, known as HUDOC and searching for “Chechen Republic” with Russia being listed as the “Respondent” state and clicking “count.” For details, please visit HUDOC at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=49902905&skin=hudoc-en>. The number of cases in which Russia was found to have violated at least one article of the Convention is based on the author’s personal review of the ECHR judgments concerning Chechnya.

219. See, e.g., *Isayeva v. Russia*, App. No. 57950/00, ¶ 180 (Eur. Ct. H.R. Feb. 24, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=718875&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (acknowledging that some exceptional measures might have been justified in light of the conflict in Chechnya).

220. Article 15 provides:

ground.”<sup>221</sup> Applicants claimed violations of article 2 (right to life) in 33 of these cases; article 3 (prohibition against torture or inhuman or degrading treatment) violations in 26 cases; article 5 (right to liberty and security of person) violations in 19 cases; and article 13 (right to an effective domestic remedy) violations in 34 cases.<sup>222</sup>

The first six Chechnya-related applications were declared admissible by the ECHR on December 19, 2002 in *Khashiyev v. Russia* (no. 57942/00), *Akayeva v. Russia* (no. 57945/00), *Isayeva v. Russia* (no. 57947/00), *Yusupova v. Russia* (no. 57948/00), *Bazayeva v. Russia* (no. 57949/00) and *Isayeva v. Russia [Isayeva II]* (no. 57950/00).<sup>223</sup> All applicants were nationals of Russia and residents of Chechnya. They complained of violations of their rights by the Russian military in Chechnya in 1999-2000, including violations of article 2 (right to life), article 3 (prohibition of torture and inhuman and degrading treatment), article 13 (right to an effective remedy), and article 1 of Protocol No. 1 (protection of property).

The *Khashiyev & Akayeva v. Russia* cases, consolidated because of their physical proximity, the similarity of their crimes and their joint perpetrators, were important because they were the first cases from the Russian-Chechen conflict that the ECHR had to adjudicate and because the Court’s decision was an indictment of the domestic remedies available to Chechen

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(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

European Convention, *supra* note 6, art. 15.

221. *Isayeva*, App. No. 57950/00, ¶¶ 133, 191.

222. These statistics are based on my search of the HUDOC database. See *supra* note 218.

223. Press Release, *supra* note 212, at 1.

citizens and of Russia's failure to comply with the European Convention.<sup>224</sup> These cases concerned never truly investigated allegations of torture and extra-judicial killings of the applicants' relatives by the Russian Army in Grozny at the end of January 2000.

The Court found violations of article 2<sup>225</sup> (right to life and failure to investigate), article 3<sup>226</sup> (failure to investigate torture), and article 13<sup>227</sup> (right to an effective remedy) but no violation of article 3 (concerning torture) given the high standard of "beyond reasonable doubt," which is applicable to torture cases.<sup>228</sup> In its decision, the ECHR signaled that Russia had not cooperated fully with the proceedings, noting that, despite numerous requests, Russia refused to provide 42 out of 130 documents that comprised the investigation file because "the documents withheld were [allegedly] not relevant to the circumstances of the present case."<sup>229</sup> The ECHR was not persuaded by this explanation and drew a negative inference against Russia as a result.<sup>230</sup> Russia once again defended on

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224. Applicants' Submissions Regarding Compliance with the Judgments of the European Court of Human Rights, ¶ 11 (Oct. 4, 2005), *Khashiyev v. Russia*, No. 57942/00; *Akayeva v. Russia*, No. 57945/00; *Isayeva v. Russia*, No. 57947/00; *Yusupova v. Russia*, No. 57948/00; *Bazayeva v. Russia*, No. 57949/00; *Isayeva v. Russia*, No. 57950/00 (Feb. 24, 2005), available at [http://www.londonmet.ac.uk/londonmet/library/i81669\\_24.doc](http://www.londonmet.ac.uk/londonmet/library/i81669_24.doc).

225. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection." European Convention, *supra* note 6, art. 2.

226. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* art. 3.

227. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* art. 13.

228. *Khashiyev & Akayeva*, ¶¶ 170-74.

229. *Id.* ¶ 46.

230. *Id.* ¶ 137. In addition to applicants' statements and other witness accounts, the Court referenced Anna Politkovskaya's article "Freedom or Death" and her testimony regarding the contemporary situation in Grozny,

the basis of exhaustion of domestic remedies.<sup>231</sup> The ECHR, however, rejected Russia's claim that remedies had not been exhausted explaining that "[t]he existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness."<sup>232</sup> According to the Court, that was the case in Russia.

In addition, after finding article 2 and article 3 violations, the ECHR also explained what it expected of its member states in terms of effective domestic remedies and investigations. The Court expounded that "[g]iven the fundamental importance of the rights guaranteed by articles 2 and 3 of the Convention, article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to article 3, including effective access for the complainant to the investigation procedure."<sup>233</sup> Hence, because the Russian government failed to conduct a thorough and objective investigation, Russia was found to have violated article 13 as well.<sup>234</sup>

The Court awarded Mr. Khashiyev the requested 15,000 euro in non-pecuniary damages (plus costs and expenses) for the loss of his four relatives (brother, sister, and two nephews) and awarded the requested 20,000 euro to Ms. Akayeva by way of non-pecuniary damages (plus costs and expenses) for the loss of her brother and mother who died of a heart attack after receiving the news of her son's death.<sup>235</sup> The Russian Judge Kovler dissented on the grounds that the applicants had failed to exhaust domestic remedies and that finding violation of ar-

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which was included in the portion of the investigative file provided by the Russian government. *Id.* ¶ 60.

231. Article 35(1) of the Convention provides that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." European Convention, *supra* note 6, art. 35(1).

232. *Khashiyev & Akayeva*, App. Nos. 57942/00 & 57945/00 ¶ 116.

233. *Id.* ¶ 183.

234. *Id.* ¶¶ 184-86.

