

# EHRAC

## Bulletin



In partnership with Memorial Human Rights Centre (MHRC) and Georgian Young Lawyers' Association (GYLA)

## Editorial: effective implementation of ECtHR judgments

The need for the effective implementation of the judgments of the European Court of Human Rights continues to present significant challenges to the Council of Europe and its member states. That is clear from the latest incisive report on this question by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (see page 7). It is the Committee of Ministers of the Council of Europe which has the initial responsibility for supervising the enforcement of Court judgments. The working methods of the Committee of

Ministers are perhaps not so well known, and in this edition of the Bulletin we have published the detailed questions which it has put to the Russian Government following the landmark environmental judgment in the case of *Fadeyeva v Russia*. The important question of implementation must remain high on the agenda of those who are continuing to evaluate the need for reform of the European Court mechanism (the reports of Lord Woolf and the Group of Wise Persons – page 7).

We continue to cover developments in Georgia, with an article on policing

(Ana Dolidze) and outlines of the main aspects of Georgian NGOs' Alternative Reports to UNCAT and CEDAW.

Also in this edition, Narine Gasparyan discusses the first European Court decisions concerning Armenia, Anton Burkov considers compulsory hospitalisation in a human rights context and we report on, among others, the important recent judgments in *Bazorkina v Russia* and *The Moscow Branch of the Salvation Army v Russia*.

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## Compulsory hospitalisation of persons of unsound mind in accordance with Article 5

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### Criteria of Lawfulness

The detention of a person of unsound mind is regulated by Art. 5 of the European Convention on Human Rights (ECHR) which stipulates that detention must be 'lawful' and 'in accordance with a procedure prescribed by law'. The case of *Winterwerp v. Netherlands* defined the term 'lawful' as meaning conformity with the requirements of national legislation and the restrictions established in Art. 5(1)(e).<sup>1</sup> *Winterwerp*

also differentiated between 'procedural' and 'material' lawfulness. Procedural 'lawfulness' requires that detention be 'in accordance with a procedure prescribed by law'. Material 'lawfulness' requires that the detainee is in fact of unsound mind and that grounds exist for confining him against his will.

*Winterwerp* established a 'triple-test approach' to material 'lawfulness'. This test was developed further in *Johnson v UK*:<sup>2</sup>

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1. A person must be acknowledged objectively as being of 'unsound mind'. Although there was no easily definable definition, *Winterwerp* established that Art. 5(1)(e) 'obviously' cannot permit the detention of a person "simply because his views or behaviour deviate from the norms prevailing in a particular society". Further, the only way to establish mental disorder is by "objective medical expertise"; only if there are convincing grounds, can the objectivity and reliability of medical evidence be doubted.<sup>3</sup> In exceptional cases medical expertise may not be required, but only if a medical examination was carried out immediately after detention.<sup>4</sup>

2. "Psychiatric deviations must be of such a character and such a degree as to warrant compulsory hospitalisation". Psychological illness should not automatically lead to detention. Initially, national authorities have a discretion to evaluate the evidence in a particular case; the Court subsequently reviews those decisions under the Convention.<sup>5</sup> The Court in *Litwa v. Poland* held that detention was only justified where less severe measures had been considered, but were insufficient to safeguard the individual or public interest.<sup>6</sup> In other words, detention must be reasonable and absolutely necessary.<sup>7</sup>

3. The justification for continued detention depends on the duration of the illness. In *Johnson* the Court opined that "it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released". The Court also recognised that a responsible authority can exercise discretion to order the discharge of a person who is no longer suffering from a mental disorder. The person authorised to carry out the detention must relocate the former patient in a post-discharge hostel, if he is being released under defined conditions.<sup>8</sup>

The application of Article 5(1) is limited. The principle of lawfulness of detention applies to both the sanctioning and execution of the measures involving deprivation of liberty.<sup>9</sup> *Ashingdane* recognised the relationship between sanctioning detention and place and conditions of detention. In principle, 'detention' is only 'lawful' if effected in a hospital, clinic or other appropriate institution authorised for that purpose.<sup>10</sup>

Procedural 'lawfulness' is only possible if there is compliance with the following rules. State law must be sufficiently precise.<sup>11</sup> For example, a violation was found in two Bulgarian cases because the national legislation did not contain any regulations providing public prosecutors with powers to detain people in psychiatric hospitals for psychiatric examination.<sup>12</sup> Additionally, the person responsible for the detention must comply with domestic legislation. *Rakevich* provides one such example.<sup>13</sup>

### **Supervision of detention of persons of unsound mind**

Art. 5(4) establishes that anyone subjected to arrest or detention is entitled to take proceedings to decide the lawfulness of the detention 'speedily by a court' and to be released if the detention is not lawful.

At this stage it is important to briefly address the "incorporation rule",<sup>14</sup> insofar as this rule exists in Russian legislation.<sup>15</sup> In Russia, supervision is already 'incorporated' in the compulsory hospitalisation decision, which creates a major peculiarity: "Where the decision depriving a person of his liberty is one taken by an administrative body... Art. 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Art. 5(4) is incorporated in the decision."<sup>16</sup>

The incorporation rule has two legal

consequences. Firstly, where a court decides to detain, the person of unsound mind does not have the right to have the lawfulness routinely reconsidered. Secondly, the rule signifies a degree of overlap between the guarantees of Article 5(4) requiring supervision, and Article 5(1)(e), in accordance with procedures prescribed by law, which could include the court's original decision to detain.

The European Court's case law answers three basic questions that arise when qualifying actions in accordance with Art. 5(4):

1. What to supervise? Art. 5(4) does not grant a right to judicial review of such a scope that the court's decision would substitute for the discretion of the decision-making body. Judicial review must, however, be sufficient to assess the observance of those guarantees that are vital for establishing lawfulness in accordance with Art. 5(1).<sup>17</sup> "The reviewing 'court' must assess the legality of the detention in the light of the *Winterwerp* criteria."<sup>18</sup> Therefore, there must be the possibility of challenging the detention on procedural and material grounds.

In exceptional circumstances, where compulsory hospitalisation is permitted before receipt of an expert medical report, the scope of the judicial review will be significantly restricted, as the person responsible for the compulsory hospitalisation must possess wider powers of discretion.<sup>19</sup>

2. Whom and how to supervise? In Art. 5(4) the term 'court' should not be understood as a judicial authority in its traditional meaning, established in the country's judicial system. Any 'court' must have the authority to decide the lawfulness of the detention; it must be independent, and guarantee appropriate judicial procedures to settle disputes.<sup>20</sup>

The European Court sanctions court procedure in accordance with Art. 5(4) which does not have to have the same procedural guarantees as provided for

by Art. 6(1) for criminal or civil cases. Nevertheless, “[i]t must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question.”<sup>21</sup>

The right to initiate one’s own proceedings to contest compulsory hospitalisation is a primary guarantee of Article 5(4). The right to judicial recourse, which is available only to a state authority (and not to the detainee) is not sufficient for compliance with the guarantees of judicial review.<sup>22</sup>

The principle of equality of arms<sup>23</sup> requires a number of guarantees: the applicant must have the right to participate in the court proceedings

(in person or by a representative) and consequently must be properly informed of the forthcoming hearing.<sup>24</sup> Furthermore, in certain cases it will be necessary to grant the applicant the right to appear before the court at the same time as the prosecutor, so that the former has the opportunity to reply to the latter’s arguments.<sup>25</sup> The lack of opportunity to argue verbally or in writing, in person or through a representative, and non-compliance with the right to full disclosure would breach Article 5(4).<sup>26</sup>

3. When to supervise? The applicant is entitled to challenge the lawfulness of detention both initially and periodically

as new facts arise. Judicial review is particularly important where initial reasons for confinement cease to exist.<sup>27</sup>

The phrase “urgent examination by the court” is reflective of the general requirements of judicial proceedings conducted without undue haste, carefully considering all relevant details.<sup>28</sup> In the event of the absence of these elements it is possible to establish breaches of Art. 5(4).

