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Russia's "Dictatorship of Law" and the European Court of Human Rights

*J.D. Kahn**

Abstract

This article is an adaptation of a lecture given at St. Antony's College, Oxford on 5 July 2003 in honor of the fiftieth anniversary of the Centre for Russian and East European Studies at Oxford University. The author evaluates the effect of the European Convention on Human Rights on Russian law and politics. Russia has been a signatory to the Convention for five years. The author argues that the full power of the Convention as a force for reform in Russia was unanticipated at the time of Russia's accession. Nevertheless, the Convention has been the catalyst for substantial reforms, especially in the criminal justice system. The author examines these reforms as well as the increasing number of cases in which Russia is a respondent before the European Court of Human Rights in Strasbourg. Drawing on interviews, the Court's statistics and his own experience training Russian human rights lawyers, the author charts the rapid growth in Russia of interest in the Strasbourg process.

Over the last few years, I have traveled to Moscow with an international team of lawyers to teach Russian lawyers the legal mechanics of how to bring a case before the European Court of Human Rights. The Russian Federation has now been a signatory to the European Convention on Human Rights, which that Court interprets, for five years. On our visits, we also advise these lawyers on particular cases they wish to bring to the Court, which sits in Strasbourg. So, I have enjoyed a rare double view of Russia's emerging post-Soviet human rights record from both the elevated perspective of legal abstraction and the hard work of very real, very human, individual cases. Since our first trip in 2000, I have also observed how the European Court's caselaw has influenced Russian law and politics and, of course, *vice versa*.

This work makes me optimistic about the gradual improvement of human rights in Russia. Thanks in no small part to this human rights treaty, Russia has effectively abolished the death penalty. A growing body of European human rights caselaw is now part of Russia's own legislative framework, cited in Russian judicial opinions, and noticeably apparent in the new Criminal Procedure Code. I also have substantial grounds for pessimism. The European Court is currently flooded with Russian applications that could overwhelm the Strasbourg process. And even when that process works, the delayed and

* The opinions expressed herein are the author's own and do not reflect the position of the United States Department of Justice.

paltry relief it renders individual victims sometimes almost seems to mock the egregious human rights violations they present. The Court has so far failed to deliver a single judgment about Chechnya—the single worst human rights atrocity in Russia today.

Early in his successful campaign to become Russia's second democratically elected president, Vladimir Putin introduced a strange phrase into the political lexicon: "the dictatorship of law".¹ Putin repeatedly used the phrase in his speeches and writings on democracy and law, pronouncements that are at once both encouraging and chilling. His use of democratic concepts often left unclear in what manner he thought them best applied.² Did the Russian president mean the Rule of Law, or a more frightening, bureaucratized rule *through* laws?

Whatever else he may have meant, President Putin's famous "Dictatorship of Law" was not intended to empower human rights crusaders. Putin meant to restore federal authority over Russia's regions, part of what he called the strengthening of vertical executive power.³ But as Putin simultaneously sought closer ties to Europe, he has found himself pressed to extend that phrase to meet the demands of Russia's membership in the Council of Europe (of which the European Court is a part) to reform the administration of justice on all levels. And that has opened the opportunity for a dictatorship of law, to borrow his unfortunate phrase, of a different sort.

First, let me draw you a thumbnail sketch of the most powerful human rights system currently in existence in the world today. Russia has accepted the obligation "[to] secure to everyone within [its] jurisdiction the rights and freedoms" described in the Convention.⁴ Russia also recognized the authority of the European Court of Human Rights to enforce this obligation, and the right of individuals—not just Russian citizens, but any human being—to petition the Court alleging to be the victim of a violation of the Convention by the Russian state. Such a right is virtually unheard of in international law, which is typically more concerned with sovereign states than with individuals.⁵