235. *Id.* ¶¶ 188-93.

title 13 was duplicative insofar as the Court found procedural violations of articles 2 and 3.<sup>236</sup>

Similarly, in *Isayeva, Yusupova & Bazayeva v. Russia*,<sup>237</sup> which concerned allegations of an indiscriminate bombing by Russian military planes of civilians leaving Grozny, and in *Isayeva v. Russia*,<sup>238</sup> which concerned never-fully-investigated allegations of another indiscriminate bombing in a village of Katyr-Yurt, the Court dismissed Russia's objection regarding exhaustion of domestic remedies.<sup>239</sup> It further found Russia to be in violation of procedural (failure to conduct an effective investigation) and substantive (right to life) aspects of article 2 and in violation of article 13 (right to an effective remedy).<sup>240</sup> In *Isayeva, Yusupova & Bazayeva v. Russia*, the Court also found a violation of article 1 of Protocol 1 (protection of property) and held that there was no separate issue under article 3 (prohibition of torture) of the Convention.<sup>241</sup>

Despite being found to be in violation of several articles of the Convention, Russia continued to obstruct the ECHR process. Specifically, in the *Isayeva v. Russia* case, notwithstanding the Court's request, the government refused to provide most documents pertaining to the military action in a Chechen village on the grounds of national security.<sup>242</sup> Similarly, in *Isayeva, Yusupova & Bazayeva v. Russia* the Russian government failed to produce a large part of the investigative file without providing any explanation to the Court.<sup>243</sup>

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236. *Id.* (Kovler, J., dissenting).

237. *Isayeva, Yusupova & Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00 & 57949/00 (Eur. Ct. H.R. Feb. 24, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=718873&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DvEA398649>.

238. *Isayeva*, App. No. 57950/00.

239. *Isayeva, Yusupova & Bazayeva*, App. Nos. 57947/00, 57948/00, & 57949/00, ¶ 151; *Isayeva*, App. No. 57950/00, ¶ 159.

240. *Id.* at 55-56 (summarizing violations); *Isayeva, Yusupova & Bazayeva*, App. Nos. 57947/00, 57948/00 & 57949/00, at 51-52 (summarizing violations).

241. *Isayeva, Yusupova & Bazayeva*, App. Nos. 57947/00, 57948/00 & 57949/00, at 52.

242. *Isayeva*, App. No. 57950/00, ¶ 39.

243. *Isayeva, Yusupova & Bazayeva*, App. Nos. 57947/00, 57948/00 & 57949/00, ¶ 44.



Ultimately, the Court awarded Ms. Isayeva of the *Isayeva v. Russia* 18,710 euro for pecuniary damages and 25,000 euro for non-pecuniary damages plus costs and fees for the loss of her son and three nieces during an indiscriminate bombing of a Chechen village by the Russian military forces.<sup>244</sup> Ms. Isayeva of the *Isayeva, Yusupova & Bazayeva v. Russia* received 25,000 euro for her injuries and the loss of her son during the indiscriminate bombing by Russian military planes of a civilian convoy on October 29, 1999, near Grozny; Ms. Yusupova was awarded 15,000 euro for her injuries received as a result of the same bombing; and Ms. Bazayeva was awarded 17,000 euro for the resultant loss of her property.<sup>245</sup>

Although Russia proceeded to satisfy the monetary judgments against it, it essentially refused to move toward real compliance with the Convention or with the spirit of the ECHR judgment by reopening the cases at issue. To demonstrate, the payments in all of these cases were due on October 6, 2005.<sup>246</sup> Russia paid the judgments to all the applicants in full on September 15, 2005.<sup>247</sup> However, no additional steps to remedy these violations have been taken by the Russian government. On September 9, 2005, the Memorial Human Rights Centre (which represented some of the applicants in these cases) wrote to the Prosecutor-General of the Russian Federation requesting reopening of proceedings in the cases of *Isayeva, Yusupova & Bazayeva v. Russia* and *Isayeva v. Russia* under article 413<sup>248</sup> of the Code of Criminal Procedure and

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244. *Isayeva*, App. No. 57950/00, at 56 (summarizing violations and damages awarded for these violations).

245. *Isayeva, Yusupova & Bazayeva*, App. Nos. 57947/00, 57948/00 & 57949/00, at 52.

246. Applicants' Submissions Regarding Compliance, *supra* note 224, ¶ 4.

247. *Id.* ¶ 5.

248. According to the Submission, "Article 413 of the [Russian] Code of Criminal Procedure reads in relevant part as follows:

1. A court sentence, ruling or resolution, which has come into legal force, may be dismissed and the proceedings on a criminal case may be re-opened because of a new or of the newly revealed circumstances.

.....

4. The new circumstances shall be:

.....

2) a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, established by

asking that criminal charges be brought against several likely perpetrators, whose names came to light during the ECHR proceedings. The letter also requested reopening of the suspended criminal investigation in the case of *Khashiyev & Akayeva*. As of October 15, 2005, no reply has been received by Memorial.<sup>249</sup>

While numerous ECHR judgments have resulted in legislative and constitutional amendments in other countries, as discussed in Part V.A of this Note, *supra*,<sup>250</sup> Russia has continuously failed to adopt the necessary “individual” and “general” measures to ensure that no similar violations take place in the future or that violators are adequately reprimanded. Adopting the necessary measures is especially important to help the Court deal with the “avalanche of applications by attacking the root causes for repetitive applications”<sup>251</sup> and to change the pattern of systemic human rights abuses in the violator-country. Yet, as of September 2008, neither of the above-discussed cases were prosecuted: *Isayeva, Yusupova & Bazayeva v. Russia* and *Isayeva v. Russia* have been closed under article 24(2) of the Russian Criminal Procedure Code (“absence of corpus delicti”), while *Khashiyev & Akayeva v. Russia* has been adjourned under article 208(1)(1) of the Russian Criminal Procedure Code (“failure to identify a person responsible”).<sup>252</sup>

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the European Court on Human Rights, during the examination of the criminal case by a court of the Russian Federation, caused by:

- a) an application of the federal law violating the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms;

- b) other violations of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

*Id.* ¶ 29.

249. *Id.* ¶ 31.

250. *See id.* ¶ 45 (discussing individual and general measures implemented in the context of similar violations by the security forces in Turkey).

251. *See id.* ¶ 46 (quoting PACE Comm. on Legal Affairs & Hum. Rts., *Implementation of Judgements of the European Court of Human Rights*, ¶ 6, AS/Jur (2005) 35 (June 20, 2005) (by Erik Jurgens)).

