

## RUSSIAN JUSTICE INITIATIVE

Правовая инициатива | Астрейя

MEMORANDUM TO THE COMMITTEE OF MINISTERS

IN REGARD TO APPLICANTS' OBSERVATIONS ON THE EXECUTION OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS FROM THE NORTH CAUCASUS (*Khashiyev* Group)

SUBMITTED BY THE RUSSIAN JUSTICE INITIATIVE (the Netherlands) and LEGAL ASSISTANCE ORGANIATION "ASTREYA" (Moscow), 17 May 2012

### Introduction

1. The Russian Justice Initiative (RJI) is submitting these observations to the Committee of Ministers (the Committee) in accordance with Rule 9 (2) of the Committee of Ministers' Rules for consideration during the Committee's **1144th DH Meeting on 4-6 June 2012**. They are copied to the Department for the Execution of Judgments of the European Court of Human Rights as well as to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe.
2. The Russian Justice Initiative is a Dutch non-governmental organization with partner organizations in Russia, which as of 1 May was representing applicants in 110 out of over 190 cases decided to date concerning grave violations of the European Convention on Human Rights in the North Caucasus.
3. This submission provides information on *individual measures* which we consider relevant for the Committee's monitoring of execution of cases from the *Khashiyev* group by the Russian Federation. In particular, we report on procedural or other developments in the following 11 cases, 10 of which have been reported on previously to the Committee:

(1) *Sadykov v. Russia* (41840/02), judgment of 7 October 2010, final on 21 February 2011.

(2) *Khadisov and Tsechoyev v. Russia* (no. 21519/02), judgment of 5 February 2009, final on 5 May 2009.

(3) *Akhmadova v. Russia* (no. 3026/03), judgment of 4 December 2008, final on 5 June 2009.

(4) *Khatsiyeva and Others v. Russia* (no. 5108/02), judgment of 17 January 2008, final on 7 July 2008.

(5) *Utsayeva and Others v. Russia* (no. 29133/03), judgment of 29 May 2008, final on 1 December 2008.

(6) *Isigova and Others v. Russia* (no. 6844/02), judgment of 26 June 2008, final on 1 December 2008.

(7) *Baysayeva v. Russia* (no. 74237/01), judgment of 5 April 2007, final on 24 September 2007.

(8) *Chitayev and Chitayev v. Russia* (no. 59334/00), judgment of 18 January 2007, final on 18 April 2007.

(9) *Khaydayeva and Others v. Russia* (no. 1848/04), judgment of 5 February 2009, final on 14 September 2009.

(10) *Elsiyev and Others v. Russia* (no. 21816/03), judgment of 12 March 2009, final on 14 September 2009.

(11) *Imakayeva v. Russia* (no. 7615/02), judgment of 9 November 2006, final on 9 February 2007.

4. We note at the outset that three of these cases (nos. 1-3 from the above list) are cited in the Committee's December 2011 Interim Resolution (CM/Res/DH (2011) 292) and/or the September 2011 Decision (CM/Del/Dec(2011)1120) in the context of concern that six years after the Court's first judgments, **no accountability has been ensured for those responsible for Convention violations**, even in those cases where "key elements have been established with sufficient clarity in the course of domestic investigations, including evidence implicating particular servicemen or military units in the events."<sup>1</sup>
5. In **Section A** we provide an **overview** of the results of the applicants' submissions to the domestic authorities in cases 1-11 above. In **Sections B and C** we provide a detailed account of some of the specific submissions made in the applicants' cases (**Section B** presents cases 1-3 from the above list, mentioned in Interim Resolution CM/ResDH(2011)292<sup>2</sup> and in Decisions from June and September 2011 (CM/Del/Dec(2011)1120)<sup>3</sup> and **Section C** presents developments in cases 4-11 above). In **Section D** we offer concluding remarks and questions which we urge the Committee to pose to the Russian delegation as soon as possible.

#### A. Overview of Submission

6. One of the undoubtedly positive trends observed by applicants in regard to individual measures in the *Khashiyev* group is an **increased willingness to grant victims access to case materials**. We also note the **progressive interpretation by a local court regarding the obligation to implement** European Court judgments. Unfortunately, however, persistent shortcomings in the conduct of investigations continue on the whole to outweigh signs of progress. The cases discussed in this submission illustrate this dynamic in the following ways:
  - In regard to the case *Sadykov v Russia*, according to a submission by the Russian Government to the Committee of 15 May 2012, **the perpetrator arrested in connection with the torture of the applicant was amnestied and the criminal case against him discontinued in December 2011. Such action blatantly disregards the notion of accountability** referred to in the Committee's Resolution CM/Res/DH (2011) 292. The applicant will respond to the information provided in the Government's report in detail in a further submission. However, in Section D we include questions to the Russian delegation in regard to the discontinuing of the criminal case and the application of the amnesty act.
  - In several cases, the granting of access to case materials by investigators **has not always meant full and unimpeded access to the materials in practice**. The materials may turn out to be

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<sup>1</sup> CM/Res/DH (2011) 292, Section 1.