*\*With thanks to Professors Françoise Hampson and Kevin Boyle (University of Essex) for their assistance.*

1 24/10/79 para. 39.  
2 24/10/ 97 para. 60.  
3 *Winterwerp v. Netherlands*, paras. 37, 39 & 42.  
4 *ibid*; Ovey C. & White R. *The European Convention on Human Rights*. Oxford University Press, 2002. p. 125; *Varbanov v. Bulgaria* 5/10/00, para. 48.  
5 *Winterwerp v. Netherlands* para. 40.  
6 4/03/00, para. 78.  
7 *Varbanov v. Bulgaria* para. 46.  
8 paras. 61, 62 & 66.  
9 *Winterwerp v. Netherlands* para. 39.  
10 *Ashingdane v. UK* 28/05/85 para. 44; *Aerts v. Belgium* 30/07/98, para. 46.

11 *Sunday Times v. UK* of 26/03/79 para. 49.  
12 *Varbanov v. Bulgaria* paras. 15, 50-53; *Kepenerov v. Bulgaria* 31/07/03, para. 33.  
13 *Rakevich v. Russia* 28/10/03 para. 35.  
14 Harris D.J., O’Boyle M. & Warbrick C. *Law of the European Convention on Human Rights*. Butterworths, 1995. p. 151.  
15 *Rakevich v. Russia* para. 15.  
16 *De Wilde, Ooms and Versyp v. Belgium* 18/11/70 para. 76.  
17 *X v. UK* 5/11/81 para. 58; *E v. Norway* 29/08/90, para. 50.  
18 Ovey & White p.133.  
19 *X v. UK*, para. 58.  
20 *ibid* para. 53, and *Weeks v. UK* 2/03/87,

para. 61.  
21 *Niedbala v. Poland*, 4/07/00, para. 66. Also *Winterwerp v. Netherlands*, para. 60; *Megyeri v. Germany* 12/05/92, para. 22  
22 *Rakevich v. Russia* para. 43.  
23 *Nikolova v. Bulgaria* 25/03/99 para. 59; *Niedbala v. Poland*, para. 66.  
24 *Van der Leer v. Netherlands* 21/02/90; *Winterwerp v. Netherlands*, para. 60.  
25 *Kampanis v. Greece* 13/07/95 para. 58.  
26 *Sanchez-Reisse v. Switzerland* 21/10/86 para. 51; *Weeks v. UK* 2/03/87, para. 66.  
27 *Winterwerp v. Netherlands*, para. 55.  
28 Ovey & White p. 135.

## Georgian police shooting to kill - incompetence or policy?

Ana Dolidze, GYLA

November 2003 marked a new chapter in Georgian history. Through non-violent public protests triggered by highly fraudulent parliamentary elections on 2 November 2003, the government of Georgia, headed by Eduard Shevardnadze, was ousted and interim rule, under the leadership of the Western-educated international lawyer and charismatic opposition leader, Mikhail Saakashvili, came to power. Later, through widely recognized democratic elections, Saakashvili was elected President and a new composition of the Georgian Parliament was formed. Immediately upon election, the establishment of Western-style democracy based on the rule of law was proclaimed as an ultimate

goal of Georgia’s new leadership. Protection of fundamental human rights and freedoms, along with re-establishing order and equality before the law, especially regarding the accountability and responsibility of public officials, was said to be one of the top priorities in the government’s reform agenda. Yet, unfortunately, since its inception, the government has not been immune from criticism from human rights groups and the opposition concerning the conduct of the police forces, notably in relation to arrests or ‘special’ operations when so-called ‘special squads’ have participated in arrests in important cases.

Allegations of frequent abuse of power by arrest squads and the lack of any subsequent investigations and

prosecution are supported by official statistics supplied by the Office of the Prosecutor General. According to the data, during 2005-2006, 73 of these special operations were conducted and, as a result, 25 persons died. However, investigations into the fact of injury or death during arrest operations were opened in only four cases. It is significant that almost one-third of special operations have resulted in the death of the suspect and official inquiries into the incidents have taken place only in about two per cent of all cases.

Detailed information regarding specific instances of the use of lethal force by the police during arrest operations, which resulted in the death of suspects and inadequate follow up from the

Prosecutor's Office, also gives a good indication of the tendency of 'loose' attitudes among law enforcement officials concerning the use of lethal force. In one of these cases, on 11 November 2005, the police killed an unarmed suspect, Levan Gulua, a young man standing at the entrance of a blockhouse building, when reacting to a telephone report of a planned burglary in one of the capital's neighbourhoods. Unfortunately, this incident did not result in an investigation by the Prosecutor's Office, which is charged with the task of supervising the lawfulness of the activities of the police force, or the prosecution of the officials involved.

The fact that many arrest operations result in the death of suspects, as well as the absence of adequate follow up and inquiry from the relevant authorities, has led to a debate on the reasons and causes for such a tendency. There are two principal lines of argument on this subject. Human rights activists have suggested that a *laissez faire* attitude towards the use of lethal force, resulting in a large number of casualties during arrest operations, is a part of the Government's policy of cracking down on organized crime, which is intended to signal to criminal gangs the readiness of the police to 'respond' with the use of firearms to instances of crime and instill panic and fear among criminals. However, other experts have argued that the reason is the lack of training and competence among police officers, as well as the inheritance from the Soviet period of a lack of consideration of human rights standards.

Actually, both arguments have a point and deserve further discussion. Statements by the President of Georgia and the Minister of Interior have raised questions about the possibility of the existence of a government policy which deliberately fuels a feeling of superiority amongst law enforcement officers, in order to strengthen the fight against crime. In both statements, policemen were encouraged to "eliminate criminals on the spot" if they endanger the lives

of citizens and policemen. As statements from such a high level are usually perceived as pronouncements of state policy, both statements made under the aegis of enhancing the fight against organized crime could be understood to establish a state level policy of allowing the unlimited use of force by the police to combat crime. Moreover, gradually a new term has been established in the law enforcement discourse - 'elimination of criminals' - which has been reiterated by high-level officials after almost every arrest operation resulting in the death of the suspect. Furthermore, media reports from law enforcement agencies, as well as high-level officials commenting on arrest operations, have almost always gravely violated the presumption of innocence of the person killed. Although in the majority of cases persons had not yet been charged with the commission of a crime, they were labelled as 'criminals', 'gangsters', 'recidivists' and 'members of the mafia'. Proponents alleging that the high rate of mortality in arrest operations is due to an intentional policy of law enforcement argue that the attempts of senior officials to establish such a discourse have been part of a media strategy attempting to justify such a policy. Finally, the extremely low rate of effective investigations, the lack of a single case where police officials have been held accountable for the excessive use of force resulting in a casualty or of an instance of public accountability for such incidents by their superiors or the political leadership further corroborate speculation about the existence of a policy designed to establish fear of the police.

On the other hand, suggestion of police incompetence and the lack of adequate skill and training of law enforcement officials are also quite well founded. Although the Ministry of Interior has undergone reforms and there has been a major change in the staffing of the police, new recruits spend only a few weeks in preparatory training and minimal attention is paid to the discussion of basic human rights

standards concerning the right to life and other related standards in their training curricula. In addition, the lack of adequate planning and preparation for police operations, which is often explained by the lack of experience and expertise of the responsible officials, many of whom were appointed after the change of government, may explain the high rate of mortality of suspects. Moreover, skills-based training in the use of lethal force has only recently been incorporated into the training of new police recruits. Representatives of the Prosecutors' Office often argue that a lack of competence in the investigation of complex cases among its employees, when particular expertise is required to determine whether lethal force was used in circumstances of absolute necessity or in violation of the principle of proportionality, explains an extremely low percentage of subsequent inquiries and prosecutions. Additionally, it is inevitable that the Soviet-style law enforcement mentality is deeply rooted in the public service culture of law enforcement, where minimal consideration is given to human rights standards, which are overwhelmed by the need to preserve the 'dignity of the office' and hence, there is a reluctance to reveal the misconduct of colleagues or subordinates. Besides, the heritage of Soviet law enforcement culture still influences the institutional kinship between the police and the Prokuratura (Prosecutor's Office), which results in a lack of adequate investigations and prosecution of violations by police officers by the latter. Unfortunately, attempted reforms by the current government in the last few years (as Shevardnadze's Government rather reinforced this culture) have not been enough to establish a new public service and human rights-oriented culture amongst the large corps of law enforcement personnel.

