

# The oversight of the European Court of Human Rights in cases from the North Caucasus

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Prof. Philip Leach\*

## Introduction

1. For more than 10 years, the Russian Federation has been subject to the obligations of the European Convention on Human Rights, but the first decisions of the European Court of Human Rights relating to the second conflict in Chechnya (which began in 1999), were not published until 2005. The growing corpus of cases from the North Caucasus (now more than 100 judgments) are significant because they deliver a degree of justice for the applicants and their families, they ensure that the international spotlight is intermittently directed at the region, and its authorities, and they provide a measure of accountability.
2. This brief paper considers the European Court's contribution to the international oversight of the region, by examining its case law, and drawing conclusions as to the implications of its findings.<sup>1</sup>

## The Chechen conflict: context and applicable legal framework

3. The second armed conflict in Chechnya began in September 1999. It has been widely acknowledged that during the conflict both federal forces and Chechen rebel fighters have committed grave human rights violations. The cases which have come before the European Court reflect various facets of the conflict, including the federal forces' use of bombing and shelling (in particular in 1999-2000), the widespread tactic of carrying out large-scale 'sweeping-up' operations (*zachistka*) in which large numbers of civilians were detained or killed during what were ostensibly searches for rebel fighters, and more targeted operations in which individuals have been abducted from their homes.
4. The Court has acknowledged, in general terms, Russia's right to respond to a situation of conflict, accepting "that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency". Russia considers the conflict to be a 'counter-terrorist operation'. No state of emergency or martial law has been declared in Chechnya, and no derogation under Article 15 of the European Convention on Human Rights has been made. As a result, the European Court considers that it should judge military operations (including aerial bombardment and artillery shelling) "against a normal legal background".
5. In a situation of armed conflict, as in Chechnya, both international human rights law and international humanitarian law (IHL) apply concurrently. As a matter of IHL, the conflict can be characterized as a non-international armed conflict. Apparently unwilling to delve into the question of the complementarity of human rights law and IHL, the European Court has assiduously avoided any express reference to humanitarian law in the Chechen cases, despite specific reliance being placed on humanitarian law provisions and principles. However, the Court has touched on humanitarian law *concepts*, including the need to carry

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\* Director, European Human Rights Advocacy Centre (EHRAC), London Metropolitan University

out military operations in a way that minimizes incidental civilian losses and the prohibition of the use of indiscriminate weapons.

### **An Overview of the Chechen judgments**

6. An analysis of the Court's judgments delivered between February 2005 and July 2008 has shown:

- There were 37 judgments, the majority concerning events in 2000. Several cases attest to the mass killings of civilians in the Staropromyslovsky district of Grozny in January 2000 and in Novye Aldy in February 2000, and to enforced disappearances from the village of Novye Atagi in June 2002.
- Almost two-thirds of the applicants were women. In most cases, as the applications concerned killings or disappearances, the applicants brought the cases upon behalf of members of their family, 80% of whom were men.
- A number of the applicants were living outside Russia, having sought asylum.
- In 35 cases, the applicants were represented by NGOs: either the Stichting Russian Justice Initiative or the partnership created by Memorial (in Russia) and the European Human Rights Advocacy Centre (EHRAC) (in London).
- In each of the 37 cases, there were at least two provisions of the ECHR which were found to have been violated. In 34 of the 37 cases, the right to life (Article 2) was in issue: 30 cases concerning disappearances and/or extra-judicial executions; 2 cases in which there was an attack (aerial and/or artillery bombardment); and 2 cases of shootings which turned out not to be fatal. In all of the 34 cases the right to life was found to have been violated, and in all but one of those cases, the Court found the Russian authorities directly responsible for the fatality itself (or presumed death) as well as being in breach of Article 2 for having failed to investigate the matter adequately.
- In more than two-thirds of the disappearance cases, the victims were abducted from their homes (in other cases they went missing having allegedly been detained at checkpoints or elsewhere). The victims' bodies were subsequently discovered in 5 cases, but in 19 cases no bodies were ever found. The Government's usual riposte was not to deny that the victims had indeed been abducted, but to assert that unidentified armed men had been responsible and that it had not been possible to establish the responsibility of any state officials, or (in cases where no body had been discovered) that the victim was dead.
- Article 3 ECHR (the prohibition of torture and inhuman and degrading treatment) was found to have been violated in 26 of the 37 cases, in two of which the level of ill-treatment was considered to amount to torture.
- The Court found Article 5 ECHR (right to liberty and security of the person) to have been violated in 24 cases, noting that the detentions were neither logged by the authorities, nor were they even acknowledged, and reiterating the principle that unacknowledged detention is a "complete negation" of the Article 5 guarantees and amounts to a "very grave violation". Two particular detention centres are referred

to in a predominant number of cases: the federal military base at Khankala and the unofficial 'pre-trial detention centre' at Chernokozovo.