<sup>2</sup> The cases cited in the text of the Resolution as well as in footnote 2 are the following: *Sadykov v Russia*; *Isayeva v Russia*; *Abuyeva v Russia*; *Musayev and others v Russia*; *Bazorkina v Russia*; *Khadisov and Tsechoyev v Russia*.

<sup>3</sup> The cases cited in the June and September 2011 Decisions are the following: *Sadykov v Russia*; *Isayeva v Russia*; *Abuyeva v Russia*; *Akhmadova v Russia*; *Bazorkina v Russia*; *Khadisov and Tsechoyev v Russia*.

physically inaccessible due to their location, or access may be denied to certain materials due to their classification as secret, despite the fact that Russian law does not allow classification of documents which concern human rights violations (for details see below paras. 10, 31, 50 concerning access to case files in the cases *Sadykov v Russia*, *Imakayeva v Russia*, *Khaydayeva v Russia*).

- The representation of applicants by counsel may not be recognized on spurious technical grounds, **causing further delays in the processing of applicants' submissions to the domestic authorities** (see below paras. 24, 27, regarding *Akhmadova v Russia* and *Baysayeva v Russia*).
- **Recourse to appeals under Article 125 of the criminal procedure code (CCP)<sup>4</sup> does not positively impact the overall effectiveness of investigations**, even when local courts deliver judgments partially in the applicant's favor and which contain progressive interpretations of the obligation to implement judgments by the European Court (see below paras. 45-50 regarding *Khaydayeva v Russia*).
- Practices noted in earlier submissions, such as **repeated suspension and re-opening of investigations** and the failure to comply with established procedural requirements regarding the time limits for responding to motions or complaints lodged by Applicants' counsel,<sup>5</sup> do not show signs of improvement in general (see below paras. 16, 17-25, 26-27, 28-36, 39-41, 43, 49).

## **B. Update on cases cited in Interim Resolution CM/Res/DH (2011) 292 and Decision CM/Del/Dec(2011)1120: *Sadykov v Russia*; *Akhmadova v Russia*; *Khadisov and Tsechoyev v Russia*.**

### *Sadykov v. Russia*

7. As noted above, Section D includes questions to the Russian delegation on the *Sadykov* case based on information included in the Government's report of 15 May 2012 on measures undertaken on enforcement of judgments in the *Khashiyev* group. Below we provide an account of counsel's attempt to receive the case materials in this case.
8. On 12 March 2012 counsel for the applicant filed a motion to the Directorate of the Investigative Committee of the Chechen Republic in which he requested access to the case materials.<sup>6</sup>
9. On 22 March 2012 an investigator from the 3<sup>rd</sup> Department of especially important cases of the Investigative Directorate of the Chechen Republic informed the applicant's counsel that the

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<sup>4</sup> The Russian Government has provided the following information in the context of monitoring of execution of judgments in the *Khashiyev* group regarding the Article 125 CCP: Victims or other parties to judicial proceedings are able to lodge complaints with local courts to challenge procedural actions, omissions or decisions which affect victims' constitutional rights and freedoms. The judge is empowered to evaluate the lawfulness of the decision in question without however having the authority to annul decisions found unlawful; rather, he orders the investigator to rectify any violations found. If the investigating authorities do not comply with a decision on a 125 complaint, the complainant may challenge their inactivity and the judge may issue an injunction to ensure compliance.

<sup>5</sup> See RJI communications on behalf of the Applicants, in particular of: (1) **4 May 2009 on individual measures in 19 cases** from the North Caucasus; (2) **26 May 2010 on individual measures in five cases** (*Bazorkina*; *Isigova*; *Akhmadova*; *Estamirov*; *Khadisov and Tsechoyev*) concerning disappearance, extra-judicial execution, and torture in Chechnya and Ingushetia in which the involvement of the Russian military/security forces has been established with high probability; (3) **of 25 August 2010 on individual measures in 29 cases** from the North Caucasus; (4) **3 November 2010 on individual measures in 3 cases** from the North Caucasus. This submission presents the preliminary results of RJI's attempts to address procedural shortcomings in domestic investigations identified in judgments of the European Court of Human Rights via the procedure provided for under Article 125 of the Russian Code of Criminal Procedure in the following cases: *Khadisov and Tsechoyev v. Russia* (no. 21519/02), *Rasayev and Chankayeva v. Russia* (no. 38003/03), *Isigova and Others v. Russia* (no. 6844/02); (5) **May 2011 concerning individual measures in 22 cases** from the North Caucasus.