252. Eur. Hum. Rts. Advocacy Ctr. & Memorial Hum. Rts. Ctr., Memorandum to the Committee of Ministers: Applicants’ Observations in Response to the Government’s Observation on Execution of Judgments in Cases Concerning the Security Forces in the Chechen Republic, ¶¶ 6-7, (Sept. 8, 2008), available at [http://www.londonmet.ac.uk/library/110114\\_3.pdf](http://www.londonmet.ac.uk/library/110114_3.pdf) [hereinafter 2008 Memorandum to the Committee of Ministers].

Moreover, not only does Russia appear to be uninterested in using new information from ECHR proceedings to go after perpetrators, it is seemingly content to reward and elevate those perpetrators to positions of power, suggesting state approval of the crimes committed. In 2009, for instance, Human Rights Watch (HRW) reported that Lt. General Shamanov—the man allegedly responsible for the operation which led to the deaths of Ms. Zara Isayeva’s son and three nieces—had been appointed commander of the airborne troops of the Russian Federation.<sup>253</sup>

The Russian government also continuously fails to provide ECHR applicants and the Court with details regarding domestic investigations of ECHR cases and with access to domestic criminal files as is technically required by domestic criminal laws.<sup>254</sup> Access to domestic case files is deemed crucial in part because without such access it is difficult to point out to the Court which steps should have been taken by domestic authorities to identify perpetrators.<sup>255</sup> The Russian government repeatedly claims that domestic law prohibits victims from gaining access to the documents in criminal case files while investigations are pending or suspended<sup>256</sup> (as many of them are), which is arguably in direct violation of article 2 (“[e]veryone’s right to life shall be protected by law”), article 3 (“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”), and article 13 (“[e]veryone . . . shall have an effective remedy. . .”) of the Convention. Finally, while Russian government maintains that Russian prosecutors engage in prosecutions of members of the Russian Armed Forces for crimes committed against civilians in Chechnya, no statistical evidence is available regarding convictions of military officers in cases concerning crimes committed against civilians in Chechnya and pending before, or completed by, public (as opposed to military) prosecutors.<sup>257</sup>

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253. Human Rights Watch I, *supra* note 202, at 14-15.

254. 2008 Memorandum to the Committee of Ministers, *supra* note 252, ¶¶ 6-8, 11.

255. See Human Rights Watch I, *supra* note 202, at 24-25 (quoting an unidentified Russian Human Rights lawyer).

256. 2008 Memorandum to the Committee of Ministers, *supra* note 252, ¶ 12.

257. See GEN. PROSECUTOR’S OFFICE OF RUSS. FED’N, 34 COMPLAINTS AGAINST THE RUSSIAN FEDERATION: INFORMATION SUBMITTED BY THE GENERAL

Although Russia has sometimes justified its continuous failure to provide the ECHR with the requested documents on the questionable grounds that Russia provides information that is “sufficient” to deal with individual applications,<sup>258</sup> this evasion represents a deliberate strategy of non-cooperation with the ECHR and non-compliance with the Convention. “Very basic investigative failings have been identified on numerous occasions,” including failing to question the applicants or delaying in doing so, failing to identify and question witnesses, failing to identify other victims and witnesses of the attack, failing to initiate criminal proceedings, and failing to conduct autopsy or prepare a forensic report, etc.<sup>259</sup>

All in all, Russia’s non-compliance may have grave consequences for the Chechen applicants, especially since the Russian law seemingly has a statute of limitations of fifteen years for crimes committed in Chechnya.<sup>260</sup> At the same time, the Chechnya judgments have “therefore arguably already established that there has been a systematic pattern indicative of a clear lack of will to carry out timely and thorough investigations into human rights abuses by state officials.”<sup>261</sup> Hence, “[t]he Russian authorities’ approach to the question of implementation of the Chechen judgments can only be characterized as obfuscation.”<sup>262</sup>

The latest ECHR Chechnya-related decision demonstrates Russia’s continuous failure to fully comply with the ECHR judgments in its ongoing efforts to curtail access to the Court. During his recent visit to Russia in February 2010, the PACE Rapporteur noted that with respect to the implementation of some of the ECHR decisions, such as those concerning the length of pre-trial detention, the Council of Europe “can now

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PROSECUTOR’S OFFICE OF THE RUSSIAN FEDERATION 1, 4 (2008) (unofficial translation), *available at* [http://www.londonmet.ac.uk/londonmet/library/j24270\\_3.pdf](http://www.londonmet.ac.uk/londonmet/library/j24270_3.pdf) (“[A]s the practice of cooperation with international organizations has shown, the publication of statistical data may be used to harm the interests of the Russian Federation.”); *see also* 2008 Memorandum to the Committee of Ministers, *supra* note 252, ¶ 25.

258. GEN. PROSECUTOR’S OFFICE OF RUSS. FED’N, *supra* note 258, at 2-3.

259. Leach, *supra* note 210, ¶ 20.

260. 2008 Memorandum to the Committee of Ministers, *supra* note 252, ¶¶ 13-16.

261. Leach, *supra* note 210, ¶ 26.

262. *Id.* ¶ 34.

see the light at the end of the tunnel.” He went on to add, however, “But, to my regret, the same cannot be said with respect to the findings, by the Strasbourg Court, of serious violations of the European Convention in the Chechen Republic.”<sup>263</sup>

To demonstrate, on February 18, 2010, the Court decided the case of *Aliyeva v. Russia*, which was originally filed with the Court on December 4, 2004.<sup>264</sup> Dismissing the Russian government’s objection, the Court decided to review the admissibility and merits of the case simultaneously pursuant to article 29(3)<sup>265</sup> of the Convention.<sup>266</sup> In her application, Ms. Aliyeva claimed that on October 29, 2002, around 2:00 a.m., approximately thirty armed men wearing camouflage uniforms and masks entered her apartment. She believed them to belong to the Russian military because they “spoke unaccented Russian and had blue eyes.” They threw her on the kitchen floor and tied her up with adhesive tape. They also assaulted her husband (who was disabled due to a leg amputation) and then dragged him out of the apartment, half-naked. Ms. Aliyeva’s account was supported by several statements from neighbors and her two children who were present during the incident.<sup>267</sup> Despite her numerous requests that her husband’s abduction be investigated, the investigation, which was formally opened on November 11, 2002, was suspended several times due to the Grozny Prosecutor’s Office’s inability to identify perpetrators.<sup>268</sup> In addition, the applicant’s request to copy the investigation file, at her own expense, was denied on a number of occasions.<sup>269</sup>

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263. Press Release, PACE, “We Can Now See Light At The End Of The Tunnel,” Says Christos Pourgourides, at the End of His Visit to Russia (Feb. 10, 2010), *available at* [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=5269](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5269).