Therefore, proponents of both approaches have their own reasonable arguments. Groups that allege deliberate attempts by the political leadership to establish an image of immense law

enforcement power, base their analysis on external assessments, including the actions of the political leadership and high-level state officials, as well as official data. Advocates of the latter approach related to lack of competence

and reform in the system mainly use subjective, internal factors for arguing their position. The formulation and subsequent implementation of an active reform strategy, taking into account assessments and recommendations

framed in the continuous public debate on the subject, stands as the best possible response to the trend of an excessive rate of killings during arrests, where none of the parties can possibly win.

## Georgia: alternative report to UNCAT

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Despite the Rose Revolution that took place in Georgia and a lot of positive steps forward, torture and inhuman and degrading treatment still represent a significant problem for the democratic development of the country. The main reasons why the abuse of human rights remains such a painful issue in Georgia are deeply rooted impunity and the lack of a long-term vision.

The Georgian Young Lawyers' Association, in collaboration with other human rights NGOs operating in Georgia and the Geneva-based international NGO, World Organization Against Torture (OMCT), submitted an alternative report on the human rights situation in Georgia to the 36th session of the UN Committee Against Torture.<sup>1</sup>

The main concerns raised by the NGOs may be divided into two parts: legislative issues and problems in practice.

### Legislative issues

- Despite numerous positive amendments to the domestic criminal legislation, it is still far from being in compliance with relevant international agreements. The prohibition of torture is not an absolute right according to the Constitution and it can be restricted during a state of emergency or martial law, which contradicts the absolute and non-derogable nature of the right as is guaranteed by the main international agreements prohibiting torture.

- As torture usually takes place during pre-trial detention, it is very important

to ensure the existence of alternative non-custodial preventive measures and their application, especially for non-violent, minor or less serious offences. Criminal legislation currently in force encourages the courts to impose preliminary detention as a preventive measure even more frequently than they have previously done so. Since December 2005, only bail and personal guarantees have remained as preventive measures in the Criminal Procedure Code. Other articles providing for such non-custodial preventive measures as placement under police surveillance, a written undertaking not to leave a particular place and to behave properly, and house arrest have been abolished.

- Vague provisions within the criminal legislation guaranteeing compulsory medical examination for detainees enable law enforcement agencies to ignore them. Thus, injuries sustained during arrest, or later in preliminary detention facilities, go unreported and perpetrators remain unpunished.

- Georgian legislation provides no explicit right to reparation. However, it does include some guarantees with respect to compensation. The right to compensation can be exercised through civil as well as criminal litigation, though the outcome of the complaint will be ultimately related to the result of the criminal case in question. However, the failure to identify the perpetrator does not prevent a victim from bringing an action before the civil courts on the basis of state liability. As a matter of practice,

the perpetrators of torture are not identified, mainly because of the victim's fear of retaliation. Thus, this provision is an important guarantee of the right to receive compensation, even in the absence of an identified perpetrator. Unfortunately, the enactment of this provision has already been postponed by Parliament four times. Each time the date for the entry into force of this article approaches, new amendments are made suspending its application. Currently the application of this article is postponed until January 2007.

- In 2004, the concept of plea bargaining was introduced into the Criminal Procedure Code of Georgia. Since its introduction, plea bargaining has become, in practice, a means for the illegal extraction of property (money) from the defendants, as well as a means for the perpetrators of torture to avoid conviction. It is noteworthy, that following the recommendations of Human Rights Watch, a number of positive amendments relating to the prohibition of torture were made to the articles of the Criminal Code Procedure regulating plea bargaining. Nevertheless, in the absence of a clear definition or a limitation of the type of crimes on which a plea bargain can be reached, there still is a chance for such an agreement to be reached in torture cases or other serious crimes.

- Despite the amendments (June 23, 2005) to the definition of torture (Article 144), the number of cases initiated since then still raise serious doubts regarding

the implementation of the article in practice and the effective investigation of the cases concerned.

### Problems in practice

• After the Rose Revolution, the Government declared the fight against crime and its perpetrators to be its top priority. Thus, as new policemen were selected, so-called 'demonstrative detentions' were held in Georgia. The so-called special operations carried out by the law enforcement bodies of Georgia in many cases are characterized by excessive severity and too frequently result in the death of those persons who are supposed to be detained. The unlawful and excessive actions of police officers would appear to be condoned by the official statements of the President of Georgia, as well as the Minister of Interior. Arms are not used in exceptional cases as a means of a last resort, but are used as standard practice. The outcome of the special operations mentioned above is fatal not only for the suspects but for the police officers as well. Moreover, innocent citizens suffer from such practices. In 2005, 15 suspects (some of whom had not at the time been considered to be suspects) were shot to death during special operations. In the first quarter of 2006, 17 individuals were killed during special operations. The number of citizens killed in the first three months of 2006, has already exceeded the total number during the previous year, which demonstrates, and is a direct result of, a deeply rooted impunity.

• The situation in the penitentiary system is still alarming. Conditions in most of the institutions within the penitentiary system do not comply with minimum standards. Prisons are overcrowded so that three to four prisoners have to share one bed and sleep in turn. There are only open sanitary facilities in the cells and prisoners have to eat at the same place where they urinate, creating horribly unsanitary conditions. Laundry is not cleaned very often and cells are not ventilated, creating an unbearable smell. There is not enough space for each prisoner. Cell lighting is very poor. Quite often prisoners are not able to take exercise, because of insufficient space. Prisoners' food and the medical service within the penitentiary establishments are very poor.

• The number of deaths in custody is still very high, exacerbated by the failure of the government to carry out an effective investigation leading to the determination of the truth. In 2004, 43 inmates died within the penitentiary system. In 2005 the number increased to 47.

• The lack of integrated national statistics with respect to torture cases, investigations initiated and the results achieved is a persistent problem in Georgia.

On 4 May 2006, the Committee Against Torture considered the third periodic report of Georgia on the implementation

of the rights contained in the UN Convention Against Torture (UNCAT) and adopted its recommendations, which reflect the main concerns raised in the alternative report.

The Committee remained concerned that despite extensive legislative reforms, impunity and intimidation still persist in Georgia, in particular in relation to the use of excessive force, including torture and other forms of ill-treatment by law enforcement officials, especially prior to and during arrest, during prison riots and in the fight against organized crime. The Committee expressed its concern about the relatively low number of convictions and disciplinary measures imposed on law enforcement officials in light of numerous allegations of torture and other acts of cruel and inhuman or degrading treatment, as well as the lack of public information about such cases. The Committee expressed its particular concern about the high number of sudden deaths in custody and the absence of detailed information on the causes of death in each case. It also underlined the poor conditions in many penitentiary facilities, as well as the overcrowding and the fact that there is no explicit law that provides for reparation.

The conclusions and recommendations of the CAT can be found at:

<http://www.ohchr.org/english/bodies/cat/cats36.htm>

1 P. Mutzenberg (ed.) May 2006, Human Rights Violations in Georgia: Alternative Report to the United Nations Committee against Torture. Available online at: [http://www.omct.org/pdf/procedures/2006/cat\\_36th/altern\\_reports/georgia\\_cat36\\_0406\\_eng.pdf](http://www.omct.org/pdf/procedures/2006/cat_36th/altern_reports/georgia_cat36_0406_eng.pdf).

## Violence against Women in Georgia: an alternative report to CEDAW

In August 2006, the Georgian Young Lawyers' Association (GYLA) and the World Organisation Against Torture (OMCT) submitted a joint alternative report to the UN Committee on the Elimination of Discrimination against Women (CEDAW). This report considers a number of issues in relation to violence against women in Georgia

such as domestic violence, rape within the family and bride kidnapping and also makes recommendations to the Georgian State in order to promote and protect women's human rights. These recommendations include: updating national laws to ensure the effective protection of women in cases of domestic violence and human trafficking; and

human rights training programmes for police, penitentiary staff, judges, investigators and medical personnel focusing on gender-based violations.

The full report can be downloaded from: [http://www.omct.org/pdf/vaw/2006/CEDAW\\_36th/cedaw36\\_vaw\\_in\\_georgia\\_en.pdf](http://www.omct.org/pdf/vaw/2006/CEDAW_36th/cedaw36_vaw_in_georgia_en.pdf).

