

EHRAC

Bulletin



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

How gays and lesbians play a key role in the campaign for freedom of assembly in Russia

Nikolai Alekseev, Head, LGBT Human Rights Project, GayRussia.Ru; Moscow Pride, Chief Organiser

2009 marks the 40th anniversary of the Stonewall riot when the gay community organised a spontaneous demonstration against a police raid in New York. This is often referred to as the start of the gay rights movement when homosexuals started to protest against police persecution.

In the 1970s, gay activists across Europe and the US started to march in the streets for gay rights. The first ever gay pride marches celebrating the

anniversary of the Stonewall riot took place in Los Angeles and New York on 28 June 1970. On 1 July 1972, the first gay pride march in Europe took place in London. Gays were allowed to march in the streets demanding equal rights, while in other countries homosexual acts were still illegal.

Europe has made much progress in the last 30 years. Several EU countries have given homosexuals complete equality by granting marriage and adoption rights. A second group of countries have granted partial rights, creating, for example, civil same sex partnerships. A

final group of countries, primarily the former Soviet bloc, have only decriminalised homosexuality. Russia's decriminalisation of male same sex relations in 1993 is often perceived to have been an obligatory step for Council of Europe membership.

However, in the countries of the former Soviet Union, the transition to a market economy, coupled with a difficult financial crisis, made any fight for gay rights seem frivolous in the eyes of a population that was fighting to discover the wonders of consumerism or some-

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Editorial

Forty years on from the Stonewall riots in New York and only ten years after homosexuality was removed from the list of mental disorders in the Russian Federation, Nikolai Alekseev (Head of LGBT Human Rights Project, GayRussia.Ru and Moscow Pride Chief Organiser) explains some of the challenges that Russia's gay community still faces today and particularly the difficulties and discrimination surrounding freedom of assembly. Also in this edition, Bakanai Guseynova (EHRAC-Memorial lawyer) writes candidly about the continued problem of forced disappearances in Dagestan and the attempts being made to litigate before the ECtHR as a means of redress for the flawed or non-existent investigations which currently prevail in the region. On a similar theme and following the recommendation of the UN Human Rights Council that the Russian Federation accede to the Optional Protocol of the Convention

against Torture, Tatiana Chernikova (EHRAC-Memorial lawyer) discusses some of the legal and practical difficulties which have arisen in litigating on behalf of some of the 'Nalchik detainees' who allege that they were tortured whilst in custody in Kabardino-Balkaria. Elsewhere, Grigor Avetisyan (EHRAC-Memorial lawyer) discusses the challenging question of monitoring effective disclosure by the Russian Federation in cases before the ECtHR. From Georgia, Ketevan Abashidze (EHRAC-GYLA lawyer) reports on the regulation of the interception of telephone communications in the light of recent ECtHR jurisprudence, and continuing with our exploration of the legal impact of the 2008 South Ossetian conflict, Furkat Tishaev (EHRAC-Memorial lawyer) discusses the issues raised by Georgia's application against Russia at the International Court of Justice.

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How gays and lesbians play a key role in the campaign for freedom of assembly in Russia

times even just for survival.

In July 2005, I announced that the LGBT community would be holding, in May 2006, the first ever march in Russia demanding equal rights for sexual minorities. In December 2008 the Mayor of Moscow told the media that the only limitation he would impose on homosexuals was on their right to hold street protests. His refusal to respect Art. 31 of the Constitution, which grants freedom of assembly to all citizens, was backed by a violent anti-gay rhetoric from religious groups and numerous politicians.

Since 2006, 185 applications to hold street actions on issues concerning homosexuality have been made in Moscow, Tambov and Ryazan. The applications were systematically turned down on various grounds, such as the authorities' inability to guarantee the participants' safety or their concern for the rights of other citizens. The Russian courts held all the decisions to ban gay street actions lawful.

When other human rights or political groups make a request to hold a public action the authorities often decline the request for the proposed location, but suggest a different location that would be permitted. This has not been the case for the proposed gay rights actions. The bans have always been challenged in the local and appeal courts. The judges have always refused to take into account or have disregarded the ECHR precedent in *Bączkowski & Others v Poland* (No. 1543/06) 3/5/07 in which the ECtHR held violations of Arts. 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination) ECHR. The first ban of Moscow Pride was specifically taken up to the Presidium of the Russian Supreme Court but without success.

On 17 September 2009, the combined case about the banning of Moscow

Pride 2006, 2007 and 2008 (*Alekseyev v Russia* (Nos. 4916/07, 25924/08 and 14599/09)) was communicated to the Russian Government, which has until 20 January 2010 to respond to the questions posed by the ECtHR. This case represents the banning of 163 public events and alleges violations of Arts. 11, 13 and 14. The ECtHR will consider the admissibility and merits of this case simultaneously and has emphasised homophobic statements made by Moscow officials in the Statement of Facts. Three other ECtHR cases concerning the banning of LGBT public events in Tambov and Ryazan and one case in which a request was made to President Medvedev to hold an event at a location that falls under his jurisdiction are pending communication. A case about hate speech on the part of the Governor of Tambov and another freedom of expression case are also pending admissibility.

Multiple ECHR complaints are deemed necessary as, in their justifications for banning the gay marches, the Russian authorities refer to different restrictions listed in Art. 11(2) ECHR. To avoid the situation whereby the Russian authorities could argue that one ECtHR judgment in respect of a particular restriction has no application to any of the other restrictions listed in Art. 11, it was decided to appeal all the different reasons for denials received at the ECtHR.

In 2009, a complaint against Russia was sent to the UN Human Rights Committee concerning the banning of a picket in front of the Iranian Embassy in July 2008. The action aimed to denounce the situation of gays and lesbians in the country. The complaint states that the Russian authorities breached Art. 21 of the International Covenant on Civil and Political Rights, which guarantees the right to freedom of peaceful assembly to everyone. In its answer to the Committee, Russia argued that the Covenant allows a country to ban an event on security grounds. A decision is expected in 2010.

The campaign for freedom of assembly launched by gay activists goes further than the right to hold a gay pride march, which some still consider frivolous in Russia. Russian officials' and Russian justice's systematic refusal to recognise Russian homosexuals' right to freedom of assembly has become a symptomatic and symbolic breach of human rights in the country. The issue is no longer limited to the rights of sexual minorities, as tomorrow a similar policy may be used against other social groups or minorities.

It is hoped that this campaign will set a precedent against the Russian authorities which could lead to significant positive changes to the law on public meetings and demonstrations. Today, one has to apply to hold a public event 10 to 15 days before it is scheduled to take place. If the request is refused, there is not time to appeal the decision in court before the planned event.

Where no effective remedies exist the ECtHR may find that Russian law violates Art. 13 ECHR. Even if a court hearing does take place before the planned date of the event, as was the case with Moscow Pride 2006, the court decision would only come into force 10 days later, which would definitely fall after the planned date of the event.

In 1993 Russia allowed male homosexuals to engage in sexual relations. In 1999 Russia removed homosexuality from the list of mental disorders, following international standards. In 2008 the Government removed gays from the list of banned blood donors allowing slightly better, albeit symbolic, integration into society. Yet in 2009 the country has still not given sexual minorities the essential right to freedom of assembly, which is perhaps the most emblematic.