264. *Aliyeva v. Russia*, App. No. 1901/05, ¶ 1 (Eur. Ct. H.R. Feb. 18, 2010), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863086&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

265. “The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.” European Convention, *supra* note 6, art. 29(2).

266. *Aliyeva*, App. No. 1901/05, ¶¶ 3-4.

267. *Id.* ¶¶ 6-10.

268. *Id.* ¶¶ 17, 19, 34.

269. *Id.* ¶¶ 31, 35-36.

Despite evidence that several witnesses had been questioned, the Russian government provided only ten pages of documents related to the investigation, which covered mostly procedural decisions and did not include transcripts of questioning and other documents concerning the investigative measures allegedly taken.<sup>270</sup> Just as it did in *Khashiyev & Akayeva v. Russia*, the ECHR had to draw negative inferences against the Russian government.<sup>271</sup> The ECHR also rejected the Russian government's argument that the abductors were not Russian servicemen in light of applicant's description of the men and the fact that several vehicles carrying these men were able to pass through the then-operating checkpoints in Grozny in the middle of the night.<sup>272</sup>

Finally, the Court found all the claims to be admissible and held that Russia violated both substantive and procedural (failure to carry out an effective investigation) aspects of article 2 (right to life) and article 3 (prohibition of torture) for presumed death of the applicant's husband Mr. Aliyev,<sup>273</sup> and that Russia also violated article 3 with respect to the applicant (on account of her mental suffering), article 5 (right to liberty and security) with respect to the applicant's husband's detention, and article 13 (right to an effective remedy) with respect to the alleged violations of articles 2 and 3 of the Convention on account of the ill-treatment of Mr. Aliyev.<sup>274</sup> As a result, the applicant was awarded non-pecuniary damages in the amount of 60,000 euro plus 1,650 euro for costs and expenses.<sup>275</sup> It is to be expected that Russia will satisfy the monetary judgment on time. Yet, to use the words of another applicant who won her case in the ECHR for enforced disappearances of her husband and son, "I am glad that there is justice. However, what I wanted and was hoping for was that the Russian authorities would return my son and husband alive. For

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270. *Id.* ¶ 38.

271. *Id.* ¶ 53.

272. *Id.* ¶ 57.

273. Mr. Aliyev has not been seen since his abduction, and the domestic investigation obtained no conclusive results as to his fate. See *European Court Finds Russia Responsible for Two Chechen Disappearances, Increases Moral Compensation*, RUSS. JUSTICE INITIATIVE (Feb. 18, 2010) <http://www.sji.org/en/news/2010/02/86/>.

274. *Aliyeva*, App. No. 1901/05, ¶¶ 1-10.

275. *Id.* at 25.

me, today's ruling is not a joyous occasion—it is proof that my son and husband are dead.”<sup>276</sup>

In other words, little has changed since the ECHR has handed down its first Chechnya-related judgment in 2005—Russia “has failed to meaningfully implement the core of the judgments: it has failed to ensure effective investigations and hold perpetrators accountable.”<sup>277</sup> The recent HRW report, analyzing thirty-three Chechnya-related cases, found that no single person has been held accountable and that the Russian authorities failed to take any meaningful steps toward bringing the perpetrators to justice.<sup>278</sup> In light of this fact, as well as the Russian authorities' failure to implement the appropriate “individual” and “general” measures in the early Chechnya-related judgments, payment of the monetary judgment is all Ms. Aliyeva should expect from Russia. Moreover, as discussed in Part V.C of this Note, both Ms. Aliyeva and her attorneys may actually be in danger as a result of their win in the Strasbourg Court. Many Chechen applicants have been threatened by the Russian law enforcement and many have also been forced to immigrate to escape prosecution. At least one applicant has disappeared, and another has been murdered.<sup>279</sup> The Russian government's “continued inability or unwillingness to conduct meaningful investigations and to provide substantive responses to the inquiries of the victims' relatives represents not only a failure to implement European Court judgments, but also continued inhuman treatment of the applicants.”<sup>280</sup>

Yet, despite all the futility, corruption and dangers described above, continuous access to the ECHR is imperative for Chechen victims. At the moment, the ECHR is essentially the only international legal institution that continuously condemns human rights violations on the part of the Russian government and its military forces in Chechnya in its judgments against Russia. Also, the ECHR is not powerless against Russia and can, when needed, utilize its tools to force the member state to implement substantive changes that could work to

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276. Amnesty Int'l, *What the European Court of Human Rights Means to Me*, at 1, 2 IOR 61/007/2010 (Feb. 18, 2010).

277. Human Rights Watch I, *supra* note 202, at 1.

278. *Id.* at 11.

279. Svetova & Tselms, *supra* note 34.

280. Human Rights Watch I, *supra* note 202, at 23.

eradicate that state's human rights violations. The story of Russia's eventual ratification of Protocol No. 14, described in Part IV.B of this Note, illustrates the ECHR's ability to effect changes in Russia. Finally, despite the associated dangers and the fact that the ECHR process is slow and that sums awarded are often relatively minuscule, "the cases [against Russia] keep coming [to the ECHR]—a sign that vindication in [C]ourt is as important to Russian victims [including Chechen applicants] as remuneration by the state."<sup>281</sup> The next step—figuring out how to force Russia to comply with judgments in full and to go beyond mere promptly paying "just satisfaction" since the Russian law seemingly has a statute of limitations of fifteen years for crimes committed in Chechnya—is the subject of Part VI.

## VI. RUSSIA'S NONCOMPLIANCE: WHY DOES IT MATTER AND WHAT CAN BE DONE?

Russia's commitment to the Convention "was made at a rather general and abstract level at the time of ratification."<sup>282</sup> However, as early as 2000, Bill Bowring, a human rights attorney, who represents applicants before the ECHR, argued that loss of access to the ECHR "would deprive Russians of the best opportunity for furthering reform, and seeking effective judicial remedies."<sup>283</sup> In 2002 another commentator noted that "[t]here can be little doubt that accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms was a bold and important step forward for the advancement of human rights and legal reform in the Russian Federation."<sup>284</sup> Access to the ECHR is especially important for Chechen applicants given that ever since the Second Chechen conflict "[t]here is [still], in fact, no adequate legal framework (supported by a properly functioning judicial system) to protect[ ] the citizenry of the Chechen Republic."<sup>285</sup>

281. Kahn, *supra* note 14, at 7.

282. Kahn, *supra* note 35, at 537.

283. Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 11 HELSINKI MONITOR, no. 3, 2000, at 53, 70.