1. Open Letter from Vladimir Putin to Russian Voters, 25 February 2000, available at: <<http://putin2000.ru/07/05.html>>.
2. "In a non-law-governed, *i.e.*, weak, state the individual is defenseless and not free. *The stronger the state, the freer the individual* [emphasis in original]. [...] I know that there are many now that are afraid of order. But order is nothing more than rules. And let those who are currently engaged in substituting concepts for one another, trying to pass off the absence of order for genuine democracy—let them, I say, stop looking for hidden dirty tricks and trying to scare us with the past. 'Our land is rich, but there is no order in it,' they used to say in Russia. Nobody will ever say such things about us in future." *Id.*
3. See, *e.g.*, Chapter Eight: "The Federal Reforms of Vladimir Putin", in Jeffrey Kahn, *Federalism, Democratization, and the Rule of Law in Russia*, Oxford 2002.
4. Art. 1, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Of course, such a right would be empty if the Convention were merely aspirational in tone. Fortunately, that is not the case. The Convention establishes an absolute right to life.⁶ There is an absolute right against torture and inhuman or degrading treatment by the state.⁷ There is a right to liberty and security of the person, which provisions govern criminal arrest and detention, involuntary commitment, detention of minors and deportation.⁸ The Convention requires fair and public hearings in both civil and criminal cases, the presumption of innocence and certain minimum rights to criminal defendants.⁹ There is a right to privacy and family life in the Convention,¹⁰ as well as to religious freedom,¹¹ freedom of expression,¹² association,¹³ freedom from discrimination,¹⁴ and the list goes on. Crucially, the Convention explicitly establishes the right to an effective remedy before a national authority for violations of all of these rights.¹⁵ There is even a procedure for the Court to expedite urgent cases and request interim measures of a member-state to ensure the safety of an applicant who complains of torture, inhuman or degrading treatment.¹⁶

These are not abstract or lofty proclamations. The Court's cases have concerned issues of *habeas corpus*, speedy trials, self-incrimination, surveillance and wiretapping, legal aid, abortion, paternity and custody disputes, the right to work and to a state pension, the rights of homosexuals, conscientious objectors, membership in political parties and trade unions. Russia's moratorium on death sentences, begun under Boris Yeltsin and still in effect, is a direct result of Russia's signature to Protocol Six of the Convention.¹⁷

Russian membership in the Council of Europe and compliance with the Convention has not been easy. The Council's rapporteurs have repeatedly criticized Russia's foul human rights record, the generally poor condition of

5. D.J. Harris, *Cases and Materials on International Law*, fifth edition, London 1998, 142 n.2, ("For the most part, however, the individual remains an object, not a subject, of international law [...].").
6. ECHR, Art. 2.
7. ECHR, Art. 3.
8. ECHR, Art. 5.
9. ECHR, Art. 6.
10. ECHR, Art. 8.
11. ECHR, Art. 9.
12. ECHR, Art. 10.
13. ECHR, Art. 11.
14. ECHR, Art. 14.
15. ECHR, Art. 13.
16. Rules of Court 39 (interim measures), 40 (urgent notification of an application), and 41 (case priority).
17. Russia signed, but did not ratify, Protocol 6 to the European Convention, which abolishes the death penalty. However, a moratorium on executions begun by President Boris Yeltsin as part of Russia's bid for membership in the Council of Europe is still in effect.

state institutions, and the weak state of the rule of law.¹⁸ One of the most obvious causes of concern by other member-states, and one about which I shall say more later, is the continuing large-scale violence in Chechnya.¹⁹ On 30 June 2003, the Council of Europe's Committee for the Prevention of Torture published its first public report on the Russian Federation following eleven visits throughout Russia.²⁰ The report documents deplorable conditions at facilities run by the Ministry of Internal Affairs, the Ministry of Justice, the Federal Border Service, the military and psychiatric hospitals and makes recommendations for their immediate improvement.²¹

Access to the Court has also not been easy for Russian applicants. In the first three years after Russia ratified the Convention in 1998, not a single Russian case was declared admissible by the Court for a hearing on its merits. This has