<sup>6</sup> Attachment 1.

investigation in the case was ongoing and that the time-frame for the investigation had been extended until 25 March 2012, and that counsel could examine the case materials after 5 April 2012.<sup>7</sup>

10. According to information received from the applicant's counsel, the investigative authorities initially allowed examination of all of the case materials. **Subsequently, however, certain materials were withdrawn, apparently due to their classification as secret.** In order to examine these materials, counsel for the applicant has to sign a non-disclosure form, rendering the information contained in the materials inaccessible to any third parties. RJI will provide further information on the results of the examination of the rest of the case files in a further submission.
11. At this time we also wish to draw the Committee's attention to information published earlier in 2012 regarding the release of the main suspect in the applicant's case, an officer of the Khanty-Mansiysk OMON regiment, Mr Sergey Zakharov. His release is discussed in the article "Khanty-Mansiyskiy OMON: Guilty, Not Guiltless" in the February 2012 edition of the Chechen publication *Zakon i Pravo (Law and Rights)*. According to the article, Mr. Zakharov was arrested in September 2011 and delivered to the Grozny pre-trial detention center (SIZO), where he was charged with offences under Arts. 286, 33 and 111 of the Criminal Code<sup>8</sup> in relation to the torture of the applicant in the Oktyabrskiy ROVD in 2000.
12. However, on 11 November 2011, citing a "health condition," Mr Zakharov was released from custody with a measure of restriction imposed on his physical whereabouts (a ban from leaving his place of residence). As pointed out by the author of the article, release of suspects under such conditions **is a common practice which is in fact employed as a tactic to evade justice.** The article furthermore emphasized that Mr Zakharov's arrest had been perceived by his colleagues in law-enforcement structures and portrayed by the mass media as "revenge" on an "innocent victim" by former Chechen insurgents now close to the local ruling elite.<sup>9</sup>
13. **It follows from the Government's submission of 15 May 2012 that Mr Zakharov's guilt under Article 286(3) CCP was established, but that the criminal investigation against him was discontinued on 15 December 2011 due to the application of an amnesty act in respect of him.**<sup>10</sup>

Khadisov and Tsechoyev v. Russia

14. As RJI has indicated in previous submissions, there are two separate sets of investigation files in this case— one with the Investigative Committee in Ingushetia, and one with the Military Investigative Department for the Southern Military District.<sup>11</sup> RJI has reported on this case in the context of the

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<sup>7</sup> Attachment 2.

<sup>8</sup> Exceeding official powers with the use of violence or with the threat of its use with the infliction of grave consequences and intentional infliction of a grave injury by a group of persons, a group of persons under a preliminary conspiracy, or an organized group.

<sup>9</sup> Attachment 3.

<sup>10</sup> See Submission by the Russian Government of 15 May 2012, pages 4-5.

<sup>11</sup> See Communication from the representatives of the applicants of 3 November 2010, *supra* note 5, at paras 17, 18.

effectiveness of the remedy provided for by Art. 125 CCP<sup>12</sup> and in the context of statutes of limitation for prosecution.<sup>13</sup>

15. On 9 April 2012 the applicant's counsel submitted a motion to the Military Investigative Department of the Southern Military District requesting access to the case materials in possession of the military investigators.<sup>14</sup>
16. On 11 May the applicant received a reply dated 12 April 2012 by post. The stamp on the envelope indicated that it had been sent on 23 April 2012. In the reply an investigator from the department of especially important cases of the 3<sup>rd</sup> Military Investigating Department **denied the applicant full access to the case materials on the ground that the investigation in the applicant's case was still ongoing.** The applicant could in the meantime obtain access to procedural decisions in the criminal case.<sup>15</sup>

Akhmadova and others v Russia

17. On 2 June 2010 and 17 June 2011 the applicant was informed that the investigation into her case had been suspended for a failure to identify the perpetrators.<sup>16</sup>
18. On an unspecified date the applicant was given a **“Report to the Victim” which described the main measures undertaken by the authorities during the course of the investigation.** Specifically, it said that according to the responses received from various security agencies, the applicant's relative had never been arrested and/or delivered to detention centers run by those agencies. The report also stated that a series of judicial orders had been obtained by the investigators authorizing them to carry out seizures of documentation containing state secrets in the possession of the security agencies (Federal Service of Execution of Punishment, Federal Security Service, Interior Ministry, Central Archive of the Ministry of Defense and Archive of the North Caucasus Military District). However, no information indicating the participation of federal forces in the special operation of 6 March 2002 in the Vedenov district of the Chechen Republic had been obtained.<sup>17</sup>
19. On 15 June 2011 the 2<sup>nd</sup> Department informed the applicant that she could receive access to the case materials at any time upon agreement with investigator.<sup>18</sup>
20. On 18 May 2011 an investigator of the 3<sup>rd</sup> Department of the DIC of the Chechen Republic issued a resolution that the blood samples of the victim's son would be subjected to molecular-genetic analysis.<sup>19</sup>

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<sup>12</sup> See RJI Submission of 3 November 2010 regarding results of applicant's attempts to address procedural shortcomings in domestic investigations identified in judgments of the European Court of Human Rights via the procedure provided for under Article 125 of the Russian Code of Criminal Procedure in the following cases: Khadisov and Tsechoyev v. Russia (no. 21519/02), Rasayev and Chankayeva v. Russia (no. 38003/03), Isigova and Others v. Russia (no. 6844/02).