## Latest PACE report on the implementation of European Court judgments

The most recent report of the Parliamentary Assembly of the Council of Europe (PACE) on the implementation of judgments of the ECtHR<sup>1</sup>, published by its Committee on Legal Affairs and Human Rights on 18 September 2006, draws attention to the Assembly's grave concern regarding the continuing existence of major structural deficiencies in the states to which the Committee's Rapporteur paid *in situ* visits.<sup>2</sup>

In relation to the Russian Federation, the report identifies major shortcomings arising from the judicial system, notably: the deficient judicial review of pre-trial detention, which results in excessive periods of detention and the

overcrowding of detention facilities; chronic non-enforcement of domestic judicial decisions delivered against the state; violations of the requirement of legal certainty by extensive quashing of binding judicial decisions through the *nadzor* (supervisory review) procedure.

The report also records that no progress has been achieved as regards the release of two applicants still detained in the 'Moldovan Republic of Transnistria' (the case of *Ilascu et al. v. Moldova and Russian Federation*), with Russia in this case claiming that it has no influence in Transnistria, a contention which the report states cannot be taken seriously.

The report also highlights the importance of ensuring the

implementation by the Russian Federation of judgments relating to abuses by security forces and/or the lack of effective investigation into such abuses. The report encourages the Russian authorities to utilise fully the experience of other states and to implement as rapidly as possible judgments concerning the actions of the security forces, notably in relation to the Chechen Republic.

1 CoE Parliamentary Assembly doc. 11020, Implementation of judgments of the European Court of Human Rights Report issued on 18th of September 2006 to the Committee on Legal Affairs and Human Rights by the Committee's Rapporteur, Mr. Erik Jurgens. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC11020.htm>.

2 Italy, Russian Federation, Turkey, Ukraine, United Kingdom, Bulgaria, France, Germany, Greece, Latvia, Moldova, Poland and Romania.

## ECtHR considers new practices

The European Court of Human Rights is faced with an enormous and ever-growing workload. The number of cases pending before the Court – now at 82,100 – is projected to rise to 250,000 by 2010. The Council of Europe has established the Group of Wise Persons (GWP) to secure the long term effectiveness of the European Convention on Human Rights. One member of the Group, Lord Woolf, published a report in December 2005 reviewing the working methods of the Court. The Group of Wise Persons published their Interim Report in May 2006 to inform the Committee of Ministers of their progress and to set out provisional guidelines. This article summarises these reports.

The GWP recognised the problem of the growing caseload, and suggested measures affecting the functioning of the 'central' judicial control system established by the Convention, and related to decentralised actions at the level of the member states. The GWP

suggested amending the Convention to authorise the Committee of Ministers to carry out certain reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time. It is also considering the possibility of a judicial filtering body which would be integrated with the Court but separate from it, to guarantee that individual applications result in a judicial, and not an administrative, decision. Lord Woolf also proposes that the Court should only deal with properly completed application forms which contain all the information required for the Court to process the application (and that it should not accept 'introductory letters').

The GWP recommends that the Commissioner for Human Rights should play a more active role in the Convention's control system. In particular, the Commissioner should respond actively to information resulting from Court decisions finding serious violations of human rights. The Commissioner should

extend his current co-operation to form an active network of ombudsmen, so as to disseminate appropriate information on human rights. Lord Woolf also suggested that the Council of Europe, the Court and its satellite offices should encourage greater use of national ombudsmen and other methods of alternative dispute resolution.

The GWP is also considering the use of judgments of principle. Under the present system, judgments are given in a particular case and do not directly apply to other states. The GWP is considering recommending that, in this category of cases, all states party to the Convention should be invited to intervene before the Court. In summary, once a pilot case has been designated as such by the Court, all similar applications against the same state, including those lodged after designation of the pilot case, should be adjourned pending the adoption of general measures at national level to remedy the problem identified by the Court.

One reason for the existence of the profusion of cases is the fact that most states do not have domestic procedures for redressing the damage resulting from the length of proceedings and other violations, such as excessive length of detention pending trial. Therefore, the GWP advocates improvement of domestic remedies to provide redress for violations of the reasonable time requirement. It also observes that it would be useful to explore a system under which the national courts might apply to the Court for consultative opinions.

The GWP noted the lessons drawn

from the Warsaw “Information Office” project. Thus, satellite offices could host one or more lawyers who would do the same kind of work as the lawyer at the Warsaw Information Office and would provide potential applicants with information on admissibility issues. Similarly, Lord Woolf proposes that satellite offices of the Registry be established in countries which produce high numbers of inadmissible applications. The satellite offices would provide applicants with information as to the Court’s admissibility criteria, and the availability, locally, of ombudsmen

and other alternative methods of resolving disputes. Also on the question of access to information, the GWP proposes that the case-law of the court should be available to national judicial and administrative institutions in their respective languages. In the GWP’s view, responsibility for translation, publication and dissemination of case-law lies with the member states.

The full reports are available at: <https://wcd.coe.int/ViewDoc.jsp?id=998185&andhttp://www.echr.coe.int/ECHR/Resources/Home/LORDWOOLFREVIEWONWORKINGMETHODS.pdf>.

## Report on unofficial places of detention in the Chechen Republic

On 15th May 2006, the International Helsinki Federation for Human Rights (IHF) produced a report entitled *Unofficial Places of Detention in the Chechen Republic*. The report alleges that there still exist numerous unofficial detention centres throughout Chechnya, dating back to the Chechen conflicts. Many of them are said to be no more than earth pits, and a large number of the centres, though not all, are allegedly run by forces under the Chechen Prime Minister Ramzan Kadyrov, known as the ‘Kadyrovtsy’. Certain Russian armed formations and the Federal Security Service are also accused of running such centres.

The ‘Kadyrovtsy’ originally came into existence under Ramzan Kadyrov to provide security for the then Prime Minister Akhmad Kadyrov (Ramzan’s father). There are now thought to be somewhere between 4,000 and 12,000 members of the organisation, which consists of various sub-units, some of which are now legal and integrated into the workings of government, whilst others continue to operate as paramilitary organisations. Chechens are said to fear the group even more than Federal Servicemen.

There are reports of numerous

incidents of unlawful detention followed by violence, torture, “disappearances” and killings at the hands of these forces. These acts are thought to be carried out in order to obtain confessions so that suspects can then be held in lawful detention centres. Violence is said to have occurred against various members of society, including the elderly, and there are even reports that Ramzan Kadyrov himself has tortured innocent civilians.

One legalised group, the Operational-Search Bureau of the North Caucasus Operative Department of the Chief Department of the Russian Federal Ministry of Internal Affairs in the Southern Federal District, has been accused not only of torturing suspects, but also of refusing to allow clients one-on-one legal advice and, on occasion, even threatening and intimidating lawyers.

There are also problems at official detention facilities, where, it is alleged, detainees are sometimes not registered properly and are held without any notification being given to relatives or lawyers. There are reports of beatings, torture and extrajudicial executions occurring at these official centres.

Soon after the IHF report was published, the *Memorial Human Rights*

*Centre* issued a report alleging the existence of an illegal detention centre in Grozny (the Chechen capital). According to the report, the centre was only decommissioned on 26 May 2006 when the Operating Group of the local police department of the Oktyabrsky district of Grozny, which had been occupying the building, withdrew. The Operating Group comprised police officers from different parts of Russia, who had been posted to the region. It is alleged that the members of this Group illegally detained, tortured – and even killed – people in the building. The report refers to video footage of the basement of the building, and of writing scribbled on the walls of the cells reflecting the desperate and hopeless state of mind of the prisoners. The report also includes information on persons who were taken to the Operating Group’s offices and subsequently disappeared, as well as an account of a former prisoner, Alavdi Sadykov, who alleges that he and other inmates were subjected to torture – whilst others were executed – by members of the Operating Group.

The full reports are available on the IHF and Memorial websites at [http://www.ihf-hr.org/documents/doc\\_summary.php?sec\\_id=54&d\\_id=4249](http://www.ihf-hr.org/documents/doc_summary.php?sec_id=54&d_id=4249) and <http://www.memo.ru/hr/hotpoints/caucas1/index.htm> respectively.

