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Editorial:

In its resolution of 2 October 2008, the Parliamentary Assembly of the Council of Europe stated that having resorted to the use of force over South Ossetia, both Georgia and Russia had violated Council of Europe principles and values, and their commitment to settle conflicts by peaceful means: both states were responsible for violations of human rights and humanitarian law. In the light of these recent events, the lead article in this edition of the Bulletin, by Matthew Happold, of Hull University, discusses the interplay between human rights law and international humanitarian law.

Continuing our exploration of issues of implementation, Jakub Wołąsiewicz (Polish Government Agent) and Michał Balcerzak (Nicholaus Copernicus University, Poland) discuss the pros and cons of the European Court's pilot judgment procedure, highlighting systemic human rights problems, and from the UK, Angela Patrick and Joanne Sawyer explain the important functions carried out by the Parliamentary Joint Committee on Human Rights, which include following up human rights decisions and auditing draft legislation.

Also in this issue, Eleonora Davidyan (EHRAC-Memorial) considers restrictions on Muslim freedoms in Russia, Grigor Avetisyan (EHRAC-Memorial) assesses the implications of the *Gäfgen v Germany* case (relating to the use of evidence obtained through torture) and Natia Katsitadze (Article 42) analyses the practice of plea bargaining in Georgia as against fair trial principles. Tatiana Chernikova (EHRAC-Memorial) outlines the main features of the reformed Universal Periodic Review mechanism of the UN Human Rights Council.

Prof. Philip Leach
Director, EHRAC

Human rights in armed conflict and the jurisdiction of the ECtHR

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The recent armed conflict between Georgia and the Russian Federation has brought to prominence the applicability of human rights law to situations of armed conflict and the jurisdiction of the ECtHR over events occurring during hostilities.

The relationship between international human rights law and international humanitarian law (IHL) has long been controversial. IHL applies in situations of armed conflict. Although originally only applicable in situations of international armed conflict (wars between states), it has been gradually extended to cover internal armed conflicts (civil wars), although the rules applying in such situations are more rudimentary than the very detailed provisions applicable in international armed conflicts. As for international human rights law, a more recently developed body of rules, it is clear that it applies in peacetime, but does it apply in times of war?

One answer was given by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Faced with an argument that deaths resulting from the use of nuclear weapons would breach individuals' right to life, the Court concluded that:

"Whether a particular loss of life, through use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International] Covenant [of Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[1]*"*

In other words, a killing in wartime

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would only breach international human rights law if it breached IHL.

This answer, however, gives rise to further questions. International human rights courts are not courts of general jurisdiction. They are only empowered to determine cases by reference to their constitutive treaties. For example, Art. 34 of the ECHR provides that:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention of the protocols thereto...."

The Inter-American Commission on Human Rights established a practice of finding violations not only of the Inter-American Convention on Human Rights but also of IHL conventions. However, in the *Las Palmeras* case,[2] the Inter-American Court of Human Rights held this practice outside of its jurisdiction. In that case, the Inter-American Commission had found that Colombia had violated the right to life enshrined in Art. 4 of the American Convention on Human Rights and in Common Art. 3 of the Geneva Conventions. The Inter-American Court, however, stated that whilst it was competent to interpret the Geneva Conventions whenever necessary to interpret a rule of the American Convention, it was not competent to apply those Conventions. IHL could only be applied indirectly.

The ECtHR has also been faced with numerous applications arising out of events in armed conflicts: from south-east Turkey and Chechnya in particular. However, in contrast to the American Court of Human Rights, it has not applied IHL, even indirectly, to determine whether the ECHR has been breached. In *Ergi v Turkey*,[3] the Court determined that the applicant's sister's death in cross-fire between Turkish security forces and PKK guerrillas was an unlawful killing by sole reference to Art. 2 of the ECHR. Similarly, in *Isayeva, Yusupova & Bazayeva v Russia*[4] the ECtHR held deaths caused by the bombing of a civilian convoy by Russian military planes violations of the ECHR without referring to IHL, despite being invited to by Rights International, an NGO which intervened in the case.[5]

It is difficult to know the precise reasons why the ECtHR has taken this route. It may be that it has simply responded to the parties' pleadings. Applicants may not wish to rely on less favourable rules of IHL, as opposed

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Legal remedies for human rights violations in the North Caucasus

A recent report by the Council of Europe's Committee on Legal Affairs and Human Rights, declassified on 15 April 2008, documents the Council's problems in obtaining access to the region. It also comments on the human rights situation there based on NGO reports.[1]

The report first expresses frustration at the delay in obtaining official authorisation for a visit to the region, despite the fact that a parliamentary motion was originally filed in April 2006 on this issue. This was due to the need for the agreement of a comprehensive mandate and, implicitly, the steps taken by the Russian authorities to prevent such a mandate and access to the team.

The report then summarises the human rights situation, as based on NGO reports. Despite improvements in the general material situation and infrastructure, especially in Grozny, it expresses continuing human rights concerns, in particular extrajudicial killings, disappearances and torture in the area.

In relation to torture, reference is made to three European Committee for the Prevention of Torture (CPT) public statements concerning the Russian authorities lack of cooperation in relation to places of detention in the Chechen Republic[2] and Russia's persistent refusal to authorise the publication of CPT reports.

The report also refers to the March 2008 report of the Norwegian Helsinki Committee: *Anti-terrorism Measures and Human Rights in the North Caucasus*.[3] This concluded that counter terrorist measures taken by the authorities conceal grave human rights breaches in Ingushetia, Kabardino-Balkaria, Dagestan and North Ossetia, including torture, forced confessions and enforced disappearances. In this connection reference is made to a large-scale counter terrorist operation launched by security forces in Ingushetia in response to attacks on security forces and bombings. The report mentions with concern the ill treatment and abduction of Oleg Orlov, president of Memorial, and TV journalists in Ingushetia in late 2007.

Finally, reference is made to the problem of impunity of state agents in human rights abuses and the selective and inadequate enforcement of ECtHR judgments. It also highlights the fact that official figures relating to complaints of torture or disappearances are distorted due to the victims' reluctance to report due to intimidation, including the murder of family members.

The report concludes that the situation in the North Caucasus constitutes by far the most alarming human rights situation in Council of Europe territory. It urgently calls for an appropriate mandate to clarify these problems and identify ways to improve the situation.

1 Available at: http://assembly.coe.int/CommitteeDocs/2008/20080411_ajdoc21_2008.pdf.

2 The most recent of which (13 March 2007) is available at: http://www.cpt.coe.int/documents/rus/2007-17-inf-eng.htm.

3 Available at: http://www.nhc.no/php/files/documents/land/Tsjetsjenia/2008/Report_2_2008.pdf.

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to the ECHR. Respondent states are frequently unwilling to admit they are in situations of armed conflict, preferring to argue that they are simply undertaking "police actions" against "terrorists". As already mentioned, the ECtHR may also consider that it is not entitled to make reference to IHL, although this has not stopped it referring to other human rights norms and decisions of human rights monitoring bodies elsewhere (see, for example, *Kalashnikov v Russia,*[6] where the ECtHR relied on the views of the European Committee on the Prevention of Torture in deciding that the conditions of the applicant's detention violated Art. 3).[7]

However, it is difficult to say that the ECtHR's stance has disadvantaged applicants. Although IHL and international human rights law duplicate each other on some issues (such as with regard to torture, which is equally prohibited by both), IHL is generally more permissive. To take a particular pertinent example, whereas Art. 2 restricts killings by the State to situations of absolute necessity, IHL assesses the issue by reference to the concept of proportionality. An attack giving rise to civilian casualties is unlawful in IHL only when it is directed against the civilian population and civilian objects, or causes damage to civilians which was disproportionate to the direct military advantage gained, or is indiscriminate because it uses indiscriminate methods or means of war or causes indiscriminate damage to the civilian population.