<sup>13</sup> See Joint Submission of 22 November 2011 by Russian Justice Initiative, European Human Rights Advocacy Centre, Memorial Human Rights Centre concerning the issue of statute of limitations for domestic criminal prosecutions in the Chechen cases, paras. 9-10.

<sup>14</sup> Attachment 4.

<sup>15</sup> Attachment 5.

<sup>16</sup> Attachment 6.

<sup>17</sup> Attachment 7.

<sup>18</sup> Attachment 8.

<sup>19</sup> Attachment 9.

21. On 2 April 2012 counsel for the applicant in the above case submitted a motion to the Directorate of the Investigative Committee of the Chechen Republic which requested rectification of shortcomings in the investigation identified by the ECtHR in its judgment *Akhmadova v Russia*. Counsel also requested access to the case files in possession of the investigators and enclosed with the motion a warrant and a copy of the judgment of the ECtHR translated into Russian.<sup>20</sup>
22. Upon submission of the motion, which was done in person by counsel through the chancellery of the DIC of the Chechen Republic in Grozny, counsel was told by an officer at the chancellery not to enclose the warrant with the motion, but that the warrant would need to be submitted to the investigator in person.
23. On 7 April 2012 an investigator of the 3<sup>rd</sup> Department of DIC of the Chechen Republic<sup>21</sup> **refused access to the case materials on the ground that counsel had failed to enclose a warrant as well as a notarized power of attorney with the motion.**<sup>22</sup>
24. On 3 May 2012 counsel for the applicant appealed the denial of access to the case files under Article 124 CCP<sup>23</sup> to the Head of the Directorate of the Investigative Committee of the Chechen Republic, arguing that the requirement to provide a notarized power of attorney in order to represent a victim in a criminal case was unlawful. Counsel enclosed the warrant with her appeal and requested the Head of the DIC of the Chechen Republic to allow examination of the case materials and to rectify the shortcomings in the domestic investigation in the case *Akhmadova v Russia*.<sup>24</sup>
25. Article 124 CCP establishes a time limit of 10 days for responding to appeals.<sup>25</sup> To date, however, counsel has not received a decision on her appeal.

### **C. Update on cases 4-11 in the list**

#### *Baysayeva v Russia*

26. In July 2009 the Directorate of the Investigative Committee of the Chechen Republic in response to the applicant's request for access to the case files informed the applicant that she could obtain access to the case file only after the preliminary investigation was completed.<sup>26</sup>
27. Most recently, counsel for the applicant in the above case encountered the exact same difficulties in obtaining access to the case materials as in *Akhmadova v Russia* (see above paras. 23-25). In the *Baysayeva* case, **counsel was refused access to the case materials on 9 April 2012 because of the**

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<sup>20</sup> Attachment 10.

<sup>21</sup> It is RJI's understanding that the 3<sup>rd</sup> Department replaced the 2<sup>nd</sup> Department within the Directorate of the Investigative Committee of the Chechen Republic as the primary civilian department responsible for investigating cases concerning violations of the ECHR in the North Caucasus.

<sup>22</sup> Attachment 11.

<sup>23</sup> Article 124 CCP lays out the procedure for the consideration of a complaint submitted to the public prosecutor.

<sup>24</sup> Attachment 12.

<sup>25</sup> Article 124 CCP provides in part: The public prosecutor shall consider the complaint in the course of three days from the day of its receipt. In the exceptional cases, when it is necessary to demand that additional materials shall be supplied or other measures taken for checking it, it shall be admissible to consider the complaint within a term of up to ten days, about which the applicant shall be duly informed.

<sup>26</sup> Attachment 13.

**failure to enclose the warrant and a notarized power of attorney.** On 3 May 2012 counsel appealed this decision but has not received a reply to date.<sup>27</sup>

