

EHRAC

Bulletin



In partnership with Memorial Human Rights Centre (MHRC), the Georgian Young Lawyers' Association (GYLA) and Article 42 of the Constitution

The recent war in the South Caucasus and extra-territorial jurisdiction under the ECHR

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Last year's armed conflict in the South Caucasus has led to allegations of large-scale human rights violations by both sides. Soon after the cessation of hostilities, Georgia filed an interstate complaint with the ECtHR against the Russian Federation. On the other hand, more than 3,300 applications have been lodged by South Ossetians against Georgia¹; and it is likely that in the

near future even more individuals (Georgians as well as Ossetians) will bring cases against Russia or Georgia.

These applications raise the issue of extra-territorial jurisdiction and will certainly be challenged on this ground by the respondent states. This article, therefore, endeavours to give some insight into this complex legal issue and will outline the relevant ECHR jurisprudence for the upcoming cases.

Art. 1 defines the personal scope of the substantive part of the ECHR. It stipulates that: "*The High Con-*

tracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Responsibility of Georgia

As the meaning of jurisdiction is primarily territorial, Georgia has to observe the full range of rights and freedoms in respect of everyone on its entire territory. However, as significant parts of Abkhazia and South Ossetia have been (or are now) under the control of secessionist authorities

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Editorial

In this edition of the *Bulletin*, analysis of the recent conflict in the South Caucasus is continued with an article by Cornelius Wiesener (Memorial) considering the question of extra-territorial jurisdiction under the ECHR.

In addition, elsewhere in the region, Narine Gasparyan (President of the Armenian NGO, Legal Guide) explains the legal steps being taken by ethnic Armenians displaced from their homes in Azerbaijan and Azeri controlled territory as a result of the Nagorno-Karabakh conflict some 17 years ago. Samantha Knights (Barrister & EHRAC consultant) considers the plight and persecution of the Yezidi people living in southern Russia and Alexander Halban (EHRAC) analyses the ongoing problem of racism in Russian society.

Also in Russia, Pavel Chikov & Dmitry Kolbasin (Chair & Head of Informational Department, AGORA)

report on the effects of the 2006 Russian Law on non-commercial organisations and the impact of ongoing state scrutiny upon civil society in Russia. In addition, Ramil Iskandarov, (Chair, Eurasian Lawyers' Association, Azerbaijan) considers the impact which the ECtHR's jurisprudence has had in improving the protection of freedom of association within Azerbaijan.

Finally, in this issue, we include an overview of Philip Leach's recent analysis of ECtHR judgments concerning Chechnya, together with an assessment by Kirill Koroteev (EHRAC-Memorial) as to the adequacy of remedies currently offered by the Court in respect of large-scale human rights abuses committed during periods of armed conflict.

Joanna Evans

Senior Lawyer, EHRAC

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The recent war in the South Caucasus and extra-territorial jurisdiction under the ECHR

and Russian forces, Georgia has been prevented from exercising authority over these areas.²

In *Ilaşcu v Moldova & Russia* (No. 48787/99) 8/7/04, involving human rights violations in the Moldovan breakaway region of Transnistria, the Court held that in such a “*constraining de facto situation*” the state does not cease to have jurisdiction; however, the scope of obligations has to be adapted to the situation.³

As regards its negative obligations in areas controlled by rebel forces, Georgia’s responsibility may be engaged by acts of its own forces, such as the shelling of Tskhinvali and other military operations. Concomitantly, Georgia has a positive obligation to take all diplomatic, economic, judicial or other measures available to secure the rights of those subject to the control of the secessionist authorities and/or Russian forces.⁴

Responsibility of the Russian Federation

Since the armed conflict took place outside Russian territory, the question of jurisdiction with regard to Russia is particularly challenging. However, the term jurisdiction is not solely confined to the state party’s territory. Responsibility under the ECHR may also arise when a state exercises effective control of an area situated outside its national territory (e.g. as a consequence of military occupation), either directly through its armed forces or indirectly through a local administration attributable to the state.⁵ The standard of attribution is relatively low; in *Ilaşcu* the ECtHR was satisfied with the finding that Transnistria had been under the “*decisive influence*” of Russia as a consequence of the latter’s crucial military, economic, financial

and political support.⁶

Given the Russian policy towards Abkhazia and South Ossetia, the acts and omissions of these breakaway regimes can easily be attributed to the Russian Federation. Thus, the ECtHR may find that Russia had been exercising effective control of those areas held by the secessionist forces before the outbreak of hostilities. Furthermore, effective control may also extend to those areas that were occupied by Russian and allied forces in the course of the conflict, including the buffer zone, which was held until mid-October. In areas under effective control, Russia has both negative and positive obligations. It is therefore not only obliged to refrain from certain acts but must also take steps to prevent individuals (looters, for example) from interfering with the rights of other persons.

In areas affected by the armed conflict but not under the effective control of Russia, possible victims can rely on a more relaxed control standard: it is submitted that a state exercises jurisdiction over a person under its ‘authority and control’, even if he/she is on the territory of another state.⁷ Certainly, this may be the case in situations when a person is arrested or detained by state agents operating abroad, for example the taking of POWs or civilian detainees.

It is, however, not fully clear whether the ‘authority and control’ concept also extends to combat situations, such as the battle in and around the town of Gori. Can a state bring a person within its jurisdiction by merely firing at them? Or is its jurisdiction only engaged in the event of capture? If the latter were true, it would lead to an absurd result: the state could escape responsibility under the ECHR by simply shooting a person rather than detaining them, while the acts of the other state, on whose territory

the battle is taking place, are subject to human rights scrutiny. For this reason, a better approach would seem to be that a state brings a person within its jurisdiction to the extent that the person’s rights and freedoms are negatively affected by the acts of that state.

In its controversial decision in *Banković v Belgium & Others* (No. 52207/99) dec. 12/12/01, the ECtHR was unwilling to apply this progressive concept of jurisdiction.⁸ However, recent case-law shows a clear shift: in the case of *Isaak v Turkey* (No. 44587/98) dec. 28/9/06, involving the beating to death of a Greek-Cypriot demonstrator in the neutral UN buffer zone in Cyprus, the ECtHR found that the victim (although not arrested) was within Turkish jurisdiction. Given this ruling, it may be easier for potential applicants to argue that they fell under Russian jurisdiction.

Conclusion

It is to be hoped that the ECtHR will not consider the issue of jurisdiction a major obstacle to assessing the lawfulness of Russian and Georgian acts during the recent armed conflict. Moreover, it can be expected that the upcoming cases will shape the way the ECtHR deals with future cases involving military operations abroad.

1 Press release of the Registrar of the European Court of Human Rights. 14 January 2009. *Seven applications against Georgia concerning hostilities in South Ossetia*.

2 See by way of contrast: *Assanidze v Georgia* (No. 71503/01) 8/4/04, para. 150.

3 Para. 333.

4 See by way of analogy, *ibid*.

5 *Loizidou v Turkey* (No. 15318/89) dec. 23/5/95, para. 62.

6 Paras. 392-94.

7 *Issa v Turkey* (No. 31821/96) 16/11/04, para. 71.

8 Para. 75. However, the situation during the war in Georgia can be distinguished from *Banković*, as Russian air campaigns and artillery shelling were accompanied by ground troops and both belligerent states are ECHR contracting parties.

CoE Commissioner Special Mission to Georgia including South Ossetia: Summary of Findings

Council of Europe Commissioner for Human Rights, Thomas Hammarberg visited Georgia, including South Ossetia, from 25 to 27 September 2008 to assess what action had been taken to implement his principles for human rights and humanitarian protection, formulated on his previous visit in late August 2008.

Right to return: The Commissioner recommended that all political figures make a commitment on the right to return, including guarantees of security and reconstruction. He reported that the authorities indicated respect for this right, and half of the people displaced in August had been able to return to their homes.

Care of displaced persons: In August the Commissioner found that the living conditions for refugees and displaced persons were inadequate. By September he reported an improvement; the authorities had a plan to care for the 17,000 people who could not return home and new housing was being built for displaced persons. However, he stressed that improvements to

ECtHR applications from South Ossetia

In a press release issued on 14 January 2009, the ECtHR reported that it had given priority to seven applications concerning the hostilities in South Ossetia – six from inhabitants of the region and one from a member of the Russian armed forces stationed there. The ECtHR also reported that by 14 January over 3,300 cases with similar facts had been lodged since the hostilities in August 2008.

their living conditions was not a substitute for helping them to return home.

De-mining: The Commissioner reported on the need to de-mine large areas which still contained unexploded bombs and threatened lives. The Russian army had neutralised mines in the buffer zone and international organisations had helped with de-mining in the Georgian-controlled areas, but the Commissioner emphasised that this effort needed the cooperation of both sides.

