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Remedies for human rights violations in Chechnya: The approach of the European Court in context

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When the armed conflict[1] in Chechnya, officially called a 'counter-terrorist operation', commenced in 1999, extrajudicial executions, indiscriminate bombardment, torture and disappearances were committed by Russian forces on a large scale. The first judgments of the ECtHR, handed down in February 2005[2] addressing those atrocities, have been followed, at the time of writing, by more than 70 further judgments. In all of the cases, Russia was found in violation of ECHR rights and required to pay compensation to the applicants. However, it is important to analyse this significant body of case-law to ascertain how effective and adequate the ECtHR's response has been. It was not surprising that the ECtHR was the only jurisdiction (Russian prosecutors and courts largely being neither capable of, nor willing to, prosecute those responsible of human rights abuses) able to hear Chechen cases. But, it is submitted that the remedies provided by the ECtHR were not always sufficient to make good the violations suffered by the applicants.

sonable doubt' has not been applied consistently in all cases. For instance, in *Tangiyeva*[3] (extra-judicial execution) and *Mezhidov*[4] (aerial bombardment) the ECtHR held that the evidence (witness testimonies and expert reports) submitted by the applicants constituted a *prima facie* case to which the Government had failed to reply, and found violations of Art. 2 (right to life). However, in *Albekov*[5] the ECtHR, faced with a case about landmines, refrained from ruling on the question as to which party to the conflict had planted them, even though the applicants alleged, referring to specific evidence, that the Russian military was in possession of a map of the minefield. One of the factors which prevented a clear decision in *Albekov* – though disregarded in all other cases – was that the domestic investigation had not been completed. Given that the establishment of facts is in itself a means of providing redress to victims in post-conflict situations, it is of concern that the ECtHR does not always meet this challenge head-on.

In all the Chechen cases, the ECtHR's awards of just satisfaction under Art. 41 of the ECHR were limited to damages and costs. Since *Kukayev*[6] the case-law, to oblige the respondent Government to conduct a fresh investigation, a search for the body of the disappeared person and to apologise publicly to his family.

The IACHR, relying on the often-quoted Permanent Court of International Justice (PCIJ) judgment in the *Chorzow Factory Case*,[10] on numerous occasions ordered fresh investigations and prosecutions in cases of violations of the right to life and included those orders in the operative parts of judgments.[11] It further obliged the respondent states to apologise publicly, via national and regional media, to the victims[12] and to hold public acts of recognition of State responsibility for human rights violations,[13] to search for the bodies of disappeared persons and, eventually, to return them to the relatives of the disappeared for burial.[14] These measures do not exhaust the IACHR's non-monetary reparation awards, which are inventive and far-reaching.

As a result of ECtHR just satisfaction awards being limited to payments of damages, the measures aimed at preventing new similar ECHR violations are at the discretion of the respondent Government, which implements these

This is particularly apparent, in respect of the establishment of facts, just satisfaction awards and execution of judgments, if compared to the case-law of the Inter-American Court of Human Rights (IACHR) on similar issues. This article aims to analyse and assess the Strasbourg approach and to propose some remaining challenges, especially in the light of the recent and numerous applications to the ECtHR from South Ossetia.

As regards the establishment of facts, it is noted that the ECtHR has never conducted a fact-finding mission in a Chechen case. Only two public hearings were held in Strasbourg. All other cases have been decided on paper. The ECtHR's burden of proof: 'beyond rea- ECtHR has expressly refused to oblige the Government to conduct new investigations in conformity with ECHR requirements. However, the application of this case-law led to dissenting opinions from Judge Spielmann in both *Umayeva*[7] and *Medova*.[8] He argued that, on the facts of those cases, fresh investigations were possible and did not contradict the respondent State's freedom to choose the means by which it would comply with the ECtHR's judgment. However, it is yet to be seen whether this is the beginning of a reconsideration of the *Kukayev* approach or just a stand alone dissent. In *Bersunkayeva*,[9] for example, the ECtHR dismissed the applicant's claims, which were based on well-established IACHR under the control of the Committee of Ministers of the Council of Europe. The process is political and diplomatic rather then jurisdictional and adversarial. For the moment, more than three years after the first Chechen judgments have become final, not a single Russian military officer has been prosecuted for crimes which constituted violations of the ECHR in the cases decided in Strasbourg. The ECtHR itself has only limited power to review compliance with its judgments. The only means is to rule on new applications in cases of continuing violations. Such applications have been brought to the Court, but no judgment has been given so far.

It is suggested that the limited ef-

fectiveness of the ECtHR in providing redress in post-conflict situations, especially if compared to the IACHR, is linked not only to its nature as a subsidiary jurisdiction, but also to its refusal to adopt an outreach strategy that would include complex measures ranging from disseminating information about judgments and publicising procedures to diversifying just satisfaction awards (such a strategy may soon be needed for South Ossetia). Another explanation for the different approaches of the Strasbourg and San-Jose Courts may be that the latter is more conscious of the fact that many of the States Parties to the Inter-American Convention have recently been or are in transition from autocratic rule to democracy and, thus, require significant guidance in dealing with grave human rights abuses. The former is yet to adapt its case-law to the situations of an armed conflict.

1 The ECtHR expressly used this term for the first time in *Akhmadov & Others v Russia* (No. 21586/02) 14/11/08, para. 97.

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

3 *Tangiyeva v Russia* (No. 57935/00) 29/11/07.

4 *Mezhidov v Russia* (No. 67326/01) 25/9/08.

5 *Albekov & Others v Russia* (No. 68216/01) 9/10/08.

6 *Kukayev v Russia* (No. 29316/02) 15/11/07.

7 *Umayeva v Russia* (No. 1200/03) 4/12/08.

8 *Medova v Russia* (No. 25385/04) 15/1/09.

9 *Bersunkayeva v Russia* (No. 27233/03) 4/12/08.

10 PCIJ, Merits, 13 September 1928, Series A No. 17, p. 47.

11 *El Amparo v Venezuela*, judgment (reparations) of 14 September 1996, Series C No. 28, § 61 and item 4 of the operative provisions; *Garrido & Baigorria v Argentina*, judgment (reparations) of 27 August 1998, Series C No. 39, §§ 68-74 and item 4 of the operative provisions; *Castillo Paez v Peru*, judgment (reparations) of 27 November 1998, Series C No. 43, item 2 of the operative provisions; *Barrios-Altos v Peru*, judgment (merits) of 14 March 2001, Series C No. 75, item 5 of the operative provisions.

12 *Cantoral Benavides v Peru*, judgment (reparations) of 3 December 2001, Series C No. 88, § 77 and item 7 of the operative provisions.

13 *Bamaca Velasques v Guatemala*, judgment (reparations) of 22 February 2002, Series C No. 91, § 83.

14 *Caballero Delgado & Santana v Peru*, judgment (reparations) of 29 January 1997, Series C No. 31, item 4 of the operative provisions; *Paniagula Morales v Guatemala (the "Panel Blanca" case)*, judgment (reparations) of 25 May 2001, Series C No. 76, item 3 of the operative provisions.