*Imakayeva v. Russia*

28. Between April 2011 and February 2012, the applicant was informed of several procedural decisions in her case, mainly concerning the re-opening and suspension of the criminal case into her husband's disappearance. During the majority of this time, the criminal case was suspended on the grounds of a failure to identify the perpetrators, but the relevant investigating authorities informed the applicant that operational-search measures were still being carried out, such as the establishment of the vehicles used in the kidnapping of her relative.<sup>28</sup> On 29 February 2012, the 3<sup>rd</sup> Military Investigating Department informed RJI of the decision **to allow the applicant access to the criminal case materials** in possession of the investigators.<sup>29</sup>
29. The applicant, Ms Marzet Imakayeva, who lives in the United States and suffers from a health condition, had traveled to Chechnya in 2008 and 2009 after receiving a decision allowing her access to case materials, which were then located at the Shali Prosecutor's Office. As reported by Human Rights Watch, she was in practice prevented from accessing the materials at that time.<sup>30</sup>
30. In April 2012 Ms Imakayeva again traveled to Chechnya in order to obtain copies of the criminal case files in possession of the investigators at the 3<sup>rd</sup> Military Investigating Department located on the territory of the Khankala federal military base, which operates under a strict security protocol. In order to gain access to the Investigating Department at Khankala, all visitors to the Department, including applicants and their counsel, must be escorted in person by either the investigator in charge of their case or other authorized personnel from the Investigating Department. Without a personal escort, visitors are not permitted to enter the premises.
31. Investigators at the Department initially assisted Ms. Imakayeva and her counsel in obtaining access to the Investigating Department and in copying a substantial part of the case files over several days. **Subsequently, however, they were prevented from copying the rest of the materials because they were physically prevented from accessing the territory of the Investigating Department at Khankala,** since the investigator in charge of the case failed to escort them to the Department. The investigator also could not be reached by telephone.
32. On 24 April 2012 counsel for Ms. Imakayeva submitted a motion to the 3<sup>rd</sup> Investigative Department requesting to continue examination of the remaining case files on an urgent basis, **emphasizing the special circumstances of the applicant,** who was preparing to return to the United States and whose state of health did not permit frequent travel between the US and Chechnya.<sup>31</sup>
33. On 26 April 2012 the applicant returned to the United States without having had the opportunity to examine all of the case files.

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<sup>27</sup> Attachments 14, 15, 16.

<sup>28</sup> Attachments 17, 18, 19, 20.

<sup>29</sup> Attachment 21.

<sup>30</sup> See Human Rights Watch, *Who Will Tell Me What Happened to My Son*, September 2009, page 25. Available at: <http://www.hrw.org/reports/2009/09/28/who-will-tell-me-what-happened-my-son-0>. Last accessed 14 May 2012.

<sup>31</sup> Attachment 22.

34. Despite the three-day time limit established by Article 121 CCP<sup>32</sup> for responding to the motion in the form of a resolution, the applicant has not yet received a reply to date.
35. On 3 May 2012 counsel for Ms. Imakayeva lodged a complaint under Article 124 CCP with the 3<sup>rd</sup> Investigative Department appealing the failure of the investigator to respond within the time frame established by the law, and requesting further examination of the case files.<sup>33</sup>
36. Despite the 10-day time limit established by Article 124 CCP for responding to such complaints, the applicant's counsel has not received a reply to date.

*Chitayev and Chitayev v. Russia*

37. Prior to recent correspondence, RJI had submitted the applicants' medical records to investigators in February 2009, along with a detailed description of the ECtHR judgment and a request for specific measures to be undertaken.<sup>34</sup>
38. Most recently, on 6 February 2012, in reply to RJI's letter of 20 January 2012, the Deputy of the Head of the Unit of Procedural Control № 2 of the Directorate of the Investigative Committee of the Chechen Republic Mr. Makeev (the DIC of the Chechen Republic) informed RJI that on 27 December 2001 the Achkhoy – Martan Inter-District Investigating Department of the Chechen Republic had initiated an investigative check regarding the alleged ill-treatment and torture of Adam and Arbi Chitayev at Chernokozovo and the Achkhoy-Martán police department. Based on the results of the investigative check, and taking into account **the medial documents provided by RJI in 2008 regarding the bodily injuries sustained by the applicants during the period of their detention, the investigator of the Achkhoy-Martán Inter-District Investigating Department refused to initiate a criminal investigation into the allegations because there were currently no grounds on which to do so.** Furthermore, because the authorities were not aware of the whereabouts of the Applicants, they could not inform them of the decision not to open a criminal investigation. It was further stated that the Applicants had the right to receive access to the materials concerning the investigative check and that they had the right to appeal against the decision of the investigator.<sup>35</sup>

*Elsiyev and Others v. Russia*

39. Prior to recent correspondence, on 1 March 2011 the Prosecutor's Office of the Chechen Republic informed the applicant that the criminal investigation in the case No 75089 had been suspended.<sup>36</sup>
40. Most recently, on 29 February 2012, in reply to RJI's letter of 20 January 2012, the investigator of the 3<sup>rd</sup> MID informed RJI that on 5 March 2011 **the case file had been transferred from the civilian investigative committee of the Chechen Republic to the 3<sup>rd</sup> Military Investigating Department** of the Directorate of the Investigative Committee of the Southern Military District and had been assigned case № 14/90/0050-11.

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<sup>32</sup> Art. 121 CCP provides: A petition shall be subject to an examination and the resolution immediately after it is filed. If immediate decision-making on the petition, filed in the course of the preliminary inquisition, is impossible, it shall be resolved not later than three days from the day of being filed.