Lawlessness: The Commissioner noted that while much of the buffer zone was stabilised and a majority of people could return, the safety of people in the northern part of the zone remained a serious issue. There were reports of looting, arson and threats of violence, so that few people could

return.

Detainees and prisoners of war: The Commissioner achieved important agreements on the release and exchange of prisoners of war and detainees. He reported progress in enabling people in hiding to return home and in identifying dead bodies – both of which helped reduce the number of missing people.

International human rights presence: The Commissioner welcomed the cooperation of the international community in protecting human rights in the affected areas and noted the continued need for widespread monitoring. However, the Commissioner emphasised that international aid organisations had not yet been given full access to all affected areas, which was vital for providing assistance to people in need.

European Court of Human Rights statistics

As of 31 December 2008, a total of 97,300 cases were pending before a judicial formation of the ECtHR. 28% of these (27,250) were against Russia – more than double the number against the next most common country, Turkey. 2,022 cases were pending against Georgia.

In total, from ratification to the end of December 2008, the ECtHR had delivered 643 judgments against Russia. At least one violation of the

ECHR was found in 605 of these. The most common violations have been of Art. 5 (liberty and security) – 401 findings; and Art. 1 of Protocol 1 (protection of property) – 337 findings. There have also been 59 violations of the substantive limb of the right to life (Art. 2) and 15 substantive findings of torture (Art. 3). There have been a total of 24 judgments against Georgia, 17 of which found at least one violation of the

ECHR. Arts. 5 (liberty and security) and 6 (fair trial) were violated in five cases each.

These statistics are taken from the ECtHR's Annual Report 2008 (provisional edition), which is available at: http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf.

CERD concluding observations on the Russian Federation

In its concluding observations on the 18th and 19th periodic reports of the Russian Federation covering the period February 2002 to July 2006¹, the Committee on the Elimination of Racial Discrimination (CERD) notes six positive aspects: the introduction of ethnic, racial or religious hatred as an aggravating circumstance for some criminal offences; the prohibition of indecent or offensive content based on race and ethnicity in commercial advertising; the simplification of certain work and temporary residence permit procedures; the establishment of an institutional framework for the protection of ethnic minority and small indigenous peoples' (SIPs) rights; local government responsibility for the rights of national and cultural autonomies; and substantial voluntary contributions to the Office of the High Commissioner for Human Rights.

CERD's list of concerns is rather longer. It is "gravely concerned" at the "alarming rise" in racially/ethnically motivated violence, and notes that anti-extremist

legislation is not systematically applied against racially or religiously motivated activities. It is concerned at the rise of racist and xenophobic attitudes in the media, among public and party officials and among young Russians, and at reports of discriminatory and unlawful police conduct (with a specific recommendation for an independent inquiry into police action against Georgians during 2006). It is concerned at reports that internally displaced persons (IDPs) are pressured to return to Chechnya; that IDPs within Chechnya are not eligible for, and IDPs outside Chechnya are sometimes denied, forced migrant status and that the system of residence registration as well as access to Russian citizenship for former Soviet citizens operate in an ethnically discriminatory manner. It notes the lack of a comprehensive legal definition of racial discrimination and of comprehensive civil and administrative anti-discrimination laws. It also refers to the lack of statistical information on ethnic minority rights, asylum and refugee applications and civil and administrative pro-

ceedings on racial discrimination. Other concerns regard workplace/recruitment discrimination, the reported inefficiency of a programme for the development of SIPs, legislative changes depriving SIPs of preferred access to natural resources, and the lack of SIP representation in the legislative bodies at regional and federal level, as well as the destruction of illegally constructed Roma settlements, the educational exclusion and/or segregation of ethnic minority, particularly Roma, children and the absence of a federal government programme to address Roma marginalisation.

The observations, periodic reports and other documents are available online from the CERD website.²

1 CERD, Seventy-third session, 28 July-15 August 2008. *Consideration of reports submitted by state parties under Article 9 of the convention. Concluding observations of the Committee on the Elimination of Racial Discrimination. Russian Federation.* [Online]. Available at: www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.RUS.CO.19.pdf.

2 www2.ohchr.org/english/bodies/cerd/cerds73.htm.

PACE gives boost to European Union accession to ECHR

John Eames, Independent consultant and legal trainer

New backing for the accession of the European Union (EU) to the ECHR was given by a Committee of the Parliamentary Assembly of the Council of Europe (PACE) report released in March 2008.¹

Should the EU's institutions be under the supervision of the ECtHR, just like the governments of EU member states? The issue is not a new one, having been repeatedly advanced since the 1970s, not only by the European Commission and European Parliament but also by the Council of Europe (CoE) itself. Fresh impetus has come from the Treaty of Lisbon, agreed by the EU's Council on 13 December 2007, and which states: "the Union shall accede to ECHR".² The logic favouring accession has not changed: sign-

ing the ECHR is a pre-condition of EU membership, but whilst this means EU member states are individually bound by the ECHR, EU institutions are not. Currently it is not possible for a person in the EU to bring a case to the ECtHR against, for example, the EU Commission.

In an environment in which the EU's institutions – such as the European Parliament and the Commission, among others – have an increasing influence and power over member states' activities, the arguments in favour of making EU institutions accountable to the ECtHR grow stronger. Citizens of member states are increasingly likely to have their affairs governed by EU law and policies. Therefore, argues PACE's Legal Affairs and Human Rights Committee, EU citizens deserve a consistent guarantee of human rights protection in respect of the EU's actions; the Union should be prepared to submit

its own acts to the external supervision of the ECtHR.

The Committee endorses a number of favourable arguments, urging that the time is right to make progress on the question, after too long a period of stalling. Not that the issue is likely to be straightforward: quite apart from institutional inertia, there remain technical barriers to overcome.

What are the arguments in favour of accession? The Committee is unequivocal about the strong message that accession would convey in respect of the EU's commitment to the protection of human rights. Indeed some consider that the political and symbolic value of accession is of more consequence than the concrete changes that would follow. Nevertheless, practical benefits would accrue.

Accession would help iron out discrepancies in human rights standards that

currently exist. Consistency would be enhanced by the adoption of the uniform ECHR standard by those EU institutions, to the benefit of EU citizens.

By delegating increasing levels of power to the EU, member states allow a growing number of policies and legislation to be made quite outside the ECHR's reach. Indeed, EU institutions are perhaps the only public authorities operating in CoE countries that are beyond the ECtHR's jurisdiction. Any transfer of power from domestic legislatures to the EU represents law-making taken outside of ECHR protection. Accession to the ECHR by the EU would remedy this anomalous effect, says the PACE Committee. The institutions would place themselves under the scrutiny of the same system of external monitoring that all member states must individually undergo.

The EU already has its own human rights standards – for example its Charter on Fundamental Rights.³ Some argue that this reduces the urgency of accession to the ECHR. But the Committee's general view is that such measures would benefit from the complementarity, with parallel ECHR obligations resulting in improved convergence between the different standards.

More practically still, EU citizens would be able to bring allegations of EU institutions' human rights transgressions directly before the ECtHR, a course of action currently unavailable. Legal remedies for victims would be simplified. In the present system a member state must appear as respondent, almost as a proxy, and perhaps be subject to a remedy that depends on a third party – the EU – for its implementation.⁴ Following EU accession, the correct respondent, if it were an EU institution, would appear and – if the finding were adverse – compensate.

Reservations still exist however. Doubts arise over the perception that the European Court of Justice – which interprets matters of EU law for member states' own courts – would be subordinating itself to the ECtHR. There is a view that accession to the ECHR may be superfluous, with some EU human rights measures already in place, and supervision by the ECtHR, or at least, the binding nature of its jurisprudence, over EU institutions, already endorsed by judgments from Strasbourg.⁵ Most of these concerns are rebutted to the PACE Committee's satisfaction, but they could still put a gentle brake on the accession process.

Other complexities, such as the legal

route by which EU accession will be authorised, in the unpredictable landscape of Treaty of Lisbon ratification, and the question of whether the EU or the European Community, has appropriate status as a legal person, though apparently troublesome, are not likely to be fatal to the process.

There is clearly a growing impetus moving towards accession. But, it may lack the overall urgency which the PACE Human Rights Committee would like to impart to it. The majority view is that accession is desirable. That it will happen is very likely; *when* it will take place is another matter.

1 PACE, 18 March 2008. *The Accession of the European Union/European Community to the European Convention on Human Rights*, Report of the Committee on Legal Affairs and Human Rights, Doc. 11533, [Online] Available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11533.pdf>.

2 Treaty of Lisbon 2007, amending Treaty on European Union, Article 6(2), [Online] Available at: www.consilium.europa.eu/uedocs/cmsUpload/st06655.en08.pdf.