## 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

*Alikhadzhiyeva v Russia*  
 (No. 68007/01), 08/12/2005  
 (ECHR: Admissibility)  
*Disappearance*

The applicant lives in Shali, near Grozny, together with her son, A.

According to the applicant, on 17 May 2000, A was at home with the applicant when Russian armed forces entered and forced A into a vehicle. No reasons were provided for the arrest and no documents were produced.

Together with A, five of the applicant's neighbours were also taken from their homes. These five individuals, however, were released the following day and have detailed their experiences. They testify that they were driven away with A and subsequently led to an underground room. Three of them, excluding A, were then individually interrogated. After questioning all five neighbours were grouped together, but A was not among them, and then the following morning they were dropped off at a roadside.

A has not been heard of since. The applicant has searched for him and has applied to several bodies, including the Ministry of Interior, but to no avail. A criminal investigation into the disappearance has been adjourned due to a failure to find the perpetrators.

#### *Complaints*

The applicant complained under Article 2 ECHR, arguing that the facts strongly suggest that A is dead, and that the Russian authorities failed to effectively investigate his disappearance. The applicant also argued that there are serious grounds to believe that A had been subjected to torture or treatment prohibited by Article 3, and that the fact of her son's disappearance and uncertainty about his fate violated Article 3 in respect of her own suffering.

Additionally, she alleged violations

of Article 5 due to A's unacknowledged detention, and of Article 13, on the basis that she had no effective remedies.

The Court declared the case admissible on 8 December 2005.

*Goncharuk v Russia*  
 (No. 58643/00), 18/05/2006  
 (ECHR: Admissibility)  
*Right to Life*

The applicant lived in the Staropromyslovskiy district of Grozny, which, following the resumption of hostilities in October 1999, came under heavy bombardment.

The applicant alleged that on 19 January 2000 federal forces launched a major attack in the area. The applicant and five others had been hiding in a garage, but ran to a nearby cellar when the shelling intensified. Several military servicemen then approached and ordered those inside the cellar to come out. Once they emerged, the soldiers stated that they had orders to kill everybody and that any residents in the area were Chechen rebels. They then ordered the individuals back into the cellar and, once the six had done so, threw tear-gas grenades into it. They then ordered those inside to come out again. Once they emerged this time, however, they were all shot.

The applicant, who had been wounded, later regained consciousness and realised that the others were dead. She managed to reach a neighbouring street where she was taken to hospital and treated for gunshot wounds, concussion and neurotic asthenia.

The applicant argued that the circumstances of the attack and its consequences constituted violations of Articles 2 and 3. She also complained under the same Articles about a failure to carry out an effective and speedy investigation into the attack. Lastly, she complained of an absence of effective remedies, contrary to Art 13.

On 18th May 2006, the application

was declared admissible. The question of whether the applicant had exhausted all available domestic remedies was joined to the merits of the case.

*Magomadov and Magomadov v Russia* (No. 68004/01),  
 24/11/2005 (ECHR:  
 Admissibility) *Disappearance*

According to the applicants, on 2 October 2000 an armed unit of the Federal Security Service (FSB) searched the applicants' house, and their brother, Ayubkhan, was arrested and driven away. He has not been seen since.

The applicants immediately started looking for him, and complained about his disappearance to several state departments, including the FSB and Department for the Interior (DoI).

Subsequently, the DoI acknowledged that he had been detained by DoI and FSS officials upon suspicion of involvement in illegal armed groups, but had since been released. A subsequent criminal investigation failed to identify the persons responsible for Ayubkhan's 'disappearance' or to establish his whereabouts.

#### *The First Applicant's Disappearance*

The first applicant, Yakub, also subsequently 'disappeared' – he was last seen on 19 April 2004. A note, allegedly written by him, was conveyed to his family by a State official and made clear that he was being held at a Russian military base in Khankala, Chechnya.

The Russian Government subsequently acknowledged that the first applicant had temporarily been detained for failing to register a temporary residence, but added that they were no longer aware of his whereabouts.

#### *Decision*

The applicants complained under Articles 2, 3 and 5 of the European Convention in respect of their brothers' right to life, the authorities' failure to investigate the case,

the likelihood that he had suffered torture, and the suffering they had endured as a result of the uncertainty surrounding his whereabouts. They further complained under Article 34 that the “disappearance” of the first applicant constituted an attempt to “hinder the right to individual petition”.

The Court declared the application admissible on 24 November 2005.

*Makhaouri v Russia*  
(No. 58701/00), 18/05/06  
(ECHR: Admissibility)  
*Right to Life*

Three women (the applicant, L and N) had temporarily fled their homes in the settlement of Tashkala, Chechnya, following the resumption of hostilities in October 1999. They returned, briefly, however, in January 2000, after Russian forces had gained control of Tashkala.

According to the applicant, whilst walking through the settlement on 22 January 2000, the three women noticed a group of soldiers taking valuables out of people’s houses. The soldiers saw the three and ordered them to come closer. The soldiers then stated that they had to be taken for an identity check. The soldiers walked them into the courtyard of a destroyed house, and shot all three. N and L died as a result, and the applicant was left wounded.

As a result of her injuries, the applicant spent two months in hospital and is now paralysed in her left hand.

The authorities opened an investigation into the attack, which, according to the Russian government, is still “ongoing” some 6 years after the incident.

The applicant complained under Article 2 regarding both the shooting and the subsequent failure of the competent authorities to conduct an effective investigation. She further submitted that she was subjected to inhuman and degrading treatment under Article 3, and that the State failed to fulfil its positive obligation to investigate her claim of such treatment. Lastly, she argued that she was deprived of an effective remedy, contrary to Article 13.

On 18th May 2006, the European Court of Human Rights declared the application admissible.

*Musayev, Magomadov  
& Labazanova v Russia*  
(Nos. 57941/00; 58699/00;  
60403/00), 13/12/05 (ECHR:  
Admissibility) *Right to Life*

The applicants are all relatives of individuals killed during a Russian military operation in Novye Aldy, Chechnya, on 5 February 2000.

#### *First Applicant*

On 5 February 2000, the first applicant was at his relatives’ house when Russian soldiers entered a neighbouring house, which was also inhabited by his relatives. Following continued gunfire and screams, the first applicant went outside to discover that five of his relatives and a neighbour had been killed. Then, when the applicant and a neighbour attempted to bring the bodies indoors, soldiers opened fire and killed the neighbour.

Later that same evening, the first applicant also discovered the bodies of his two nephews, who had been stopped by Russian troops earlier that morning. They had died from gunshot wounds.

Therefore, according to the applicant, he had witnessed nine killings, seven of which involved his relatives.

#### *Second and Third Applicants*

The second and third applicants stayed in Ingushetia in the winter of 1999-2000 because of the hostilities in Grozny. Their relatives, however, remained in Grozny to look after the family property. Following the Russian operation of 5 February 2000, neighbours found the remains of the applicants’ relatives, Salman and Abdula Magomadov, in the cellar of the property. Death certificates subsequently gave the cause of death as gunshot wounds to both head and body.

#### *Fourth and Fifth Applicants*

The fourth and fifth applicants were wife and husband respectively, and lived together with the fifth applicant’s brother and sister. On 5 February 2000, soldiers arrived at

the applicants’ house, demanding money and threatening to kill those present. The soldiers then killed the fifth applicant’s siblings, while the fifth applicant managed to escape unseen. The fourth applicant was left physically unharmed. Before leaving, the soldiers set the house on fire, thus destroying it and killing the livestock inside.

#### *Subsequent Events*

A criminal investigation, opened on 5 March 2000, has been transferred and adjourned several times and has failed to identify the perpetrators.

#### *Complaints*

The applicants complained under Article 2 that their relatives’ right to life had been violated and that no effective investigation had been carried out. Further, they alleged violations of Article 13 in that they were denied an effective remedy. In addition, the first applicant complained of being subjected to treatment falling within the scope of Article 3 as a result of intense feelings of fear, anguish and emotional distress suffered in connection with witnessing the killing of his relatives and neighbours.

The Court declared all the applications admissible on 13 December 2005.