284. Kahn, Note, *supra* note 28, at 689.

285. S. A. Gorchkova, *European Norms on the Protection of Human Rights: On the Development of Russian Human Rights Legislation*, 29 REV. CENT. & E. EUR. L. 365, 391 (2004).



With the enormous number of human rights violations in Russia, some members of the Council of Europe originally feared that Russia's accession to the Council of Europe would undermine the ECHR and ultimately destroy this institution from within by its noncompliance and gross human rights violations, especially in Chechnya.<sup>286</sup> In practice, this fear has recently become more realistic in light of ever-increasing filings by Russian nationals, with the ECHR backlog reaching nearly 120,000 in 2009.<sup>287</sup> Nonetheless, as detailed in Part IV.B of this Note, *supra*, for the longest time Russia refused to ratify Protocol No. 14 to the Convention, which would have eased the process of filtering applications (most of which are inadmissible due to various technicalities).<sup>288</sup>

At the same time, Russia has tried to appease the Court and the international community by paying compensation pursuant to the ECHR judgments<sup>289</sup> without earnestly committing to the advancement of human rights.<sup>290</sup> Instead of fostering a true commitment to the improvement of human rights, the Russian government focused on curtailing access to the Court by intimidating and in some cases even sanctioning (by failing to adequately investigate) murders and disappearances of ECHR applicants, their attorneys, and other human rights activists involved in investigating human rights abuses in Russia and in Chechnya, in particular.<sup>291</sup> In addition, Russia's failure to provide copies of domestic investigation files seems to support some of the applicants' claims that Russia deliberately does not want to bring perpetrators of human rights violations to justice.

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286. See *Provisional Version of the Report of the Debate of 06 April 2000 at 10 A.M.*, PACE (Apr. 6, 2000), <http://assembly.coe.int/Main.asp?link=/Documents/Records/2000/E/0002061000E.htm> [hereinafter *April 2000 Debate*] ("What on earth is the point of having these institutions if our governments are not prepared to act?").

287. Meijnen, *supra* note 166.

288. See *supra* Part V.

289. See *supra* Part IV.

290. In his speech to the Council of Europe, Lord Judd urged the Russian representatives that "the Council of Europe is about human rights or it is about nothing. [And] [u]nless. . . [Russia felt] a genuine commitment to the battle for human rights, . . . [it was] wasting. . . time by coming to this Assembly." *April 2000 Debate*, *supra* note 286.

291. See *supra* Part V.

The Court and the Council of Europe, however, have a number of mechanisms at their disposal that could be used to force Russia to implement substantive changes that would improve the human rights situation in Russia and in Chechnya, in particular. As discussed below, although there are a number of methods that the Council of Europe can employ to increase pressure on Russia to address the human rights violations, including the suspension of its voting rights, expulsion and the possibility of bringing infringement proceedings, the interstate application process is currently the tool that offers the best chance of incentivizing Russia to change its policies without causing it to lose so much face that it withdraws from the process altogether.

A. *Suspension of Voting Rights and Expulsion*

What can be done about Russia's ongoing failure to implement the "individual" and "general" measures to redress and prevent human rights violations as required by the ECHR judgments? One option would be to suspend Russia's voting rights in the Council of Europe and the Committee of Ministers or even expel Russia from the Parliamentary Assembly and the Council of Europe altogether. Both statutory and precedential authorities for this type of actions exist. Pursuant to article 8 of the Statute of Council of Europe, "[a]ny member . . . which has seriously violated Article 3<sup>292</sup> may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7<sup>293</sup>. . . If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."<sup>294</sup> The Commit-

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292. "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Statute of the Council of Europe, art. 3, May 5, 1949, 87 U.N.T.S. 103.

293. "Any member of the Council of Europe may withdraw by formally notifying the Secretary General of its intention to do so. Such withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year." *Id.* art. 7.

294. *Id.* art. 8.

tee of Ministers contemplated using its power to expel with respect to Greece following the installation of the Colonels' military dictatorship in 1967.<sup>295</sup> In response, Greece voluntarily withdrew from the organization in 1969 before the Committee of Ministers voted for its suspension.<sup>296</sup> The country was readmitted to the organization in 1974 following the fall of the regime.<sup>297</sup>

Similarly, Parliamentary Assembly of the Council of Europe (PACE) has the power to challenge both ratified and yet unratified credentials of any delegation on substantive grounds, which include violation of article 3 of the Statute of Council of Europe and "persistent failure to honor obligations and commitments and lack of cooperation in the Assembly's monitoring procedure."<sup>298</sup> Russia has already been suspended once from the Assembly for nine months from 2000 to 2001 as a result of the Council of Europe's condemnation of its actions in Chechnya.<sup>299</sup> When its voting rights were reinstated, the Russian Foreign Ministry was quoted as saying that "[t]he delegates (of the Assembly) realistically looked at the situation and understood that Russia is not a pupil who can be sent out from the classroom and that cooperation with it. . . will yield a better result than confrontation."<sup>300</sup> More recently, the attempt to reconsider the ratified credentials of the Russian delegation in light of the Assembly resolutions on the consequences of the

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295. Committee of Ministers of Council of Eur., Res. (70) 34 (Nov. 27, 1970), *available at* [http://www.ena.lu/resolution\\_70\\_34\\_committee\\_ministers\\_council\\_europe\\_27\\_november\\_1970-2-13932](http://www.ena.lu/resolution_70_34_committee_ministers_council_europe_27_november_1970-2-13932).

296. *Id.*

297. Comm. of Ministers of Council of Eur., Res. (74) 34 (Nov. 28, 1974), *available at* [http://www.ena.lu/resolution\\_74\\_34\\_committee\\_ministers\\_council\\_europe\\_28\\_november\\_1974-2-12405](http://www.ena.lu/resolution_74_34_committee_ministers_council_europe_28_november_1974-2-12405). (inviting Greece to rejoin Council of Europe in light of Greece's expressed wish to rejoin the Council of Europe).