- The right to an effective remedy (Article 13 ECHR) was found to have been breached in 35 cases. A national remedy that is deemed to meet the Article 13 criteria when applied in the context of the right to life, must provide a "thorough and effective investigation capable of leading to the identification and punishment of those responsible". Violations of Article 13 have followed from overwhelming findings as to the utter inadequacy of the domestic criminal investigations which then had the consequential effect of undermining any civil remedies.
- In 15 of the decisions, the Russian Federation was found to have failed to have cooperated in respect of the Court's examination of the case, thus being in breach of Article 38(1)(a) ECHR, because of no, or inadequate, disclosure of the domestic case files.
- There has been a grave problem of the intimidation of applicants in Chechen cases.<sup>2</sup> Following the killing of Zura Bitiyeva (whose case was pending before the Court) together with three of members of her family, in May 2003, the Court invoked its 'interim measures' procedure (under Rule 39), and requested the Russian Government to take all measures to ensure that there was no hindrance in any way of the effective exercise of the right of individual petition of the second applicant (Zura Bitiyeva's daughter).

#### **Fact-finding and evidence in the Chechen cases: the problem of non-disclosure**

7. It is a recurring, and particularly lamentable, feature of the Chechen cases that the Government refuses to disclose to the Court copies of the domestic case files, in spite of repeated requests made by the Court. In 28 of the 37 cases, there has been what may be described as a significant level of non-disclosure (with some degree of non-disclosure in another 5 cases). For example, in *Baysayeva*, the Government referred to witness statements taken from 65 military servicemen, none of which were disclosed. The Court noted in the *Bitiyeva* case that there was no disclosure of various important documents: witness statements, forensic and ballistic expert reports, information on the examination of the scene of the crime, requests for information, and replies relating to the alleged participation of the security or military forces in the killings in question.
8. The main thrust of the Government's argument to attempt to justify no, or only selective, disclosure, was that the documents contained state or military secrets, information about the locations of military or special forces, information about officers who took part in counter-terrorist operations and other information about witnesses. These claims were not particularized or otherwise substantiated.
9. In a majority of the cases (25 out of 37), the Government sought to justify its refusal to disclose with reference to the domestic law: Article 161 of the Code of Criminal Procedure. It was said that this provision prohibits the disclosure of information from the preliminary investigation file: according to Article 161(3), information from the investigation file may only be disclosed with the permission of a prosecutor or investigator (and only in so far as it does not infringe the rights and lawful interests of the parties to the criminal proceedings or prejudice the investigation).
10. Perhaps most remarkably, in a number of cases the Government has even proposed that a delegation of the Court would be able to access the case file at the location in Russia where

the investigation was being carried out. These offers did not, however, extend to documents disclosing military information or personal data about witnesses, and the delegation would not be allowed to make copies or to provide the information to others.

11. The Court has taken a clear stand in rejecting the Government's reliance on Article 161 of the Code of Criminal Procedure, which it has pointed out, quite correctly, does not in fact prevent disclosure of the documents from a pending investigation file, but merely sets out a procedure for such disclosure and prescribes limits to it. Indeed, Article 161 clearly gives the investigating authorities a discretionary power over the question of disclosure. It has also been critical of the Government for failing to specify the nature of the documents which purportedly could not be disclosed, or for explaining the reasons for non-disclosure. It has also highlighted the Government's apparently inconsistent position, as in some of the Chechen cases considerable disclosure has been made, without any reliance being placed on the Criminal Procedure Code. The Court has also frequently noted that no attempt has been made by the Russian authorities to invoke Rule 33(2) of the Court Rules in order to have public access to a document (or part of a document) restricted.
12. The Court's response to this situation has been two-fold: to consider whether any inferences can be drawn from the failure of disclosure or to assess whether the Government has thereby breached the Convention itself. Thus, as a result of the non-disclosure of case files, the Court has found a distinct violation of the Convention in 15 cases, on the basis that the Russian Government has failed to comply with its obligations under Article 38(1)(a) ECHR: to "furnish all necessary facilities" in order to ensure the effective conduct of the Court's examination of the case. In the starkest cases, the Court will both draw inferences from non-disclosure and also find Article 38(1)(a) to have been violated. There is no sign, however, of the Court's willingness to review and increase awards of damages in the light of non-disclosure, as some commentators have advocated.<sup>3</sup>
13. How significant has the problem of non-disclosure been? The Court underlined its importance very clearly in *Bazorkina*:

"In a case where the application raises issues of grave unlawful actions by State agents, the documents of the criminal investigation are fundamental to the establishment of facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility and merits stage".
14. It must accordingly be acknowledged that in many cases non-disclosure has been extremely detrimental to the Court's task of establishing what had happened. In *Isayeva, Yusupova and Bazayeva*, which concerned the aerial bombing of a convoy of civilian cars as they were attempting to leave Grozny in October 1999, the Court found:

"At the outset it has to be stated that the Court's ability to make an assessment of the legitimacy of the attack, as well as of how the operation had been planned and executed, is severely hampered by the lack of information before it. No plan was submitted and no information was provided as to how the operation had been planned, what assessment of the perceived threats and constraints had been made, or what other weapons or tactics had been at the pilots' disposal when faced with the ground attack the Government refer to. Most notably, there was no reference to assessing and preventing possible harm to the civilians who might have been present on the road or elsewhere in the vicinity of what the military could have perceived as legitimate targets".
15. In the light of the serious problems of non-disclosure, it may seem remarkable that in 33 of the 34 cases in which Article 2 was raised, the Court was able to find both procedural and

substantive violations of the right to life: not only had the authorities failed to carry out an adequate investigation into the incident, but there was also sufficient evidence to establish that state agents were themselves responsible for the fatality in question (or presumed death, in a number of cases).

16. Nevertheless, in too many of the disappearance cases, the most significant questions are still left unresolved: we may not even know if the victim has died (it's presumed); we don't know how they died, when they died or where they died; nor do we know which state bodies, still less which individual officials, were responsible. Thus, this body of Chechen cases has again drawn attention to the inadequacies of an arena of redress which is founded on individual cases, in addressing large-scale, systematic (or indeed systemic) human rights violations of such gravity.<sup>4</sup>
17. A significant difference in the Court's handling of the Kurdish/Turkish and Chechen cases is that fact-finding investigations were relatively frequently held in the Kurdish/Turkish cases, whereas, to date, there have been no fact-finding missions at all in the Chechen cases.
18. The Court's findings of a violation of Article 38(1)(a) should not be considered as mere additional, 'technical' breaches of the Convention, but should be interpreted as being indicative of a systematic policy of non-cooperation with the Court.

#### **A systematic failure to investigate**

19. The Court has been strongly critical of the negligence of the investigatory authorities in Chechnya in responding to wholly credible allegations of extra-judicial executions, kidnappings, disappearances and ill-treatment. In numerous cases, the Court has found that the most basic investigatory steps were never taken, and many investigations were "plagued by inexplicable delays". In some cases, investigatory measures were only eventually carried out after the communication of the European Court application to the Russian Government.
20. Very basic investigative failings have been identified on numerous occasions, including the following:
  - the failure to question the applicants or delays in doing so;
  - the failure to identify and question witnesses, or delays in doing so, or the failure to raise particular pertinent questions;
  - the failure to identify other victims and witnesses of an attack, including those identified and named by the applicants;
  - the failure to initiate criminal proceedings or to specify what investigative steps were taken following the discovery of a body;
  - the failure to carry out an appropriate autopsy or forensic report, or delays in doing so;
  - the failure to carry out a ballistics report or delays in doing so;
  - the failure to draw up a map or plan; and
  - a delay in drawing up an inventory of real evidence.