3 Charter of Fundamental Rights of the European Union (2000/C 364/01), [Online] Available at: www.europarl.europa.eu/charter/pdf/text_en.pdf.

4 See *Matthews v UK* (No. 24833/94) 18/2/99; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (No. 45036/98) 30/6/05.

5 Eg. the *Bosphorus* judgment, *supra* 4.

The role of the ECtHR in the implementation of freedom of association in Azerbaijan

Ramil Iskandarov, Chair, Eurasian Lawyers' Association, Azerbaijan

Despite the problems that civil society continues to face in Azerbaijan, the number of NGOs has been growing rapidly since the country's independence in 1991. As a member of the Council of Europe (CoE), the Government of Azerbaijan undertakes to respect individuals' right to exercise freedom of association, as well as other rights and freedoms under the ECHR. Given that problems with exercising these rights and freedoms exist in Azerbaijan, the Parliamentary Assembly of the CoE, which reviewed

Azerbaijan's application for CoE membership in June 2000, noted that Azerbaijan undertakes to “re-examine and amend, at the latest within one year of its accession, the rules governing registration of associations and appeals procedures.”¹

At the time of accession to the CoE in 2001 according to CoE Parliamentary Opinion 222(2000) Azerbaijan undertook the following commitments regarding freedom of association:

“...to re-examine and amend the law on media and to turn the national television channel into a public channel managed by an independent administrative

board; to re-examine and amend the rules governing registration of associations and appeals procedures...”²

However, Azerbaijan undertook obligations not only before the CoE, but also the European Union. Azerbaijan is a member of the European Neighbourhood Policy (ENP) programme and signed the Action Plan within the ENP. An important part of the Action Plan is dedicated to Azerbaijan fulfilling human rights obligations:

“Priority area 3 – Promote the growth of civil society and its organised forms (human rights NGOs, associations, etc). Al-

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The role of the ECtHR in the implementation of freedom of association in Azerbaijan

*leviate the current cumbersome procedures required for NGO registration...*³

Azerbaijan ratified the ECHR on 15 April 2002. Art. 11 ECHR says that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The decisions of the ECtHR on violations of freedom of association in Azerbaijan have played an important role in changing legislation and improving procedures for enjoying the freedom of association. For instance, in *Ismayilov v Azerbaijan* (No. 4439/04) 17/1/08 the applicant complained about the significant delays to State registration of an association named Humanity and Environment, of which he was a founder. The ECtHR held unanimously that there had been a violation of Art. 11 ECHR and awarded Mr Ismayilov €1,000 non-pecuniary damages. The ECtHR found that the Law on State Registration of Legal Entities of 6 February 1996 did not afford sufficient protection against delays in the State registration procedure caused by the Ministry's failure to respond to registration requests within the statutory time limits.

According to the report of the CoE Commissioner for Human Rights, Thomas Hammerberg, on his visit to Azerbaijan on 3-7 September 2007, under

the Law on State Registration of Legal Entities, any organisation must register under the Ministry of Justice in order to be set up as a legal entity.⁴ Where registration is denied the authorities cite procedural shortcomings. Further, the authorities should respond within thirty days of an application being made, however this is most often delayed. In a recent judgment (*Nasibova v Azerbaijan* (No. 4307/04), 18/10/07) the ECtHR ruled that delaying registration outside the time prescribed by law constitutes a *de facto* refusal to register an association. These significant delays interfere with the right to associate freely. The ECtHR confirmed its stance in *Ismayilov v Azerbaijan* (No. 4437/04) 17/1/08. The Commissioner therefore urges the Ministry of Justice to deliver its replies in the time prescribed by law.⁵

However, there have also been positive developments for NGOs in Azerbaijan. On 27 July 2007 the President signed a decree confirming State support for NGOs and establishing the State Council for Support to NGOs. According to the decree the State will provide financial assistance to NGOs in such areas as the protection of refugees and displaced persons, the integration of Azerbaijan into the world community, the strengthening of cooperation with international organisations and foreign NGOs, the development of political, legal and civil culture, the development of citizens' awareness of the law and human rights, the expansion of

the freedom of speech and the protection of health.

In conclusion, there are a number of problems, both in legislation and practice, in relation to freedom of association in Azerbaijan, particularly for civil society organisations. However, we can find some optimism in the adoption of new laws which help develop NGOs, such as the Law on State Registration of Legal Entities, and the establishment of the State Council of Support to NGOs, which has adopted many of the international community's recommendations. We have to be thankful to the international community and particularly to the CoE, ECtHR and the Commissioner for Human Rights for their contributions in issuing decisions and reports about strengthening freedom of association in Azerbaijan and in assisting the Government of Azerbaijan to address the problems they have identified.

1 PACE, 2000. Opinion No 222: Azerbaijan's application for membership of the Council of Europe, [Online]. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EOP1222.htm>.

2 Ibid.

3 European Commission, EU/Azerbaijan Action Plan, [Online]. Available at: http://ec.europa.eu/world/enp/pdf/action_plans/azerbaijan_enp_ap_final_en.pdf.

4 Council of Europe Commissioner for Human Rights, 20 February 2008. Report by the Commissioner for Human Rights, Mr Thomas Hammerberg on his Visit to Azerbaijan, [Online]. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1251577&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

5 Ibid.

State scrutiny of NGOs in Russia 2006-2008

Pavel Chikov, Chair, AGORA & Dmitry Kolbasin, Head of Informational Department, AGORA

In Russia, there are nearly 200,000 registered non-governmental organisations (NGOs). Additionally, there are an unknown number of

unregistered NGOs, which have a named head of organisation, members and an adopted organisational charter. These unregistered NGOs cannot operate as legal persons and therefore have severe difficulties in obtaining funding as only legal entities may open

a bank account.

After the adoption of amendments to the Law on Non-commercial Organisations in 2006, the State suddenly and dramatically increased the legal requirements upon NGOs. Organisations struggled to adapt to these changes in

the time available. Tens of thousands of NGOs, who had experienced no demands for information from the authorities for many years, were suddenly inundated with requests from various official bodies.

In 2006-07, one in six NGOs that filed for registration were refused. After reviewing 119 of these refusals, human rights activists have concluded that in more than half the cases refused, the refusal was based on institutional weaknesses and in particular as a consequence of an NGO submitting documents that were not correctly assembled into a file or numbered.

Since 2006, thousands of NGOs have been faced with illegal actions on behalf of the registration authorities. In 2007 alone the registration authorities issued 45,920 notifications of violations of Federal laws, inspected 13,381 NGOs, denied registration to 11,044 NGOs and sent 8,274 cases to court seeking closure or termination of NGO activities. According to the Federal Registration Service, in 2007, violations of the law were identified in the vast majority of audited NGOs. Interestingly, these statistics are considered to be an indicator of the effectiveness of the Federal Registration Service. According to a study conducted by AGORA, of 14 instances of media reports on the quantitative outputs of the Federal Registration Service in 2007, 13 highlighted the Federal Registration Service's punitive function.

Relations with the Federal Registration Service did improve, but change was slow and gradual. For example, it took two years for the Supreme Court of Russia, in the case of Voice (an organisation from Samara), to decide that *"the closure of public organisations is not permitted on the grounds of only one violation of Federal law"*.¹ Prior to this decision, delayed meetings of NGO members, the late preparation of meeting minutes, the absence of identity cards

for organisation members or the use of an abbreviated organisational name on a stamp were deemed by the registration and control bodies as a flagrant violation of the law and could be used as a reason for filing a court action to close an NGO. The equation of 'gaps' in an NGO's documents with a 'flagrant violation' of legislation and the subsequent notification and decision to suspend an NGO's activities became a widespread practice.

Recently there has been a trend for prosecutors to designate certain NGOs as being extremist and to use this as a reason to close them. Thus, it seems that the Russian authorities may have come to see the fight against extremism as a means by which to apply pressure on NGOs to desist from criticising the authorities. The Russian Criminal Code classifies all crimes of an extremist nature, including incitement to hatred, as crimes against State security. Consequently, it can appear that law enforcement activity is primarily targeted at defending the State rather than at protecting society. For example, in early 2008, the Council of Elders of the Balkar People was closed, as the Council's activities were deemed to be extremist. It was only thanks to the work of lawyers before the Russian Supreme Court that this decision was held to be unfounded and illegal.

There are also court decisions which could be described as questionable even in terms of common sense. The Raduzhny House, based in the Tyumen Region, aims to protect the rights of sexual minorities. It was refused registration on the grounds that protecting gays and lesbians *"undermines the sovereignty and territorial integrity of Russia"* and is therefore extremist. Over 2007-08 the organisation exhausted all domestic remedies appealing against its closure and has now filed a complaint with the ECtHR.²

In summer 2008, control over

NGOs was transferred from the Federal Registration Service to the Ministry of Justice. The effects of this change for NGOs are not yet clear. However, legal analysts at AGORA believe that following President Medvedev's decree to transfer control and abolish the Federal Registration Service, the Government's campaign against NGOs is coming to an end. 2009 is marked by uncertainty as to the role and functions of the Ministry of Justice vis-à-vis NGOs. The Russian Ministry of Justice has yet to make any steps to define its policy.