<sup>33</sup> Attachment 23.

<sup>34</sup> See RJI communication of 4 May 2009 on individual measures in 19 cases from the North Caucasus, paras. 10-12.

<sup>35</sup> Attachment 24.

<sup>36</sup> See RJI communication of 23 May 2011 concerning individual measures in 22 cases from the North Caucasus, paras. 10-11.



41. RJI was also informed that the investigation into the Applicants' case had been **suspended on 16 September 2011 on account of a failure to identify the perpetrators**. RJI was further informed of the following investigative measures undertaken by the authorities:

- The former Deputy of the Head of the United Group Alliance (UGA) on special tasks – Lieutenant- General Studenikin A.I. had been questioned by the investigators as a witness;
- Mr. Pashayev A. Kh., Agmerzayev S.V., Abubakarov L.B., Mandiyev Kh. A-V and Debishev A.B – all victims in the case – had been re-interviewed;
- Victims Mr. Agmerzayev S.V., Ms. Abubakarova L.B., Mandiyeva Kh.A-V and Debisheva A.B. submitted blood samples which would be subjected to molecular-genetic analysis;
- The 3<sup>rd</sup> MID was undertaking measures to obtain documentation and to establish the officials involved in the special operation in the village of Tsotsi-Yurt between 1-8 September 2002.
- The victims **had been granted access to the case files** held on the premises of the 3<sup>rd</sup> MID.<sup>37</sup>

*Khatsiyeva and Others v. Russia; Utsayeva and others v. Russia;*<sup>38</sup> *Isigova and others v Russia*<sup>39</sup>

42. On 4 and 23 April 2012 counsel for the applicants in the above three cases submitted separate motions requesting access to case files and the carrying out of investigative steps to the relevant investigating authorities in each case.<sup>40</sup>

43. Despite the three-day time limit established by Article 121 CCP for responding to the motion in the form of a resolution, the applicants have not received a reply to the motion to date in any of the above three cases.

*Khaydayeva and Others v. Russia*

44. On 7 November 2010 counsel for the applicant appealed against several procedural decisions of the investigator of the UGA Military Investigating Department **under Article 125 CCP** to the Grozny Garrison Court. The complaint addressed the investigator's failure to respond to the applicant's motions in accordance with the CCP, rendering the applicant unable to challenge investigatory decisions on the merits, as well as the refusal to carry out requested investigative measures in light of the judgment of the ECtHR in *Khaydayeva v Russia*, and the refusal to grant access to the case materials on the ground of their classification as secret.<sup>41</sup>

45. On 20 April 2011 the Grozny Garrison Court satisfied the applicant's complaint in part of the failure of the UGA Investigating Department to properly respond to counsel's motions, a decision later upheld on appeal to the North Caucasus District Court.<sup>42</sup> However, the court did not address the applicant's complaint regarding the denial of access to the case files on the grounds of their classification as secret. In regard to counsel's request to instruct investigators to rectify shortcomings

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<sup>37</sup> Attachment 25.

<sup>38</sup> On *Utsayeva*, see RJI communication of 25 August 2010 concerning individual measures in 29 cases, para. 48.

<sup>39</sup> On *Isigova*, see RJI communication of 3 November 2010 concerning individual measures in 3 cases.

<sup>40</sup> Attachments 26, 27, 28.

<sup>41</sup> Attachments 29-34.

<sup>42</sup> Attachments 35-37.

identified by the ECtHR in its judgment, the court put forward the **following interpretation of the obligation incumbent on the Russian authorities to implement ECtHR judgments:**

- Citing Article 15 (4) of the Russian Constitution, which establishes the primacy of Russia's international treaty obligations over domestic law as well as the Ruling of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003, "*On application of customary international law by the courts of general jurisdiction*",<sup>43</sup> **the court concluded that ECtHR judgments have direct effect on the territory of the Russian Federation;**
- Because of the obligation to give effect to ECtHR judgments against the Russian Federation, there was no need to duplicate the ECtHR's reasoning in the domestic court judgment; the **shortcomings in the investigation in the applicant's case which were described in paragraphs 111-118 in the ECtHR's judgment in the case of *Khaydayeva and Others v. Russia* should be rectified accordingly.**