Until this right is respected either through the enforcement of an ECtHR judgment or after a shift in the authorities' policy towards the LGBT community, we will keep fighting for equal rights in Russia.

A chronicle of unresolved crimes

Bakanai Guseynova, EHRAC-Memorial lawyer, Makhachkala

There are no statistics on unresolved instances of abduction and disappearance for the Republic of Dagestan.¹ Nor do the relatives of abducted persons have any hope that they can obtain information about their loved ones. Investigations into such cases are conducted with little professionalism, if at all, as the names of law enforcement and security officials figure in these crimes, and it is very hard for relatives to get criminal cases into abductions opened.

The adoption of the Law of the Republic of Dagestan on the Prohibition of Wahhabite and Other Extremist Activity on the Territory of the Republic of Dagestan on 22 September 1999 resulted in an increase in the number of abductions, as it legalised the fight against Wahhabites and gave the special services a cover for their activities in this regard. Consequently the number of complaints about the abduction of relatives by the law enforcement agencies rose. Initially the circumstances of the disappearances seemed innocuous to the law enforcement agencies: officers would approach someone and ask them to get into a car to go to an investigative commission so that they could be excluded from suspicion of involvement in a crime. However, that person would never return home.

Relatives would use their contacts to find out where their loved one had been taken and it would turn out that they had been transported to one of the law enforcement agencies. When asked why and where the person had been detained, the agencies would reply that the person had indeed been brought in, but then released again less than three hours later, hav-

ing been cleared of suspicion in the course of an interview.

In one such case a mother was told by the Dagestan Prosecutor's Office: "After identification procedures had been conducted your son was released from our Office. The Prosecutor's Office has no information on his subsequent whereabouts." However, there was no record of this in the log book. One of the Prosecutor's Office employees was a distant relative of the man in question and he informed the relatives that he had seen the 'disappeared' at the premises of the Prosecutor's Office. This is the last news his relatives have of him.

There has also been a rise in the number of complaints against the law enforcement agencies in connection with unlawful detention. Subsequently, the methods used for combating so-called Wahhabites have become more brutal. Now, people in masks violently shove someone into a car and take him away in an unknown direction, where he is beaten, tortured and forced to confess to crimes in which he has not usually been involved. If he is lucky, he is taken to an investigative committee and a criminal case is opened on the basis of the allegedly self-incriminating statements. Otherwise, the abducted person disappears.

Applying to the ECtHR as a means of legal protection is a new phenomenon for Dagestan. There are, as yet, no ECHR judgments in Dagestani cases - applications are either pending communication or an admissibility decision. One Dagestani ECtHR case is about the disappearance of Ramazan Umarov. It was submitted in late 2007 (*Umarov and Umarova v Russia* (No. 2546/08)).

According to the criminal file in this case, opened in May 2007 by the

Sovietski District Prosecutor's Office (ROVD) in Makhachkala, Dagestan, it had been found "that on 28 April 2007, at around 8am, R. Umarov was detained by law enforcement officials at flat 46, 41 Salavatov St., Makhachkala, together with M. Radzhabov and S. Sultanbekov, and taken to the offices of the Department for Organised Crime Control (UBOP) of the Dagestani Ministry of the Interior, following which he disappeared and his whereabouts are unknown."

The same day it was announced on television that a group of militants had been detained who were preparing to blow up the Sovietski ROVD and that a large quantity of ammunition had been found in their flat. One of these 'militants' was Ramazan. The two others were charged with unlawful possession of ammunition and weapons but were acquitted by the Sovietski District Court for lack of *corpus delicti* in their actions and were released. At the Court hearing it was established that two searches were conducted at the same flat and of the same car on the same day (although officially the criminal case materials only list one search). During the first search nothing was discovered, but the second one 'revealed' a whole arsenal of ammunition and a plan of the Sovietski ROVD.

After 10 months the investigator responsible for the criminal case into Ramazan's disappearance is still not able to identify the persons who were present during the special operation or the persons who delivered Ramazan to the UBOP. He cannot even establish who conducted the special operation and on what grounds.

When Ramazan's father visits the investigator, the latter makes no secret of his helplessness and asks the

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father to make a written request for the case to be transferred to another investigator. Ramazan's father does this, but the request is never granted. The father presumes that the case is not given to another more experienced investigator because it suits the authorities that the criminal case is not being investigated.

A few days after Ramazan disappeared his father's car was also taken. A criminal case into the theft of the car found a person who had supposedly purchased the car from Ramazan and who was driving the car with a false licence, supposedly given to him by Ramazan.

According to the guard at the car park where the car had been left by Ramazan, on 8 May 2007, the car was opened and examined by the police. That evening the car disappeared. According to Ramazan's sister: "On 9 May 2007, at around 9.10pm, a woman my father did not know called his mobile phone and told him that Ramazan was with them, and that we should go to see her. I contin-

ued talking with the unknown woman on the phone. When I began to probe as to who they were and told her that I did not trust her, the woman gave the phone to my brother, who spoke in a very low voice and in his native Avar language, telling my father that he was in a bad way, that he did not know where he was nor what was happening to him. My father recognised his son's voice. The unknown woman explained that Ramazan was in the medical section of some penal colony, and that he had been taken there after he was found unconscious in woods in the Shali District. The woman suggested that I and my father should go to Gudermes, and she promised to take us to Ramazan. Later, at midnight, an unknown man telephoned my father and suggested he could meet him in the morning in Gudermes to talk about Ramazan. My father said he could not go, and the caller hung up immediately."

During the morning of 10 May 2007, the father and sister were contacted three times by these people. Meetings in Gudermes, Khasavyurt and finally Shali were suggested. In

the end no agreement was reached. The father went to Gudermes to search all the medical centres and units, but without success.

On 13 May 2007, On 13 May 2007, Ramazan rang his father again and asked him to give the car to the people who were going to ring him. These people asked the father to go to a designated location in Kizilyurt. There he met M.B. Shiryev and U.A. Umarov; they took 20,000 roubles from him, and said that he should look for Zh. Khalilov, a police officer in Gudermes, who would help return Ramazan to his father. The father could not find Zh. Khalilov.

The investigative agencies have the phone numbers from which the unidentified persons rang and information about the individuals with whom the father talked about his son, but they are taking no steps to clarify these facts; they simply do not want to conduct any kind of investigation.

¹ The Republic of Dagestan is a federal subject of the Russian Federation located in the North Caucasus region to the south and east of Chechnya.

Failure to disclose and Rule 33 requests in North Caucasus ECHR cases

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Lawyers acting in ECtHR cases against the Russian Government have consistently been faced with the problem of how to counter incomplete or even a total absence of disclosure of relevant documentation on the part of the Respondent State. This problem is particularly noticeable in cases involving a domestic criminal investigation (such as disappearance cases or deaths in custody) where sight

of documentation emanating from the investigating authorities could be crucial in determining the fate of a particular individual and/or whether or not an effective investigation has been conducted by the Respondent State.