Until now, there has been a lack of systematic jurisprudence and clarifications from the Supreme Court in cases concerning NGOs which has led to a huge array of often contradictory lower instance judicial decisions concerning NGOs. This must be addressed, as the evolving jurisprudence on NGOs is ambiguous and often demonstrably discriminatory. However, a certain protective function does still exist and it should be emphasised that it is still possible to successfully protect NGOs through the legal system as long as qualified legal assistance is available. In 2008, lawyers from AGORA helped the following organisations to have the claims of public bodies, including the Russian Supreme Court, against them recognised as unfounded: the Association for the Rights of Voters 'Voice', the Voice-Povolzhie Fund (Samara), the Youth Studio of Guitar Songs 'Great Spring' (Baikal Region), the Children's Ballet Theatre (Vladimir) and the Antifascist Union (Moscow region).

Note: Most of the information used in this article is taken from a study by AGORA of more than 250 cases, court decisions and general jurisprudence on the liquidation of NGOs over 2006-08. It is available online in Russian at: http://www.openinform.ru/fs/j_photos/openinform_174.pdf.

¹ For the text of the decision of the Russian Supreme Court refusing to close Voice see: http://www.supcourt.ru/stor_text.php?id=20248831.

² *Raduzhnyy Dom v Russia* (No. 12200/08).

HUMAN RIGHTS CASES

This section features selected decisions in recent human rights cases which have wider significance beyond the particular case or are cases in which EHRAC/Memorial is representing the applicants.

EHRAC-Memorial cases

Albekov & Others v Russia
(No. 68216/01), 9/10/08
(ECHR: Judgment)
Right to life

Facts

The three applicants are Russian nationals and residents of the Chechen Republic. In 2000 the first applicant's brother disappeared and was later found dead in the forest near his village of Akhkinchu-Barzoy, thought to be as the result of an explosion. While searching for him, the second applicant's brother was badly injured and died as a result of a landmine explosion. The third applicant's son was badly injured and lost his leg in similar circumstances. The first applicant alleged that his brother had been intentionally killed by federal servicemen; the other applicants claimed that their relatives died or were wounded as a result of mines placed in the forest by federal servicemen. All the applicants claimed that no adequate investigation had followed the deaths or injury of their relatives. They complained of violations of Arts. 2 (right to life) and 13 (effective remedy) of the ECHR.

Judgment

The ECtHR found that the evidence presented by the first applicant to support the claim that his brother had been killed by servicemen was insufficient and held that the tape and footprints found near to his body were inconclusive in this regard. However, even though it could not establish who laid the mines near Akhkinchu-Barzoy, the ECtHR concluded that the authorities were aware of the mines and therefore obliged "to protect the residents from the risks involved." As they had not attempted to locate and deactivate the mines or take sufficient steps to prevent access to the mined area, the ECtHR held the authorities had failed in this obligation and found a violation of Art. 2. In addition, the ECtHR further found that the criminal investigation conducted by the authorities was ineffective and therefore the ECtHR also found a viola-

tion in this regard under the procedural limb of Art. 2. For the same reasons the ECtHR found a further violation under Art. 13. Finally, the ECtHR found that by virtue of the Government's failure to provide copies of requested documents (including a copy of the investigation file), it had fallen short of its obligations under Art. 38(1).

Comment

Although the evidence submitted by the parties was found by the ECtHR to be insufficient to establish responsibility for the actual laying of the mines, the ECtHR stated that independent of any involvement, the State had a positive obligation to protect local residents from the risks involved. The ECtHR stated that regardless of where responsibility lies, in such circumstances it is incumbent upon the State to "endeavour to locate and deactivate the mines, to mark and seal off the protected area so as to prevent anyone from freely entering it, and to provide the villagers with comprehensive warnings concerning the mines laid in the vicinity of their village".

Medova v Russia
(No. 25385/04), 15/01/09
(ECHR: Judgment)
Disappearance

Facts

In June 2004, the applicant's husband was apprehended (together with another man) by four armed men. The applicant alleged that the armed men were in fact FSB officers. Following a checkpoint stop when the captors were unable to produce identity documents, all six men were detained by the Department of Interior (ROVD) but were subsequently released following confirmation by the District Prosecutor that the four captors were indeed FSB officers and the detention was authorised. The applicant's husband has not been seen since. The applicant complained of violations of Arts. 2 (right to life), 3 (prohibition of inhuman treatment), 5 (right to liberty) and 13 (right to an effective remedy).

Judgment

The ECtHR did not find it estab-

lished that state agents were responsible for the disappearance of Mr Medov. However, it was held that the authorities had breached their positive obligations to protect his life when he was under police control by failing to verify whether the armed men who presented FSB identity documents were indeed FSB officers. Furthermore the ECtHR found there to be a breach of the procedural limb of Art. 2 due to the failure to conduct an effective investigation into Mr Medov's disappearance. The ECtHR also found a violation of Art. 5, as the State had failed to protect Mr Medov from arbitrary deprivation of liberty. The ECtHR awarded the applicant €35,000 in damages.

Comment

The ECtHR's reasoning in respect of the lack of state responsibility for the abduction itself would seem to be open to question in this case. It is accepted that following a request from ROVD officers, the District Prosecutor's Office confirmed the validity of the relevant FSB identity documents and the lawfulness of the detention before the applicant's husband was released. Therefore the ECtHR's finding that the abduction itself could not be attributed to the State appears to be based only on the possibility that the check made as to the captors' identities and circumstances of detention were not sufficiently diligent. In circumstances where the Russian Government yet again refused to disclose a copy of the entire investigation file to the Court, such reasoning would appear to disproportionately disadvantage the applicant.

Other recent disappearance cases from Chechnya:

Lyanova & Aliyeva v Russia
(Nos. 12713/02 & 28440/03),
02/10/08

Bersunkayeva v Russia
(No. 27233/03), 04/12/08

Abdulkadyrova v Russia
(No. 25385/04), 15/01/09

Ayubov v Russia
(No. 7654/02), 12/02/09

Mezhidov v Russia

(No. 67326/01), 25/09/08

(ECHR: Judgment)

Right to life

On 5 October 1999, the applicant's family were killed when their village, Znamenskoye, in Chechnya, came under fire from a mountain range where Russian troops were stationed as part of a counter-terrorism operation. The Government argued that the applicant's family had been killed by an attack carried out by unidentified men. The applicant asked the authorities to investigate the deaths of his family. Between 2000 and 2006 an investigation was launched and suspended on several occasions without conclusion. On 15 November 2000, the applicant applied to the ECtHR under Arts. 2 (right to life) and 13 (effective remedy). The ECtHR found a violation of Art. 2 largely based upon an expert report which concluded that the weaponry used in the attack were such as to have been presumed to have been in the exclusive possession of the Government. In spite of the fact that some degree of investigation had been carried out in this case, the ECtHR held that there was nonetheless a breach of the procedural limb of Art. 2 on account of inexplicable shortcomings and considerable periods of inactivity. A violation of Art. 13 was also upheld. The applicant was awarded €100,000 non-pecuniary damages.

Umayeva v Russia

(No. 1200/03), 04/12/08

(ECHR: Judgment)

Right to life

On 23 January 2000, the applicant suffered shell and bullet wounds as she was attempting to leave Grozny through a humanitarian corridor. As a result of her injuries she was left partially disabled. The domestic investigation which followed was characterised by "serious and unexplained failures to act". In September 2005 she applied to the ECtHR claiming violations of Arts. 2 (right to life) and 13 (effective remedy). The ECtHR found breaches of both the substantive and procedural limb of Art. 2, as well as a violation of Art. 13.

Other ECHR cases***Kovach v Ukraine***

(No. 39424/02), 07/02/08

(ECHR: Judgment)

Right to free elections***Facts***

The applicant was a Ukrainian national living in Uzhgorod (Ukraine). He stood as a candidate in the 2002 parliamentary elections in a constituency in the Zakarpattya region. The case concerned the applicant's complaint about the conditions in which the elections had been conducted in that constituency. In particular, he complained about the invalidation of votes cast in certain electoral divisions and the alleged unfairness of the recount which followed. He further complained that officers of the constituency Electoral Commission were biased in favour of an opposing candidate as manifested by their signatures appended to a newspaper appeal published in support of the candidate in question. The applicant sought damages in the form of potential lost earnings, and also for the anguish and distress which he had suffered on account of the violation of his electoral rights. He relied on Art. 3 of Protocol 1 (right to free elections) which provides that:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Judgment

- The ECtHR re-affirmed that Art. 3 of Protocol 1 guarantees an individual's right to vote and stand for election (and if elected, to sit as a member of parliament).
- The ECtHR considered that the decision by the Electoral Commission to annul the vote in four electoral divisions to be arbitrary and not proportionate to any legitimate aim pleaded by the Government.
- It unanimously held that there had been a violation of Art. 3 of Protocol 1 and awarded Mr Kovach €8,000 euros as non-pecuniary damages.
- The ECtHR dismissed the claim for damages based upon loss of the salary due to him as a member of parliament noting that the sum claimed would

have to be offset against other income received by the applicant. As no details had been provided of the actual net loss incurred the ECtHR dismissed the applicant's claims under this head.