*Tangieva v Russia*  
(57935/00), 29/05/06  
(ECHR: Admissibility)  
*Right to Life*

Following the resumption of hostilities in Chechnya in 1999, the applicant and her family initially chose to remain in their house in Grozny. The shelling, however, intensified, and the applicant and her mother moved elsewhere, while her father, uncle and one neighbour (N) remained in the house to look after their livestock.

The applicant continued to visit the family house over the following weeks, to check on her father and uncle. Outside she was, however, on several occasions confronted by a soldier who threatened to shoot both her and the inhabitants of the house.

In January 2000, the applicant decided to leave Grozny. She went to the family house

to say goodbye to her parents (including her mother who, by that time, had returned there). There she found the bodies of her father and N, both with gunshot wounds. The remains of the applicant's mother and uncle were also recovered.

According to the applicant, the authorities have yet to conduct a proper investigation into the deaths, including into the possible involvement of the soldier outside the family home.

The applicant alleged violations of Article 2 in respect of the killings and the failure of the authorities to conduct an effective investigation. The applicant also complained that the loss of her parents and uncle, as well as the fear, anguish and distress suffered by her constituted degrading treatment contrary to Article 3.

On 18th May 2006, the application was declared admissible. The question of whether the applicant had exhausted all available domestic remedies was joined to the merits of the case.

## Other ECHR cases

*Bazorkina v Russia*  
(No. 69481/01) 27/07/2006  
(ECHR: Judgment)  
*Disappearance*

(by Ole Solvang, Russia Justice Initiative)

In a landmark decision, the European Court of Human Rights ruled on 27 July 2006 that the Russian government was responsible for the “disappearance” and death of a young man in Chechnya in 2000. It was the first time that the European Court has ruled on a “disappearance” case from Chechnya.

The case of *Bazorkina v. Russia* concerns the “disappearance” of Khadzhi-Murat Yandiyev, a 25-year-old Chechen, who was detained after he fled Grozny on 1 February 2000 together with a group of fighters. Following his detention, Yandiyev was questioned in the village of Alkhan-Kala by Colonel-General Alexander Baranov, who, at the end of the interrogation, ordered his execution. The interrogation and execution order were filmed by several camera crews, whose footage was filed with the Court. Yandiyev has been missing since.

Despite his mother's numerous attempts to seek justice through the Russian legal system, the government opened a criminal investigation into the “disappearance” only in July 2001, almost eighteen months after the events. Despite the clear evidence in the case, they suspended the investigation six times in the last six years, stating that it was impossible to identify the perpetrators of the disappearance. Colonel-General Baranov was only questioned for the first time in June 2004. No charges were ever brought before a Russian court.

In its judgment, the Court made a number of findings:

- The detention of Yandiyev had been unlawful as Russian troops disregarded domestic legal procedures (Article 5 of the European Convention on Human Rights);
- Yandiyev must be presumed dead considering the execution order that was issued against him and the fact that he has been missing for more than six years. The Court held that the Russian government is responsible for his death (Article 2);
- The investigation into the “disappearance” of Yandiyev has been inadequate on numerous accounts (Article 2);
- The suffering of Yandiyev's mother as a result of her son's “disappearance” and the failure of the Russian government to take adequate steps to clarify his fate reaches the threshold of inhuman and degrading treatment (Article 3).

The Court ruled that there was not enough evidence to find that Yandiyev himself had been subjected to torture, inhuman or degrading treatment.

In its judgment, the Court also considered the issue of non-disclosure of documents from the criminal investigation file. The Russian government several times refused to provide documents from the criminal investigation file despite requests from the Court, referring to Article 161 of Criminal Procedural Code. In the end, however, the government provided the entire investigation file just weeks before the oral hearing. As a consequence, the Court did not find a violation of Article 34 and Article 38, but reiterated its previous

statements that failure to provide the Court with requested documents might lead to a violation of Article 38.

The Court has ordered Russia to pay compensation to Yandiyev's family. The government is also obliged to take steps to properly investigate Yandiyev's disappearance. Once the judgment has attained legal force, the Committee of Ministers of the Council of Europe will monitor its implementation.

The Court also awarded the applicant legal costs despite the Russian government's argument that the legal services were provided for free and that no costs should therefore be awarded.

Bazorkina's case is not unique. The Russian human rights group Memorial estimates that between 3,000 and 5,000 people have disappeared in Chechnya at the hands of Russian or pro-Moscow Chechen troops since the conflict started in 1999. It has documented 127 new cases of “disappearance” in 2005.

Several of these cases have been brought to the Court. In an interview in December 2005, a lawyer from the Court stated that the Court had received approximately 200 cases concerning grave human rights abuse in Chechnya.

The case of *Bazorkina v Russia* was initially brought to the European Court on behalf of the applicant by British barrister Gareth Peirce. Following its establishment in 2001, Stichting Russian Justice Initiative (then Chechnya Justice Initiative) and Gareth Peirce have jointly represented the applicant.

For more information about the case, see:

[www.srji.org/legal/bazorkina](http://www.srji.org/legal/bazorkina) (Russian)  
[www.srji.org/en/legal/bazorkina](http://www.srji.org/en/legal/bazorkina) (English)

*Timishev v Russia*  
(Nos. 55762/00 and 55974/00),  
13/12/2005 (ECHR: Judgment)  
*Freedom of Movement*

### Summary

The applicant was an ethnic Chechen and a lawyer. He had been living in Nalchik (Kabardino-Balkaria) as a forced migrant since 1996. He claimed to have been refused entry into the Kabardino-

Balkaria region, when entering by car from Ingushetia, on the grounds that he was Chechen. The authorities claimed that he had tried to jump the queue unsuccessfully. He complained through the courts about the behaviour of the police, but his claim was dismissed at every level. He also complained unsuccessfully to the Russian Ombudsman, who stated that the restriction was a legal, temporary safety measure. He also complained to the Prosecutor General, who ordered that the Ministry rectify the actions of the police officers. The Ministry informed the prosecutor's office that no rectification was possible, because the courts had found that no breach of the law had occurred. However, the Ministry also commissioned a report which indicated that orders which forbade the admission of Chechens to Karbadino-Balkaria apparently came from the deputy head of the public safety police of the Ministry.

Furthermore, on 1 September 2000 the applicant's nine-year-old son and seven-year-old daughter were refused admission to their school in Nalchik, which they had attended for nearly two years, because the applicant could not produce his migrant's card, which was in the Government's possession. He had handed it in to receive compensation in respect of the property he had lost in the Chechen Republic.

#### *Decision*

The Court found that there had been a violation of the applicant's freedom of movement, within the meaning of Article 2(1) of Protocol No.4, as the restriction had not been in accordance with the law (being based merely on an oral order). It noted that the Ministry and Prosecutor's office had both found in internal inquiries that the applicant had been prevented from passing through the checkpoint on the day in question. The Court found that there had also been a breach of Article 2 of Protocol No. 4 taken together with Article 14 (the prohibition of discrimination), as the orders relating to the checkpoint referred specifically to "Chechens".

As for schooling of the applicant's children, it was accepted by the Russian Government that Russian law did not provide for the denial of children's educational rights on the basis of their parents' failure to register residency. The Court therefore found that there had been

a violation of Article 2 of Protocol No. 1.

#### *Comment*

The Court in this decision described racial discrimination as "a particularly invidious kind of discrimination" which required "from the authorities special vigilance and a vigorous reaction." Member States should be trying to "reinforce democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."

In finding a Convention breach in respect of Mr. Timishev's children's education, the Court also cited relevant sections of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child.

On the same day, judgment was given in a similar case (*Gartukayev v. Russia*, Application no. 71933/01, 13/12/05).

*Moscow Branch of Salvation Army v. Russia* (No. 72881/01)  
5/10/2006 (ECHR: Judgment)  
*Freedom of Religion,*  
*Freedom of Assembly*

#### *Facts*

The applicant, the Moscow Branch of The Salvation Army, is a religious organisation engaged in charitable work in Russia since its re-establishment in 1992. In 1997, the Russian Federation enacted a new Law on Freedom of Conscience and Religious Associations ("the Religions Act"), which required all the religious organisations that had previously been granted legal-entity status to amend their articles of association in conformity with the new Act and to re-register by December 1999. The applicant submitted its application in February 1999, but re-registration was denied. The Moscow Justice Department confirmed this refusal in July 2000 on the ground that the applicant branch was a representative office of the London-based international organisation and not an independent religious organisation, and moreover held

that the Salvation Army was a subversive paramilitary foreign organisation, whose members were ordered in ranks and wore uniform, and advocated a violent change of constitutional principles of the Russian Federation undermining the security and integrity of the State.