18. See Rudolf Bernhardt *et al.*, "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards", 15 *Hum. Rts. L.J.* 1994, 249, 250-295. See also Bill Bowring, "Russia's Accession to the Council of Europe and Human Rights: Four Years On", 4 *Eur. Hum. Rts. L. Rev.* 2000, 362.
19. See, e.g., Sergei Kovalev (an outspoken human rights leader and former political prisoner), "Putin's War," *N.Y. Rev. Books*, 10 Feb. 2000, at 4-8. On 6 April 2000, the excesses of the Second Chechen War resulted in suspension of Russia's voting rights in the Council's Parliamentary Assembly, a sensational walk-out from that body by the Russian delegation, and vituperative diplomatic exchanges on both sides. For an excellent summary of the Parliamentary Assembly's actions that April, see "Credentials of the Delegation of the Russian Federation", *Opinion of the Committee on Legal Affairs and Human Rights*, Doc. No. 8956 (25 Jan. 2001), available at: <www.stars.coe.fr/doc/doc01/edoc8956.htm> (19 Jun. 2001). For unofficial transcripts and summaries of the debates, see "Provisional Version of the Report of the Debate of 06 April 2000 at 10 A.M.", available at: <<http://stars.coe.fr/verbatim/20002/e/0002061000e.htm>> and "Provisional Version of the Report of the Debate of 06 April 2000 at 15 P.M.", [sic] available at: <<http://stars.coe.fr/verbatim/20002/e/0002061500e.htm>>.
20. See "Press Release from the Council of Europe Spokesperson and Press Division, Ref: 355a03", "First Council of Europe Anti-Torture Committee report on the Russian Federation published," 30 June 2003, available at: <[http://press.coe.int/cp/2003/355a\(2003\).htm](http://press.coe.int/cp/2003/355a(2003).htm)>. The report is available in English at: <<http://www.cpt.coe.int/documents/rus/2003-30-inf-eng.htm>>. The Russian response is available at: <<http://www.cpt.coe.int/documents/rus/2003-31-inf-eng.htm>>.
21. The Council of Europe's Committee for the Prevention of Torture (CPT) began its visits to Russia in 1998. The visit that is the subject of the published report was carried out from 2-17 December 2001. Six members of the CPT, with interpreters and staff, visited 31 facilities in Moscow city, Khabarovsk Territory, and Primorskii Territory. The CPT reported a "very high standard" of cooperation by some Russian authorities, while cooperation by other Russian authorities "could hardly be described as satisfactory". The CPT also reported at least one "serious incident" during its visit to one facility, when a recording device was discovered in an interview room. The CPT was not always afforded unencumbered access, despite provisions for unannounced inspections of certain facilities. Although a full account of the methodology and findings of the CPT is impossible here, it should be clear that the CPT found ample evidence to warrant immediate recommendations for basic improvements in the accommodation and treatment of detained persons.

not been for a lack of complaints, however. By the end of 1999, Strasbourg had received almost 2,000 applications; another 2,312 applications were lodged the next year. Only in 2001, when over 6,300 applications were sent to Strasbourg, were two found to meet the Court's rigid requirements for hearing a case on its merits.²² Most of the applications were rejected on technical grounds that reflect the lack of attention paid to educating Russia's capable and growing cadre of human-rights lawyers (not to mention the population in general, since representation by a lawyer is not required by the Court).²³

Those numbers are, slowly, starting to improve. Last year, some 4,000 applications came from Russia, almost thirteen per cent of all applications that year from the Council of Europe's forty-five members. Twelve were declared admissible. So far this year, four applications have been declared admissible.²⁴

These numbers are more promising than they may appear. First, an increasing number of applications are being referred to the Russian Government for comment before the Court makes a decision on admissibility. This is an indication of the gravity of the complaints and also evidence of the Court's persuasive powers, since it is a step that frequently leads to an immediate ameliorative response by the Russian authorities.²⁵ In a way, Russia is trapped: unwilling to

22. *European Court of Human Rights: Survey of Activities: 2002*, 33. Information document issued by the Registrar of the European Court of Human Rights (Provisional version). A pdf version of this comprehensive report is available at: <<http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm>>.

23. The jurisdiction of the Court is limited by Article 35 of the Convention, which sets forth certain admissibility criteria. Two common grounds for holding a complaint inadmissible are failures to exhaust domestic remedies and to comply with the Court's six-month time limit (from the date on which a final decision was taken on the matter) for filing an application. Four other grounds for inadmissibility are *ratione personae* (personal jurisdiction and standing requirements), *ratione loci* and *ratione temporis* (member-states are liable only for violations of the Convention occurring within the state's jurisdiction after the state has assumed its obligations under the Convention), and *ratione materiae* (complaints must relate to Convention rights and freedoms regarding which the member-state has assumed responsibility). Under Art. 35, § 3, the Court may declare inadmissible an application that it considers "incompatible with the provisions of the Convention," "manifestly ill-founded", or an "abuse of the right of application". For an excellent and thorough discussion of these technical requirements, see Luke Clements, Nuala Mole and Alan Simmons, *European Human Rights: Taking a Case Under the Convention*, London 1999.

24. *European Court of Human Rights: Survey of Activities: 2002*, 33.

25. For example, in the case of *Burdov v. Russia*, discussed below, the Russian government attempted to moot a Russian pensioner's application regarding failure to pay compensation and enforce civil judgments by finally paying compensation on the eve of an admissibility decision by the Court, coldly suggesting that Burdov could make a claim in the Russian courts if he felt entitled to any damages for the untimely enforcement of his judgments. Nevertheless, the Court held that the amount offered—which was made only after Burdov's application was communicated to the Russian Government by the Court—in no way afforded adequate redress, specifically since it did not involve any acknowledgment of the violations alleged. The Court held the complaint admissible and later found a violation of the Convention in a decision on the merits.

quit one of the only European organizations willing to accept it as an equal member, the Russian government finds itself increasingly called to meet the requirements of membership. It is a carrot and a stick, all in one.