In defending its actions the Russian Government has relied on Art. 161 of the Russian Code of Criminal Procedure (CCP), para. 3 of which states that: "Information from a preliminary investigation may only be made public with the permission of the investigative and interrogating officers and only in that volume which they consider permissible, if such divulgence does not contradict

the interests of the preliminary investigation and does not constitute a violation of the rights and lawful interests of the participants in criminal proceedings. The divulgence of information concerning the private life of participants in criminal proceedings without their consent is not permissible."

The ECtHR has responded to this by stating that Art. 161 does not preclude the disclosure of documents from a pending investigation file, but rather sets out a procedure for, and limits to, such disclosure. The ECtHR has further stated that in relying solely on Art. 161 and failing to specify either the na-

ture of the documents withheld, or the grounds on which it is said they cannot be disclosed, the Government has violated Art. 38(1).¹

However, this approach has recently been undermined by a number of decisions in cases from the North Caucasus. In these cases the ECtHR has granted requests from the Russian Government pursuant to Rule 33(1) of the Rules of Court to restrict public access to documents requested by the ECtHR.

Rule 33(1) provides that “*all documents deposited with the Registry by the parties [...] shall be accessible to the public...*” However, Rule 33(2) provides for restrictions to this access “*in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice*”. This Rule is underpinned by Art. 40(2) ECHR which states that “*documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise*”.

In several pending cases, Rule 33 requests made by the Russian Government have been granted even though the Respondent State failed to explain how its request fell within the ambit of Rule 33(2). Of even greater concern is the fact that in granting these requests the Court itself also failed to explain how, in the absence of any evidence or submissions from the Respondent State, it was able to determine that one of the stated restrictions within Rule 33(2) had indeed been made out.

In the absence of any reasoned argument by either the Respondent Government or the ECtHR justifying the application of the Rule 33 procedure in these cases, the applicants are clearly placed at a significant disadvantage in seeking to address this worrying development. This is also true in cases where

the ECtHR has unilaterally granted certain Rule 33 applications by the Respondent State even before seeking representations from those acting on behalf of the applicants. Furthermore, representations submitted on behalf of the applicant following notification of the relevant decisions have subsequently been rejected without consideration. This approach would seem to significantly undermine the interpartes nature of proceedings before the ECtHR.

In one of these cases, the Government’s request merely stated that: “*the preliminary investigation is still pending and the disclosure of information contained in the case file might violate the interests of the participants of the criminal investigation*” without putting forward any evidence as to how the disclosure of information in the case file (concerning the investigation into the abduction, torture and murder of the applicant’s son by State agents) could fall within the ambit of any of the restrictions listed in Rule 33(2). Furthermore, when responding to the applicant’s argument that any investigation must make its findings public in order to be effective, the Russian Government simply referred in general terms to an “*investigative secret*”, which, in the particular circumstances, could not be equated with a valid claim under Rule 33(2).

It is possible that the rationale behind the ECtHR’s decisions is to encourage the Russian authorities to furnish additional material (albeit on a confidential basis) which will assist it in a proper examination of the cases in question. However, the question arises as to what extent, if at all, this tactic is justified. Even in cases where the Russian Government’s requests under Rule 33 have been successful, the problems of disclosure have not been solved and the Government has still provided only those documents which could be disclosed “*without bringing any harm to the interests protected by the law,*” mean-

ing that some of the documents which might be crucial to establishing the facts of the case were not disclosed to the ECtHR.

In both the abovementioned instances, the applicants’ representatives have been able to specify to the ECtHR documents which should have been enclosed with the case files in accordance with the ECtHR’s requests but which were not and which were arguably important for effective investigation by the ECtHR.

In conclusion, whilst in a number of similar cases the ECtHR has reiterated that Art. 161 CCP cannot be used to limit disclosure, at the same time it seems to be willing to accede to Government requests which, as it has been shown, fail to satisfy the Rule 33(2) test. Further, as has been demonstrated above, this approach has still not led to the full disclosure of documentation in cases regarding the alleged involvement of State agents in abduction, torture and murder.

In order to prevent any further undermining of the principles of open justice (particularly in cases of the most grave human rights abuses) it is suggested that practitioners carefully monitor any applications by respondent governments designed to limit the public character of documents submitted to the ECtHR. Furthermore, practitioners should resist any such applications or decisions under Rule 33 which are not substantiated by reasoned argument and/or evidence in accordance with the provisions of the Rule itself. Finally, practitioners may also wish to rely on the overarching principles of open and public justice which, it could be argued, should be applied as rigorously by the ECtHR to its own proceedings as to the proceedings it delivers judgment upon in domestic states.

¹ See among other authorities *Kukayev v Russia* (No. 29361/02), 15/11/07, para. 122 and *Mikheyev v Russia* (No. 77617/01), 26/1/06, para. 104.

Allegations of politically-motivated abuses of the criminal justice system in CoE member states

In June 2009, the Parliamentary Assembly of the Council of Europe published a report concerning allegations of politically-motivated abuse of the criminal justice systems in four member states: the UK, France, Germany and Russia.

Defining such abuses to include discrimination, public statements of senior representatives of the executive on the guilt of the accused, poorly specified or constantly changing charges, or lack of independence of the court or prosecution, it was found that adversarial criminal systems such as those used in the UK were best able to withstand interference.

Of the four countries examined, the Russian criminal justice system was found to suffer from the most severe political abuse. This is partly due to structural features remaining from the Communist period such as the pre-eminence of the prosecution, but is also compounded by unofficial practices such as 'telephone justice', whereby Kremlin officials instruct

judges how to decide a case.

Whilst the Yukos case is perhaps the most notorious example of alleged political interference, pressure on judges to convict in cases brought by the prosecutors' office and the intimidation of defence lawyers in Russia were also raised as being serious problems. The hostile takeover of HSBC/Hermitage and the slow investigation into the murder of journalist Anna Politkovskaya were further causes for concern.

There were, however, indications of positive developments in the Russian criminal justice system. President Medvedev's admission of the need to combat 'legal nihilism' in Russia is a hopeful start. In addition, a host of measures designed to safeguard the independence of the judiciary have already been enacted; the establishment of a federal council of judges and recent changes to align the criminal code with European standards are two prominent examples. Beyond the legal sphere, the roles of both par-

liament and the media as platforms of debate were highlighted as encouraging for the future.

Russia still has a long way to go to ensure that its criminal justice system is sufficiently robust to resist political interference. What is needed is 'climate change' in the Russian judiciary, alongside substantive changes such as greater transparency in criminal proceedings, effective protection for defence lawyers and fair evaluation of judges' performance. This would ensure that the spirit of reforms take root, not only for the sake of harmony in cooperation with its European neighbours, but also to ensure that Russia is not denied the chance to try suspected criminals in its own courts due to Western doubts of a fair trial.

The report is available at: http://assembly.coe.int/CommitteeDocs/2009/20090623_abuses-JUR_E.pdf.

