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Fact-finding missions: The Strasbourg experience

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In the vast majority of cases brought before it the ECtHR is able to reach a judgment on the basis of decisions made and documents created in the course of prior domestic proceedings. However, where fundamental facts remain in dispute between the parties, the ECtHR has, in the past, conducted fact-finding missions.¹

The basis upon which such fact-finding missions are conducted is to be found in Art. 38(1) ECHR which provides simply that the Court may, "if need be, undertake an investigation". However, in 2003, the ECtHR introduced an annex to its Rules of Court which deals specifically and in some detail with the conduct of such in-

vestigations.²

The ECtHR has, in the past, carried out its fact-finding role by sending judicial delegations to hear witnesses and by conducting judicial 'on-the-spot' investigations. For example, in the case of *Ireland v UK* (18/1/78, Series A No. 25), concerning the arrest and detention of IRA suspects by the British security forces, 119 witnesses were heard by the (former) European Commission. In a series of cases brought by individuals against Turkey from the mid-1990s the former Commission and (since 1998) the new Court have held fact-finding hearings in order to adjudicate on fundamental factual differences between the parties. The cases against Turkey have concerned the destruction of homes, ex-

trajudicial killings, disappearances and torture occurring in south-east Turkey. Other more recent examples of fact-finding missions include the inter-state case of *Cyprus v Turkey* (No. 25781/94) 10/5/01 (missing persons, etc.), *Valasinas v Lithuania* (No. 44558/98) 24/7/01 (prison conditions) and *Poltonatskiy v Ukraine* (No. 38812/97) 29/04/03 (treatment of prisoners on death row). In March 2003 a delegation of four judges took evidence from 43 witnesses in Chişinău and Tiraspol, Moldova, in the case of *Ilaşcu & Others v Moldova & Russia* (No. 48787/99) GC 8/7/04, in which the Moldovan applicants complained of their continuing unlawful detention in the Russian-occupied area of Transnistria.

Despite its potentially crucial role for

applicants in obtaining redress from the ECHR system, this procedure is undoubtedly expensive and time-consuming. A significant number of these missions can take up to a week and involve at least five or six ECtHR officials (usually three judges, a registrar and lawyers) and interpreters. In addition, some of the ECtHR judges consider that evidence taken five to seven years after the events in question (the time period that a case might take to reach Strasbourg) is likely to be unreliable. However, other judges believe that the fact-finding procedures of the ECtHR could serve as an important check on efforts to conceal or distort the record on human rights.³

It should be noted that whilst states are obliged to cooperate fully with the ECtHR in the conduct of its fact-finding investigations this does not always happen in reality. For example, in *Shamayev & Others v Georgia & Russia* (No. 36378/02) 12/4/05, the ECtHR's delegation was refused access to five allegedly detained/extradited applicants who were being held in Russia within the jurisdiction of the Stavropol Regional

Court. The ECtHR (and the former Commission) have also acknowledged their own limitations in establishing the facts. One feature of the fact-finding process, which may reduce its effectiveness, is the inability to compel a witness to attend and give evidence to the ECtHR. For example, this problem was evident in *Denizci & Others v Cyprus* (Nos. 25316-25321/94 & 27207/95) 23/5/01, *Ipek v Turkey* (No. 25760/94) 17/2/04 and *Nuray Şen v Turkey* (No. 2) (No. 25354/94) 30/3/04. Fact-finding missions would appear to be necessary in such cases which raise issues of gross violations of the ECHR, especially because of the likelihood of no prior effective proceedings.

The post-Protocol 11 ECtHR has continued to engage in fact-finding hearings, although it is understood that the ECtHR is extremely conscious of the time and cost of such proceedings. In recent years, however, partly because of its heavy caseload (124,650 cases pending on 31 March 2010), the new ECtHR has conducted fact-finding missions relatively rarely. Nevertheless, Strasbourg continues to re-

ceive serious applications from European 'trouble spots' (such as Russia (Chechnya),⁴ Georgia,⁵ Turkey,⁶ Moldova,⁷ and Cyprus⁸).

Fact-finding missions are clearly crucial to the proceedings of the ECtHR and should not be forgotten during the ongoing debates for the reform of the ECtHR. Furthermore, as already discussed, fact-finding missions are more likely to be necessary in cases involving gross and systematic violations. Despite the problems which may arise in holding fact-finding missions some years after the events in question, the ECtHR should not rule out holding such missions solely on this ground. An effective fact-finding mechanism within the ECtHR is of paramount importance in ensuring access to justice for victims of grave human rights violations within Europe and, in the absence of effective domestic proceedings, the ECtHR should be able to continue to conduct fact-finding missions in order to establish the facts in question.

1 The Human Rights and Social Justice Research Institute at London Metropolitan University has conducted research on the fact-finding missions carried out by the European Court (and Commission) of Human Rights. See: Leach, P., Paraskeva, C. & Uzelac, G., 2009. *International Human Rights & Fact-finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, [Online]. Available at: http://www.londonmet.ac.uk/londonmet/library/e40396_3.pdf.

2 Rules A1-8, adopted on 7 July 2003, available at: <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

3 Shelton, D., 2003. *The Boundaries of Human*

Rights Jurisdiction in Europe. *Duke Journal of International and Comparative Law*, 4(13), p.151.

4 Poutgourides, C. *Parliamentary Assembly Committee on Legal Affairs and Human Rights*, 26 May 2008. *Implementation of judgments of the European Court of Human Rights: Introductory Memorandum AS/Jur* (2008) 24. paras. 76-79. Available at: http://assembly.coe.int/CommitteeDocs/2008/20080526_ajdoc24_2008.pdf. See also: Leach, P., 2008. *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*. *European Human Rights Law Review*, 2008(6), pp. 732-761. Available at: http://www.londonmet.ac.uk/londonmet/library/m12314_3.pdf.

5 *Shamayev & Others v Georgia & Russia* (No. 36378/02) 12/4/05. See also: European Court of

Human Rights. Press Release, *2,700 applications received by the Court from South Ossetians against Georgia*, 10 October 2008.

6 Committee of Ministers, 18 September 2008. Interim Resolution ResDH(2008)69. *Execution of the judgments of the European Court of Human Rights - Actions of the security forces in Turkey, progress achieved and outstanding issues*. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1344121>.

7 *Ilaşcu & Others v Moldova & Russia* (No. 48787/99) GC 8/7/04.

8 *Varnava & Others v Turkey* (Nos. 16064-16066/90 & 16068-16073/90) 10/1/08.