Consequently, the ECtHR has been willing to determine the legality of Contracting Parties' conduct during armed conflicts, and to do so by reference to the ECHR rather than IHL (whether directly or indirectly). However, the ECtHR might nevertheless be prevented from adjudicating on such issues when the conflict is international in character and military activities take place outside a party's territory. Art. 1 of the ECHR provides that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined in the ECHR. The extent of the parties' obligations is therefore confined to persons within their "jurisdiction". In *Bankovic v Belgium*,[8] the ECtHR held that persons within the premises of Serbian television in Belgrade, who had been killed or injured in the bombing of the building by NATO military planes during the 1999 Kosovo campaign, had not been within the jurisdiction of the respondent States. IHL, by contrast, has no such territorial limitations.

There are, however, two exceptions to this rule. First, even outside its territory, persons within a Contracting Party's authority and control are within its jurisdiction for the purposes of the ECHR, as in *Issa v Turkey,*[9] where the ECtHR held admissible a complaint about the killing of seven Kurdish men by Turkish forces operating in northern Iraq.[10] Second, it is clear that when one Contracting Party occupies territory belonging to another, the population continues to benefit from the ECHR, as, in the Court's view, otherwise there would be a vacuum in the system of human rights protection provided by the ECHR.[11]

Applying these conclusions to the recent Georgia-Russian conflict, it would appear that the ECHR applies to the acts of both sides, regardless of whether the locus of their activities was in their own or the other's territory.

1 (1996) ICJ Rep. 66, at para. 25.

2 Preliminary objections, judgment of 4 February 2000, Series C no. 66.

3 (No. 23818/94) 28/7/98, Reports 1998-IV.

4 (Nos. 57947/00, 57948/00 & 57949/00) 24/2/05.

5 Some of the wording used in the judgment mirrored IHL concepts. However, there was no acknowledgement of this 'borrowing'.

6 (No. 47095/99) 15/7/02, Reports 2002-VI.

7 The difference in treatment may arise from the fact that the ECPT is also a part of the Council of Europe's systems for the protection of human rights.

8 (No. 52207/99) dec. 12/12/01.

9 (No. 31821/96) dec. 30/5/00.

10 Indeed, it may be that the benefits of the ECHR extend to everyone in territory under military occupation by a Contracting Party, but see the contrary view taken by the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

11 This has been the view of the ECtHR in a number of cases concerning the activities of Turkey in northern Cyprus: see, in particular, *Loizidou v Turkey* (No. 15318/89) 18/12/96, Reports 1996-VI; and *Cyprus v Turkey* (No. 25781/94) 10/5/01), Reports 2001-IV.

The Universal Periodic Review mechanism of the UN Human Rights Council – a hope for universal coverage and equal treatment of states?

Tatiana Chernikova, Lawyer, EHRAC-Memorial

The UN General Assembly, in its resolution 60/251 mandated the Human Rights Council to undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations in a manner which ensures universality of coverage and equal treatment with respect to all states.[1] All member states of the Council are to be reviewed during their term of membership.

At its fifth session, the Council adopted, in resolution 5/1, detailed provisions regarding the Universal Periodic Review (UPR) mechanism.[2] The bases for the review are the human rights instruments to which a state is party, voluntary pledges and commitments made by states, including those undertaken when presenting their candidatures for election to the

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Human Rights Council, as well as applicable international humanitarian law.[3]

The information for the UPR is based on three sources. Firstly, there is the state's 20-page report. Secondly, a compilation is prepared by the UN Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of the UN treaty bodies, special procedures and other relevant UN official documents (10 pages). Thirdly, a 10-page compilation is prepared by OHCHR, of credible and reliable information provided by other relevant stakeholders (NGOs, national human rights institutions, academic institutions and research institutes, regional organisations and civil society representatives).[4]

The review of this information is conducted by a Working Group, chaired by the President of the Council and composed of the 47 member states of the Council. Other relevant stakeholders may attend the review. A group of three rapporteurs (*troika*), selected by the drawing of lots among the members of the Council and from different Regional Groups, is formed to facilitate each review, including the preparation of the report of the Working Group. Interactive dialogue between the country under review and the Council takes place in the Working Group.[5]

The outcome of the UPR is a report consisting of a summary of the proceedings of the review process, conclusions and/or recommendations, and the voluntary commitments of the state concerned. The outcome is adopted by the plenary of the Council. Recommendations that enjoy the support of the state concerned are identified as such. Other recommendations, together with the state's comments, are noted. The Council should then follow up the implementation of recommendations in consultation with the state concerned.[6]

UPR has several advantages and challenges. It is very interesting that this mechanism is aimed at ensuring universal coverage of the fulfilment by a state of all its legal obligations under international human rights and humanitarian laws, thus potentially giving a full picture of the human rights situation in a country. At the same time, the fact that the information from all sources about all human rights cannot exceed 40 pages may make such a report superficial. It is very positive that the report of the Working Group on the UPR is based on different sources, which include the state's position, the position of different UN bodies and of NGOs. This is aimed at ensuring the objectivity of the information. It is also a good opportunity for NGOs and human rights defenders to try to influence the position of the Human Rights Council, although it is not yet known how significant such an influence will prove to be.

One of the most important features of the UPR is that it is a non-selective mechanism, which examines every state under the same conditions. It is aimed at ensuring the equal treatment of states. At the same time, the Human Rights Council is an inter-governmental institution and the decisions are made by state representatives. This of course means a risk of political issues influencing debates on human rights and of political voting. The positive aspect of UPR is an opportunity to share human rights practice between states. At the same time, states facing similar human rights problems may agree not to criticise one another. The examination is not carried out by an independent judge but it is an examination of equals by equals, including all positive and negative aspects. It is a 'democratic' examination which will represent the opinion of the majority of the international community on human rights issues, but will it be a professional examination based on legal principles?

It is positive that UPR is a cooperative mechanism based on interactive dialogue which fully involves the country under review. It is a non-confrontational mechanism. It can encourage cooperation between states and different human rights bodies. At the same time, the UPR does not have a clear follow-up mechanism and the implementation of the recommendations of the Council will mainly depend on the goodwill of a state.

Two sessions of the Working Group have already been held and 32 states were reviewed. Russia is scheduled to be reviewed at the 4th session to be held between 2 and 13 February 2009. Georgia is scheduled for the 10th session in 2011.[7]

In order to facilitate OHCHR's work on the compilation of UN reports for the UPR the University of Bern has developed a special electronic database, the Universal Human Rights Index. This database contains all observations and recommendations of the treaty bodies and special procedures (starting from 2000) devised by bodies, countries, rights concerned and affected persons. The database could also be useful in the everyday work of human rights defenders and NGOs.[8]

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1 General Assembly, A/RES/60/251, 15 March 2006, para. 5(e).

2 Human Rights Council, A/HRC/RES/5/1, 18 June 2007, para. 1-38.

3 *Ibid*, para. 1-2.

4 *Ibid*, para. 15.

5 *Ibid*, para. 18-25.

6 *Ibid*, para. 26-38.

7 Information about the UPR mechanism and different reports may be found at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx and http://www.upr-info.org/.

8 The database is accessible at http://www.universalhumanrightsindex.org.

The pros and cons of the European Court of Human Rights pilot judgment procedure

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Responding to systemic human rights violations: an analysis of ECtHR pilot judgments

The Human Rights & Social Justice Research Institute (HRSJ) at London Metropolitan University is currently conducting research into the pilot judgment procedure and its impact within national legal systems. This research aims to provide a deepened understanding of pilot judgments and will assess whether European Governments are responding adequately to them. For more information, please see: http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm.

The ECtHR has applied the pilot judgment procedure in two cases against Poland: *Broniowski* (No. 31443/96 25/9/05) (for the first time ever) and *Hutten-Czapska* (No. 35014/97 GC 28/4/08). In both cases the underlying causes of the ECHR violation were found in systemic deficiencies of the legislation in connection with dysfunctional domestic practice. Having regard to the systemic cause of the violation, the ECtHR held that its consequences concerned not only the applicants in the abovementioned cases, but also applicants with pending ECtHR cases and potential applicants.