298. PACE, *Rules of Procedure of the Assembly*, r. 8, 9 (Jan. 2010), *available at* [http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/RulesofProcedure/2010/E\\_Reglement\\_2009\\_EN.htm#P57\\_8775](http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/RulesofProcedure/2010/E_Reglement_2009_EN.htm#P57_8775).

299. Peter Baker, *European Council Restores Russia Rights*, WASH. POST, Jan. 26, 2001, at A20.

300. Gilbert Reilhac, *Russia Gets Back Council of Europe Voting Rights*, REUTERS, Jan. 25, 2001, *duplicated in* JOHNSON'S RUSSIA LIST NO. 5051, <http://www.cdi.org/russia/johnson/5051.html>.

war between Georgia and Russia<sup>301</sup> failed after PACE voted to confirm the credentials of the Russian Federation.<sup>302</sup>

While there are benefits associated with the Committee of Ministers exercising their powers under article 8 of the Statute of Council of Europe, including political leverage over a Russian government that wants to improve its overall image in the eyes of the international community, this step is not likely to be taken in the near future in light of the precedent, recent developments, and the current political climate in the Council of Europe. Perhaps more importantly, continuous access to the ECHR is imperative for Chechen claimants who often have no other real recourse. Russia has recently decided to “give in” to the ECHR’s demands and to finally ratify Protocol No.14 to the Convention, which is designed to streamline the review of cases in the ECHR and to alleviate some of the burdens associated with an enormous backlog of pending cases.<sup>303</sup> The news of ratification has changed the climate within the Council of Europe and was warmly welcomed by the newly elected PACE President who remarked, “The Russian authorities are sending us a strong message [by ratifying Protocol No. 14] . . . It shows Russia’s firm commitment to the Council of Europe’s values and protection mechanisms . . .”<sup>304</sup>

Moreover, unlike Greece, which at the time of its contemplated expulsion and subsequent withdrawal had repudiated the Convention,<sup>305</sup> the Russian government has continuously

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301. See, e.g., PACE Res. 1647 (2009), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1647.htm#1> (condemning the war between Georgia and Russia and urging that both sides take measures to reduce tension).

302. *PACE Confirms Credentials Of The Russian Delegation*, PACE, Oct. 1, 2009, [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=4967](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4967).

303. See *supra* Part V.B.

304. *President Mevlüt Çavuşoğlu Warmly Welcomes Russia’s Ratification Of Protocol No. 14*, PACE, Feb. 18, 2010, [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=5285](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5285).

305. Comm. of Ministers of Council of Eur., Res. DH (70) 1 (Apr. 15, 1970), available at [http://www.ena.lu/resolution\\_dh\\_70\\_committee\\_ministers\\_council\\_europe\\_15\\_april\\_1970-2-13933](http://www.ena.lu/resolution_dh_70_committee_ministers_council_europe_15_april_1970-2-13933) (“Considering that the Government of Greece has denounced on 12 December 1969, the European Convention on Human Rights and the First Protocol and that, in accordance with Article 65, paragraph 1 of the Convention, this denunciation will become effective on 13 June 1970.”)

assured the Council of Europe that “that Russian membership in the Council of Europe is key to . . . efforts to modernize Russia’s judicial system.”<sup>306</sup> Perhaps as a result, the recent attempt to expel the Russian delegation from the Assembly failed. Some of the Assembly members believed that “change will not suddenly come about if the Russian delegation is expelled.”<sup>307</sup>

Recourse to article 8 of the Statute of Council of Europe is an even more “extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe”<sup>308</sup> in order to remedy the situation. While one of the common (and legitimate) criticisms of the Council of Europe is that it has been constrained by admitting countries (such as Russia) that are not serious about human rights, it is true that “[i]f Russia was not a member then it would not be possible for the citizens of Russia [in-

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306. Statement By Secretary-General Of The Council Of Europe, Thorbjørn Jagland, Russian Approval Of Protocol No. 14—A Commitment To Europe (Jan. 15, 2010), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=1571749&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

307. Rapporteur, Comm. on the Honouring of Obligations and Commitments by Member States of Council of Eur., *Reconsideration On Substantive Grounds Of Previously Ratified Credentials Of The Russian Delegation (Rule 9 of the Rules of Procedure of the Assembly)*, PACE, Doc. 1,2045 (Sept. 29, 2009) (by Andrea Gross), <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC12045.htm>.

308. Council of Eur., Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, ¶ 100 (May 12, 2009) [hereinafter Explanatory Report], *available at* <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>. The “situation” referred to in article 46(4) is as follows:

If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph 1.

European Convention Protocol No. 14, *supra* note 103, art. 16 (amending art. 46(4) of the Convention).

cluding Chechen residents] to go to the [C]ourt.”<sup>309</sup> As a result, in the words of the former PACE President, “[t]he future of Europe cannot be built without Russia.”<sup>310</sup> Leaving Russian nationals and Chechen residents without any recourse for the human rights violations committed by the Russian government would undermine the governance of the whole European system, as “Russia is a major player in the European political architecture and plays a decisive role in maintaining peace and stability on the European continent.”<sup>311</sup>

### B. *Interstate Application*

The most effective option would be for several member states to lodge an interstate complaint against Russia for failure to provide for “individual” and “general” measures pursuant to the ECHR judgments. Once again, there are both statutory and precedential authorities for this type of action. Pursuant to article 33 of the Convention, “[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.”<sup>312</sup> A search of the HUDOC database (Council of Europe’s search vehicle) revealed that approximately eleven interstate complaints have been lodged since the Convention was first signed in 1950.<sup>313</sup> The case of *France*,

309. Crosbie, *supra* note 121 (quoting Thomas Hammerberg, the Council of Europe’s human rights commissioner).

310. Press Release, PACE, PACE President To Invite Dmitri Medvedev To Address Assembly (Dec. 4, 2009), [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=5085](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5085); *see also* Press Release, Council of Eur., Russia And The Council Of Europe Share Common Ground And A Future Vision (Dec. 24, 2009), <https://wcd.coe.int/ViewDoc.jsp?id=1568723&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (quoting Thorbjørn Jagland, Secretary-General of the Council of Europe, as saying “The Russian Federation is key to building Europe’s future”); Press Release, Council of Eur., Secretary General Visits Moscow (Dec. 18, 2009), <https://wcd.coe.int/ViewDoc.jsp?id=1565853&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (“Russia’s commitment is of crucial importance to the future of the Council of Europe as an Organisation, and to the progress and renewal of democracy, human rights and the rule of law in Europe.”).