Comment

Although it was not a decisive point in this particular case, the Court also expressed its doubts as to whether a practice discounting all votes at a polling station at which irregularities have taken place, regardless of the extent of the irregularity and regardless of the impact on the outcome of the result in the constituency, could be regarded as pursuing a legitimate aim for the purposes of Art. 3 of Protocol 1. In this case what was important was the vague and contradictory nature of the relevant domestic law, coupled with the lack of clarity in the decision of the Electoral Commission.

Burdov v Russia (No.2)

(No. 33509/04), 15/01/09

(ECHR: Judgment)

Enforcement of judgments; pilot judgment procedure***Facts***

The applicant was called up to take part in emergency operations following the Chernobyl nuclear plant disaster from 1 October 1986 to 11 January 1987. He suffered extensive exposure to radiation and was thereby entitled to social security benefits. State authorities failed to pay in full and on time and the applicant sued in domestic courts, which granted his claims, but a number of judgments remained unenforced for various periods of time. In this connection, he applied to the ECtHR and received a judgment in his favour - *Burdov v Russia* (No. 59498/00) 7/5/02 – in which the ECtHR found a violation of Art. 6 and Art. 1 of Protocol 1. Despite the ECHR judgment the applicant was again faced with the non-enforcement of judgments in Russia. He then submitted a new application to the ECtHR claiming that he was still a victim (Art. 34) and re-affirming violations of Art. 6 and Art. 1 Protocol 1.

Judgment

As to admissibility, although the applicant's judgments had eventually been enforced, the ECtHR viewed that this, in itself, was not sufficient to deny the applicant victim status. In addition, the

ECtHR asserted that the Government's decision to compensate only inflation-related losses from the delays in enforcement and not any further pecuniary or non-pecuniary loss did not constitute adequate redress, thus the applicant could still claim to be a victim under Art. 34.

As to the merits, the applicant pleaded Art. 6 and Art. 1 Protocol 1. Dismissing the government's purported legislative and budgetary difficulties, the ECtHR found a violation of Art. 6, as the enforcement of three out of five judgments had been unreasonably delayed (delays ranged from one year to nearly three years). With a knock-on effect, Art. 1 Protocol 1 was also breached; the ECtHR considered a judgment to be a 'possession' whose peaceful enjoyment had been interfered with by the unreasonable delay in enforcement. The ECtHR then, of its own initiative, examined and found a violation of the applicant's right to an effective remedy (Art. 13), finding the compensatory and preventive (ineffective bailiffs; innocuous declaratory judgments) remedies available inadequate.

Comment

The ECtHR noted that the 200 rulings that it has issued on delayed enforcement of judgments in Russia since *Burdov* in 2002 reflect a "structural dysfunction" and resolved to use the 'pilot judgment' procedure, under Art. 46, to facilitate effective implementation of its judgments. This procedure allows the ECtHR to clearly identify the existence of structural problems underlying violations and to indicate specific measures or actions to be taken by the respondent state. The implication of using this procedure is that similar cases can be adjourned to give time for the state to take remedial action. In certain 'pilot-cases' the ECtHR has applied the procedure where there is "an identifiable class of citizens" – such as Polish repatriates after the Second World War as in *Bronowski v Poland* (No. 31443/96) 22/6/04. Whereas, in this case, the ECtHR has widened its scope to potentially any claimant and is aware that those affected represent "large groups of the Russian population". The ECtHR proceeded to suggest areas where legislative reform and other general measures were necessary; giving Russia six months to set up an effective compensatory rem-

edy and one year within which to provide redress to all other applicants with similar cases currently pending before the ECtHR. In the meantime, the ECtHR adjourned all new applications lodged after delivery of the present judgment.

Aleksanyan v Russia
 (No. 46468/06), 22/12/08
 (ECHR: Judgment)

Inhuman treatment, right to liberty, right to private life

Facts

The applicant was a lawyer representing Mikhail Khodorkovsky, the head of the oil company Yukos, in criminal proceedings for fraud. The applicant also served briefly as vice-president of Yukos. In April 2006 his house was searched and he was arrested and detained on alleged involvement in embezzlement as head of the legal department at Yukos.

The applicant suffered from a number of serious medical conditions. Upon arrest he had serious sight difficulties which deteriorated to near-blindness during his detention. Some months into his detention he was also found to be HIV-positive, which later developed into AIDS. The applicant encountered a catalogue of extreme difficulties in obtaining the medical assistance he required and the ECtHR concluded that from October 2007 at the very least, his condition required transfer to a hospital specialised in the treatment of AIDS. No such transfer occurred in spite of a Rule 39 indication in November 2007 that the Government should "secure, immediately...the in-patient treatment of the applicant in a hospital specialised in the treatment of AIDS". At the time of judgment in December 2008, the applicant remained in custody. He complained to the ECtHR that the lack of adequate treatment and his continued detention violated Arts. 3 (inhuman treatment) and 5 (liberty and security) ECHR and that the search on his house had violated Art. 8 (private and family life).

Judgment

The ECtHR held that:

- the treatment of the applicant "undermined his dignity [...] causing suffering beyond that inevitably associated with a prison sentence" and amounted to a violation under Art. 3;
- the applicant's prolonged detention

(for a period of two years and eight months at the date of judgment) served no meaningful purpose under Art. 5 and the domestic courts' continued refusal to grant bail on grounds which were neither relevant nor sufficient had violated his right in Art. 5(3) to release pending trial;

- the lack of proper reasoning and vagueness of the search warrant (in a non-urgent situation) amounted to a breach of the applicant's rights under Art. 8;
- the Government's failure to comply with the interim measures indicated by the ECtHR amounted to a separate violation under Art. 34;
- in order to discharge its legal obligation under Art. 46 the Government must release the applicant from prison and replace detention on remand with other less stringent restrictive measures.

Comment

The order to discontinue the applicant's detention under Arts. 41 and 46 is particularly notable. Although the Grand Chamber has granted such a remedy on two previous occasions (in *Assanidze v Georgia* (No. 71503/01) GC 8/4/04 and *Ilaşcu & Others v Moldova & Russia* (No. 48787/99) GC 8/7/04), this is the first time a seven-judge Chamber has granted such a remedy and the first time that the ECtHR has ever ordered the release of a person from pre-trial detention. The applicant was finally released on bail on 30 December 2008.

Kirakosyan, Mkhitarian & Tadevosyan v Armenia
 (Nos. 31237/03, 22390/05 & 41698/04), 02/12/08
 (ECHR: Judgment)

Degrading treatment, fair trial & right to appeal

Facts

In February and March 2003 presidential elections took place in Armenia. Opposition parties organised protests alleging irregularities and challenging the president's re-election. Mr Kirakosyan and Mr Mkhitarian participated in a rally on 21 March 2003 in Yerevan. Mr Tadevosyan participated in demonstrations held in March to May 2004. All three men are involved in opposition parties.

On 22 March 2003, the police visited Mr Kirakosyan and Mr Mkhitarian at their homes in Karakert and told them

to come to the local police station. When the applicants refused to do so, they were arrested. The court hearing was very brief and the judge, allegedly declaring himself to be acting on instructions from higher authorities, sentenced them to ten days' administrative detention. They were kept in cramped and unsanitary cells, without bedding and with restricted access to toilet facilities. They could only obtain food and water by bribing the prison guards.

In March 2004 Mr Tadevosyan was sentenced to two periods of ten days' administrative detention. He was kept with nine other inmates in a small cell, which

lacked adequate ventilation or light, and had restricted access to toilet facilities, food and water. All three applicants complained to the ECtHR about the conditions of their detention (Art. 3), their right to liberty (Art. 5) the unfairness of their trials (Art. 6) and the fact that they did not have a right to appeal (Art. 2 of Protocol 7).