It comes as no surprise that the concept of pilot judgments is at the heart of the debate relating to the stronger implementation of the ECHR at the domestic level. This is exactly what the pilot judgment procedure is aimed at: implementing the ECHR in a domestic legal system in the context of systemic problems underlying the violation of the ECHR.

The judgment in the *Broniowski* case may be regarded as a leading *test case*, as it introduced a certain pattern for the pilot procedure. Having identified the systemic violation of the ECHR, the ECtHR indicated possible measures to redress the situation both in general and in respect of the applicant. The original 2004 judgment reserved the question of the payment of damages to the applicant, and, as a result of mediation between the applicant and the Government, with the involvement of the Court's Registry, a friendly settlement was reached which defined the terms of both individual and general measures (and which was set out in the 2005 judgment).

It should be noted that whereas the 'pilot' applicant's claims under the ECHR were settled individually, the other applicants had to wait until an appropriate procedure was introduced into domestic law, since their cases were re-directed to the domestic level.

So, in fact, pilot judgments can hardly be called 'precedents', as their *rationes decidendi* are not supposed to be followed by subsequent court rulings on the same issues. Instead, pilot judgments are 'designed' for Governments rather than for applicants. The idea is to induce the domestic authorities to take over the responsibility for redressing ECHR violations in the domestic legal order. In other words, it is all about restoring the fundamental concept of subsidiarity to the ECHR system.

In general, the pilot procedure is a useful way of dealing with systemic violations of the ECHR, however, it also has certain shortcomings. Firstly, this procedure was not envisaged in the ECHR itself and some doubts have been raised as to its legitimacy. An orthodox approach to the interpretation of the ECHR in fact indicates that whenever the ECtHR applies this procedure, it is balancing on a thin red line to justify the use of Art. 46 as a legal basis for the judgment.[1]

Secondly, one of the main weaknesses of the pilot procedure is its expanded structure. As a consequence, the ECtHR needs a considerable amount of time to reach a judgment within that framework. If we consider the pilot cases already examined by the Court, the period between the communication of the case to the Government and the delivery of the judgment amounts to up to four years. If we take into account the period prior to communication, as well the amount of time necessary to examine the clone cases, the whole procedure may take up to 10 years.

Presumably it is possible to shorten the time required considerably, at least in certain categories of cases. This could be achieved by simplifying some steps in the procedure. At present the pilot judgment procedure consists of three main steps: the delivery of a pilot judgment, friendly settlement and the delivery of a judgment approving the friendly settlement. We believe that in certain circumstances the procedure could involve the delivery of a pilot judgment approving a friendly

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settlement or the Government's unilateral declaration. In other words, the conclusion of a friendly settlement or the submission of a unilateral declaration could precede the delivery of a pilot judgment. The simplified pilot procedure would not replace the present one, but would have an optional character.

We are aware that the simplified pilot procedure may only concern cases where the Government does not deny the existence of a systemic violation and its causes. However, the practice of the Polish pilot cases reveals that the lengthy pilot procedure has considerable drawbacks with respect to both the Government's position and the applicants' status. It also affects the efficiency of the ECtHR.

Some other improvements could be introduced, for example, the Council of Europe Commissioner for Human Rights could act as the mediator. It is our profound belief that the expertise and experience of the Commissioner might be of great value in concluding a friendly settlement in cases revealing a structural problem.

Undoubtedly, the simplified pilot procedure could contribute to a more effective implementation of the ECHR in situations where the Government concerned declares its willingness to cooperate with the ECtHR in eliminating the problem underlying the systemic dysfunction. Of course, the concept of the simplified pilot procedure requires some further thought, however, the idea remains clear: to strengthen the mechanisms developed in the *Broniowski* and *Hutten-Czapska* cases in order to secure a more effective way of dealing with systemic violations of the ECHR.

Finally, it is noteworthy that the concept of pilot judgments is currently on the agenda of the Reflection Group (GDR) established by the Steering Committee for Human Rights in November 2007. The GDR is tasked with an in-depth examination of the concrete follow-up that could be given to the recommendations provided in the Report of the Group of Wise Persons, as well as other sources. The Polish Delegation to the GDR is particularly interested in the concept of pilot judgments and will support the idea of drafting rules governing the use of the pilot judgment procedure, with particular reference to the criteria for 'pilot cases', the procedure for their selection, the role of the Court Registry, possible involvement of other actors in the procedure and their desired effect.

There is an urgent need to clarify and simplify the pilot judgment procedure. Without any doubt, this task would benefit from the experience of the completed or pending pilot procedures, with particular emphasis on the *Broniowski* and *Hutten-Czapska* cases.

1 Article 46 of the Convention provides:
1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Implementation of ECtHR judgments in Chechen cases

In July 2005 the ECtHR judgments in the first six cases concerning the actions of the Russian security forces in Chechnya[1] became final and the Russian Government was bound to execute these judgments under the supervision of the Committee of Ministers (CoM) of the Council of Europe. However, in two memoranda lodged in September 2008 the applicants, and the NGOs, EHRAC and Memorial, invited the CoM to find that Russia has yet to comply with this obligation.

The memoranda were prepared in response to information provided by the Russian Government to the CoM.[2] They note that despite explicit requests from the CoM, the Government's investigations into the cases in question have not made any progress since the time of the judgments. None of the investigations has led to a prosecution and neither the applicants nor their representatives have been informed about any of the decisions made in the course of the investigations. In the light of this inertia, and given that the events date to 1999-2000, concerns are raised that the application of a 15-year limitation period to 'especially grave crimes' may mean that perpetrators avoid responsibility.

The memoranda also deal with the Russian Government's persistent non-disclosure of domestic criminal case files, even though this has already been found to violate the ECHR. The CoM is also invited to request information or documents from Russia on, among others, its initiatives for training military service personnel, judges and prosecutors in international humanitarian and human rights law, and on the United Register of Kidnapped and Disappeared Persons.

The memoranda are available at: http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-litigation/chechnya---echr-litigation-and-enforcement/enforcement-of-chechen-judgments.cfm.

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

2 Written information provided by the Russian authorities at the 1007th meeting of the CoM Deputies (October 2007), an unofficial translation of which is available at:
http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-litigation/chechnya---echr-litigation-and-enforcement/enforcement-of-chechen-judgments.cfm
and information provided orally at the 1020th meeting, available in the public version of the Annotated Agenda:
https://wcd.coe.int/ViewDoc.jsp?id=1271665&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

The practice of 'plea bargaining' in Georgia – violating the principles of a fair trial?

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In February 2004 the practice of 'plea bargaining' was introduced into the Criminal Procedure Code of Georgia (CPCG). This article will consider whether the process of plea bargaining as it is applied in practice raises issues as to the fairness of the proceedings.

One reason given by the Government of Georgia for introducing plea bargaining is the 'effective fight against corruption'. However, following its introduction, plea bargaining, particularly the monetary element of concluding a plea bargain, has been highly criticised by Georgian lawyers and local and international human rights organisations.[1] Despite there being nothing said about the financial element of a plea bargain in the CPCG, in each case, regardless of whether an economic crime was involved or not, making a monetary payment is a main factor in the prosecution agreeing on the settlement of a case on the basis of a plea bargain. Defendants frequently pay particular sums to have their charges reduced or completely dropped. This might be considered to be a practice developed independently from the written provisions of the relevant law.

As it is generally understood in criminal law, plea bargaining is an agreement between the prosecution and a defendant to settle the criminal case pending against the defendant. Similarly, under Art. 679(1) of the CPCG, a court can pass sentence against a defendant without hearing the case on the merits by approving the plea bargain concluded between the prosecutor and a defendant either on a finding of guilt or on sentencing. In both cases a defendant is found guilty by the verdict of the court.

As a consequence of the concept of a plea bargain, it is arguable that a defendant who agrees to a plea bargain in effect waives part of his/her right to a fair trial. For the purpose of having the charges or sentence reduced or even no sentence imposed at all[2] a defendant agrees to enter into a plea bargain, pleading guilty or pleading no contest, and thus waiving the right to have their criminal case examined on its merits. However, even in this situation, the court, while approving the plea, plays a vital role in supervising the conditions of a plea bargain. A judge examining the case has to make sure that a defendant expresses the will to enter into a plea bargain without any coercion and should also ensure that the prosecution has a *prima facie* case against the defendant.

Similarly, under Arts. 679(3) and 679(4) of the CPCG the court is obliged to enquire into all the issues. However, these obligations are applied in different ways in practice. A good example of this is the case of *Natsvlishvili & Togonidze v Georgia* (No. 9043/05 9/3/05).

In this case the first applicant argued that the prosecutor agreed to enter into a plea bargain only after he, his wife and eight other shareholders of Kutaisi Auto Plant had transferred their shares, amounting to 22.5% of shares in the Plant, to the ownership of the Government, and after the applicants had paid 50,000 GEL (22,000 EUR) to bank accounts stipulated by the Office of the General Prosecutor. Furthermore, although under the CPCG the sanction a defendant has to serve must be approved by the court, the first applicant had previously paid a fine, amounting to 35,000 GEL (15,000 EUR), which was later approved by the court as a sanction under the plea bargain, clearly in breach of domestic legislation. However, in the court's final verdict approving the plea bargain, a fine of only 35,000 GEL was referred to. In its Observations to the ECtHR of 2 May and 13 July 2007, the Government asserted that the transfer of Auto Plant shares as well as the payment of 50,000 GEL was made by the applicants under their own free will (while the first applicant was detained on remand). Although all these circumstances were known to the court approving the plea bargain, it confined itself merely to a formal enquiry - the court did not attempt to find out what were the reasons for the additional payments or the transfer of shares.

In reality, this is a common practice in criminal cases, irrespective of whether the defendants are released with a fine or in addition to serving a prison sentence. In the light of this practice it has been argued that *"since its introduction, plea bargaining has become 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."*[3]

In the light of the above, it has been rightly stated by the Parliamentary Assembly of the Council of Europe Monitoring Committee that the system of plea bargaining cannot be sufficiently controlled in a country like Georgia where an absence of legal and administrative checks and balances in the police force, prosecutor services and courts create a risk of abuse.[4] The courts should guarantee to supervise the process of plea bargaining, however in practice, the courts only play a formal role in approving the conditions offered by the prosecution to the defendant, and do not always ensure that there is a *prima facie* case against the defendant, while, for a defendant in most cases plea bargaining is the only possibility to escape a trial by courts which still have the reputation for following the will of the prosecution.[5]

1 OMCT. 2006. Human Rights in Georgia: Alternative Report to the UN Human Rights Committee 90th session, 24 April 2006. [Online]. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ngo_georgia90.pdf. International Helsinki Foundation. 2005. Human Rights in the OSCE Region: Europe, Central Asia and North America. [Online]. Available at: http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4057.; Transparency International Georgia. State Expenditure Monitoring Report. [Online]. Available at: http://www.transparency.ge/files/215_266_273143_STATE%20EXPENDITURE%20MONITORING%20PROJECT.pdf.

2 Article 679(9) of the CPCG provides that in extraordinary circumstances, where the defendant expresses a will to cooperate with the prosecution in helping to solve a particularly grave crime or identifying the perpetrators of a grave crime, the Prosecutor General is entitled to solicit the judges that no sentence be imposed on the defendant, but that they will still have the status of a convicted person.

3 OMCT 2006 (supra 1) pp. 53-54.

4 PACE Resolution 1415(2005) Honouring of obligations and commitments by Georgia; Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. 2004. Honouring of obligations and commitments by Georgia, Doc. 10383, 21/12/04.

5 See also: Human Rights Watch, 2005. Accountability and Impunity since the 'Rose Revolution'. [Online]. Available at: http://hrw.org/backgrounder/eca/georgia0405/7.htm#_ftnref44.

EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE
EHRAC Bulletin

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

Kaplanova v Russia
(No. 7653/02) 29/04/08
Betayev & Betayeva v Russia
(No. 37315/03) 29/05/08
Umarov v Russia
(No. 12712/02) 03/07/08
Musayeva v Russia
No. 12703/02) 03/07/08
(ECHR: Judgments)
Abdulkadyrova v Russia
(No. 27180/03) 24/01/08
(ECHR: Admissibility)
Disappearance

Facts

Between April and July 2008 the ECtHR handed down judgments in a series of cases involving the detention of Chechen men by Russian military forces and their subsequent disappearance and presumed death. It found numerous breaches of the ECHR by Russia in each of these cases, including, in particular, of Arts. 2, 3 and 5. It also made significant awards of damages to the applicants, including 72,000 EUR in Kaplanova.

Judgments

Russia's failure to provide access to evidence in these cases was particularly criticised. In considering the Art. 2 claims the ECtHR was faced with conflicting accounts of events. Noting that Russia had sole access to evidence relating to the detention of the victims, in each of these cases the ECtHR drew inferences against Russia leading to findings of breaches of Art. 2.

In *Kaplanova, Musayeva* and *Umarov* it also held that the failure to provide such evidence amounted to a breach of Art. 38. It rejected Russia's reliance on Art. 161 of the Russian Code of Criminal Procedure which prohibits the disclosure of evidence from preliminary investigations, reiterating that this did not justify the withholding of information.

The failure to conduct adequate investigations was also a feature of each case. The ECtHR was especially critical of significant delay by the Russian authorities in commencing investigations and their subsequent recurrent closure and re-opening of investigations. This led to findings of breaches of Arts. 2 and 5 in all of the cases.

In *Betayev, Musayeva* and *Umarov* the ECtHR also held that the attitude of the Russian authorities towards the applicants in the investigations amounted to a breach of Art. 3. It noted in particular that the applicants did not receive plausible explanations of their relatives' disappearances and that frequently the Russian authorities' responses simply noted that investigations were still ongoing.

The ECtHR was also highly critical of the absence of any records of detention on the part of the Russian authorities, commenting that this was incompatible with the very purpose of Art. 5.

Abdulkadyrova is another 'disappearance' case and bears many similarities to those discussed above. It was declared admissible in January 2008 and awaits judgment.

Comment

The ECtHR is dealing with 'disappearance' cases ever more frequently and many similar issues arise on each occasion: Russia's failure to disclose relevant evidence, its inadequate investigations and its failure to keep detention records. This is leading to significant inferences being drawn against Russia and also to strong criticism from the ECtHR.

Ryabikin v Russia
(No. 8320/04), 19/06/08
(ECHR: Judgment)
Extradition

Facts

The applicant is a citizen of Turkmenistan and of Russian ethnic origin. He argued that from May 2000 he was threatened by Turkmen law-enforcement bodies and feared for his life in Turkmenistan after alleging that Turkmen Ministry of Finance officials had demanded bribes from his company. In June 2001 he moved to St. Petersburg having been granted permission to repatriate by the Russian authorities. After failing to gain Russian citizenship, he applied for refugee status. This was rejected and he was subsequently arrested for extradition to Turkmenistan on charges of alleged embezzlement. He made numerous appeals in Russia both against the rejection of his refugee application and his arrest. He then appealed to the ECtHR under Arts. 3 and 5.

Judgment

The ECtHR held that there would be a violation of Art. 3 if the applicant were to be extradited to Turkmenistan as the charge against him carried a prison sentence of eight to ten years and that diplomatic assurances for his safety should be questioned where there are reliable reports of practices which are "manifestly contrary" to the principles of the ECHR. Furthermore, the conditions of his detention and his vulnerable situation as a minority would place him at real risk of treatment in breach of Art. 3.

In consideration of Art. 5(1)(f), the ECtHR noted a failure in Russian law making it impossible to identify the authorising body responsible for the detention, to highlight the applicable legal provisions or to determine the time-limits of the detention, amounting to a subsequent breach of his right. With regards to Art. 5(4), it held that a respondent State must provide a "certain, accessible and effective" judicial remedy and due to the unavailability of a judicial remedy to review the lawfulness of the applicant's continued detention, there had been a violation. The applicant was awarded 15,000 EUR in damages.

Comment

This case highlighted the ECtHR's careful approach when considering the likelihood of state adherence to diplomatic assurances when dealing with the prevention of human rights violations, especially in consideration of international standards on the prohibition of torture. The ECtHR noted the need for objective monitoring where there is evidence and consistent reporting from independent international human rights protection associations detailing breaches of the ECHR. It also repeated its criticism of

Russia's domestic law concerning detention pending extradition.

Gusev v Russia
(No. 67542/01), 15/05/08
(ECHR: Judgment)
Inhuman treatment

Facts

On 2 February 2000, the applicant was convicted of theft committed in 1998 and sentenced to probation of an unspecified duration. The sentence was not executed on the basis of the Amnesty Act 2000. In 1999, he was the subject of further criminal proceedings for the theft of goods worth around eight euros. The indictment was delayed in reaching the applicant and he missed the subsequent hearing. He refused to attend the adjourned hearing unless the summons was received by post.

Consequently, he was remanded in custody on 23 April 2000 and transferred to a pre-trial detention facility until his release on 26 September 2001. On 25 September 2000, the charge was reduced and the punishment relieved although he remained in custody during a third investigation. The Court dismissed his challenges concerning the lawfulness of his detention. He submitted that detention conditions, conduct by officers and cellmates and the unlawfulness and length of detention amounted to violations of Arts. 3 (inhuman and degrading treatment) and 5 (liberty and security) of the ECHR.

Judgment

The ECtHR held that it was clear from the facts that the conditions of the applicant's detention, specifically his cell, amounted to degrading treatment in violation of Art. 3. It deemed that there had been no violation of Art. 5(1) concerning the lawfulness of his detention as the trial court had acted within its powers and there was no evidence to suggest invalidity or unlawfulness under domestic law. However, there had been a violation of Art. 5(3) in relation to the length of his detention as it had not been extended on sufficient grounds. He was awarded €5,000 euros in damages.

Comments

The ECtHR stated that it could assess compliance with the ECHR on the basis of undisputed facts without having to examine every allegation. It emphasised the onus on each state to ensure that its penitentiary system guarantees respect for detainees' dignity.

The ECtHR further reiterated that a continued period of detention could only be justified if there was evidence to show that such detention was in the public interest, despite the presumption of innocence, to warrant the loss of personal liberty and that the burden rests upon the state to show such justification.

Other ECHR cases

Budayeva & Others v Russia
(Nos. 15339/02, 21166/02, 20058/02, 11673/02 & 15343/02), 20/03/08
(ECHR: Judgment)
Right to life/property

Facts

The six applicants lived in Tyrnauz, in a mountain district adjacent to Mount Elbrus. Following a mudslide on 18 July 2000, the authorities announced the emergency evacuation of the residents, however no advance warning was given. When the residents returned home the next day a second, more powerful mudslide destroyed a dam and damaged most of the houses in the town killing and injuring some local residents. The applicants' flats and all their possessions were destroyed. The first applicant's husband died and her youngest son sustained serious injuries. The applicants complained of violations of Arts. 2, 8 and 13 and Art. 1 of Prot. No. 1.

Judgment

The ECtHR made the following findings:

- Where the loss of life potentially engages the responsibility of the state it is the state's duty to ensure that the right to life is protected and that those responsible are punished. The authorities failed to discharge the positive obligation to establish a legislative and administrative framework to address threats to the right to life. In addition, the question of state responsibility for the accident in Tyrnauz has never as such been investigated or examined by any judicial or administrative authority. Therefore there was a violation of Art. 2.
- The ECtHR awarded at total of 85,000 EUR to the applicants in non-pecuniary damages.

Comment

The ECtHR reiterated that Art. 2 lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This positive obligation entails the primary duty of the state to implement procedural measures to deal effectively with any threats to the right to life. As regards the substantive aspect, in the context of dangerous activities, special emphasis must be placed on regulations with regard to the level of potential risk to human life.

Guja v Moldova
(No. 14277/04), 12/02/08
(ECHR: Admissibility & Judgment)
Freedom of expression

Facts

The applicant was the Head of the Press Department of the Prosecutor General's Office when he released two letters received by the Office to a newspaper following a presidential statement concerning the need to fight corruption. These were subsequently published in an article on abuse of power. Neither letter contained any indication of confidentiality. The first was written by Deputy Speaker of Parliament Mişin requesting the Prosecutor General to personally resolve an issue of alleged police brutality. The second was authored by a vice-minister of the Ministry of Internal Affairs.

On 3 March 2003, the applicant was dismissed on the grounds that the letters were confidential and their release was in breach of internal regulations. He unsuccessfully argued in a civil action for reinstatement that the letters were not secretive, nor had he been obliged to consult his superiors. He submitted that their disclosure was in the public interest and his consequent dismissal was in violation of Art. 10.

Decision

The Court considered whether the interference with the applicant's right had been necessary in a democratic society with the aim of maintaining authority of the judiciary, preventing crime and protecting the reputation of others. Finding a breach of Art. 10, the Court held that as neither national legislation nor internal regulations provided systems to report such issues, the release of the letters to a newspaper was justified. Furthermore, the information disclosed on corruption was an important

matter in the public interest, which outweighed that of maintaining public confidence in official bodies. It found that the applicant had not acted for personal gain or from a grievance, as suggested by the government, and subsequently had incurred the heaviest sanction affecting his career. He was awarded €10,000 in damages.

Comment

The Court noted that it had never previously dealt with a situation where a civil servant had publicly disclosed internal information. In its assessment, the Court was mindful of the fact that although employees have a right to freedom of expression, specifically the right to impart information, they also owe their employer, a "duty of loyalty and discretion". However, the Court found that the subject of the letters was important to a democratic society and that their publication was in the public interest. Nevertheless, a civil servant who discloses such information must be significantly protected from excessive sanctions as a consequence.

Koretskyy & Others v Ukraine
(No. 40269/02), 03/04/08
(ECHR: Judgment)
Freedom of Association

Facts

The applicants were four Ukrainian nationals resident in Kiev. On 7 June 2000, they founded a non-governmental organisation, the 'Civic Committee for the Preservation of Wild (Indigenous) Natural Areas in Berezansky' (the Organisation), with Mr Koretskyy at its head.

On 27 July 2000, the applicants filed an application to register the Organisation at the Kiev City Department of Justice in accordance with the applicable legal requirements. Following advice from the City Department, amendments were made to the Organisation's articles of association, which were then resubmitted. On 18 September 2000, the City Department rejected the application on the grounds that the articles of association did not comply with domestic law, in particular the provisions relating to (i) the Organisation's geographical scope, (ii) the economic and administrative functions entrusted to its executive committee, (iii) its publishing activities and (iv) participation of volunteers. The applicants challenged this decision at the Pecherskyy District Court of Kiev, which dismissed it. The District Court decision was upheld by the Kiev City Court of Appeal. Both courts cited similar grounds to those given by the City Department. The Supreme Court rejected the applicants' request for leave to appeal. The applicants applied to the ECtHR alleging a breach of the right to freedom of association (Art. 11).

Judgment

The ECtHR found a breach of Art. 11. The Court reaffirmed that the ability to form a legal entity to act collectively in a field of mutual interest is one of the most important aspects of Art. 11.

The Court found an interference with the right to freedom of association due to the refusal of the authorities to register the organisation. In considering whether the interference was 'lawful', the Court observed that the relevant law was too vague to be sufficiently foreseeable for the applicants and that an excessively wide margin of discretion was granted to the authorities in deciding whether a particular association could be registered.

The Court found that there was no 'pressing social need' for the authorities' restrictions on the activities of associations, in particular no reasons had been given by the Government to justify the restrictions. It awarded the applicants €1,500 each in respect of non-pecuniary damages.

Comment

The Court underlined in this judgment its view that the way in which national legislation enshrines the freedom to establish an association, and its practical application by the authorities, reveal the state of democracy in a country.

Ramanauskas v Lithuania
(No.74420/01), 05/02/08
(ECHR: Judgment)
Fair trial

Facts

The applicant, Mr Kęstas Ramanauskas worked as a prosecutor. In 1998-99, an officer of a special anti-corruption police unit, AZ, approached the applicant though VS (a personal acquaintance of the applicant) and offered him a bribe of 3,000 USD to secure the acquittal of a third person. AZ did not seek official authorisation to use this 'criminal conduct simulation model' until 26 January 1999. Permission was granted the following day. The applicant initially refused the bribe, but after the offer was repeated several times, he accepted and received 1,500 USD on 28 January 1999 and 1,000 USD on 11 February 1999.

On 11 February 1999, the Prosecutor General instituted a criminal investigation into the applicant's acceptance of a bribe. On 29 August 2000 the Kaunas Regional Court found the applicant guilty of corruption. The verdict was upheld by the Court of Appeal and the Supreme Court. The applicant complained to the ECtHR on the basis of Art. 6 (fair trial).

Judgment

The ECtHR concluded that:

- AZ and VS's actions went beyond passive investigation. They had the effect of inciting the applicant to commit the offence of which he was convicted. There was no indication that the offence would have been committed without AZ's interventions;
- by authorising the use of the model and exempting AZ and VS from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results. Consequently, the ECtHR refused to accept the State's argument that AZ had acted on private initiative;
- the domestic authorities took no steps at the judicial level to carry out a serious examination of the applicant's allegations. No attempt was made to clarify the role played by the state agents, including the reasons for AZ's private initiative;
- there was therefore a breach of Art. 6.

Comments

The ECtHR reiterated that its task is not to determine whether evidence was obtained unlawfully, but rather to examine whether such 'unlawfulness' resulted in the violation of another right. Consequently, undercover techniques cannot in themselves infringe the right to a fair trial, but their use must be kept within clear limits and safeguards against abuse. Safeguards may include a clear procedure for authorising, implementing and supervising the investigative measures. As the ECtHR stated: "The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience."

Gäfgen: opening the door to a reassessment of Article 3 violations?

Grigor Avetisyan, Lawyer, EHRAC-Memorial

In 2002, the applicant in *Gäfgan v Germany* (No. 22978/05) 30/7/08 kidnapped and suffocated a boy. At the time of the applicant's arrest, the police believed the boy to still be alive. When the applicant did not disclose the boy's whereabouts, the local deputy chief of police instructed the interrogating officer to tell the applicant that he would suffer pain unless he disclosed the boy's location. The applicant then confessed to killing the boy and hiding the body. The German courts acknowledged that the threats uttered against him were contrary to Art. 3 (prohibition of torture) of the ECHR and that his testimony was not admissible in evidence during the trial. Evidence that had been obtained as a result of this testimony, however, such as the discovery of the boy's body, could be used at trial, and the applicant was sentenced to life imprisonment.

After failed appeals to German courts contesting the use of evidence obtained through torture, the applicant complained to the ECtHR. The ECtHR, while recognising that the applicant was subjected to inhuman treatment, refused, however, to recognise him as the victim of a violation of Art. 3 (on the grounds that the police officers who pressured the applicant were subjected to sanctions by the German courts), and did not find a violation of the right to a fair trial.

The argument put forward by Judge Kalaydjieva, in her dissenting opinion, that this decision is "*…opening the way for calculation of the appropriate extent of admissible coercion and its use in relation to particular accusations, contrary to the principle of a fair trial*"[1] may, in particular, breathe new life into the discussion on: (i) the interrogative value of coercion and the ECtHR's assessment of modern interrogation techniques; (ii) the value of evidence obtained under pressure, especially in the context of cases of non-refoulement.

As a result of the prohibition of abusive interrogation practices, interrogators have developed sophisticated psychologically-orientated interrogation techniques designed to convince suspects that it is in their own interest to cooperate.[2] However, in cases where the police are dealing with suspects who operate on the assumption that they will refuse any cooperation with the police, the police may want to apply more extreme interrogation tactics than those permitted in ordinary criminal cases.

It is noted that the ECtHR did not regard the threat of torture as torture and considered that: "*…the questioning [...], took place in an atmosphere of heightened tension and emotions owing to the fact that the police officers, who were completely exhausted and under extreme pressure, believed that they had only a few hours to save J.'s life…*",[3] which was regarded as a mitigating factor by the ECtHR.

In addition to such mitigating circumstances, some commentators have argued that police brutality may also be defended on the grounds that without the infliction of pain and psychological pressure some serious crimes would not be solved.[4] However, these arguments question the capability of Art. 3 (which constitutes an absolute prohibition) to cover those violations where police are more likely to use extreme interrogation tactics relying on extensive psychological pressure, and even challenge the absolute nature of Art. 3 itself.

The ECtHR's response to cases which involve modern psychologically orientated interrogative techniques, as 29 years ago in the case of *Ireland v UK* (No. 5310/71) 8/1/78, where British interrogators used a method consisting of five techniques to interrogate terrorist suspects, will involve an examination of the minimum level of severity needed to ground claims under Art. 3.

The violation of a suspect's right to due process, as a result of coercion during interrogation, is yet another issue raised by Judge Kalaydjieva, and frequently discussed in the context of refoulement.

The preventive reach of Art. 3 was expanded in *Soering v UK* (No. 14038/88) 7/7/89, and, more specifically, in *Chahal v UK* (No. 22414/93) 15/11/96. In a decision that might be seen as somewhat contrary to the developments achieved in the expulsion and non-refoulement caselaw of the ECtHR, the UK Court of Appeal in the case of *A and Others v SSHD*[5] ruled on 11 August 2004 that evidence obtained by torture is admissible in the UK.[6] However, on appeal to the House of Lords this decision was reversed.[7]

As regards the notion of non-responsibility for the actions of third country agencies, the *Barcelona Traction*[8] dictum establishes obligations *erga omnes* in the protection of human rights beyond the reach of national jurisdiction. The ECtHR does not give a clear answer to the argument that the British Home Secretary put forward – that he could not enquire into the circumstances surrounding the interrogation in the third country.

Thus, the principle that had been established in *Soering* obliges states to enquire into possible ill-treatment in a third country, where a person is to be extradited. On the other hand, the suspects in *A and Others* had already been tortured in third countries before being handed over to the UK. In this regard the principle of *ex-post facto* consideration of a breach of Art. 3, pronounced in the *Greek case,*[9] could be invoked as an obligation on states to conduct an inquiry, as a result of which the court would decide on the admissibility of the evidence and confessions.

It can be expected, therefore, that the consideration of cases resulting from the use of modern interrogative tactics which target an applicant's psychological autonomy (and which involve lies, trickery, deception and threats), and of the admissibility of evidence obtained by the use of such methods, will involve, alongside the established principles

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Gäfgen: opening the door to a reassessment of Article 3 violations?

of the ECtHR, an examination of the totality of circumstances surrounding the case, including scrutiny of modern interrogation techniques developed by police.

1 Gäfgen v Germany (No. 22978/05) 30/7/08, Dissenting Opinion by Judge Kalaydjieva.

2 Descriptions of modern interrogation techniques appear in police interrogation materials. In the US, for instance, the *Inbau Manual* has been the most widely used.

3 Gäfgen v Germany, paras 69-70.

4 See: Parry, J.T. and White, W. S., 2001-2002. Interrogating Suspected Terrorists, Should Torture be an Option? *University of Pittsburgh Law Review, 63*, p.751.

5 [2004] EWCA Civ 11323.

6 See: Hyland, J., 2004. Britain: Court of Appeals rules evidence obtained through torture is admissible (World Socialist Web Site) [online]. Available at: http://www.wsws.org/articles/2004/aug2004/brit-a13_prn.shtml.

7 [2005] UKHL 71, the House of Lords ruled that as a general rule evidence that has been obtained by torture is inadmissible.

8 The case concerning the Barcelona Traction, Light and Power Co., Ltd (ICJ Reports 1970, 32, paras 33-34).

9 The *Greek Case*, report of 5 November 1969, Yearbook of the Convention 12.

The work of the UK Parliament's Joint Committee on Human Rights

Angela Patrick and Joanne Sawyer, Specialists, Joint Committee on Human Rights

Following the coming into force of the Human Rights Act 1998 (HRA) in the UK in 2000, the UK Parliament appointed a joint committee of both Houses of Parliament to scrutinise the Government and the state of human rights in the UK (the JCHR). It consists of 12 members, with an equal number of members from each House. It is mixed politically, with five Labour, four Conservatives, two Liberal Democrats and one cross bencher and is currently chaired by a Labour member of the House of Commons, Andrew Dismore MP.[1]

The Committee's terms of reference are: "to consider matters relating to human rights in the United Kingdom (excluding individual cases)". The Committee's broad terms of reference mean that it sets its own priorities. Its main strands of work are: legislative scrutiny of bills; inquiries into specific human rights problems (such as older people in healthcare, adults with learning disabilities, a Bill of Rights for the UK and currently, policing and protest); monitoring the implementation of the HRA and establishing a culture of rights; monitoring Government responses to key ECtHR and domestic judgments and scrutiny of compliance with international instruments. This article considers some of these areas of the Committee's work in more detail.

The JCHR and the HRA

The HRA strikes a compromise between a system of parliamentary sovereignty and a system of fundamental rights. The JCHR is a product of this compromise, and is central to how it operates. Under Section 3 HRA, courts are required to interpret legislation in accordance with Convention rights in so far as it is possible to do so. If this is not possible, a court may make a declaration of incompatibility under Section 4 HRA, but this does not affect the validity or continuing operation of the law. It is at the discretion of the Government to introduce corrective legislation or a remedial order, which must be passed by Parliament. Parliament therefore retains a much more crucial role in the protection of human rights.

The JCHR fits into the scheme of the HRA in two ways. Firstly, it scrutinises ministerial statements that Government Bills are compatible with ECHR rights and so informs debate on legislation in Parliament. Secondly, it scrutinises remedial orders which are designed to rectify an incompatibility found by the domestic courts or the ECtHR. The JCHR is required, under its standing orders, to report on whether a remedial order should be approved.

Legislative scrutiny

The Committee considers the human rights compatibility of every Government Bill before Parliament. It considers not only the risk of interference with ECHR rights, but also any risk of interference with rights which the UK has signed up to internationally, such as under the UN Covenants (ICCPR and ICESCR) and the UN Conventions on the Rights of the Child, the Elimination of Racial Discrimination or Discrimination Against Women and Torture. It also considers whether a Bill misses an opportunity to improve human rights protection. It will only consider and report on a Bill which appears to it to raise significant human rights issues. Factors which it takes into account in making this assessment include:

- How important is the right affected?
- How serious is the interference?
- How strong is the justification?
- How many people are affected?
- How vulnerable are those people?
- To what extent are the State's most significant positive obligations affected?

Before reporting on a Bill that raises human rights concerns, the Committee will ordinarily write to the Government setting out these issues and seeking an explanation. It will also consider submissions made to it by interested organisations and individuals. In the current year, the Committee has also started proposing amendments to Bills to seek to alleviate some of the human rights problems which the Bills raise.

Monitoring implementation of judgments

The Committee of Ministers (CoM) of the Council of Europe (CoE) have principal

responsibility for the enforcement of judgments of the ECtHR. Both the CoM and the Parliamentary Assembly of the CoE (PACE) have repeatedly confirmed that the primary focus on the implementation of the Convention and the enforcement of judgments must be on the responsibility of states to take action domestically. This is particularly important in the light of the increasingly burdensome caseload of the ECtHR.

The CoM has repeatedly confirmed its view that in order to be considered effective, monitoring at an international level must be accompanied by close scrutiny at a national level. The JCHR considers it to be an important part of its work to scrutinise the implementation of any necessary general measures to avoid repeat, future ECHR violations. It undertakes this scrutiny through correspondence with Ministers, consideration of evidence from civil society and publication of regular progress reports on its work. Its next report is likely to be published in Autumn 2008.

In its report of 2006-7,[2] the Committee considered a number of themes as well as significant human rights judgments against the UK. Themes included the role of Parliament, the importance of national implementation and obstacles to effective implementation of judgments such as delay, non-retrospective application of the HRA, re-opening proceedings and systemic obstacles. It also made a number of recommendations for better implementation in the future, including for a coordinating role for the Ministry of Justice and a proposed timetable for Government action on human rights judgments. The Government's response to these recommendations is still awaited.

The Committee will continue to monitor the Government's responses to the implementation of both judgments of the ECtHR and declarations of incompatibility with Convention rights made by the domestic courts. On the one hand, some cases are resolved with relative speed and with the minimum of confusion, through the use of the remedial order process. For example, the Committee praised the Government response to the judgment in *B & L v United Kingdom* (No. 36536/02 13/9/05). In that case, the applicants successfully challenged domestic law which prevented a father-in-law and his former daughter-in-law from marrying. The breach was removed with relative speed once the ECtHR had given its judgment.

This is not the case for all judgments. The Committee has recently welcomed the Government's decision to remove the breach of Art. 8 ECHR identified in *Connors v UK* (No. 66746/01 27/5/04), by extending the Mobile Homes Act 1983 to Gypsy and Traveller Sites, granting the residents on those sites security of tenure. The Committee expressed disappointment that the Government did not bring forward this solution, suggested by the Committee in 2004, sooner.

In *Hirst v UK* (No. 74025/01 GC 6/10/05), the Grand Chamber held that the current blanket ban on prisoners participating in elections in the UK is in breach of the ECHR. It has now been over four years since the original Chamber decision and there appears to be no clear timetable for reform.[3] It is perhaps in the more politically difficult cases where the Committee will continue to play a valuable role: increasing transparency and monitoring the Government's responses to the CoM.

1 The terms of reference of the JCHR and more information about its work are available online: http://www.parliament.uk/parliamentary_committees/jchr.

2 Joint Committee on Human Rights. 2007. *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights: Sixteenth Report of Session 2006-07*. London: The Stationary Office Limited.

3 *Ibid.* Each of these cases is commented on in the Committee's last Report.

Report on supervision of the execution of ECtHR judgments

The main purpose of the Committee of Ministers' (CoM) first *Annual Report on the Supervision of the Execution of Judgments of the ECtHR* is to increase transparency of the impact and efficiency of this supervision body. The report details the range of issues examined by the CoM, the actors involved in the execution process, and important reforms for the development of national legal systems and practices in conformity with ECHR standards. Additionally, it provides information on the ECHR execution process and clear instructions regarding execution requirements and developments at national level in 2007. The report also gives statistical information about the number of leading, clone/repetitive, isolated and closed cases. In 2007, despite some delays to the execution of judgments, all applicants received the just satisfaction awarded to them by the ECtHR and, if applicable, individual measures to erase, as far as possible, the consequences of the violations found. Moreover, more than 1,000 different general problems highlighted by the ECtHR's judgments were addressed or are in the process of being remedied through legal, administrative and/or other reforms.

The ECtHR's increasing caseload and other challenges necessitate improvements to the effectiveness of the ECHR system. In response to this, the CoM has developed a system for informing respondent states of its concerns regarding the execution of judgments and adopting decisions and interim resolutions. In 2007, 150 such decisions and 15 interim resolutions were adopted. Furthermore, the CoM has also considered preparing detailed studies on execution practice to assist

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Report on supervision of the execution of ECtHR judgments

national authorities and information exchange with other bodies, for example the Commissioner for Human Rights, and has created a database containing information on the execution status of cases and other measures.

The effective execution of ECtHR judgments is very important for stimulating good governance, respect for the rule of law and for the human rights of all persons within a state's jurisdiction, and building trust between the authorities in the various member states. Effective redress for victims and general reforms to prevent further violations contribute to the credibility of the system and the efficiency of the ECtHR. The credibility of the ECtHR is supported by the fact that domestic courts increasingly recognise the direct effect of the ECtHR judgments at the domestic level.

The report can be downloaded from: http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf.

Comment: Muslim freedoms

Eleonora Davidyan, Lawyer, EHRAC-Memorial

The demographic crisis among ethnic Russians, together with the rapid growth of the Muslim population in Russia, has apparently led some ethnic Russians to fear that their country is losing its traditional identity. Simultaneously, many Russians associate Islam with extremists who have carried out dozens of bombings and other attacks against civilians. On Russian State television Muslims are most often portrayed as either criminals or religious radicals waging a holy war against Christians, rather than as members of Russian society.

Sensing the xenophobic and Islamophobic mood, the Russian authorities seem often to be in conflict with Islam, instead of taking the long and difficult path of education and establishing proper relations between communities. Several Russian regions have introduced mandatory classes on Orthodox Christianity in all schools. A new law that bans foreigners, most of them Muslims, from working in retail stalls and markets has been adopted. A number of Islamic books have been banned, and the list of 'extremist' publications is constantly growing.

Believers outside of the State's official Muslim institutions are increasingly viewed with suspicion because of the radicalisation of Chechnya and other republics. They are denounced as Wahhabis, followers of the puritanical sect from Saudi Arabia, a word that has become Russian shorthand for any Islamic militant. Under the pretext of fighting 'religious extremism' and 'Islamic terrorism', cases involving the violation of the rights of Russian Muslims have increased significantly in recent years.

A wide-ranging campaign of persecution of different groups of Muslims has been started in Russia in the name of fighting 'international terrorism'. The legal basis for this was laid by an unreasonably broad interpretation of the concept of 'extremism'. This was applied in the decision of the Supreme Court of the Russian Federation of 14 February 2003, by which, without any substantive reasoning or any chance of appeal for the parties involved, 15 Islamic organisations, including Hizb ut-Tahrir, were declared to be extremist and banned.

Since then, it has become unnecessary for the prosecution to prove the guilt of the accused by committing or preparing a terrorist act. The fact of participation in a banned organisation itself has become sufficient for a conviction. In most of the cases regarding participation in Hizb ut-Tahrir, the charges amounted to propaganda of the utopian ideas of the world Islamic Caliphate, studies, dissemination and possession of relevant literature, meetings, the conspiratorial nature of which was defined by the 'code words': "let's have a cup of tea", and related activities.[1] However, these charges led to convictions of inducing others to engage in terrorist activities and of creating a criminal community, which entails a sentence of up to 15 years' imprisonment.

In other cases, charges were based on statements that were obtained as a result of threats and torture.[2] Human rights activists have collected information on the severe torture of suspects and people who had to become 'witnesses' as a result of such torture.

Courts considering these cases do not even try to examine if there has been an interference with the defendants' rights to freedom of expression or freedom of religion, or to assess whether there has been compliance with the requirement of a fair balance of private and public interests. The only issue the courts do investigate during the trials is whether the accused are members of a banned organisation.

As a result, Muslims *de facto* do not have a right to protection of their interests as it is possible that they might be connected to terrorists. Any attempt to contest the lawfulness of this approach apparently may be considered as justifying terrorism.[3] Even obeying Islamic rules regarding one's dress and way of life can become a reason for suspicion. Human rights activists are

aware of cases where copies of the Koran were seized as material evidence.[4]

Another way of 'fighting Islamic extremism' consists of the unlawful extradition and deportation of Central Asian migrants who are being persecuted in their countries of origin for religious crimes.[5] In some cases people are being deprived of their Russian citizenship or even kidnapped to fulfil an agreement with the 'friendly' country.

Cases of this sort can only be considered as persecution for political and religious views. Muslims are also offended by widespread discrimination and a lack of respect for their faith. The danger of growing anti-Islamic sentiment is that it threatens to push Russian Muslims further outside the mainstream and into the arms of radicals.

On the morning of 13 October 2005, scores of men took up arms in Nalchik - driven mostly, relatives of some said, by harassment against men with beards and women with headscarves and by the closing of six mosques in the city. Many among those killed in Nalchik were not hardened fighters, but local residents acting out of what appeared to be desperation. Many were not yet armed, according to officials, but were hoping to seize weapons from police stations.

Those 59 who were accused of the attack are being tortured severely, according to their advocates, as the investigation has failed to collect any sufficient evidential basis and only concentrated on detaining people who have previously been noticed as devoted Muslims. A tragedy, like that in Nalchik, is unfortunately the inevitable result of a policy of disintegration and discrimination.

1 See application *Rafikov v Russia* (No. 22519/07). For background information on the case see: http://www.hchr.org.mx/documentos/informes/6.pdf pgs. 145-147.

2 See application *Gayanov v Russia* (No. 17118/06). For background information on the case see: http://www.forum18.org/Archive.php?article_id=761.

3 See application *Ashirov v Russia* (No. 25246/07). For background information on the case see: http://www.memo.ru/2006/12/18/eng1.htm.

4 Memorial Human Rights Centre & Civic Assistance Committee. 15 April 2007. *Fabrication of "Islamic extremism" criminal cases in Russia: campaign continues.* [Online] Available at: http://www.memo.ru/2008/09/04/0409082.htm.

5 See application *Muminov v Russia* (No. 42502/06). For background information on the case see: http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/51/51we09.htm.

Georgia still faces problems with the effective implementation of the CRC

The UN Committee on the Rights of the Child (UNCRC) has published its Observations on the third periodic report on the implementation of the Convention on the Rights of the Child (CRC) in Georgia (June 2008). Although the UNCRC welcomed the legislative and programmatic measures which have been taken towards the implementation of the CRC, it outlined a number of conditions negatively affecting children in Georgia.

The report acknowledges that the Georgian government experiences difficulties because of its *de facto* lack of control over two breakaway regions. However, numerous problems were identified in the rest of the country. These include the absence of a mechanism responsible for the coordination of the implementation of the CRC and a lack of adequate human and financial resources.

Problems relating to minority, refugee and internally displaced (IDP) children; juvenile justice; health care services; and education are highlighted as being especially worrying. According to the report, minority, disabled and IDP children face discrimination. This is primarily manifested in IDP children being placed in segregated schools and minority children being unable to study in their mother tongues. Disabled children experience discrimination in the field of healthcare and education. Girls from all these groups are disproportionately affected due to gender discrimination.

Concerns were also raised in the report in relation to juvenile justice: the absence of juvenile courts; a lack of efficient mechanisms to ensure that imprisonment is used as a last resort and for the shortest possible period of time; and the increasing number of children entering the criminal justice system and receiving custodial measures and punishments all remain unsolved. The UNCRC regretted the State's decision to lower the minimum age for criminal responsibility from 14 to 12.

As regards health related rights, the UNCRC was concerned with the high rates of neonatal deaths and premature births, especially among minority groups; limited access to health care; limited availability of health and sexual education; and the lack of youth-sensitive and confidential counseling for persons under the age of 16.

A number of the recommendations adopted by the UNCRC encourage the Georgian Government to engage civil society representatives in the process of advancing the implementation of CRC.

The report is available at: http://www2.ohchr.org/english/bodies/crc/crcs48.htm.

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.

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About EHRAC

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

EHRAC is currently working on around 150 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 the International Human Rights Committee of the Law Society of England and Wales and co-operates with many NGOs, lawyers and individuals across the former Soviet Union. For more information, please see: www.londonmet.ac.uk/ehrac.

Internship Opportunities

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

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EHRAC-Memorial project

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

EHRAC-GYLA project

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

EHRAC-Article 42 project

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

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