21. A notable and consistent feature of the investigations has been the inability, or unwillingness, of investigators or prosecutors to call state bodies to account, notably the military and security forces. There have been delays in making requests for information to state agencies and requests for information which have included significantly wrong information. The Court has frequently found a failure to identify and question particular officials.
22. Investigators have proved reluctant to attempt to establish whether special operations had been conducted in a certain place, on the date in question, or otherwise to attempt to identify the military units which could have been involved in a particular incident. They have also been criticized by the Court for failing to obtain key operational documents.
23. Military prosecutors, who are responsible for the investigation of crimes committed by servicemen in Russia, have also been singled out for particular criticism.
24. Another distinguishing feature of the Chechen investigations has been the failure to involve the families in the investigatory proceedings to a sufficient extent. Thus, applicants have not been granted victim status or there have been delays in doing so of between 6 months and 4 ½ years. In numerous cases, families were not informed about significant developments in the investigation.
25. Aside from all of these very serious errors and omissions in individual cases, more worrying still are the Court's broader criticisms pointing to a disturbing pattern of conscious behaviour. Mere bureaucratic bungling or inertia surely cannot account for the repeated adjournment and reopening of numerous investigations, for the lengthy periods of inactivity at the prosecutors' offices when no proceedings were pending or for the transfer of investigations from one prosecutor's office to another for no apparent reason. On several occasions, the Court has seen fit to criticize the failure to carry out interconnected investigations into related incidents, or to explain why separate investigations were carried out into related incidents. In a number of cases, the Court has itself suggested that investigators' inaction (especially in the first few days) in response to families' justified complaints established "a strong presumption of at least acquiescence in the situation", as well as calling into question the objectivity of the investigation.
26. This cluster of judgments from Chechnya has therefore arguably already established that there has been a systematic pattern indicative of a clear lack of will to carry out timely and thorough investigations into human rights abuses by state officials.

### **Adjudications on Article 3**

27. The Court has applied the principle that the close relatives of people who have 'disappeared' may themselves be victims of inhuman treatment (in violation of Article 3 ECHR) because of the distress and anguish that they suffer (and often continue to suffer) as a consequence. For these reasons, Article 3 has been found to have been violated in 20 of the first 37 cases relating to Chechnya.
28. Article 3 was found to have been breached in *Musayev and others* where the first applicant witnessed the extra-judicial execution of a number of relatives and neighbours, before himself being threatened at gunpoint.
29. In a number of cases applicants who had themselves been detained by the authorities were not able to substantiate their allegations of ill-treatment to the satisfaction of the Court.

However, detained applicants successfully alleged that their complaints about having been ill-treated were not properly investigated by the authorities, arising in a procedural violation of Article 3.

30. The threshold of torture (deliberate inhuman treatment causing very serious and cruel suffering) was reached in *Musayeva and others* (multiple injuries and stab wounds on the body) and *Chitayev and Chitayev* (electric shocks, beatings, strangling, use of dogs and pliers; the treatment had been intentionally inflicted in order to try to extract confessions).

### **Redress and Implementation**

31. In monetary terms, in the 37 judgments the Russian Government was ordered to pay pecuniary damages of €383,343 and non-pecuniary damages of €2,188,000: a total of €2,571,343. The usual range for awards of non-pecuniary damages has been €35,000 - €50,000.
32. Aside from the question of damages, in a number of unresolved disappearance cases the applicants have also sought, by way of 'just satisfaction' under Article 41 ECHR, an order that the authorities carry out a thorough investigation. Such arguments are based on the fact that while declaratory remedies may be the norm, in an increasing number of situations (such as cases of unlawful detention)<sup>5</sup> the Court has gone further and ordered a respondent state to take other specific steps.<sup>6</sup> Thus it has been argued that where the Court has found that a person has been the victim of an enforced 'disappearance' carried out by state officials, only an order by the Court that the respondent Government must ensure that an effective investigation is carried out, will be sufficient to afford 'just satisfaction'. This is a point which was supported by Antonio Cassese at a PACE session in June this year. He argued that where the Court finds violations of Articles 2, 3 or 4 of the Convention, it should "explicitly enjoin the State to institute criminal proceedings to punish the individuals responsible for the unlawful taking of human life, or for torture or slavery".<sup>7</sup>
33. However, such arguments have not, as yet, prevailed, with the Court concluding that because the effectiveness of the investigations had been undermined from the outset, it was "therefore very doubtful that the situation existing before the breach could be restored". This is an unconvincing response. It is true of course that an investigation of an unsolved disappearance case could only truly 'restore' the previous position if the victim were found alive and were then released. Where, however, the victim is presumed dead several years after going missing, the closest that one could get to 'restoration' would be a resolution of what had actually happened, who was responsible and the identification and return of the victim's body to the family. Thus, making an order for an investigation to be undertaken is arguably the only step which could get near to 'remedying' the violation (as it could lead to the identification and punishment of those responsible for the crime and to the discovery of the whereabouts of the victim). This would also be in tune with the broader international legal framework relating to disappearances, which widely recognises the continuing nature of an enforced disappearance, arising in particular from the denial or failure of the state to disclose what has happened to the victim.<sup>8</sup>
34. If the Court is, as yet, disinclined to require the Russian authorities to investigate an unresolved disappearance, is that something that the Committee of Ministers could enforce, through its role in supervising the execution of judgments? As has been noted elsewhere,<sup>9</sup> the follow-up to the implementation of the Chechen judgments has been protracted, lacking in transparency, and, ultimately, ineffective. The Russian authorities' approach to the question of implementation of the Chechen judgments can only be characterised as obfuscation. It is true to say that in response to the Court's earliest judgments in the