Judgment

In each case, the ECtHR found that the cumulative effect of the applicants' conditions of detention resulted in suffering which amounted to a breach of

Art. 3. In examining the expedited administrative procedure used against the applicants, the ECtHR held that the applicants had not received a fair trial and had been given insufficient time and facilities to prepare their defences, breaching Arts. 6(1) and (3). It also held that the applicants had not been allowed to challenge the judge's rulings, breaching Art. 2 of Protocol 7 (right of appeal in criminal cases). The applicants' claims under Art. 5 were held inadmissible. The applicants were each awarded €4,500 for non-pecuniary damages.

Seeking remedy and the last hope for returning home

Narine Gasparyan, President, Legal Guide; Advocate, Chamber of Advocates of the Republic of Armenia

17 years have passed since 330,000 of the 400,000 ethnic Armenians living in the Azerbaijan Soviet Socialist Republic (SSR) sought refuge in Armenia as a result of the Nagorno-Karabakh conflict. A significant number more left for Russia between 1988 and 1993.¹ To date, none of the ethnic Armenians who fled their homes in Azerbaijan have been able to return to enjoy their property.

Following their forced displacement from Azerbaijan, some ethnic Armenians tried to restore their violated property and other rights in the Azerbaijani domestic courts. However, none of these efforts were successful and The UN Committee on Economic Social and Cultural Rights (CESCR) has held that their property is still being illegally occupied and used by Azeris while the real owners of these houses are prevented from returning to their homes. CESCR in its concluding observations on Azerbaijan in 2004 specifically indicated: *"The Committee is concerned about the illegal occupation by refugees and internally displaced persons of properties belonging to Armenians and other ethnic minorities"*.²

It was only after 15 April 2002, when the ECHR entered into force in Azerbaijan that those Armenians who fled from Azerbaijan could submit individual applications to the ECtHR as a last hope for obtaining redress for their violated rights. In 2006-07 the Armenian NGO, Legal Guide, submitted around 500 ap-

plications to the ECtHR about the enforced displacement of ethnic Armenians from their homes in Azerbaijan and certain Armenian territories which are currently under Azerbaijani control; the illegal occupation of property belonging to these people and the failure of the Government of Azerbaijan to ensure the return of property or provide relevant compensation to the applicants. Some applications also allege violations of Art. 6 ECHR where the applicants' claims concerning violations of their property and other rights that were submitted to judicial authorities in Azerbaijan have not been examined.

In two of the cases handled by Legal Guide (*Sargsyan v Azerbaijan* (No. 40167/06) and *Arakelyan v Azerbaijan* (No. 13465/07)) the ECtHR has applied Rule 54(2) of the Rules of Court and following a preliminary examination of their admissibility, the applications have been communicated to the Government of Azerbaijan, which has been invited to submit written observations on the admissibility and merits of these cases. In addition the Government of Armenia is participating in these cases as a third party on the basis that the applicants are Armenian nationals.

In his application Mr Sargsyan submits that in 1992 he was forcedly displaced from his home in the village of Gyulistan, Shahumyan Region, Azerbaijan. The applicant is ethnically Armenian and had lived in Gyulistan from birth until his displacement. The applicant currently lives in Yerevan, Armenia and is unable to return to his home in Gyulistan. He argues that his property

has been illegally occupied and that the Government of Azerbaijan has failed to ensure the return of his property or to provide him with relevant financial compensation for his property. Consequently, he is not only prevented from enjoying his property and other possession, but he also cannot access certain places of moral significance, such as the graves of his close relatives and family members.

Mr Arakelyan, an Armenian national, was forced to leave his home in the village of Artsvashen, Gegharquniq Region, Armenia, when Azerbaijani forces captured the village on 8 August 1992. He has been unable to return to his home since then and currently lives in another village in his home region. In his application to the ECtHR he complains of similar violations and issues to Mr Sargsyan.

Depending on how many cases of this nature are deemed admissible by the ECtHR, it may be that it will consider applying the pilot judgment procedure on the basis of the similar facts of the displacement of Armenians from their homes either in Azerbaijan or in territory now controlled by Azerbaijan.

1 UN High Commissioner for Refugees, 1 October 1999. UNHCR CDR Background Paper on Refugees and Asylum Seekers from Armenia, [Online]. Available at: <http://www.unhcr.org/refworld/category,COI,UNHCR,,ARM,,3ae6a6500,0.html>.

2 ECOSOC, 14 December 2004. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan, [Online]. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.104.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.104.En?Opendocument).

Yezidis turn to European Court to resolve citizenship issues

Samantha Knights, Barrister, Matrix Chambers, London

For a number of years EHRAC and Memorial have been concerned with the situation of about 2,000 Yezidis living in southern Russia.

The Yezidis are followers of a religion with ancient origins. They are Kurdish people by background and claim one of the oldest religions in the world. However their belief system has frequently been misrepresented and as a group they have suffered persecution over a long period, with violent attacks most recently in Iraq.¹

A large community was until 1988 living in Soviet Armenia. An earthquake in 1988 caused almost all the community to flee to the Krasnodar region of Soviet Russia. Since relocating to Russia the community has experienced widespread discrimination from the Russian authorities in the region. A large number of the community resident in Russia have no local *propiska* (registration) and are not recognised as Russian citizens. The problems which follow from the lack of local registration and citizenship are myriad: lack of access to employment, social benefits, health care, education, voting rights, and freedom of movement to name but a few.

Since March 2006 EHRAC and Memorial have undertaken a number of visits to the region and raised awareness of the situation through Memorial's Law and Migration Programme. In July 2007 Memorial jointly organised a roundtable on problems in applying federal migration legislation in the Krasnodar region to which local state officials were invited.

In the meantime, EHRAC and Memorial have been assisting a number of Yezidis who have lodged claims in the domestic courts without success. Recently, in October 2008 an introductory letter was lodged with the ECtHR in respect of two applicants.

Under Russian law a substantial pro-

portion of the Yezidi community are entitled to Russian citizenship. Under Art. 13, part 1 of the RF Law On Citizenship of the Russian Federation of 1991, all former Soviet citizens who *permanently resided* in the RSFSR on the date the law came into force (6 February 1992) and who did not give up their Russian citizenship within one year of that date, were deemed Russian citizens. However, Russian officials have systematically interpreted the term 'permanent residence' (the concept is not defined by law) in a restrictive manner, as possession of *propiska*. This approach is widely spread although it is completely arbitrary and is not based on the law. Neither the 1991 Citizenship Law, nor its by-laws, which determined the procedure for obtaining and registering Russian citizenship, equated 'permanent residence' to the availability of *propiska* or registration by place of residence. According to the civil and administrative legislation, the place of permanent residence is the place of actual residence, that is, where a person permanently or predominantly resides. In the case of the Yezidis the denial of Russian citizenship is the result of discriminatory treatment on ethnic grounds.²

The plight of this community has a precedent in the discrimination suffered by other ethnic groups in Russia and primarily the Meskhetian Turks (Meskhetians) who were forced to migrate from Uzbekistan in 1989-1990 to Krasnodar Krai. The group comprised over 10,000 people and the authorities would not even conceal the ethnic motivation of their refusals to grant citizenship. However, while the problem was partially resolved since some Meskhetians emigrated to the USA following agreement by the US authorities, and part of them managed to legalise their citizenship earlier in other RF regions, the situation for the Yezidis remains.

The introductory letter lodged with the ECtHR in 2008 concerns two Yezidis who formerly lived in Soviet Arme-

nia. The houses in which the applicants and their families were living were completely destroyed by the earthquake, and in 1989 they were forced to move to live in the Krasnodar Krai of the now Russian Federation, where both applicants live to date. For the past 19 years they have made repeated requests to the authorities to be issued with Russian passports, all of which were refused. More recently their complaints to the Russian courts were denied on technical grounds without the courts examining the merits of their application.

The applicants argue that their inability to obtain Russian citizenship has had a significant negative impact on their private and family lives in violation of Art. 8 ECHR. They cannot legally find employment, receive medical care or marry. Their freedom of movement within and outside Russia is impaired or prevented (Art. 2 of Protocol 4), they cannot vote in parliamentary elections (Art. 3 of Protocol 1), or sell their private property (Art. 1 of Protocol 1). They also claim that the Russian authorities have waged a campaign of discrimination against the community in violation of Art. 14 and the severity of the discrimination amounts to degrading treatment under Art. 3. They have also been unable to obtain a fair hearing of their case within Russia (Art. 6) or an effective remedy (Art. 13).

The ECtHR has recently granted partial admissibility in another case against Slovenia which also involves the failure to recognise citizenship in accordance with the law.³ However, curiously, a substantially similar claim lodged on behalf of a number of Meskhetians was rejected by the ECtHR in a letter without reasons in early 2008. This is particularly surprising given the force of the legal arguments concerned and that the situation for ethnic minorities in southern Russia and the Meskhetians in particular is well documented by a number of domestic organisations.