The District Court endorsed that argument and further held that the applicant branch's articles of association failed to describe adequately the organisation's faith and objectives. The applicant was further refused permission to lodge an application for supervisory review and became liable for dissolution through the courts. In September 2001, the applicant brought a complaint before the Constitutional Court challenging the constitutionality of the Religions Act's provision (section 27(4)) relating to the dissolution of religious organisations that had failed re-registration. In 2002, the Constitutional Court ruled that the applicant's case was to be reheard. In 2003, the Taganskiy District Court of Moscow dismissed an action for the dissolution of the applicant branch. A further appeal brought by the Moscow Justice Department was rejected.

The applicant submitted that the denial of re-registration and the liquidation of the organisation's legal entity had had an adverse impact on its activity, both diverting resources from religious activity and seriously undermining their work and their reputation. In May 2001, the Salvation Army submitted an application to the European Court of Human Rights. The applicant complained under Article 9 (freedom of religion), Article 11 (freedom of association), Article 14 (prohibition of discrimination) and Article 6 (right to a fair hearing within reasonable time). The case had been the subject of a number of resolutions of the Parliamentary Assembly of the Council of Europe. The case was declared partly admissible by the First section of the European Court of Human Rights on 24 June 2004.

#### *Judgment*

The Court held unanimously that the applicant could claim to be a "victim" for the purposes of Article 34 of the Convention, and there had been a violation of Article 11 (freedom of assembly and association) of the Convention read in the light of Article 9 (freedom of thought, conscience and religion). No separate examination of the

same issues under Article 14 (prohibition of discrimination) of the Convention was required.

Article 9 is one of the foundations of a 'democratic society', and the autonomous existence of religious communities, that is indispensable for pluralism in a democratic society, is an issue at the very heart of the protection which Article 9 affords. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion in private or in community with others". Since religious communities are traditionally in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards the right to freedom of association from unjustified State interference.

The existence of a violation is conceivable even in the absence of prejudice of damage, thus the applicant could claim to be a 'victim' of the violation complained of, although there had been no dissolution of the organisation. A refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association (Article 11). Where the organisation of the religious community is at issue, a refusal to recognise it also constitutes interference with the applicants' right to freedom of religion under Article 9 of the Convention.

With reference to the arguments put forward by the Government in justification of the interference, the Court observed that:

a) there is no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion. Therefore the arguments pertaining to the applicant's alleged 'foreign origins' were neither 'relevant and sufficient' for refusing its re-registration, nor 'prescribed by law';

b) if the applicant's description of its religious affiliation was not deemed complete, it was the national courts' task to elucidate the applicable legal requirements and give the applicant clear notice as to how to prepare the documents in order to obtain re-registration;

c) the allegedly paramilitary nature of the applicant's structure did not form part of the initial decision to refuse re-registration, and, according to the Court's case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such belief are legitimate. Although the applicant branch was organised using ranks similar to those used in the army and their members wore uniforms, it could not be seriously maintained that the applicant branch advocated a violent change of constitutional foundations or thereby undermined the integrity and security of the State. There was no evidence that, during its existence, the applicant branch or its members and founders had contravened any Russian law or pursued objectives other than the advancement of the Christian faith and acts of charity. It follows that this finding by the District Court also lacked a sufficient evidentiary basis and was therefore arbitrary.

Accordingly, the Court considered that the Moscow authorities did not act in good faith and neglected their duty of neutrality and impartiality, and therefore that their interference with the applicant's right to freedom of religion and association was not justified. There was, therefore, a violation of Article 11 of the Convention read in the light of Article 9.

With regard to the alleged violation of Article 14 of the Convention, 'the inequality of treatment', of which the applicant claims to be a victim, was found to have been sufficiently taken into account in the assessment that led to the violation of the substantive Convention provisions.

Under Article 41 of the Convention the Court awarded to the applicant €10,000 for non-pecuniary damage.

#### **Comment**

*(Tatiana Tomaeva, Slavic Centre for Law and Justice)*

The case of the Salvation Army is the first Russian case concerning Article 9 on which the European Court has ruled (other Article 9 cases are pending before the Court at different stages). This positive judgment gives hope to the many groups subject to similar state interference.

Of course, how exactly the judgment will be enforced remains to be seen. The Salvation Army's representatives intend to challenge the decisions that have tarnished its reputation and deprived it of the right to function in Moscow by way of supervisory review. Since the Russian state is in deep denial about the extent of injustices that minority religions face it will take a lot of perseverance on their part to tackle this pattern of discrimination. Today, rather than denying minorities their right to establish themselves as legal entities, the State more often interferes with their property rights, depriving them of the physical opportunity to practice. However, the underlying problem remains the same – the impermissible tendency on the part of the State to distinguish between desirable and undesirable religions.

The judgment has also once again drawn attention to the serious flaws in the domestic legislation on freedom of religion. Being a shoddy piece of legislative work, which has been challenged many times in the Russian Constitutional court, it provides for disproportionately serious sanctions for purely technical breaches on the part of religious organisations – a problem recognised by the Constitutional Court but never properly addressed by the legislature. Needless to say, these overly harsh provisions have only ever been used against minority groups like the Salvation Army and some others.

## Potential ECHR Applicants:

If you think your human rights have been violated or if you are advising someone in such a position, and you would like advice about bringing a case before the European Court of Human

Rights, EHRAC may be able to assist. Please email or write to us; contact information is on the last page.

## First five decisions of the European Court with respect to the Republic of Armenia

*Narine Gasparyan, Advocate to the Chamber of Advocates of the Republic of Armenia, President of Legal Guide, NGO*

After the collapse of the Soviet Union, the Newly Independent States (NIS) started developing market-oriented societies and their integration into international and European structures became an urgent issue on the agenda. Accession to the United Nations system and the Council of Europe were one of the primary goals for nearly all NIS countries.

Armenia joined the Council of Europe on 25 January 2001 and entered into a number of commitments, which were primarily defined in Parliamentary Assembly Opinion No. 221 (2000) on Armenia's Application for Membership into the Council of Europe.<sup>1</sup> On the same day, Armenia signed the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but only ratified it on 26 April 2002. As for other Caucasus States, Azerbaijan ratified the Convention on 14 April 2002. Georgia was the first state in the Caucasus to ratify the Convention - on 20 May 1999.

Since 2002, until the end of 2005, 582 applications were lodged with the European Court of Human Rights (the Court) against Armenia, whilst 954 applications were lodged against Azerbaijan during the same time period. Just 237 cases were lodged against Georgia in the same period.<sup>2</sup>

The positive impact of the judgments of the Court, as well as the prevention of further similar violations of human rights and freedoms, has been one of the key and important aspects of the whole Strasbourg machinery. For the Caucasus States, the Strasbourg machinery is a relatively new

mechanism, therefore further consideration should be given to the impact of the Court judgments on the amendments of domestic legal norms, the adoption of new legal norms and on changes in judicial practice, in terms of the interpretation of the legal acts and the ECHR in compliance with the case law of the Court.

As of 1 September 2006, only five admissibility decisions (one admissible; three partially inadmissible; and one inadmissible) and no judgments were available on the official website of the Court with respect to Armenia, whereas seven judgments had been passed down in respect of Georgia (six judgments on the merits and just satisfaction and one striking out decision). As for Azerbaijan, there were 19 decisions (ten decisions declaring the applications inadmissible, two decisions on partial inadmissibility, five decisions on partial admissibility and one decision on striking out) and one judgment striking the case out of the list.

It is interesting to observe that the aspects of the applications that were declared admissible in relation to the Armenian cases were as follows: the removal of the applicant's counsel from the courtroom and an interference with the applicant's right to freedom of expression (*Noyan Tapan LTD v. Armenia*<sup>3</sup>); the alleged violation of the right of the applicant to silence and the admission in court of evidence obtained under torture (*Harutyunyan v. Armenia*<sup>4</sup>); the applicant's complaint under Article 10 (freedom of expression) of the Convention (*Bojolyan v. Armenia*<sup>5</sup>); and the alleged

interference with the right of the applicant to freedom of assembly (*Mkrtchyan v. Armenia*<sup>6</sup>).