The Georgia–Russia conflict: testing the International Court of Justice

Furkat Tishaev, Lawyer, EHRAC-Memorial

On 12 August 2008, the Republic of Georgia lodged an application with the International Court of Justice (the ICJ) against the Russian Federation in connection with the armed conflict which occurred in the South Caucasus in summer 2008. In its application Georgia complained of violations committed by the Russian Federation under the International Convention on the Elimination of All Forms of

Racial Discrimination (the CERD) in the context of Russian interventions in South Ossetia and Abkhazia from 1990 onwards, up to and including the August 2008 armed conflict. The application was made only four days after the commencement of hostilities between the two countries and was followed on 14 August 2008 with a request by Georgia for the order of provisional measures "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and

foreign mercenaries", the continuation of which Georgia alleged constituted an "extremely urgent threat of irreparable harm" to the rights protected by the CERD.

The use of the CERD in this context has some limitations. Aside from the racial discrimination issue, the conflict also and primarily raised serious issues under general international law: Was the use of force by Georgia against its *de jure* regions of South Ossetia and Abkhazia but *de facto* quasi-independent states legal and

legitimate under international law? Can the use of force by the Georgian army be regarded as an 'armed attack' within the meaning of Art. 51 of the UN Charter as was claimed by Russia? Does the right of self-defence extend to military action undertaken by one sovereign state in order to protect its 'nationals' staying on the territory of another sovereign state?¹ If it does, can the Russian military actions be accepted as proportionate and adequate? Was the Russian support of armed Ossetian groups legal in the light of the obligation under customary international law not to intervene in the affairs of another State?² And finally, how should two universal and at the same time mutually overlapping principles of international law – the principle of territorial integrity and the right of self-determination – be managed?

It would seem that the reliance upon the CERD before the ICJ limits the Court's consideration of the conflict to the human rights issues as outlined in Arts. 2 and 5 of the CERD: *inter alia*, the prohibition of any act of racial discrimination, the right of security of persons, the right of movement and residence and the protection of property. However, since neither Russia nor Georgia had accepted the Court's compulsory jurisdiction under the optional clause,³ it seems that in the instant case Art. 22 of CERD was the only means by which Georgia could grant to the ICJ the competence (at least *prima facie*) to deal with the dispute, thereby bringing the political and military conflict into the legal arena.⁴

In its application, Georgia alleged that during the conflict, local Ossetian separatist militia, together with foreign mercenaries who remained under the direction and control of the Russian authorities, had committed ethnic cleansing against Georgians,

including murder, forced displacement and widespread destruction of property. In response the Russian authorities argued a lack of jurisdiction of the Court and contended that, as the facts at issue related exclusively to the use of force, humanitarian law and territorial integrity, they therefore did not fall within the scope of CERD.⁵

Georgia's request to the ICJ for the Indication of Provisional Measures of Protection was granted by the Court on 15 October 2008, but not solely against the Russian Federation. The ICJ ordered both parties to refrain from any act of racial discrimination within South Ossetia and Abkhazia and the adjacent areas of Georgia. The Court also ordered that both parties ensure the security of persons, the right to freedom of movement and residence and the protection of the property of displaced persons and refugees.

The Court's Order on Provisional Measures was adopted by eight votes to seven. The seven judges who issued the joint dissenting opinion stated that the Russian military offensive in itself did not fall within the provisions of the CERD and thus, there was no 'dispute' with respect to the interpretation or application of the CERD. Arguably, this ambiguous situation considerably weakened the moral authority of the Court's Order despite its formally 'binding effect'. Moreover, the absence of a unanimous approach within the Court may jeopardise the subsequent judicial development of the case.

Regrettably, it is doubtful that the Court will see this case as an opportunity to look beyond the qualification of the parties' conduct under the legal provisions of the CERD in order to clarify the abovementioned wider issues of general international law raised by the South Ossetian

conflict. However, if the ICJ were to reaffirm its position on the scope of the right to self-determination and the supremacy of the principle of territorial integrity issues (at least within its *obiter dictum* of the judgment) it could help to facilitate the settlement not only of the Georgia–Russia conflict, but also other similar confrontations.

This case also demonstrates the growing importance of human rights within international law and provides the ICJ with an opportunity to directly examine the substance of those rights. In its recent Order, the Court has already interpreted Arts. 2 and 5 of CERD as having an extra-territorial effect to a state party when it acts beyond its territory.

Proceedings at the ICJ move slowly: the time-limits set by the Court for initial pleadings in this case required that the full Georgian Memorial be served by September 2009, with the Russian Federation's Counter-Memorial due in July 2010. A decision from the Court itself therefore is by no means imminent – it will however be awaited with interest.

1 Furthermore, it could be argued that the mass granting of Russian nationality to Ossetian residents is not valid in the light of international law due to the lack of its 'sincerité', or, genuineness (there has to be a complex bond of attachment between a national and a state - see in particular the ICJ's case *Nottebohm (Liechtenstein v Guatemala)*, judgment of 6 April 1955, p. 26).

2 The ICJ found a violation of the principle of non-intervention in internal affairs by a state which supports military and/or paramilitary activity in the territory of another state in its judgment in the case *The Military Activity in Nicaragua (Nicaragua v United States)*, judgment of 27 June 1986 (see in particular § 3 of the operative part of the judgment).

3 The optional clause provides that a state may recognise as compulsory the jurisdiction of the Court in all eventual legal disputes concerning any question of international law (see Art. 36-2 of the Statute of the ICJ).

4 This strategy was skilful as it also allowed Georgia to ask the Court to indicate provisional measures in order to, *inter alia*, stop the Russian military offensive.

5 See the Order of 15 October 2008: Request for the Indication of Provisional Measures in the case *Georgia v Russian Federation*, § 95. Available at: <http://www.icj-cij.org/docket/files/140/14801.pdf>.

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

Zolotukhin v Russia

(No. 14939/03), 10/02/09

(ECHR: Grand Chamber judgment)

Double jeopardy

Facts

On 4 January 2002, the applicant was taken to Voronezh-45 police station in order to establish how he had managed to take his girlfriend into a restricted military compound (Voronezh is a large city in southwest Russia). At the police station he was verbally abusive towards the personnel and was taken to the office of Major K. who drafted a report on this administrative offence. The applicant was then brought before a judge who sentenced him to three days' detention for committing minor disorderly acts under Art. 158 of the Code of Administrative Offences then in force.

On 23 January 2002, criminal proceedings were brought against the applicant on suspicion of his having committed, on 4 January 2002, a number of crimes at the police station, including 'disorderly acts' – a crime under Art. 213 § 2(b) of the Criminal Code. He was acquitted of this charge by a judgment of the Gribanovskiy District Court of 2 December 2002, which found that the prosecution failed to substantiate its case, but he was convicted on other counts. The judgment became final on appeal.

Before the ECtHR the applicant maintained that the two offences in the two sets of proceedings had the 'same essential elements' as required by the ECtHR's case-law (e.g. *Franz Fischer v Austria* (No. 37950/97), 29/5/01).

Judgment

In deciding the case the Grand Chamber reviewed the ECtHR's case-

law on what constitutes 'the same offence' (*idem*) and had regard to the definition of '*non bis in idem*' in other international and national instruments, including the ICCPR, EU law, the Inter-American Convention, the US Constitution, and judicial decisions applying these. It then adopted a new test of '*idem*' which focused "*on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings*" (para. 84).

The Grand Chamber found that the applicant was prosecuted in criminal proceedings for the same facts as in the first set of 'administrative' proceedings (which were found to be criminal in nature). It then considered whether the applicant's acquittal in the second set of proceedings remedied the violation or deprived the applicant of victim status (*bis*), and replied in the negative. A violation of Art. 4 of Protocol 7 was thus established.

Eminbeyli v Russia

(No. 42443/02), 26/02/09

(ECHR: Judgment)

Extradition

Facts

The applicant, a stateless person of Azeri origin, arrived in Russia in 1996. In August 2001 he was granted refugee status by UNHCR and the right to take up permanent residence in Sweden. On 10 September 2001, the Azerbaijani authorities requested his arrest in a faxed letter. On 13 September the Russian authorities were informed by UNHCR of the applicant's refugee status. Nonetheless, on 19 September the applicant was arrested

and detained. He claimed he had not been informed of the reasons for his arrest nor had he been given a certified copy of his arrest warrant. A lawyer retained on his behalf by UNHCR was not permitted to see him. On 1 October an application was made seeking the applicant's release. On 5 October a formal request for the applicant's extradition to Azerbaijan was eventually received but was dismissed on 22 October on the basis of the applicant's refugee status. An order was made for the applicant's immediate release, but was not executed until 25 October. The applicant moved to Sweden on 5 November 2001. In February 2002 the Dzerzhinskiy District Court ruled that the applicant's detention had been lawful. His subsequent appeal was dismissed. He complained of violations under Art. 5 (right to liberty).

Judgment

The ECtHR found that the applicant's detention was unlawful and arbitrary, in violation of Art. 5(1)(f). In particular, between 19 September 2001 and 25 October 2001 there was no decision – either by a Russian prosecutor or a judge – authorising the applicant's detention. In addition, Russian domestic legislation provides protection against the expulsion of refugees and the applicant's refugee status had been made available to the Russian authorities in advance of the applicant's arrest and consequently the arrest was fundamentally flawed from the outset. Finally, the delay between the dismissal of the extradition request on 22 October and the applicant's actual release on 25 October was unjustifiable.

In relation to Art. 5(2), it was held that the applicant knew that his arrest had been effected for the purpose of extradition to Azerbaijan and was simply "*dissatisfied*" that he had not

been provided with the factual basis for the charges against him in Azerbaijan and their legal characterisation. Consequently this part of his claim was manifestly ill-founded. However, the applicant's complaint that he had not been able to obtain effective judicial review of his detention, relying on Art. 5(4), was upheld on the basis that the proceedings did not comply with the requirement of speediness (lasting some five months from the lodging of the application for release to the final judgment).

Sukhov v Russia

(No. 32085/03), 18/06/09

(ECHR: Judgment)

Length of proceedings

Facts

On 21 July 1997, the applicant was arrested on suspicion of bribe-taking. The following day, criminal proceedings were authorised against him for a charge of aggravated bribery and his detention was authorised. On 22 January 1998, the applicant was released on a written undertaking not to leave the town of Sertolovo, Leningrad Region.

Between 22 January 1998 and 10 February 2005, proceedings were stayed and resumed, then adjourned on several occasions. Various reasons for the delay were attributed to both parties. On 10 February 2005, the applicant was found guilty of bribe-taking and sentenced to two years' imprisonment. He was however "relieved from the penalty owing to the expiration of the limitation period". The Supreme Court of the Russian Federation upheld the judgment on 21 July 2005.

Judgment

The ECtHR held that there had been a violation of Art. 6(1) (right to a fair trial) ECHR. The ECtHR considered that in the instant case the length of the criminal proceedings of approximately seven years and three months failed to meet the "reasonable time" re-

quirement. Although the ECHR did not enter into force in Russia until 5 May 1998, the ECtHR held that in assessing the reasonableness of the time that elapsed after that date, account had to be taken of the state of proceedings at the time the ECHR entered into force.

The ECtHR reiterated the criteria to be considered in assessing the reasonableness of the length of proceedings as including the complexity of the case and the conduct of both the applicant and relevant authorities. This case was not a complex one. In addition, although the failure of the applicant or his lawyer to attend certain hearings added ten weeks' delay to the proceedings, this was negligible in the context of the overall length of proceedings. There were substantial periods of inactivity attributable to the authorities for which no satisfactory explanation had been provided, including: an aggregate delay of approximately two-and-a-half years due to the "poor quality of the investigation"; arbitrary decisions by the investigating authorities to stay the proceedings; the failure of prosecution witnesses to attend at least five hearings; and a change in the composition of the bench more than three years after the trial had commenced, resulting in the trial having to restart.

Khalitova v Russia

(No. 39166/04), 05/03/09

(ECHR: Judgment)

Right to life

On 11 September 2000, the applicant's husband was killed when a number of armed men in two armoured personnel carriers opened fire across agricultural fields near the village of Goyskoye, Chechnya. Eye witnesses identified the armed men as Russian servicemen. The applicant applied to the ECtHR under Arts. 2 (right to life) and 13 (effective remedy). The ECtHR found a violation of Art. 2 regarding

the death of the applicant's husband based upon the Government's admissions regarding the circumstances of the incident as described by eye witnesses and the absence of any other explanation. This led the ECtHR to conclude that the State was responsible for the death. There were also violations of Arts. 2 and 13 in conjunction with one another for the failure to investigate the circumstances of the applicant's husband's death adequately and effectively. The applicant was awarded 35,000 euros in non-pecuniary damages.

Tsarkov v Russia

(No. 16854/03), 16/07/09

(ECHR: Judgment)

Right to liberty and security

The applicant complained of violations of Art. 5 ECHR (right to liberty and security), as he was held in pre-trial detention for over four years. The ECtHR held that Russia had violated Art. 5(1) by failing to fulfil the ECtHR's 'quality of law' standard by having not fixed a time limit for the applicant's detention. It also found a violation of Art. 5(3) as the applicant's pre-trial detention had exceeded a 'reasonable time' and the authorities' grounds for extending this detention were not 'sufficient' to justify such a long period.

Alaudinova v Russia

(No. 32297/05), 23/04/09

Magomadova v Russia

(No. 2393/05), 18/07/09

Mutsayeva v Russia

(No. 24297/05), 23/07/09

(ECHR: Judgment)

Disappearance

In *Alaudinova* and *Magomadova* the applicants' sons were taken from their homes in Urus-Martan, Chechnya by Russian servicemen on 8 November 2001 and 12 April 2002 respectively. In *Mutsayeva*, the applicants' son was detained in the centre of Urus-Martan

by Russian servicemen on 27 August 2001. Witnesses also saw him being beaten by soldiers prior to his detention. In all three cases the applicants were unable to establish the whereabouts or fate of their sons despite searching for them and applying to various official bodies. The ECtHR ruled that the victims must be “presumed dead” following their detention by Russian servicemen and that their deaths were attributable to the State, violating Art. 2 (right to life) ECHR. Russia’s failure to carry out an effective investigation into any of these disappearances constituted a further violation of Art. 2 and also amounted to a failure to provide the applicants with an effective domestic remedy in violation of Art. 13. The ECtHR held that the applicants’ suffering stemming from the disappearance of their sons constituted inhuman treatment and violated Art. 3. The fact that the sons were held in unacknowledged detention amounted to a violation of Art. 5 (right to liberty). 35,000 euros non-pecuniary damages were awarded in each case.

Other ECHR cases

Georgia v Russia (No. 1)
(No. 13255/07), 03/07/09
(ECHR: Admissibility)

Collective expulsion of aliens

On 26 March 2007, the Georgian authorities lodged an application with the ECtHR against the Russian Federation under Art. 33 (Inter-State cases) ECHR. The Georgian Government alleged specific and continuing breaches of the ECHR following the alleged harassment of the Georgian immigrant population in Russia after the arrest in Tbilisi on 27 September 2006, of four Russian service personnel on suspicion of espionage against Georgia. The application was lodged under the following provisions: Art. 3 (prohibition of inhuman and degrading treatment), Art. 5 (right to liberty), Art. 8 (right to respect for private and family life), Art.

13 (right to an effective remedy), Art. 14 (prohibition of discrimination), Art. 18 (limitation on the use of restrictions on rights); Arts. 1 (protection of property) and 2 (right to education) of Protocol 1; Art. 4 (prohibition of collective expulsion of aliens) of Protocol 4; and Art. 1 (procedural safeguards relating to expulsion of aliens) of Protocol 7. On 3 July 2009, the ECtHR declared the application admissible.

Ghavitadze v Georgia; *Poghosyan v Georgia*

(No. 23204/07), 03/03/09;
(No. 9870/07), 24/02/09
(ECHR: Judgment)

Prison conditions and medical care

Facts

These cases concerned two prisoners serving sentences in Georgian prisons who suffer from hepatitis C and both the lack of adequate and effective medical attention whilst detained and the living conditions in prison, which facilitated the transmission of diseases. Ghavitadze was sentenced to detention in Prison No. 5 in Tbilisi. He contracted numerous serious diseases in prison, specifically hepatitis C and tuberculosis, and was only hospitalised when his symptoms had reached their peak. Poghosyan was sent to Prison No. 6 in Rustavi. After a cystectomy, his lawyer discovered that he had contracted hepatitis C and subsequently made several demands to the Governor of the prison asking for him to be treated by a haematologist in a penitentiary hospital, but to no avail.

Judgment

In *Ghavitadze*, the ECtHR unanimously found a violation of Art. 3 (inhuman and degrading treatment) concerning the delay in hospitalising the applicant, the insufficient medical care and the critical living conditions in prison. In addition it stated that the applicant should be placed in an institution where he could receive adequate

medical attention.

In *Poghosyan*, the ECtHR held that there had been no violation of Art. 3 regarding his post-operative care within prison as it had been administered diligently. Nevertheless, the absence of medical treatment after contracting hepatitis C did constitute a violation of the same article. In this regard, the ECtHR noted that mere examination and diagnosis was not sufficient to safeguard a prisoner’s health and that it was vital to administer adequate treatment under constant medical surveillance. It was unacceptable that the applicant’s repeated requests for treatment had been left unanswered or ignored.

Comment

Noting that almost forty similar applications were pending before it, the ECtHR found there to be a systemic problem concerning the administration of adequate medical care to prisoners affected by hepatitis C. In accordance with Art. 46 (binding force and execution of judgments), the ECtHR invited the Government of Georgia to take urgent legislative and administrative steps to address the problem, including screening arrangements as suggested by CPT and WHO reports to ensure the application of more appropriate and effective treatment.

Kudeshkina v Russia

(No. 29492/05), 26/02/09
(ECHR: Judgment)

Freedom of expression

Facts

The applicant held judicial office at the Moscow City Court (MCC) and was appointed to sit on a high-profile case concerning abuse of powers by a police investigator, Mr Zaytsev. The public prosecutor made a number of challenges regarding the conduct of proceedings, including a challenge on the grounds of bias against both the applicant as judge and the lay assessors sitting in the case. The applicant

was summoned to the office of the MCC President, and questioned about her conduct of the trial, then subsequently removed from the case. Some months later the applicant submitted her candidature in the general elections to the State Duma of the Russian Federation and was granted a suspension of her judicial functions pending the elections. During this election campaign she made statements to the media criticising the Russian judicial system in general and the conduct of the *Zaytsev* case in particular. She also lodged a complaint against the President of the MCC for exerting unlawful pressure on her during the *Zaytsev* case. The applicant was not elected and was reinstated in her judicial functions however she was made the subject of disciplinary investigation in respect of comments made by her during the election campaign. She was subsequently dismissed from office by the Judiciary Qualification Board of Moscow on the basis *inter alia* that she had made false statements about the judiciary, which would undermine public confidence in the judiciary. The applicant claimed this treatment breached her Art. 10 (freedom of expression) rights.

Judgment

The ECtHR held by four votes to three that there had been a violation of Art. 10 ECHR. It found that, in spite of the findings made at domestic level, the applicant was able to put forward a factual background for her criticisms of the judicial system. The ECtHR stated that the functioning of the justice system is a matter of public interest. It reiterated that the judiciary holds a special role in society and must enjoy the confidence of the public in order to be successful. However, it further held that the applicant's criticisms raised a very important matter of public interest which should be open to free debate in a democratic society and further noted the particular significance attributed to the unhindered exercise of free-

dom of speech by candidates of general elections. The ECtHR held that the applicant's dismissal from the judiciary was a disproportionately severe penalty which was capable of having a "*chilling effect*" on judges wishing to participate in public debate on the effectiveness of judicial institutions. Ms. Kudeshkina was awarded 10,000 euros in non-pecuniary damages.

Ramishvili & Kokhreidze v Georgia
(No. 1704/06), 27/01/09
(ECHR: Judgment)
Prison conditions, right to liberty

Facts

Ramishvili and Kokhreidze were co-founders and shareholders of a media company which owned a TV station broadcasting in Tbilisi. The first applicant was also the anchorman of a popular talk show. Both were arrested in August 2005 and charged with extortion in relation to a payment made in exchange for not broadcasting a potentially embarrassing documentary about an allegedly corrupt parliamentarian. On 29 August 2005, the applicants were detained on a court order for three months, but remained in detention without further authorisation from 27 November 2005 to 13 January 2006. During various hearings, the two applicants appeared before the court in a barred dock which looked very much like a metal cage and surrounded by masked men with machine guns. In addition, they could barely communicate with their lawyers, could not properly hear the prosecutor or judge and could hardly make their submissions audible due to the turmoil in the courtroom. Both applicants complained that their treatment during court proceedings was degrading within the meaning of Art. 3. The first applicant also complained under Art. 3 in respect of the conditions of his confinement in a punishment cell. The second applicant complained in respect of overcrowding in

his ordinary prison cell where between 29-35 people shared 12 beds. The men applied for judicial review of their detention and challenged the fairness and speediness of those proceedings.

Judgment

The ECtHR strongly rebuked the Georgian Government for its trial of dubious integrity and ruled that both the applicants' incarcerations were "*inhuman and degrading*" in violation of Art. 3 ECHR. In respect of the proceedings themselves, the ECtHR upheld a further violation under Art. 3, ruling that "*the imposition of such stringent and humiliating measures*" could not be justified, and noted that "*the Government had failed to provide any justification for their having been placed in a caged dock*".