46. On 11 May 2011 the applicant was informed by the UGA Military Investigative Department that decisions on counsel's motions had been issued. However, copies of the decisions were not appended to the letter.<sup>44</sup>
47. On 2 April 2012 counsel for the applicant submitted a motion to the UGA Military Investigating Department, requesting a response to the original motions filed in October and December 2010, and citing the judgment of the Grozny Garrison Court regarding the obligation to respond to the applicants' motions and to rectify the shortcoming established by the ECtHR in paras 111-118 of the judgment in the case *Khaydayeva v Russia*.<sup>45</sup>
48. When the applicant failed to receive a reply within the legally established time-limit, counsel for the applicant submitted a complaint on 2 May 2012 under Article 124 CCP, appealing against the inaction of the investigator to the UGA Military Investigating Department.<sup>46</sup>
49. On 11 May 2012 counsel for the applicant received a letter dated 4 April 2012 from an investigator of the Military Investigative Department for the Southern Military District informing her that the requests contained in her motion of 2 April 2012 had already been considered and that decisions had already been issued in their regard and sent to her. The reply from the investigator, although dated 4 April 2012, was received by post on 11 May 2012, and the postal stamp on the envelope indicated that the letter had been sent out on 23 April 2012.
50. A decision from 5 May 2011 was enclosed with the letter of 4 April 2012, which counsel for the applicant had not received previously, addressing counsel's motions and the decision of the Grozny Garrison Court. The decision established that the applicant had been **refused access to the case files because they were classified "absolutely secret."** Regarding counsel's requests contained in her motion regarding the carrying out of investigative steps, the decision provided  **cursory answers to her requests**. For example, in response to counsel's request to determine which vehicles had been

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<sup>43</sup> According to which, in the interpretation of the local court, the jurisdiction of the ECtHR with respect to the application of the Convention and its Protocols in the event of a breach of the Convention by the authorities is mandatory for the Russian Federation.

<sup>44</sup> Attachment 38.

<sup>45</sup> Attachment 39.

<sup>46</sup> Attachment 40.

used in the apprehension of the victim's relatives, the investigator responded that two APCs and a URAL car, belonging to the armed forces of the Russian Federation, had been used in the apprehension of the applicant's relatives. The majority of the answers provided to counsel's questions concern the lack of any necessity to further question witnesses or victims in the applicant's case.<sup>47</sup>

#### **D. Conclusions and questions to the Russian delegation**

44. The applicants urge the Committee to express concern to the Russian delegation regarding the following issues which have arisen in the applicants' attempts to implement judgments in their cases, concerning in particular access to case files, effective representation by counsel, and investigative practices:

1. Regarding **access to case files by victims and their counsel:**

- a. The **denial of access to case materials on the grounds of their classification as secret**, especially the banning of *all* case materials on the ground of their secrecy (see para. 50 above) despite the fact that Russian law does not allow a secret classification on materials which concern human rights violations. In the applicants' view, denying access to some or all case materials is a restrictive measure which has the effect of limiting counsel's capability of collaborating with the applicants' representatives before the ECtHR. In addition, such a practice has the potential to restrict the applicants' ability to inform the Committee and the Department for the Execution of Judgments about the most crucial or relevant circumstances affecting implementation of the applicants' cases, thereby undermining the Committee's ability to effectively monitor execution of these judgments.
- b. The **denial of access to case materials on other grounds**, for example, that the investigation is still ongoing (see above para. 16). In this regard, the applicants recall the Secretariat's commentary that "the Russian authorities conceded that the current Russian legislation does not always clearly provide for the victims' rights pending investigation, in particular with regard to the right to receive information on the progress of the investigation," and that "*the Committee may wish to encourage the Russian authorities to continue and to conclude as soon as possible their ongoing reflection, bearing in mind the experience of other countries.*"<sup>48</sup>
- c. The **potential inaccessibility of case files due to complications in physically accessing the premises** of the 3<sup>rd</sup> Military Investigative Department located on the territory of the Khankala military base (see above para. 31). Given the large number of relevant case files in the possession of this department, measures should be put in place to ensure unfettered access to this department for those applicants who have been granted the right to examine case materials.

2. Regarding **effective representation by counsel:**

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<sup>47</sup> Attachment 41.

<sup>48</sup> CM/Inf/DH(2010)26, para. 56.

- a. The applicants wish to express their concern regarding **delays in processing of responses to motions or complaints submitted by applicants and their counsel**. In the majority of procedural actions being undertaken in these domestic investigations, the law provides for a time-limit of 3 or 10 days for responding to petitions filed by applicants or their counsel. These time limits are designed to facilitate swifter progress in investigations and to keep victims informed of the status of their submissions. In several cases presented above in which applicants are pursuing post-judgment actions, responses have been received with considerable delay; these delays appear to be due not only to the investigative authorities but also to the slow pace of the post. For example, in the cases of *Khadisov and Tsechoyev* and *Khaydayeva*, responses to complaints filed by the applicants were composed within the legal time limits, but postal records indicate that the responses were dispatched only several weeks later (see above paras. 16, 49). Given the overall length of investigations in these cases, which have lasted for five years or more, the authorities should make a concerted effort to reduce processing times for applicants' submissions.
  - b. The refusal by investigative authorities **to recognize the applicant's representatives on spurious technical grounds** (see above paras. 23, 27). The requirement that counsel for the applicant present a notarized power of attorney in order to provide legal representation in a criminal case is unlawful<sup>49</sup> and should be viewed as a deliberately obstructive tactic by the investigative authorities.
3. **Regarding investigative practices such as suspension of cases or refusal to open a criminal case:**
- a. The **suspension of criminal cases in the possession of the military investigating authorities**. The applicants point out that a case is only transferred to the military investigating authorities when the civilian authorities have established that military personnel were involved in the violations.<sup>50</sup> In this regard, the transfer of the criminal case in the case of *Elsiyev v Russia* to the military investigating authorities might be seen as a positive development, especially given the strength of the evidence in this case. However, several months after being transferred to the military investigators, the case was suspended for a failure to identify the perpetrators (see above paras. 40-41).
  - b. The applicants in *Chitayev and Chitayev v Russia*, recall that the European Court found the investigation into their allegations of torture to be ineffective in part because “the authorities never addressed the medical documents referred to by the applicants in support