These statistics also suggest that recent popular opinion polls that allege general disinterest for human rights among Russians do not give the whole picture.²⁶ There is acute interest among Russian lawyers in bringing cases.²⁷ Their numbers are growing and they are getting better at it. Lawyers are the natural engine for catalyzing interest in human rights and the rule of law.

A more important statistic for Russia than the number of admissible cases, is the number of judgments—cases decided on their merits. Beginning last year, three Russian judgments have been handed down by the Court, all *against* the Russian government.²⁸ Each case focused attention on fundamental problems in Russian law.

The first judgment against Russia was the *Burdov* case.²⁹ Burdov was a Russian pensioner awarded state compensation for his services during the Chernobyl disaster. Burdov never received a kopeck, even after winning a civil suit against the local authorities in 1997. Only after the Court requested a response to his complaint from the Russian Government were funds suddenly found to pay him. The Court unanimously held that Burdov's property interests and right to a fair trial had been violated by the State's failure to guarantee execution of Burdov's court judgment. Complaints about the non-enforcement of domestic judgments account for over half of the applications received by the Court from Russia.³⁰ The right to a fair trial means nothing if judgments are not enforced.

The second case was brought by a banker in Magadan named *Kalashnikov*.³¹ Accused of embezzlement, he spent nearly five years in pre-trial detention waiting for trial. The conditions of his detention were abominable, but fairly

26. See, e.g., Theodore P. Gerber and Sarah E. Mendelson, "Russian Public Opinion on Human Rights and the War in Chechnya", 18 *Post-Soviet Affairs* 2002, 271–305.

27. Perhaps in recognition of the increasing number of Russian applicants and lawyers pursuing cases before the Court, the Council of Europe has published a two-volume compendium of the Court's caselaw and useful documents in Russian. See *Evropeiskii sud po pravam cheloveka: Izbrannye resheniia v 2 tomakh*, Moskva 2000.

28. This figure was accurate on 5 July 2003, when this lecture was given. As of 14 November 2003, four more judgments have since been handed down by the Court, all against the Russian government. Summaries of these cases can be found in a postscript to this lecture.

29. *Burdov v. Russia*, App. No. 59498/00 (Eur. Ct. H.R. 7 May 2002). This was also the first application declared admissible against Russia. See *Burdov v. Russia*, App. No. 59498/00 (Eur. Ct. H. R. 6 Jun. 2001).

30. Interview with legal expert of the Eur. Ct. of H.R. (27 Jun. 2003) (cited on condition of anonymity).

31. *Kalashnikov v. Russia*, App. No. 47095/99 (Eur. Ct. H.R. 15 Jul. 2002).

typical. In October of last year, the Court again unanimously ruled that both the conditions and length of his detention, and the length of the criminal proceedings as a whole, violated his rights.

The *Posokhov* case, decided this past March, is the third judgment against Russia.³² A court—composed of a judge and two lay judges—found Posokhov guilty of smuggling large quantities of vodka. Posokhov appealed, alleging that the lay judges had not been chosen at random or for a limited term of appointment, as required by law. The European Court found a violation of Posokhov's right to a hearing by a fair and impartial tribunal established by law.

The lawyers who fight these cases warn their clients that the process is slow and the sums awarded are often paltry. Burdov received €3000 for his troubles; Kalashnikov was awarded €8000 and Posokhov a mere €500. But still the cases keep coming—a sign that vindication in court is as important to Russian victims as remuneration by the state. And, as you can see, these cases go to the heart of Russian legal reform.

What sorts of cases are coming out of Russia now? In summer of 2003, the Court held a hearing on the merits of an application by a woman detained in a mental hospital without court order.³³ A judgment will likely be published in the fall of 2003.³⁴ At the end of April, the Court declared admissible a case from Kaliningrad on prison conditions, judicial review, and the right to legal assistance.³⁵ In May of 2003 alone, the Court issued decisions to admit three Russian cases. One is from Chukotka concerning the excessive length of civil proceedings.³⁶ Another is from a Latvian national who alleges the unlawful confiscation of his property at Sheremetyevo-1 Airport—a case that should interest anyone planning a trip to Russia.³⁷ And the third was brought by Vladimir Gusinskii, whose arrest, detention and self-imposed exile followed by loss of his stake in NTV is well known.³⁸ Another well-known case—that

32. *Posokhov v. Russia*, App. No. 63486/00 (Eur. Ct. H.R. 4 Mar. 2003).

33. The case is *Rakevich v. