GUIDE TO INSTRUCTING EXPERT WITNESSES

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Contents

Expert witnesses can play a vital, even determinative, role in a case. An expert witness can explain and assess complex scientific or technical evidence or provide significant contextual analysis that can be central to the successful litigation of a case. This Guide provides assistance to lawyers as to why, when and how to instruct an expert in international litigation. It was written by Jessica Gavron, EHRAC Legal Director.

What is an expert witness?

An expert witness is a specialist in a particular field who has been instructed by one of the parties to a case to provide an objective opinion on a contentious set of facts or relevant issue in a case, within their area of expertise. An expert witness is impartial and independent - it is not their role to advocate or advise in a case or to provide opinions beyond their area of expertise. An expert does not take 'sides' in a case. The value of an expert is that they are independent and therefore their evidence is perceived as credible by the Court.

In cases before international tribunals, which rely on written submissions of the parties, the evidence of an expert witness is provided in the form of an expert 'report' that is submitted by the instructing party, along with other evidence in the case.

An expert witness can be an expert in one of many fields including, for example: forensic pathologists and psychologists, ballistics, medical, environmental and toxicology experts, or an expert in standards and requirements in counter-terrorism operations.

Why instruct an expert witness?

Most cases don't require an expert witness because the applicant and other witnesses can attest to the facts relating to the incident constituting the alleged violation and the impact of any measures inflicted upon them (supported, as relevant, by other evidence including for instance, medical evidence), such as in cases concerning the violent dispersal of a protest, or a police ill-treatment case.

In cases before international tribunals it is important for lawyers to obtain the necessary evidence to prove the violations, such as witness statements and medical and other evidence, and not rely on the evidence obtained by the authorities (see EHRAC's Witness Statements in International Human Rights Litigation: Preparation Guide, p. 3). The lawyer will analyse the law and rely on the evidence gathered in order to present a legal argument that a violation has occurred. In doing so the lawyer can, within reason, highlight and question inconsistencies and inaccuracies in the evidence, and rely on international reports and best practice guidelines. A lawyer should not give evidence in a case[1] nor make assertions outside their area of expertise.

In some cases, however, there may be an issue in dispute that lies beyond the competence and experience of the lawyer, applicant and witnesses, and indeed the Court. An expert is qualified in a particular field and should have demonstrable expertise and independence, therefore their opinion on a specialist issue carries authority.

> **Example:**
> In a suspicious death in custody case, the Government may rely on an autopsy report to allege that the victim died of natural causes. While the lawyer in the case can raise any obvious inconsistencies or failures evident in the report, they are not pathologists and cannot assess the medical evidence, analysis and conclusions provided with any authority. An expert forensic pathologist, however, is qualified to provide such an analysis. The lawyer will then be able to rely on the expert report in their submissions and the report will assist the Court in understanding

1 An exception might be in circumstances where a client is being ill-treated in custody and denied access to a doctor. In such circumstances a lawyer, if able to visit, can provide a witness statement documenting any injuries sustained by their client to which they can attest.

the significance of the evidence and in reaching a conclusion about responsibility for the death (See *Dzidzava v Georgia,* Annex).

In other cases, it may be helpful to instruct an expert on a particular context that is central to the case, but not well-understood or recognised. This might include explaining the dynamics and impact of domestic abuse, the dynamics and repercussions of 'honour' based values in a community, or the medical procedures, together with the risks and consequences, involved in forced gender reassignment surgery. Of course, where there are relevant international reports these can be relied on, but depending on the issue, specific information is not always available.

Whether to instruct an expert witness?

It is important to ensure that there is a need for expert evidence and that there are appropriately qualified experts to address the issue in question. Instructing an expert can be costly and therefore it is necessary to consider whether an expert is likely to have a significant impact on the outcome of a case or whether sufficient information is already available in the form of evidence, international reports, and other available resources.

In many cases it may not be necessary or helpful to instruct an expert. For instance, in a case involving the right to life it will not always be advisable to instruct a forensic pathologist to analyse an autopsy report or to instruct a ballistics expert to challenge the Government account of a killing by security forces. There may already be sufficient evidence in the case, the autopsy report may be predominantly accurate, or the Government account may not be controversial or suspicious. It is worth bearing in mind that an expert witness provides an opinion that is not influenced by the wider considerations of the case or the party instructing them. An expert report could support the Government version of events.

In deciding to instruct an expert, careful consideration is required of the key evidence and whether it requires specific scientific or technical analysis or appears inaccurate, suspicious or is not conducted in a professional manner, and whether an assessment of this requires expert knowledge. In some cases, it may be possible to ask an expert to take a preliminary look at the key evidence (such as a forensic report) in order to assess whether there is anything sufficiently contentious to merit producing a full expert report. The Annex provides examples of cases in which an expert was instructed, and their report was influential on the outcome of the case.

In circumstances in which it is not possible or desirable to instruct an expert, it is worth considering whether the issue can be addressed by a third-party intervention in the case.[2] An intervention *cannot* engage with the merits or specific facts of the case (so cannot analyse a specific piece of evidence in a case) but can provide an assessment of a relevant contextual issue such as the prevailing attitude towards a particular community within a country or region, or an analysis of an emerging consensus on an issue of law within a region. Bear in mind that it is a matter for the Court as to whether it grants permission to intervene in any particular case.

When to instruct an expert witness?

Generally, it is recommended to instruct an expert once a case has been communicated and is therefore likely to be examined on the merits. The benefit of this is also that the Government will submit its Observations and evidence and therefore the expert will have all the relevant evidence to assess. However, in some cases an expert report may be necessary at an earlier stage in order to demonstrate that the case is admissible (showing a prima facie violation).

2 See Rule 44 of the Rules of Court: https://www.echr.coe.int/documents/rules_court_eng.pdf
Also: https://www.echr.am/en/functions/representation/third-party-intervention.html

Who to instruct?

An expert witness is instructed for their expertise therefore it is important to ensure that they are sufficiently qualified in the area in question and have relevant professional experience, expertise and training. It is also important to verify that they are independent. You might want to check their source of funding, professional affiliations and whether they have been involved in any professional controversy, in order to avoid any potential conflict of interest, bias or lack of credibility that could undermine the evidential value of their report. In some cases, it might be beneficial to instruct an international expert who has experience of the issue in comparative jurisdictions that they can draw on. Where domestic expertise is not required, an international expert has the advantage of being removed from the national context and being perceived as more independent and objective in their assessment.

An expert should have experience in writing expert reports, know what is expected of them and be able to provide a report within a reasonable time frame and at a proportionate agreed cost (*see below*).

Instructing an under-qualified or inexperienced expert can be detrimental to a case.

How to instruct an expert witness?

Contract

The terms of appointment of an expert should be agreed at the outset and include:

- confirmation of their expertise;
- the service required by the expert e.g. involvement in X case by provision of a report on X issue;
- the timeline for delivery of the report, and;
- the basis of renumeration (hourly or daily rates or an agreed fee) and an estimate of the number of hours/days required to complete the report.

Payments contingent on the nature of the report or the outcome of the case can compromise the actual or perceived independence of the expert's evidence and should not be offered or accepted. However, payment can be delayed until the conclusion of the case provided it is not dependent on the result of the case. The cost of instructing an expert can be included in the claim for costs and expenses in a case, by providing the Court with evidence of the contract.

Instructions

Instructions should be provided in writing and include: the remit or purpose of the report requested; a description of the matter to be investigated and the evidence and documentation on which the expert should base their report; the specific questions to be answered or issues to be covered, and the timeline for delivery of the report. The expert should provide written confirmation of their acceptance of these instructions.

Remit

In order to instruct an expert effectively it is key to work out what issue you want their opinion on and ensure that this remains within their expertise. You can ask a ballistics expert about the firing range, position and trajectory of gun shots, but not about the cause of death.

Evidence

An expert must be provided with the evidence and facts relevant to the issue they are instructed on but is unlikely to need all the documents in the case. For instance, for an assessment of cause of death this might include an autopsy report, photographs of the deceased's body, witness statements relevant to injuries inflicted. Bear in mind that at the international level the evidence provided to and relied on by the expert is likely to be in document form only, unless it involves a medical or psychological examination of a victim.

Questions

It is important to be aware that an expert will not approach the issue from the perspective of a lawyer or be looking to construct an argument. They will simply provide an objective examination of the facts or science. It is therefore helpful to work out what questions you would like clarified and set these out clearly in writing, thereby ensuring that the expert focuses on the issues of relevance to the case you are making. However, it is also important to recognise that you have instructed an expert because specialist knowledge is required and therefore you want to ensure that you are not overly restrictive in your instructions and always include an open question as to whether there is any matter not covered by the questions that merit comment.

Example 1
For instance, if you have instructed an expert forensic pathologist to assess the credibility of an autopsy report you might want to ask them to consider: whether the Government pathologist has followed the requisite procedures in compliance with best practice (including international standards); has reported all the injuries (for instance in comparing the report with photographs of the body or witness statements about injuries); whether the conclusion is consonant with the injuries and state of health recorded; whether the death could have been caused by ill-treatment, as well as any other matter that the expert considers relevant. The questions will obviously vary according to the facts: if a weapon was used you might want to ask whether the type of weapon is identifiable from the injuries or whether, for instance, a bullet should have been removed for purposes of identification.

Example 2
For instance, in a case concerning an incident of violence against a woman that takes place in an honour community you might want to instruct an expert in 'honour' based communities and values. Questions for the expert to answer could include explaining: the significance of such values for those living within the community; the impact of 'honour' values on the behaviour of women in that community; the significance of any behaviour (presumably considered inappropriate) that led to the incident of violence; and the consequence of that violence for the victim and her future within the community, as well as any other issue the expert thinks relevant. As above, these are general examples and the actual questions that will be most helpful will depend on the facts in the case.

Review

You should not press an expert for information outside their expertise, nor for a partisan opinion. However, where an expert has not addressed an issue of concern to you or has expressed a finding in terms that are unclear or assume specialist knowledge, do not hesitate to request that they clarify these points to the extent that it is within their expertise to do so. For instance, where an expert has concluded generally that an examination has not been conducted correctly, you might want to request that the failures or errors are specified; if a measure was not undertaken according to best

practice you might want the expert to set out what best practice would require or give examples from comparative jurisdictions. Bear in mind that the expert report is intended to elucidate on a matter of specialist knowledge and therefore needs to be comprehensible to a lay person avoiding overly technical or specialised language.

Accuracy

It is important to proof-read the expert report to make sure that the evidence relating to the case is accurate and there are no typos or other errors. An expert is not as familiar as the lawyer in the case with the detail in the case file and may make errors in relation to names/dates etc. These need to be corrected otherwise they risk undermining the value of the report.

It is not necessarily prejudicial for an expert report to diverge from the position of the lawyer on some points, provided it is not fundamental to the case. This evidence of independence can add credibility to the impartiality of the report.

What must an expert report include?

An expert report should.

- include an introductory section or cover letter explaining the relevant qualifications, training and experience of the expert, including professional appointments and publications;
- specify the materials relied on in the preparation of the report (including specific case documents and any other literature or materials);
- provide a summary of their instructions, or set out the questions asked of them with the relevant response;
- contain a summary of the facts provided and relied on in the report;
- specify the nature of any test or forensic or technical examination carried out and indicate by whom, if not the expert;
- keep matters of fact separate from matters of opinion;
- only provide opinions on matters within the expert's expertise and indicate any issues that fall outside their competence;
- provide a reasoned conclusion, or if unable to do so set out the reasons for any qualification;
- include a signed statement of truth along these lines: *I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.*

ANNEX

EHRAC has instructed experts in a number of its cases across our region. Below are examples of cases which have come to judgment.

1. Dzidzava v Russia No. 16363/07 (20.12.2016)

Dzidzava v Russia concerned the mass expulsion of Georgian nationals from Russia between September 2006 and January 2007. Pursuant to this policy, the applicant's husband, Mr Tengiz Togonidze, was arrested and detained in unsanitary conditions pending his deportation. Mr Togonidze, who suffered from asthma, became unwell and died immediately following his transportation to Domodedovo airport. The initial autopsy found the cause of death to be tuberculosis, and Mr Togonidze was recorded as dying of natural causes. Subsequently, a forensic examination of a sample of his urine found methadone present and the final conclusion of cause of death was methadone poisoning. Mr Togonidze's wife, Nino Dzidzava challenged this finding. Apart from evidence that Mr Togonidze had been seen to be unwell, the autopsy report was the key piece of evidence in this case. EHRAC, together with the Georgian Young Lawyers' Association (GYLA), instructed a forensic pathologist to assess the adequacy of the report and the validity of its conclusion. This report was, as shown below, determinative in this case in the Court establishing a violation of the right to life.

Excerpt from the Dzidzava judgment:

> *Medical Report submitted by the applicant.*
>
> *36. Based on the documents provided by the Government, and in particular on the autopsy report and the report of the forensic chemical examination, the applicant submitted her own medical report regarding her husband's death. The report was compiled by a forensic pathologist, Dr John Clark – a former lecturer at different universities in the United Kingdom and chief pathologist for the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) – supported by a forensic toxicologist, Dr Hilary Hamnett.*
>
> *37. The experts pointed out that the Russian authorities gave the cause of death as methadone intoxication based on the fact that methadone was detected in the blood and urine of Mr Togonidze and that he had three injection marks on his body. They also emphasised that the authorities concluded from these facts that Mr Togonidze had repeatedly used narcotics for a long period of time. As regards the needle punctures they pointed out that the injection mark at the bend of the left elbow stemmed most probably from the resuscitation attempts at the airport, in which intravenous drugs were given, and that the other two marks, on the lower third of the left shoulder, appear as a very unusual site for self-injection of drugs. They further indicated that methadone is usually taken in liquid form and only very uncommonly by injection. In addition, according to their opinion, the last few hours of Mr Togonidze's life did not coincide with the 'normal' death of a person dying from methadone intoxication. Being a sedative, people dying from methadone intoxication typically do so after a period of unconsciousness. Mr Togonidze, however, did not show any signs of drowsiness and was able to talk to the Georgian consul and walk a few steps before suddenly collapsing. Lastly, they pointed out that the conclusion of repeated drug use was not confirmed by an analysis of a hair sample or by finding any supporting evidence, such as needles, ampoules or syringes, on Mr Togonidze's corpse or in his cell.*
>
> *38. As regards the forensic chemical examination the experts indicated that the applied analyses appear not to have been carried out according to international recommendations and that the level of methadone was only measured in the urine and not in the blood. In their opinion it is unacceptable to conclude intoxication on urine levels alone, as drugs accumulate in the bladder over time and only blood levels can give an indication of a likely intoxication or incapacitation.*
>
> *39. In sum the forensic pathologist concluded that there was no scientific justification for giving methadone intoxication as the cause of death. He himself would have given the cause of*

death as suppurative bronchopneumonia due to chronic obstructive airways disease. He further indicated that, given Mr Togonidze's chronic lung disease, he was more likely to develop a chest infection and to progress his pneumonia in aacrowded, airless space. The deterioration of his health, however, would have been noticeable, as he would have been unwell and showed signs such as wheezing and coughing. A timely hospitalisation and antibiotic treatment would have been the correct course of action.

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The Court's assessment:

1. The death of Mr Togonidze.

57. Turning to the particular circumstances of the case the Court notes that according to the final assessment of the Russian authorities Mr Togonidze died of methadone poisoning. Consequently, having regard to the circumstances of Mr Togonidze's death, the Court has to determine whether this submission constitutes a satisfactory and convincing explanation of his death during detention. The Court observes that the medical report submitted by the applicant indicates several inconsistencies regarding the finding of the Russian authorities and that the Government did not submit any comments – clarifying these inconsistencies – regarding the medical report (see paragraph 36-39). The Court notes in particular that the level of methadone in Mr Togonidze's blood had not been determined and that it was therefore impossible to determine the amount of methadone allegedly taken by Mr Togonidze. Furthermore, it notes that neither drugs nor drug related evidence were found on Mr Togonidze and that there were no reports regarding drug use during his detention. In addition, the Court agrees with the findings in the medical report that the lower third of the left shoulder appears a very unusual site for self injection of drugs. Furthermore, it notes that establishing a long-term drug use from three injection marks seems improbable in the absence of any supporting evidence. The Court also observes that the Government submitted that Mr Togonidze was searched before entering the bus and closely monitored during the bus ride and that it is therefore highly unlikely that he was able to buy or take drugs during the last 9-10 hours before his death. Finally, the Court notes that the specific circumstances of Mr Togonidze's death and his conduct shortly before collapsing appear highly inconsistent with a methadone overdose.

58. The foregoing considerations are sufficient to enable the Court to conclude that the explanation provided by the Russian Government for the death of Mr Togonidze is, in particular in light of the medical report submitted by the applicant (see paragraphs 36 - 39) and the absence of an explanatory response by the Government, not satisfactory and convincing. There has accordingly been a violation of Article 2 of the Convention under its substantive head.

2. Tagayeva and others v Russia No. 26562/07, 14755/08 (13.04.2017)

Tagayeva and others v Russia, concerned the Beslan school siege in September 2004, in which more than 1000 civilians (including 886 children) were taken hostage on the Day of Knowledge at School No. 1 in Beslan, North Ossetia, by Chechen separatists and held for 3 days in a gymnasium wired with IEDs. On the third day in response to an explosion in the gym, Russian Special Forces stormed the school using tank shells and other heavy weaponry during which 331 people were killed (186 children). EHRAC, together with Memorial, represented more than 350 applicants who had been hostages or whose relatives had died during the siege.

The extensive evidence in this case raised many issues including: the sufficiency of the measures taken to prevent the terror attack; the adequacy of the organisation of the rescue operation; the role

and structure of the operational command; the decision to use and use of indiscriminate weapons, and the failure to conduct thorough autopsies on the victims. While we could highlight the perceived inadequacy of measures and failures of organisation that we considered clear on the evidence, we were aware that the response of a State to a terrorist threat and attack on a massive scale is a complex and specialised matter outside our area of expertise and that our submissions on these aspects would not be as credible as those of an expert. We therefore instructed a counter-terror and a military expertto assess the evidence concerning the measures taken to prevent the attack, the command and control of the rescue operation and the use of force. We raised numerous detailed questions and issues that concerned us and requested that they provide an opinion on these, with examples of UK counter-terror procedures that would have been relevant to such a scenario. We also instructed an expert pathologist to assess the approach to and adequacy of the provisions made for large-scale deaths and the autopsies undertaken. These reports were summarised by the Court in its judgment at paras 435-456 (see excerpts below) and were clearly influential in its reasoning. The judgment found four violations of the right to life: the failure to take reasonable measures to prevent the attack; failures of control and planning of the rescue operation; the indiscriminate and disproportionate use of lethal force; and the failure to conduct an effective investigation.

G. Expert reports submitted by the applicants after the admissibility decision.

435. Following the admissibility decision of 9 June 2015, the applicants submitted two additional documents – independent expert reports ordered by them on the counter-terrorist and forensic aspects of the case.

1. Expert report on counter-terrorism.

436. In September 2014 two UK anti-terrorist experts produced a report following a request from EHRAC, the applicants' representatives. The experts were Mr Ralph Roche, a solicitor admitted in Northern Ireland, England and Wales, a Council of Europe and OSCE consultant on policing and human rights issues, co-author of the Council of Europe publication The European Convention on Human Rights and Policing (2013); and Mr George McCauley, former Detective Chief Superintendent and former head of the Special Operations Branch within the Police Service of Northern Ireland. The authors relied on open sources, including the communication report in the present case, and analysed the applicability of the relevant standards under Article 2 of the Convention to different aspects of the operation. Their main conclusions may be summarised as follows.

(a) Existence of real and immediate threat known to the authorities

437. Looking at the previous attacks and the information available to the authorities immediately before the Beslan attack, the experts argued that "there was an extremely high level of threat of terrorist attack in the Southern Federal [Circuit] of Russia in late August to early September 2004, in particular in the border areas of [North Ossetia] and Ingushetia. This threat could be classified as real, as it had been verified by various orders, telexes and other documents issued by the Federal [Ministry of the Interior]. It could also be classified as immediate, as the information disseminated by the authorities pointed to an attack taking place on a specific day: 1 September". The experts also pointed out that, in addition to the date, the information had referred to a specific area – near the border between North Ossetia and Ingushetia – and the potential target, as the attack had been planned to coincide with the Day of Knowledge. As Beslan was the largest town in Ossetia within 20 kilometres of the border with the Malgobek District, where terrorists had apparently been gathering, they concluded that "Beslan, and other towns in the vicinity, were clearly under a real and immediate threat of an attack on a school on 1 September". Such a large-scale attack against a civilian target would have the potential for significant loss of life. The experts concluded that the level of detail available even from the relatively "sanitised versions" in the telexes and other communications indicated that there might have been a "covert human intelligence source" in the terrorist group, as well as technical coverage, such as the interception of communications. The event had therefore had a "high degree of foreseeability".

438. As to the scale of the threat presented by the "well-organised, ruthless and determined terrorists who had ... actively targeted civilians", the report reiterated the importance of the Day of Knowledge to Russian society and argued that an attack upon a school on that day was an act "bound to strike at the very heart of the nation" – something the terrorists had obviously strived to achieve.

(b) Feasible preventive measures

439. The experts thus concluded that in view of the high foreseeability and magnitude of the threat, the feasible operational measures "must have been seen to take precedence over all other threats". They divided the possible responses into three broad categories: (i) target denial, (ii) intervention and (iii) security. An example of target denial would involve postponing the opening of the school year in a

439. The experts thus concluded that in view of the high foreseeability and magnitude of the threat, the feasible operational measures "must have been seen to take precedence over all other threats". They divided the possible responses into three broad categories: (i) target denial, (ii) intervention and (iii) security. An example of target denial would involve postponing the opening of the school year in a defined area. Although unprecedented, this would have denied the terrorists the high-profile target sought. As to intervention, in the absence of any additional information, any comment would necessarily be speculative. It could be that the authorities did not conduct any preventive strike on the basis that to do so would have compromised the sources, or for other reasons – for example in view of the serious risk to the lives of the members of the security forces. Nevertheless, it was clear that "the risk would be likely to be greater in the event that the group succeeded in carrying out their intentions" and that the need to protect sources could not be used as a valid reason to put human life at serious risk. Lastly, as to security, the experts were of the opinion that the "essentially passive approach" adopted had been "seriously inadequate" in view of the circumstances. They noted that there had been no effective ownership or containment of the threat and that the staff of the local police had clearly been incapable of dealing with the security situation:

> *"Given the degree of foreseeability, the recognised high threat by the [North Ossetian Ministry of the Interior] and the level of specificity in terms of the terrorists' location, asserted target and likely area, there should have been a significant scaling up of resources in the identified areas. The purpose of this would have been to prevent or disrupt the terrorists' plans and deny the target. Such actions would include large, highly visible deployments of forces to search and locate the terrorist group, to undertake Vehicle Check Points both along the main arterial routes and in depth at likely target towns. Similar specific deployments should have been implemented at schools to deny the target."*

The experts concluded that while no security measures could serve as a guarantee against the attackers' success, the presence of security personnel on the roads and at potential targets would have acted as a deterrent and could have impeded the attackers. They considered that the fact that a group of over thirty armed terrorists had been able to travel along the local roads to Beslan, having encountered only one police roadblock manned by a single officer "show[ed] the extent of failure of the authorities to act upon the information available to them".

440. By means of comparison, the experts outlined the steps that would have been taken in the United Kingdom in the event of a known comparable threat. They considered that a command centre would have been established, with a clear and accountable chain of command, depending on role requirements. The centre would have comprised senior police officers coordinating with the relevant units of the British Army, specialist counter-terrorism units and the security services, as well as other public sector bodies such as fire and rescue and ambulance services. A dedicated crisis response committee would have been set up within the Government of the UK, in order to co-ordinate the actions of various bodies to ensure adequate resources and a media strategy. The potential targets would have been "hardened" by high-profile visible deployments of armed security personnel.

2. Expert report on medical (forensic) aspects of the operation.

452. In October 2015 a forensic pathologist from Glasgow produced an expert report in response to a request from EHRAC to consider matters related to the recovery of bodies, post-mortem examinations and conclusions drawn as to the causes of death. Dr John Clark had worked in England and Scotland as a forensic pathologist for about thirty years. He was also involved in international work, having been the Chief Pathologist for the International Criminal Court for Former Yugoslavia (1999-2001) and having worked in Africa for the International Criminal Court, in Palestine/Jordan for the United Nations, and in other regions of the world. He also had the relevant academic and teaching background (having previously held a post at the University of Glasgow and being an examiner for national pathology qualifications and secretary of the professional association for UK forensic pathologists). In addition to the Statement of Facts (admissibility decision) in the present case, dr Clark was provided with the transcripts of the

representatives' oral submissions before the Court, English translations of expert report no.1 (of 23 December 2005), five autopsy reports of the victims and transcripts of the testimonies given by the pathologists in the domestic proceedings. His conclusions may be summarised as follows.

453. On the overall organisation of the forensic service, Dr Clark noted that the task faced by the authorities had been extremely difficult. The mortuary in Vladikavkaz could not have possibly coped with the influx of over 300 bodies – as, in fact, no mortuary in the world could have. Alternative solutions should therefore have been considered, such as establishing a temporary mortuary elsewhere (a storage warehouse or cool facility – he recalled the use of an ice-rink in the Lockerby events) and bringing in refrigerator trucks or distribution to other mortuaries. In view of the potentially high number of expected casualties from the siege, some sort of system should have been planned in advance, with a suitable location, equipment and personnel identified and available at short notice. He noted that "the matter of body storage and preservation would have been uppermost in the minds of the pathologists, particularly with the warm weather". A more orderly fashion of dealing with the bodies could have not only helped to avoid wrong identifications, but also alleviated the pressure on the forensic team. It would have permitted them to carry out a more in-depth examination of the bodies, where necessary, in order to establish the causes of death and identify and extract the objects that could be helpful to the investigation, such as bullets, fragments of IEDs and so forth. A clear explanation to the relatives as regards time expectations and the need for examination would have helped both them and those dealing with the bodies.

454. As to the recovery of the bodies from the school, the expert noted that the location and position of each person should have been recorded and the body numbered and preferably photographed. The description of the scene and the record of body recovery as reflected in the available documents appeared "totally inadequate for such an important incident and provides no basis for independent analysis, as any proper forensic report should allow".

455. That most bodies had been subjected to external examinations only, as opposed to a full autopsy, would have been understandable if the principal purpose of the examination had been identification. Such an approach was justifiable, for example, in cases of major disaster casualties, or even at mass crime scenes where the evident injuries from gunfire or gross damage from an explosive device made the cause of death obvious. However, such an approach "would not reveal other unexpected findings, nor permit retrieval of bullets or shrapnel from inside the body", although the evidential value of much of this type of material, for example for matching with a particular rifle, would have been questionable in the case of high-velocity ammunition. A lighter option could have included the use of imaging facilities, such as portable X-ray machines usually available at hospitals. This could have assisted in deciding whether a more in-depth examination had been required. In some cases, the expert noted, the conclusions about the cause of death had been inconsistent with the number of examination carried out, and should have been "couched in far more cautious terms". With

respect to those cases where the cause of death had not been established, mostly in view of extensive burns, Dr Clark was of the opinion that this could have been established relatively easily. "Questions of where and when they died, and whether it was from gunshot, explosion, fire, other trauma, or any combination, could and should have been established..."

456. The expert also commented on the people who had been burnt to an extent that the cause of death could not be established, and whether these burns could have been received ante or post mortem. He stressed that post mortem burns often masked those received while the person had been alive; that most people died in fires from smoke inhalation rather than from burns; but that smoke inhalation could only be proved by an internal examination including a carboxyhaemoglobin blood test and dissection of the body in order to examine to what extent the air passages were lined with soot. The expert stressed that "[i]nternal examination of a body to establish smoke inhalation can be done on even very charred and partly destroyed remains (which generally are remarkably well preserved inside), certainly on the type seen in the photographs and described in the post-mortem reports above. Thus, to say that no cause of death could be established because the body was burned is nonsense and dishonest".

3. Fadayeva v Russia No. 55723/00 (09.06.2005)

Fadayeva and others v Russia concerned the environmental impact of pollution from a steel plant on quality of life of nearby residents. Ms Fadayeva and her family lived in the city of Cherepovets, a major steel-producing centre in Russia. Their council flat was situated within half a kilometre of a steel plant, operated by Severstal PLC, Russia's largest iron-smelting company. In 2000, the authorities confirmed that the concentration of certain hazardous substances in the atmosphere within the zone in which Ms Fadayeva lived largely exceeded the 'maximum permitted limit' established by Russian legislation. Ms Fadayeva took her case to the local court, seeking resettlement outside the zone. The court recognised that her flat was situated within the 'sanitary security zone', an area around the plant, which delimits areas where pollution may be excessive and was supposed to be free of residential property. The court found that, in principle, the applicant had the right to be resettled, but made no specific order for her resettlement, instead requiring the local authorities to put her on a priority housing waiting list. No further action was taken. Represented by EHRAC and Memorial, Ms Fadayeva took her case to the ECtHR, complaining that, inter alia, the failure to re-settle her was in violation of her right to private and family life under Article 8 of the Convention. We instructed an expert in environmental toxicology to assess the risk the pollutants posed to the human health of residents within the sanitary zone. This report, as shown below, was influential on the Court's finding of a violation of Article 8 in this case.

46. In 2004 the applicant submitted a report entitled "Human health risk assessment of pollutant levels in the vicinity of the Severstal facility in Cherepovets". This report, commissioned on behalf of the applicant, was prepared by Dr Mark Chernaik[2]. Dr Chernaik concluded that he would expect the population residing within the zone to suffer from above-average incidences of odour annoyance, respiratory infections, irritation of the nose, coughs and headaches, thyroid abnormalities, cancer of the nose and respiratory tract, chronic irritation of the eyes, nose and throat, and adverse impacts on neurobehavioral, neurological, cardiovascular and reproductive functions. The report concluded as follows:

> *"The toxic pollutants found in excessive levels within the sanitary security zone in Cherepovets are all gaseous pollutants specifically produced by iron and steel manufacturing plants (in particular, by process units involved in metallurgical coke production), but not usually by other industrial facilities.*
>
> *It is therefore reasonable to conclude that inadequately controlled emissions from the Severstal facility are a primary cause of the excess incidences of the above-mentioned adverse health conditions of persons residing within the sanitary security zone in Cherepovets."*

85. The Court notes further that on many occasions the State recognised that the environmental situation in Cherepovets caused an increase in the morbidity rate for the city's residents (see paragraphs 12, 15, 34 and 47 above). The reports and official documents produced by the applicant, and, in particular, the report by Dr Mark Chernaik (see paragraph 46), described the adverse effects of pollution on all residents of Cherepovets, especially those who lived near the plant. Thus, according to the data provided by both parties, during the entire period under consideration the concentration of formaldehyde in the air near the applicant's home was three to six times higher than the safe levels. Dr Chernaik described the adverse effects of formaldehyde as follows:

> *"Considering the ongoing exposure to formaldehyde within the Cherepovets sanitary security zone, I would expect the population residing within the zone to suffer from above-average incidences of cancer of the nasal passages, headaches, and chronic irritation of the eyes, nose, and throat compared to populations residing in areas not polluted by excessive levels of formaldehyde."*

As regards carbon disulphide, the concentration of which exceeded the MPL by 1.1 to 3.75 times during this entire period (except for 2002), Dr Chernaik stated:

> *"Considering the ongoing exposure to carbon disulphide within the Cherepovets sanitary security zone, I would expect the population residing within the zone to suffer from above-average incidences of adverse neurobehavioral, neurological, cardiovascular, and reproductive functions compared to populations residing in areas not polluted by excessive levels of carbon disulphide."*

86. Finally, the Court pays special attention to the fact that the domestic courts in the present case recognised the applicant's right to be resettled. Admittedly, the effects of pollution on the applicant's private life were not at the heart of the domestic proceedings. However, as follows from the Vologda Regional Court's decision in Ledyayeva (see paragraph 58 above), it was not contested that the pollution caused by the Severstal facilities called for resettlement in a safer area. Moreover, domestic legislation itself defined the zone in which the applicant's home was situated as unfit for habitation (see paragraph 51). Therefore, it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level.

87. In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements (see paragraph 49 above). Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proved negative effects on the population as a whole, the applicant did not suffer any special and extraordinary damage.

88. In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.

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