311. Secretary General Visits Moscow, *supra* note 310.

312. European Convention, *supra* note 6, art. 33.

313. *See Georgia v. Russia (I)*, App. No. 13255/07, (Eur. Ct. H.R. June 30, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852071&portal=hbkms&source=externalbydocnumber&table=F69A27FD>

*Norway, Denmark, Sweden & Netherlands v. Turkey*<sup>314</sup> is particularly instructive given the factual similarities and positive results.

The application concerned activities (including unlawful detention and inhuman or degrading treatment of “political” detainees) of the Turkish National Security Council (NSC) between September 12, 1980, and July 1, 1982, when the NSC dissolved the then-existing Turkish Parliament, transferred full executive power to the Chairman of the Council, declared martial law in sixty-seven districts of the country, and passed the Law on the Constitutional Order, which, according to the complaining governments, “abrogated the constitutional protection of fundamental rights” and breached articles 3, 5, 6, 9, 10, 11, and 15(3) of the Convention.<sup>315</sup>

The applicant Governments emphasized that they were “not asking for redress, compensation or damages for injuries sustained by individuals, [nor were they] . . . exercising their right of action under [the former] Article 24 for the purpose of safeguarding any rights of their own, but for the purpose of contributing to upholding the public order in Europe.”<sup>316</sup>

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8FB86142BF01C1166DEA398649; *Cyprus v. Turkey*, 2001-VI Eur. Ct. H.R.; *Denmark v. Turkey*, 2000-VI Eur. Ct. H.R.; *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, App. Nos. 9940/82, 9941/82, 9942/82, 9943/82, 9944/82, 35 Eur. Comm’n H.R. Dec. & Rep. 143 (1983); *Cyprus v. Turkey*, App. No. 8007/77, 13 Eur. Comm’n H.R. Dec. & Rep. 85 (1978); *Ireland v. United Kingdom*, App. No. 5310/71, 1976 Y.B. Eur. Conv. on H.R. 512 (Eur. Comm’n on H.R.); *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125 (1975); *Denmark, Norway, Sweden, Netherlands v. Greece*, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R.); *Austria v. Italy*, App. No. 778/60, 1963 Y.B. Eur. Conv. on H.R. 740 (Eur. Comm’n on H.R.); *Greece v. United Kingdom (Second Cyprus Case)*, App. No. 299/57, 1959 Y.B. Eur. Conv. on H.R. 184 (Eur. Comm’n on H.R.); *Greece v. United Kingdom (First Cyprus Case)*, App. No. 176/56, 2 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm’n on H.R. 1958).

314. 35 Eur. Comm’n H.R. Dec. & Rep. 143. For an in-depth account of the case, see generally Eur. Comm’n on Hum. Rts., *Report of the Commission*, (Dec. 7, 1985), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=861988&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> [hereinafter Commission Report].

315. 35 Eur. Comm’n H.R. Dec. & Rep. 143. For a complete summary of the allegations against Turkey, see *id.* at 145-48.

316. *Id.* at 158.

The applicant Governments also claimed that violations alleged were not isolated incidents—rather they reflected a “widespread and systematic practice” of the respondent government, of which certain individual cases were illustrative.<sup>317</sup> The application was declared admissible by the European Commission of Human Rights<sup>318</sup> on December 6, 1983.<sup>319</sup> The case was ultimately resolved via the process of “friendly settlement”<sup>320</sup> as a result of Turkey’s implementation of what can be seen as “individual” and “general” measures contemplated by the Convention—including amending some of its legislation, lifting martial law in most of its provinces, and allowing the Commission to visit Turkey and assess the magnitude of changes.<sup>321</sup>

The route of filing an interstate complaint against Russia is attractive for several reasons. First, filing an interstate complaint would place substantial political pressure on Russia, and

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317. *Id.*

318. Originally, the European Convention on Human Rights set up two institutions: European Commission of Human Rights (“Commission”) and European Court of Human Rights (“the Court”). See European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 222, (current version as amended by Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1998, 33 I.L.M. 943), available at <http://www.hri.org/docs/ECHR50.htm>. The predecessor of article 33—article 24—provided that “[a]ny High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.” *Id.* art. 24. The Court’s jurisdiction was set forth in article 48 of the Convention. See *id.* art. 48. The Commission was abolished and replaced by the permanent Court pursuant to Protocol No. 11. See Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, pmb., May 11, 1998, 33 I.L.M. 943 (“Considering that it is therefore desirable to amend certain provisions of the Convention with a view, in particular, to replacing the Existing European Commission and Court of Human Rights with a new permanent Court.”).

319. 35 Eur. Comm’n H.R. Dec. & Rep. at 170.

320. Article 38(1)(b) of the Convention provides that if the application is declared admissible, the Court may “place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.” European Convention, *supra* note 6, art. 39(1). Article 39 further provides that “[i]f a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.” *Id.* art. 39(3).

321. Commission Report, *supra* note 314, ¶¶ 37-41.



other Council of Europe members should consider utilizing it in order to compel Russia to fully comply with the ECHR judgments and to affirmatively engage in preventing grave human rights violations, such as those taking place in Chechnya, from recurring.

Second, the favorable precedent already exists. While the case of *France, Norway, Denmark, Sweden & Netherlands v. Turkey* arose out of somewhat different facts, certain similarities, including widespread and systemic violations of several articles of the Convention, exist. This paves the way for any such application, should it be filed against Russia, to be found at least admissible.

This is especially true since, as in the case of *France, Norway, Denmark, Sweden & Netherlands v. Turkey*, human rights violations in Chechnya can be viewed as Russian “administrative practice” that can be proven by “means of substantial evidence” in light of over 100 Chechnya-related judgments handed down against Russia.<sup>322</sup> Turkey exercised its power of derogation under article 15 of the Convention allowing for at least some arguable defense. The ECHR has held on numerous occasions that no martial law or emergency state has been declared in Chechnya.<sup>323</sup> It is possible that the same member states that had previously filed against Turkey might unite again to file an interstate complaint against Russia given the existing precedent, their obvious ability to work well together, and interests in promoting human rights abroad. Russia’s equivalent of “lifting martial law” in Turkish provinces might easily be withdrawing all of the Russian military from Chechnya and reviving Chechen courts and other institutions. Chechnya might also benefit from visits or even temporary stationing of the Council of Ministers’ commissions to oversee the changes that should be implemented in Chechnya.