<sup>49</sup> According to several articles of the Criminal Procedure Code, including Article 49 and Article 45 CCP, there is no requirement for counsel to present a power of attorney for representation in a criminal case.

<sup>50</sup> For a discussion of the determination of jurisdiction for investigations, see Pashayev, S.M. “Problems in the Investigation of Criminal Cases subject to examination by the European Court of Human Rights,” *Journal of the Investigative Committee* No. 2(8) 2010 (Пашаев, С.М., “Проблемы расследования уголовных дел, ставших предметом рассмотрения в Европейском Суде по Правам Человека,” *Вестник Следственного Комитета при Прокуратуре Российской Федерации* No 2(8) – 2010). According to Pashayev, the current law on the determination of the jurisdiction of the military investigative authorities is extremely restrictive. For example, according to Decree of 17 March 2008 “On the Determination of Jurisdiction of the Special Investigative Bodies of the Investigative Committee of the Prosecutor’s Office,” the military investigative authorities take on investigations only after the preliminary investigation has established the specific identities of the military servicemen who participated in the crime.

of their allegations.”<sup>51</sup> Over four years ago, following the entry into force of the ECtHR judgment, the applicants submitted their medical records to the relevant investigating authorities. No replies followed. Most recently, the applicants’ representatives were informed that the Achkoy-Martan investigating authorities **refused to open a criminal case into the applicants’ allegations of ill-treatment (see above paras. 37-38).**

4. **Regarding the prospects of an effective remedy provided by Article 125 CCP as a means of challenging decisions of the investigative authorities via judicial review:**

- a. As the dynamic of the applicant’s submissions in the case *Khaydayeva v Russia* exemplifies, **even after the local court referred to the necessity of remedying investigative shortcomings identified by the ECtHR in its judgment, the applicant is still unable to make an objective assessment of whether this instruction has been carried out by the investigative authorities.** Following the local court’s judgment, the investigators refused to allow the applicant access to any of the case materials on the ground of their classification as secret, which in practice prevents her from challenging the conduct of the investigation further. The inaccessibility of case materials to applicants is one of the main reasons for which the European Court in numerous judgments does not recognize the Article 125 procedure as an effective remedy. In addition, despite the local court’s characterization of ECtHR judgments requiring implementation by the authorities, larger questions remain regarding the ability of the court’s ability to provide any form of control or supervision over the enforcement of the judgment. As the Secretariat has noted regarding the Article 125 procedure, “the court ruling under Article 125 cannot order the investigator to undertake a specific action, e.g. to question witnesses, to order an expert examination. The redress in the procedure under Article 125 CCP consists of invalidating the impugned action or inaction as unlawful or lacking justification and requiring the respondent authority to remedy the violation.”<sup>52</sup> The applicant therefore doubts that the Article 125 CCP procedure can positively impact either her ability to participate in the investigation or the conduct of the investigation itself, despite the court’s potentially far-reaching statement regarding the “direct effect” of ECtHR judgments in Russian law.

5. **Regarding case of *Sadykov v. Russia*,** we urge the Committee to pose the following questions to the Russian delegation based on information included in the Government’s report to the Committee of 15 May 2012:

- a. Interim Resolution CM/ResDH(2011)292 refers to the obligation to undertake measures aimed at “ensuring effective accountability of members of the security forces for abuses committed during antiterrorist operations, including effective domestic investigations” and in this regard notes with interest the arrest of Mr Zakharov. **How does applying an amnesty to Mr Zakharov and discontinuing the criminal case against him ensure accountability for the crimes of which he has been found guilty?**

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<sup>51</sup> *Chitayev and Chitayev v Russia*, para. 165.

<sup>52</sup> CM/Inf/DH(2010)26 para. 73

- b. To what extent does the authorities' approach of discontinuing the criminal case against Mr Zakharov and applying an amnesty in respect of him (as well as in respect of other suspects in the criminal case concerning the torture of Mr Sadykov) reflect **a general policy of the Russian Federation regarding an intention to apply the amnesty act to other identified perpetrators of crimes committed against applicants to the ECtHR from the North Caucasus?**

**Moscow, 17 May 2012.**