The ECtHR also found a violation of Art. 5(1)(c) because of the absence of a judicial decision authorising the applicants' pre-trial detention beyond the initial three months. In addition, the ECtHR condemned the manner in which the applicants' judicial review hearing had been conducted, stating that "*such humiliating and unjustifiably stringent measures of restraint during the public hearing [...] tainted the presumption of innocence*" in breach of Art. 5(4). It further held that the hearing in question not only failed to meet the need for speedy decision under Art. 5(4) but also lacked the fundamentals of a fair hearing noting that "*the court cannot be said to have given the appearance of independence when the government agents seemed to be more in control of the situation in the court room*" than the judge. The applicants were awarded 6,000 euros each for non-pecuniary damage. Following the ECHR judgment, in May 2009, the authorities closed Prison No. 5 where both applicants were held. Kokhreidze was released by presidential pardon on 26 May 2007. Ramishvili was released in August 2009 on the expiration of his prison term.

Interception of telephone communications in Georgia: points of concern

Ketevan Abashidze, Strategic Litigation Lawyer, Georgian Young Lawyers' Association

The recent case of *Iordachi & Others v Moldova* (No. 25198/02) 10/2/09 deals with the Moldovan legislation regarding phone tapping. The Georgian and Moldovan criminal systems are quite similar. Therefore, this article analyses Georgian legislation in the light of the *Iordachi & Others* judgment.

The Georgian Law on Operative-Investigative Activities (LOIA) (No. 1933, 18/5/09) sets out the legal basis for interference with telephone communications. This interference is a form of operative-investigative activity.

In Georgia, phone tapping is permitted where it is authorised by an order from a judge (Art. 7(2)(h) LOIA). In an emergency – where delays could destroy important factual data for a case or investigation or make it impossible to obtain such data – a phone may be tapped by order of a prosecutor's reasoned decision. However, in such circumstances, the prosecutor must apply to a judge within 12 hours of commencing the tapping. The latter should authorise or reject this application within 24 hours. In the event of rejection, the data obtained must be destroyed (Art. 7(4) LOIA). The data obtained from a tapped phone is secret for 25 years (Art. 5(1) LOIA).

In *Iordachi & Others* the ECtHR

found that the nature of the offences which could give rise to an interception warrant being issued was not sufficiently clearly defined in legislation: more than half of the offences provided for in the Moldovan Criminal Code would fall within the category of offences eligible for interception warrants.¹ Art. 9(2) LOIA provides that phone tapping can be conducted in relation to offences carrying a punishment of greater than two years. This equates to more than half of the offences provided for in the Georgian Criminal Code.

In *Iordachi & Others* the ECtHR was concerned by the fact that the impugned legislation did not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It noted that Art. 156(1) of the Moldovan Criminal Code used very general language when referring to such persons and stated that the measure of interception might be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation is given as to exactly who falls within the category of "another person involved in a criminal offence".² LOIA does not define at all the scope of those persons whose calls can be tapped.

In para. 45 of *Iordachi & Others* the Court expressed concern that the Moldovan authorities could indefinitely seek and obtain new interception warrants. Under Art. 8(2), (3) and (4) LOIA

the period of phone tapping can be extended to a maximum of 12 months. No further extensions are allowed. However, the supervision of the extension is within the exclusive jurisdiction of the executive branch and is not subject to the judiciary's supervision. Under ECHR standards the body issuing authorisation must be either under judicial control or the control of an independent body.³

Art. 1 LOIA enumerates circumstances in which operational-investigative measures may be applied: the safeguard of human rights and freedoms or the rights of legal entities, and protection of public security. However, none of these is defined. Further, legislation does not specify the circumstances in which an individual may be at risk of having his or her telephone communications intercepted on any of those grounds. Such vagueness was found to be incompatible with the ECHR.⁴

The judge plays a very limited role in the procedure for intercepting telephone communications. According to Arts. 7, 9 and 20 LOIA, a judge's role is to order or authorise phone tapping. The law makes no provision for acquainting the judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with.⁵ On the contrary, Art. 21 LOIA places such supervision duties on the Minister of Justice and his or her subordi-

nate prosecutors.

The ECtHR established that an appropriate degree of precision is needed in the way in which intelligence obtained through surveillance is screened; the procedures for preserving its integrity and confidentiality and the procedures for its destruction should also be clear.⁶ LOIA lacks such regulations. It only refers to data obtained through phone tapping, which do not concern a person's criminal activity but can in some way be

compromising. Such data “cannot be stored” and “must be immediately destroyed” (Art. 6(4) LOIA).

Art. 38(7) of the Georgian Law on Lawyers (No. 976, 20/7/01) provides for the secrecy of lawyer-client communications. However there is no procedure that gives substance to this provision. There is no clear rule defining what should happen when a phone call between a client and lawyer is intercepted.⁷

Thus, it can be argued that Geor-

gian legislation regarding interference with telephone communications clearly requires a number of amendments in order to be compatible with ECHR standards.

1 *Iordachi & Others v Moldova* (No. 25198/02) 10/2/09, para. 44.

2 Ibid.

3 *Dumitru Popescu v Romania* (No.2) (No. 71525/01) 26/4/07, para. 61.

4 See mutatis mutandis supra note 1, para. 46.

5 See mutatis mutandis supra note 1, para. 47.

6 See mutatis mutandis supra note 1, para. 48.

7 Supra note 1, para. 50.

UN Human Rights Council Universal Periodic Review - Russian Federation

In February 2009 the UN Human Rights Council (HRC) reviewed the human rights record of the Russian Federation within the framework of the Universal Periodic Review (UPR), a process which reviews the human rights record of all UN Member States once every four years.

As part of this process the Russian State submitted a report on the human rights situation in Russia. This sets out the legal underpinnings of human rights and freedoms in Russia and what it considers to be its achievements and challenges in ensuring these. The Office of the High Commissioner for Human Rights produced a report based on information available in official UN documents, such as those evaluating Russia's compliance with various human rights treaties or the reports of special rapporteurs.

Submissions received from 17

stakeholders, primarily NGOs (both Russian and international), evaluating the promotion and protection of human rights on the ground in Russia, were also considered. Among the submissions was one from a coalition of 15 Russian NGOs.¹ This document asserts that the human rights situation in Russia is deteriorating with the introduction of legislation limiting fundamental rights, often under the pretext of security concerns, and diminishing transparency. The report noted that interactions with intergovernmental organisations (IOs) were becoming less productive; key UN special rapporteurs had been blocked; IO recommendations were not being implemented or published; and a number of international human rights agreements had not been ratified.

On the basis of the reports and discussions during the HRC, the

UPR made recommendations to Russia, including: to accede to the Optional Protocol of the Convention against Torture; to review and improve prison conditions, especially in juvenile prison facilities; to reform the judicial system to comply with international standards and overcome corruption; to take further measures to ensure the security of journalists and human rights defenders and to bring perpetrators of crimes against them to justice; to provide access to the North Caucasus for certain UN delegations; to abolish the death penalty; to promote the right to freedom of assembly and encourage citizens to freely express their views; to fully comply with the International Court of Justice's provisional measures; to ensure the rights of ethnic minorities; and to further address unemployment, socio-economic

continued on page 14

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UN Human Rights Council Universal Periodic Review - Russian Federation

inequality and social vulnerability.

Russia's response to the recommendations has been included in an Outcome Report. Whilst Russia stated that it was prepared to implement the majority of the

recommendations some stakeholders have expressed concerns over implementation, particularly in the light of restrictions on the freedoms of expression and assembly for journalists, lawyers, human rights defenders and representatives of sexual minorities; the hostile and deteriorating envi-

ronment for civil society; and ongoing gross human rights abuses in the North Caucasus. All the UPR documents are available at: <http://www.ohchr.org/EN/HR-Bodies/UPR/PAGES/RUSession4.aspx>.

¹ Available online at: <http://www.memo.ru/2009/02/04/0402091.htm>.

Nalchik: non-investigation of allegations of torture

Tatiana Chernikova, Lawyer, EHRAC-Memorial

On 13 October 2005, an armed attack was carried out against several Russian military and law enforcement agencies in Nalchik, Republic of Kabardino-Balkaria, Russia. 58 individuals have been charged in relation to this attack in one judicial process which is currently in progress in Nalchik. This case illustrates the challenges facing investigations into allegations of torture in Russia.

Almost every defendant in the Nalchik case has submitted complaints to the domestic courts about torture. They allege that they were tortured by representatives of the law enforcement agencies in order that they confess to having participated in the attack and provide testimony against other defendants. These testimonies constitute the main evidence in the case, as the majority of the defendants were not arrested at the scene of the attack and consequently there is no direct evidence that they participated in it.

The defendants complain of the use of electric shocks, sometimes

with water; suffocation; beatings with gun butts, fists, batons and heavy objects; and kicking. The defendants were beaten on different parts of the body, including the head, face, shoulders and back. Some of the defendants lost consciousness. The policemen also threatened to kill the defendants or to use force against their relatives. Sometimes the torture lasted many hours and was repeated over a long period of time.

Among the evidence of torture, medical certificates play an important role. These certificates usually attest to such injuries as numerous bruises and abrasions on different parts of the body, including the face, caused by hard blunt objects, and haemorrhages. However, according to the applicants not all the injuries have been recorded on the medical certificates and sometimes even where injuries are recorded, the certificates do not reflect the gravity of the injuries. However, in accordance with the jurisprudence of the ECtHR where injuries are sustained in detention, the authorities are obliged to explain how they occurred. For example, the ECtHR supported this position in the cases *Tomashi v France*

(No. 12850/87) 27/8/92 paras. 108-111; *Ribitsch v Austria* (No. 18896/91) 4/12/95 para. 34; and *Selmouni v France* (No. 25803/94) 28/7/99 para. 87.

In addition, the defendants' own evidence about the torture they have suffered is often corroborated by evidence given by other detainees, who witnessed the torture of another prisoner when they were in the same cell or when they were transferred together to various detention centres for interrogation. Sometimes detainees report that they heard beatings taking place and the cries of the victims from their cells.

Other evidence used in this kind of case are statements from the relatives of the victims or their neighbours who witnessed the use of force against the defendants when they were arrested or who the defendants told about the use of torture in detention. These people can also attest that the victims were not injured before they were arrested.

Lawyers at Memorial believe that after arresting the defendants, the authorities did not respect the main safeguards against torture, such as providing the defendants

with immediate access to their lawyers and relatives. For instance, some of the detainees were only provided with the assistance of a lawyer several days after their arrest and the defendants had very few opportunities to see their relatives. The defendants were often taken to pre-trial detention centres where it is reported that the use of torture is frequent, for example, Centre T, a special centre for those charged with terrorism. The authorities also did not record the defendants' arrest correctly. Sometimes this was recorded as being several days after the date on which witnesses state the individual had actually been detained.

The defendants submitted several complaints about torture to the Nalchik Prosecutor's Office. However, the Prosecutor's Office has repeatedly refused to launch a criminal investigation. Some of the applications even specify concrete investigative measures which the defendants expect from the authorities, for example the questioning of the victims, their relatives, other inmates and those policemen suspected of conducting the torture. However, the authorities have not undertaken these measures. Following the rejection of the complaints by the Prosecutor's Office, the defendants submitted complaints to the Nalchik City Court concerning the inaction of the Prosecutor's Office.

The behaviour of the Prosecutor's Office in this regard suggests a deliberate attempt to impede the defendants' right to an effective domestic remedy. On a number of occasions, one day before the

court was due to hear the defendants' appeal against the Prosecutor's refusal to launch an investigation, the Office issued a fresh decision abolishing the decision to be appealed. The court then rejected the defendants' complaint on the grounds that the decision which was the subject of the complaint had been already reversed. Several days later the Prosecutor's Office adopted a new decision refusing to launch the criminal investigation. The cycle was then repeated and this is one of the reasons for arguing that domestic remedies are ineffective in the Nalchik cases.

Thus several defendants have submitted applications to the ECtHR alleging violations of Arts. 3 (prohibition of torture) and 13 (right to an effective remedy) ECHR. Lawyers submitting such cases to the ECtHR are faced with the problem of deciding the moment from which domestic remedies became ineffective and consequently from which point the six-month deadline for the submission of an application to the ECtHR is calculated. Currently, some lawyers have submitted applications to the ECtHR dating from the Prosecutor's Office's third refusal to launch an investigation and two City Court decisions. Other lawyers have waited until a fourth refusal from the Prosecutor's Office (and three City Court decisions). The actual number of decisions is of course less relevant than the argument that the consistent practice of the Prosecutor's Office in these cases, as set out above, demonstrates the unavailability in practice of any effective

remedy for the applicants.

Another challenge in preparing ECtHR applications in these cases is that the lawyers who were appointed to the defendants immediately after their arrest have been replaced. It is therefore not always possible for the new representatives to easily gain access to relevant information and documents concerning the torture of the defendants at an earlier stage in the proceedings. The lawyers currently representing the defendants in the criminal case are primarily defending them as regards the Nalchik attack and do not always possess full information about their complaints of torture. It is also important to note that only the defendants' current lawyers and their relatives are being given the right to meet with the defendants and not the lawyers who previously made the complaints about torture.

The success of the ECtHR litigation in such cases will depend, *inter alia*, on the ability to access evidence of the use of torture in detention and also to ensure that all necessary complaints are submitted at the domestic level in relation to not only the torture itself, but also the non-investigation of the same. In spite of the difficulties involved in such litigation, it can only be hoped that any attention which such cases obtain will help to ensure that allegations of torture are not left without investigation, even if it is the ECtHR rather than the domestic court system which eventually provides some level of redress.

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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 e-mail.

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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 organisations. 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, including the provision of litigation expertise in cases arising from the Russia-Georgia conflict, conducts training seminars in Georgia and facilitates the participation of a GYLA delegate in EHRAC's Legal Skills Development Programme.

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 and current litigation work includes cases arising from the 2008 Russia-Georgia conflict. 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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