Ultimately it is hoped that it will be possible to resolve the situation for the Yezidis community without having to fight the case all the way through the ECtHR. This form of discrimination which is prevalent in Russia today is senseless, degrading, and demeaning to

the community and to Russian society as a whole. Should the case be ultimately heard by the ECtHR it will be particularly important for the ECtHR to consider the Art. 14 claims in the light of the overwhelming objective evidence of the situation for Yezidis in Russia today.

1 BBC. 15 December 2008. *Yazidis targeted in Iraq attack*. [Online]. Available at: http://news.bbc.co.uk/1/hi/world/middle_east/7783278.stm.

2 Russian NGOs Alternative Report. November 2007 (updated March 2008) *Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination*. [Online]. Available at: <http://www.memo.ru/hr/discrim/ver1/Report-ICERD-eng-site.html>.

3 *Makuc & Others v Slovenia* (No. 26828/06) dec. 31/5/07.

Racism in Russia

Alexander Halban, Intern, EHRAC

“Racism is a global phenomenon” said Thomas Hammarberg, the Council of Europe Commissioner for Human Rights. “No country, no region, is free of this social ill – including the European countries”.¹

These observations have been borne out in Russia over the last year. The SOVA Centre on Nationalism and Xenophobia reported that in 2008 at least 87 people were killed and 378 wounded in racist attacks. This slight change from 2007 (at least 86 killed and 599 wounded) may result more from under-reporting, rather than any reduction in the number of attacks.² The ferocity of these attacks is illustrated by a case in December 2008, when ultra-nationalists attacked two Tajik migrant workers. One escaped wounded, but the body of the other was later found beheaded. The attackers claimed responsibility by sending out pictures of his severed head.³

The State has taken some action against the perpetrators of these racist incidents: 105 people were convicted for violent hate crimes and 55 for producing hate propaganda.⁴ The penalties imposed by the courts have occasionally been severe, as in the case of the ‘Ryno gang’, a neo-Nazi group charged with 20 murders and 12 attempted murders on members of ethnic

minorities in Moscow. The leaders of the group were both minors when they committed the murders and were sentenced to the maximum 10 years’ imprisonment, while other members received sentences ranging from six to 20 years.⁵ However, other cases saw a far more lenient and ineffectual approach: 29 people convicted for hate crimes only received suspended sentences.⁶

The Russian government has adopted some measures to fight the increase in racist attacks, particularly its new ‘anti-extremism’ laws. This legislation has certainly helped fight racism and hate crimes, particularly in outlawing and banning racist groups. However, its results have not been wholly positive; it does not speak of ‘racism’ or ‘xenophobia’, but of ‘extremism’ in general and it has been arbitrarily enforced, with some extremist groups being proscribed while others maintain contacts with the Government itself. Russian NGOs have noted that the Government has not only used the laws in order to combat racist groups, but also to suppress political opponents and silence critics. This has only served to politicise the fight against racism and undermine it in the eyes of the public.⁷

Russian NGOs have concluded that racism by State authorities remains widespread, particular in respect of racially

selective arrests and identity checks by the police as well as criminal charges fabricated by prosecutors against members of ethnic minorities.⁸ The Government has itself launched campaigns against ethnic groups, particularly against Georgians in 2006, during which many had their visa or work permits cancelled and were deported from Russia.⁹ Such Government actions legitimise racial discrimination and help fuel hatred of ethnic minorities amongst the public. Politicians have exploited these sentiments - in September 2008 the European Commission against Racism and Intolerance (part of the Council of Europe) noted an increase in the use of racist and xenophobic rhetoric in Russian politics itself.¹⁰

Racism is certainly not a problem exclusive to Russia. But no country – least of all a signatory to numerous human rights conventions – should see 500 victims of racist violence a year and countless instances of discrimination. The Russian Government has taken some commendable political and legal measures to prevent racism and extremism. But they have been partly tainted by their use against political opposition as well. It can only be hoped that in the future, racism in Russia will be recognised for what it truly is: in the words of Commissioner Hammarberg, ‘a social ill’.

1 Hammarberg, T. & Kjaerum, M. 4 December 2008. *Joint Statement: Do not miss the opportunity to step up the global fight against racism and discrimination!* [Online]. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1382653>.

2 SOVA Centre. December 2008. *Preliminary Annual Result*. [Online]. Available at: <http://xeno.sova-center.ru/6BA2468/6BB41EE/C4055C6>.

3 SOVA Centre. 15 December 2008. *Savage Attack on Guest Workers from Tajikistan near Moscow*. [Online]. Available at: <http://xeno.sova-center.ru/6BA2468/>

6BB41EE/C2E428F.

4 Supra 2.

5 SOVA Centre. 15 December 2008. *A Neo-Nazi Group Convicted in Moscow*. [Online]. Available at: <http://xeno.sova-center.ru/6BA2468/6BB41EE/C2E45E5>.

6 Supra 2.

7 Russian NGOs. 12 August 2008. *Alternative Report on Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial*

Discrimination. paras. 45-50. [Online]. Available at: <http://xeno.sova-center.ru/6BA2468/6BB4254/B8954EB>.

8 Ibid. paras. 69-81.

9 Ibid. paras. 82-101.

10 European Commission against Racism and Intolerance. *Round Table in the Russian Federation: Briefing Paper*. [Online]. Available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/31-Round_Table_Russia_2008/RT_Russia_briefing_en.asp.

Remedies for human rights violations in Chechnya: The approach of the European Court in context

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When the armed conflict¹ in Chechnya, officially called a 'counter-terrorist operation', commenced in 1999, extrajudicial executions, indiscriminate bombardment, torture and disappearances were committed by Russian forces on a large scale. The first judgments of the ECtHR, handed down in February 2005² addressing those atrocities, have been followed, at the time of writing, by more than 70 further judgments. In all of the cases, Russia was found in violation of ECHR rights and required to pay compensation to the applicants. However, it is important to analyse this significant body of case-law to ascertain how effective and adequate the ECtHR's response has been. It was not surprising that the ECtHR was the only jurisdiction (Russian prosecutors and courts largely being neither capable of, nor willing to, prosecute those responsible of human rights abuses) able to hear Chechen cases. But, it is submitted that the remedies provided by the ECtHR were not always sufficient to make good the violations suffered by the applicants. This is particularly apparent, in respect of the establishment of facts, just satisfaction awards and execution of judgments, if compared to the case-law of the Inter-American Court of Human Rights (IACHR) on similar issues. This article aims to analyse and assess the Strasbourg approach and to propose some remaining challenges, especially in the light of the recent and numerous applications to the ECtHR from South Ossetia.

As regards the establishment of facts, it is noted that the ECtHR has never conducted a fact-finding mission in a Chechen case. Only two public hearings were held in Strasbourg. All other cases have been decided on paper. The ECtHR's burden of proof: 'beyond rea-

sonable doubt' has not been applied consistently in all cases. For instance, in *Tangiyeva*³ (extra-judicial execution) and *Mezhidov*⁴ (aerial bombardment) the ECtHR held that the evidence (witness testimonies and expert reports) submitted by the applicants constituted a *prima facie* case to which the Government had failed to reply, and found violations of Art. 2 (right to life). However, in *Albekov*⁵ the ECtHR, faced with a case about landmines, refrained from ruling on the question as to which party to the conflict had planted them, even though the applicants alleged, referring to specific evidence, that the Russian military was in possession of a map of the minefield. One of the factors which prevented a clear decision in *Albekov* – though disregarded in all other cases – was that the domestic investigation had not been completed. Given that the establishment of facts is in itself a means of providing redress to victims in post-conflict situations, it is of concern that the ECtHR does not always meet this challenge head-on.

In all the Chechen cases, the ECtHR's awards of just satisfaction under Art. 41 of the ECHR were limited to damages and costs. Since *Kukayev*⁶ the ECtHR has expressly refused to oblige the Government to conduct new investigations in conformity with ECHR requirements. However, the application of this case-law led to dissenting opinions from Judge Spielmann in both *Umayeva*⁷ and *Medova*.⁸ He argued that, on the facts of those cases, fresh investigations were possible and did not contradict the respondent State's freedom to choose the means by which it would comply with the ECtHR's judgment. However, it is yet to be seen whether this is the beginning of a reconsideration of the *Kukayev* approach or just a stand alone dissent. In *Bersunkayeva*,⁹ for example, the ECtHR dismissed the applicant's claims, which were based on well-established IACHR

case-law, to oblige the respondent Government to conduct a fresh investigation, a search for the body of the disappeared person and to apologise publicly to his family.

The IACHR, relying on the often-quoted Permanent Court of International Justice (PCIJ) judgment in the *Chorzow Factory Case*,¹⁰ on numerous occasions ordered fresh investigations and prosecutions in cases of violations of the right to life and included those orders in the operative parts of judgments.¹¹ It further obliged the respondent states to apologise publicly, via national and regional media, to the victims¹² and to hold public acts of recognition of State responsibility for human rights violations,¹³ to search for the bodies of disappeared persons and, eventually, to return them to the relatives of the disappeared for burial.¹⁴ These measures do not exhaust the IACHR's non-monetary reparation awards, which are inventive and far-reaching.