Chechen cases, domestic investigations were re-opened or re-instigated. However, according to the information provided by the Russian Government to the March 2008 meeting of the Committee of Ministers,<sup>10</sup> not one of the investigations in respect of 9 listed cases (both disappearances and extra-judicial killings) had led to a prosecution: two had been closed; five had been adjourned; and no information had been provided about two cases. The Government continues to be pressed by the Committee of Ministers for further specific information about the legal and regulatory framework and about measures to ensure the accountability of the security forces for abuses committed in Chechnya.<sup>11</sup>

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<sup>1</sup> This paper is based on: P. Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights* [2008] European Human Rights Law Review 732-761.

<sup>2</sup> See *Member states' duty to co-operate with the European Court of Human Rights*, Report of the Committee on Legal Affairs and Human Rights (Parliamentary Assembly of the Council of Europe), Doc. 11183, 9 February 2007, para. 35.

<sup>3</sup> O. Solvang, *Russia and the European Court of Human Rights: The Price of Non-Cooperation*, Human Rights Brief, Vol. 15, Issue 2 (Winter 2008).

<sup>4</sup> See A. Reidy, F. Hampson and K. Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey* (1997) 15 NQHR 161.

<sup>5</sup> See *Assanidze v Georgia*, No. 71403/01, 8.4.04 and *Ilaşcu and Others v Moldova and Russia* No. 48787/99, 8.7.04.

<sup>6</sup> As to other examples, see *Brumarescu v Romania*, No. 28342/95, 23.1.01 (return of property formerly nationalized); *L v Lithuania*, No. 27527/03, 11.9.07 (adoption of legislation to allow gender reassignment surgery); and *Hasan & Eylem Zengin v Turkey*, No. 1448/04, 9.10.07 (bringing legislation relating to religious education into conformity with the Convention). See also: L Loucaides, *Reparations for violations of human rights under the European Convention and restitution in integrum* [2008] EHRLR 182-192.

<sup>7</sup> A. Cassese, *How To Ensure That The Authors Of Gross And Large-Scale Violations Of Human Rights Are Brought To Book*, Session of the Parliamentary Assembly, 22-26 June 2009, available at:

[http://www.coe.int/t/dc/files/pa\\_session/June\\_2009/20090624\\_disc\\_Cassese\\_en.asp](http://www.coe.int/t/dc/files/pa_session/June_2009/20090624_disc_Cassese_en.asp)

<sup>8</sup> See, for example, *Quinteros v Uruguay*, Comm. No. 107/1981, 21 July 1983; Article 17.1 of the 1992 Declaration; UNWGEID General Comment, E/CN4/2001/68, Annex III, 18 December 2000; *Velasquez Rodríguez v Honduras*, judgment of 29 July 1988, para. 140; *Blake v Guatemala*, judgment of 24 January 1998; Article 8 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>9</sup> See P. Leach, *Strasbourg's oversight of Russia – an increasingly strained relationship*, Public Law, Winter 2007, 640-654.

<sup>10</sup> The information was provided orally, and is summarised in: CM/Del/OJ/DH(2008)1020 Section 4.3 PUBLIC 8, April 2008.

<sup>11</sup> *Actions of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights*, CM/Inf/DH(2008)33, 11 September 2008 (declassified on 18 September 2008). See also: *Implementation of judgments of the European Court of Human Rights – Introductory memorandum (Rapporteur: Mr Christos Pourgourides)*, Committee on Legal Affairs and Human Rights, PACE, AS/Jur (2008)24, 26 May 2008 (declassified 2 June 2008).