Ultimately, while long-term effects of lodging such a complaint may be hard to predict,<sup>324</sup> the political and economic

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322. In the case against Turkey, the Commission said that in accordance with its case-law on admissibility, a case would be admissible when there was an alleged administrative process where allegations of victims of that practice can be “sufficiently substantiated.” 35 Eur. Comm’n H.R. Dec. & Rep. at 164-65.

323. See *supra* note 220 and accompanying text.

324. For example, Turkey is currently ranked second (11.1 percent) after Russia in terms of cases pending against it. *Pending Applications Allocated to a*

pressures produced by an interstate complaint can yield substantial immediate results, thereby benefiting both the Russian applicants and the Council of Europe. Russia's recent ratification of Protocol No. 14 to the Convention demonstrates that a combination of international pressures and some concessions from the Council of Ministers and ECHR can incentivize Russia to partake in the collective effort to improve the human rights situation in Russia and in Chechnya, in particular. While Protocol No. 14 was a relatively voluntary endeavor, filing an interstate complaint might be perceived as engaging in direct confrontation with Russia. However, as with Turkey, any such potential conflict can be peacefully resolved via the process of "friendly settlement" allowing each participating member state to "save face" and achieve optimal results through negotiations. Both the case against Turkey and Russia's eventual ratification of Protocol No. 14 demonstrate that member states value membership in the ECHR and are eventually willing to adopt the necessary measures to keep the privilege of membership and the international community's acceptance and respect that this membership carries. Therefore, if Russia is to be forced to radically change its handling of the ECHR judgments and its domestic human rights situation, filing of an interstate complaint appears to be the most optimum recourse for the ECHR and the Council of Ministers.

### C. *Committee of Ministers and Infringement Proceedings*

Finally, the Committee of Ministers can also make use of the newly amended article 46,<sup>325</sup> which, upon Protocol No.

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*Judicial Formation*, ECHR (Sept. 30, 2010) [http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending\\_applications\\_chart.pdf](http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf).

325. The text of article 16 of Protocol No. 14, which amends European Convention article 46, reads:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

14's entry into force on June 1, 2010, empowered the Committee of Ministers to bring infringement proceedings in the Court (which shall sit as a Grand Chamber) in order to pressure states into complying with the substance of ignored ECHR judgments. The Committee of Ministers' decision to bring such proceedings requires a qualified majority of two-thirds of the representatives entitled to sit on the Committee. According to the Explanatory Report attached to Protocol No. 14, this infringement procedure is not designed to reopen the question of violation, nor does it provide for payment of a financial penalty should the member state be found to be in violation of article 46(1). The idea is that "political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned."<sup>326</sup>

The utility of this measure is presently unclear, but it is possible that it might turn into a useful mechanism after several precedents are established. The Explanatory Report cautions that "[t]he Committee of Ministers should bring infringement proceedings only in exceptional circumstances." While the Report also notes that this article gives the Committee of Ministers "a wider range of means of pressure to secure execution of judgments,"<sup>327</sup> the Russian government was quoted as saying that the newly adopted Protocol No. 14 is not giving the Court any new enforcement powers, without making any reference to the new powers of the Committee of Ministers.<sup>328</sup> It is difficult to imagine why "[t]he procedure's mere

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4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

326. Explanatory Report, *supra* note 308, ¶ 99.

327. *Id.* at ¶¶ 99-100.

328. *See* Barry, *supra* note 125.

existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments"<sup>329</sup> especially in light of already existing (and arguably more drastic) measures contemplated by article 8 of the Statute of the Council of Europe and rules 8 and 9 of the Rules of the Procedure of the Assembly.<sup>330</sup> Furthermore, article 46 does not explain which "measures" may be taken by the Committee of Ministers should the Court find that the state violated article 46(1).

Thus, given its newness, lack of precedent, and inherent limitations, the utility of this mechanism is presently questionable. Nonetheless, article 46 should not be underestimated in the future once precedents are set and procedures are perfected.

## VII. CONCLUSION

Ever since Russia's accession to the Council of Europe and its consequent submission to the compulsory jurisdiction of the European Court of Human Rights, Russia has failed to take affirmative steps towards any earnest embrace of the principles embodied in the European Convention of Human Rights. Instead, Russia has focused on two goals: appeasement of the Court (via prompt payment of "just satisfaction" and official pronouncements of cooperation) and curtailment of access to the Court (via intimidation and interference with other rights of ECHR applicants, their attorneys, and other human rights activists and failure to investigate such human rights violations, delay of its ratification of Protocol No. 14 until it became politically convenient for Russia to do so, and failure to produce copies of domestic investigative files).

Nowhere is this double-sided treatment of the ECHR is more apparent than in Russia's handling of and response to (or, rather, lack of thereof) the ECHR judgments dealing with grave human rights violations in Chechnya. While winning against Russia before the ECHR gives Chechen applicants some satisfaction, Russia has continuously failed to implement "individual" and "general" measures that go beyond prompt payment of "just satisfaction" to ensure that perpetrators are

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329. Explanatory Report, *supra* note 308, ¶¶ 99-100.

330. See text accompanying *supra* notes 294, 298.

brought to justice and that similar violations are prevented in the future.

What can be done about Russia's non-compliance? While several routes are available, the most promising course appears to be lodging an interstate complaint against Russia, given the precedent and the kind of political pressure that such a complaint can exert, especially if it is filed by several member states. In light of the recent motion to suspend Russia from the Parliamentary Assembly (with respect to the situation in Georgia), it seems that the political capital and momentum exist. Vigorous oversight of Russia's actions (especially in Chechnya) is just as important now as it has ever been given the reports that the number of enforced disappearances in Chechnya has recently been on the rise. Filing of an interstate complaint against Russia for its failure to fully comply with judgments of the Court will validate the trust that Russian applicants place in the Court and may even bring some of their sons home.