As a result of ECtHR just satisfaction awards being limited to payments of damages, the measures aimed at preventing new similar ECHR violations are at the discretion of the respondent Government, which implements these under the control of the Committee of Ministers of the Council of Europe. The process is political and diplomatic rather than jurisdictional and adversarial. For the moment, more than three years after the first Chechen judgments have become final, not a single Russian military officer has been prosecuted for crimes which constituted violations of the ECHR in the cases decided in Strasbourg. The ECtHR itself has only limited power to review compliance with its judgments. The only means is to rule on new applications in cases of continuing violations. Such applications have been brought to the Court, but no judgment has been given so far.

It is suggested that the limited ef-

fectiveness of the ECtHR in providing redress in post-conflict situations, especially if compared to the IACHR, is linked not only to its nature as a subsidiary jurisdiction, but also to its refusal to adopt an outreach strategy that would include complex measures ranging from disseminating information about judg-

ments and publicising procedures to diversifying just satisfaction awards (such a strategy may soon be needed for South Ossetia). Another explanation for the different approaches of the Strasbourg and San-Jose Courts may be that the latter is more conscious of the fact that many of the States Parties to the Inter-

American Convention have recently been or are in transition from autocratic rule to democracy and, thus, require significant guidance in dealing with grave human rights abuses. The former is yet to adapt its case-law to the situations of an armed conflict.

1 The ECtHR expressly used this term for the first time in *Akhmadov & Others v Russia* (No. 21586/02) 14/11/08, para. 97.

2 *Khashiyev & Akayeva v Russia* (Nos. 57942/00 & 57945/00), 24/2/05; *Isayeva, Yusupova & Bazayeva v Russia* (Nos. 57947/00, 57948/00 & 57949/00), 24/2/05; *Isayeva v Russia* (No. 57950/00), 24/2/05.

3 *Tangiyeva v Russia* (No. 57935/00) 29/11/07.

4 *Mezhidov v Russia* (No. 67326/01) 25/9/08.

5 *Albekov & Others v Russia* (No. 68216/01) 9/10/08.

6 *Kukayev v Russia* (No. 29316/02) 15/11/07.

7 *Umayeva v Russia* (No. 1200/03) 4/12/08.

8 *Medova v Russia* (No. 25385/04) 15/1/09.

9 *Bersunkayeva v Russia* (No. 27233/03) 4/12/08.

10 PCIJ, Merits, 13 September 1928, Series A No. 17, p. 47.

11 *El Amparo v Venezuela*, judgment (reparations) of 14 September 1996, Series C No. 28, § 61 and item 4 of the operative provisions; *Garrido & Baigorria v Argentina*, judgment (reparations) of 27 August 1998, Series C No. 39, §§ 68-74 and item 4 of the operative provisions; *Castillo Paez v Peru*, judgment (reparations) of 27 November 1998, Series C No. 43, item 2 of the operative provisions; *Barrios-Altos v Peru*, judgment

(merits) of 14 March 2001, Series C No. 75, item 5 of the operative provisions.

12 *Cantoral Benavides v Peru*, judgment (reparations) of 3 December 2001, Series C No. 88, § 77 and item 7 of the operative provisions.

13 *Bamaca Velasques v Guatemala*, judgment (reparations) of 22 February 2002, Series C No. 91, § 83.

14 *Caballero Delgado & Santana v Peru*, judgment (reparations) of 29 January 1997, Series C No. 31, item 4 of the operative provisions; *Paniagua Morales v Guatemala (the "Panel Blanca" case)*, judgment (reparations) of 25 May 2001, Series C No. 76, item 3 of the operative provisions.

Analysis of European Court judgments on Chechnya

A recent article by Prof. Philip Leach, EHRAC Director, analyses the judgments of the ECtHR concerning Chechnya.¹ The ECtHR delivered 37 judgments from February 2005 to July 2008. They reflect different aspects of the conflict: bombing by Russian forces, targeted abductions and 'mopping up' operations detaining large numbers of civilians. The article examines the cases and draws conclusions about the ECtHR's approach to the Chechen conflict.

All but three of the judgments concerned the right to life (Art. 2), which was found to have been breached in each case; it is notable that the ECtHR rejected the Russian Government's denials of responsibility or unsupported theories about victims' disappearances. In 33 of the 34 Art. 2 cases, the ECtHR was able to find the State directly responsible for the killing or 'disappearance' (a substantive violation of Art. 2) as well as a separate failure of the duty to investigate under Art. 2 (a procedural violation). The State breached the prohibition of torture and inhuman treatment (Art. 3) in 26 of the cases, including two cases of actual torture. The right to liberty (Art. 5) was

breached in 24 cases, with unrecorded and unacknowledged detention by State authorities. Other cases also found breaches of the right to an effective remedy (Art. 13).

The ECtHR consistently dismissed the Government's objection that the applicants had not exhausted domestic remedies. In all cases but one the ECtHR found that the State's investigations into the deaths were ineffective. In the disappearance cases it was noted that the authorities had consistently refused to provide adequate information to the victims' families, thereby preventing them from seeking redress. The few civil cases that were brought were also fruitless. When considering admissibility, the ECtHR made it clear that it took account of the reality in Chechnya in making its assessment.

A theme throughout the cases is the Government's failure to disclose documents to the ECtHR, often claiming that they contained state or military secrets. This severely hinders the applicants in proving their case and can prejudice the ECtHR's ability to adjudicate on the case. In serious instances the ECtHR drew negative inferences from

the Government's non-disclosure.

In total, between February 2005 and July 2008 the ECtHR awarded €2.5m damages against the Russian Government in the Chechen cases. The implementation of these judgments has often been poor and the supervision process carried out by the Committee of Ministers has been slow and lacked transparency. Despite the applicants' arguments, the ECtHR has not ordered the Government to carry out effective investigations as an aspect of redress for the applicants. In response to some early cases, the Government opened their own investigations but most provided no information and none led to a prosecution. Nonetheless, the article concludes that the ECtHR's Chechen judgments are significant in providing some justice to the victims and in bringing a degree of accountability and international attention to the region.

1 Leach, P., 2008. The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights. *European Human Rights Law Review*. Thomson Reuters, Issue 6 (2008) Available online at: http://www.londonmet.ac.uk/londonmet/library/m12314_3.pdf.

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About EHRAC

The European Human Rights Advocacy Centre (EHRAC) was established in 2003 at London Metropolitan University. Its primary objective is to assist lawyers, individuals and non-governmental organisations (NGOs) to take cases to the European Court of Human Rights, whilst working to transfer skills and build the capacity of the local human rights community, and raise awareness of the human rights violations in these countries. Launched initially to focus on Russia, EHRAC has broadened its geographical remit to Georgia and also assists in individual cases from other former Soviet Union countries.

EHRAC is currently working on around 250 cases involving more than 800 primary victims and their immediate family members. These cases concern such issues as extrajudicial execution, ethnic discrimination, disappearances, environmental pollution and criminal justice amongst others. In addition to the formal partnerships below, EHRAC works with the Bar Human Rights Committee of England and Wales and the International Human Rights Committee of the Law Society of England and Wales and co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: www.londonmet.ac.uk/ehrac.

Internship Opportunities

Internship opportunities, legal and general, are available at EHRAC's London and Moscow offices. Depending on individual qualifications and skills, tasks may include assisting with the casework, preparing case summaries, collating and preparing training materials, conducting research, fundraising, writing awareness-raising material, press work and basic administrative duties. EHRAC is, regrettably, unable to afford paid internships, but offers the opportunity to gain valuable experience in human rights and NGO work. To apply, or for more information, please contact us by email.

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EHRAC-Memorial project

EHRAC has been working in partnership with Memorial since 2003. Memorial is one of Russia's oldest and most respected human rights organizations. The EHRAC-Memorial project is implemented in three main areas: human rights litigation and advocacy; human rights training; and raising awareness and dissemination of information.

EHRAC-GYLA project

In early 2006 EHRAC formalised a partnership with the highly respected NGO, the Georgian Young Lawyers' Association (GYLA). This joint project supports litigation at the European Court of Human Rights and conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme in London and Strasbourg.

EHRAC-Article 42 project

In 2008 EHRAC formalised its cooperation with the Georgian NGO, Article 42 of the Constitution. EHRAC has been providing advice to Article 42 on European Court cases since 2006. Lawyers from Article 42 have also attended training seminars conducted by EHRAC in Georgia and participated in the EHRAC Legal Skills Development Programme.

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