The cases of *Noyan Tapan LTD* and *Bojolyan* are high profile cases in Armenia, both concerning alleged violations of the right of freedom of expression. In *Bojolyan*, the applicant complains that his conviction (for treason) unlawfully interfered with his right to freedom of expression. In *Noyan Tapan*, the applicant complains that the decision of the National Commission of Television and Radio unlawfully interfered with its right to freedom of expression guaranteed by Article 10 ECHR.

In the case of *Mkrtchyan*, the Court, without prejudging the merits, declared admissible the complaint concerning an interference with his right to freedom of assembly. It is worth mentioning that considerable numbers of applications were lodged with the Court with similar allegations related to the demonstrations led by the political opposition in Armenia before and after the presidential elections in 2003.

As for the case of *Harutyunyan*, the alleged violation - the admission in court of evidence obtained under torture - is one of the prohibited practices and, therefore, the case raises an issue of common importance. The case also involved issues of alleged violation of the right to silence, which is considered an important element of a fair trial.

Since there is, as yet, no judgment concerning Armenia, it is too early to assess the impact of the ECHR on the domestic

## New Book - Implementation of the European Convention of Human Rights in Russian Courts

The sixth volume in the International Human Rights Protection series, *Implementation of the European Convention of Human Rights in Russian Courts*, has been published this year. The book focuses on the domestic application of the European Convention on Human Rights in the courts of different levels and jurisdictions within the Russian Federation. The book contains extracts

of relevant international documents and Russian legislation necessary for the successful implementation of the Convention in Russian courts, including some resolutions of the Committee of Ministers of the Council of Europe that were not previously translated into the Russian language.

The editor of the book is Anton Burkov, PhD candidate in Law at

the University of Cambridge. Other contributors include Ludmila Churkina, Anna Demeneva, Vladislav Bykov and Ella Pamfilova.

The book can be downloaded for free at [www.sutyajnik.ru/rus/library/sborniki/echr6/echr6.pdf](http://www.sutyajnik.ru/rus/library/sborniki/echr6/echr6.pdf) or a free copy can be ordered at [www.sutyajnik.ru/rus/library/sborniki/echr6/zakaz.htm](http://www.sutyajnik.ru/rus/library/sborniki/echr6/zakaz.htm).

judicial practice and/or the improvements of the legal system. However, one must note that many judges and lawyers in Armenia have changed their approaches to drafting pleadings and interpreting both domestic laws and the ECHR at the domestic level after Armenia ratified the ECHR and it became the part of the Armenian legal system. Furthermore, Armenia is currently taking steps to incorporate several concepts of the common law system, in particular a jurisprudence based on judicial precedents, into the domestic legal system, which is closer to a civil law system. This will have a significant impact and will allow judicial interpretation of the legal acts, interpretation of the legal

meaning of certain provisions of domestic legal acts and clarification of those legal acts. Many lawyers and judges accept that the introduction of these concepts into the Armenian legal system will promote the protection of human rights and freedoms, as positive results at the domestic judicial level may remain rare if the domestic courts are not flexible enough to follow them. Consequently this will enhance the effectiveness of domestic legal remedies and may reduce the level of human rights violations and the number of the cases submitted to the Court.

It will be interesting to observe how the first judgments of the Court to which Armenia is a party will change the judicial

practice and what impact they will have on the legal and judicial systems of Armenia.

1 Opinion No. 221 (2000) of the Parliamentary Assembly of the Council of Europe on Armenia's application for membership of the Council of Europe. Assembly Debate on 28 June 2000 (21st Sitting), text adopted by the Assembly on 28 June 2000. URL: <http://assembly.coe.int/Documents/AdoptedText/TA00/eopi221.htm>

2 See the Surveys of Activities of the Court for 2004 and 2005. URL: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+survey+of+activity/>

3 *Noyan Tapan LTD v. Armenia*, No. 37784/02, dec. 21.10.04

4 *Harutyunyan v. Armenia*, No. 36549/03, dec. 5.7.05

5 *Bojohyan v. Armenia*, No. 23693/03, dec. 6.10.05

6 *Mkrtychyan v. Armenia*, No. 6562/03, dec. 20.10.05

## Environmental pollution – supervising the execution of the *Fadeyeva* judgment

The judgment in the groundbreaking environmental case of *Fadeyeva v. Russia* (No. 55723/00, 09/06/2005) became final on 30 November 2005. The applicant lives in a council flat situated in a sanitary zone established around the Severstal steel plant in Cherepovets. Pollution in the zone is much higher than the limit established by Russian law, and the applicant, therefore, wished to be resettled. Instead of resettling the applicant, the authorities merely placed her on a general resettlement waiting list, and took no steps to reduce the pollution to an acceptable level. Consequently, the European Court held that Russia had failed to strike a fair balance between the interests of the community and the applicant's right to respect for her home and private life (in violation of Article 8 ECHR).

As is the case with all European Court judgments, it is the responsibility of the Committee of Ministers of the Council of Europe to supervise the enforcement

of this decision.

In this case, the Committee of Ministers has decided that, before it can determine the 'general measures' to be taken by the Russian authorities to prevent new, similar violations, the authorities should answer a series of questions which were sent to the Russian authorities on 3 February 2006. These are summarised below.

- What are the avenues available under domestic law to prevent dangerous pollution by industrial plants in populated areas?
- What is the current legal status and size of the sanitary zone around the Severstal plant?
- Which authorities are competent to ensure that sanitary zones are set up and implemented, and what measures may be taken in the event of a breach of the common rules for such zones by the competent authorities?
- What is the current state policy in respect of inducing industrial plants

to take measures for environmental protection

- What legal remedies/sanctions (e.g. civil, administrative or criminal) are available in Russian law to combat unlawful industrial pollution or to make polluting industrial plants bear the consequences of their activities?
- More specifically, what judicial or administrative remedies, either preventive or compensatory, are available to ensure respect for the rights of persons in the applicant's position?

The Russian authorities were invited to answer these questions and to inform the Committee of Ministers of any measures taken or envisaged so as to comply with Russia's positive duties under the European Convention, as set out in the judgment. The Government was also asked to provide its 'action plan' for the implementation of the judgment.

Source: [http://www.coe.int/t/e/human\\_rights/execution/PPcasesExecution\\_April%202006.doc](http://www.coe.int/t/e/human_rights/execution/PPcasesExecution_April%202006.doc). Accessed 12/09/06.

## NGO Register: link up with us!

EHRAC is interested in building links and sharing experiences with a network of NGOs in Russia and ultimately the wider area encompassing states formerly within the Soviet Union.

Through networking and sharing information and resources,

it will be possible to reach more people and become yet more effective. If you are interested in our work or are involved in similar areas of activity and would like to develop links with us, please do not hesitate to contact us.

EHRAC receives funding from the British Foreign Office and several other grant-making institutions, but is very much in need of your assistance to support the costs of some of the project activities.

EHRAC would be most grateful for any help you are able to give. If you would like to make a donation, please complete this form and send it to us with your donation.

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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 almost 100 cases involving more than 550 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 co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: [www.londonmet.ac.uk/ehrac](http://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.

EHRAC would like to thank the following people for their contributions: Federica Arisco, Afag Abdullaeva, Anton Burkov, Ana Dolidze, Narine Gasparyan, Sophio Japaridze, Shushan Khachyan, Bilal Khan, Joseph Kotrie Monson, Ole Solvang, Lala Stone and Tatiana Tomaeva. This bulletin was produced by: Tina Devadasan, Philip Leach and Kirsty Stuart, and designed by Torske & Sterling Legal Marketing.

The EHRAC Bulletin is published biannually. We welcome contributions of articles, information or ideas. Communications regarding proposed articles should be sent to EHRAC by email. Materials in the bulletin can be reproduced without prior permission. However, we would request that acknowledgment is given to EHRAC in any subsequent publication and a copy sent to us.

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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.

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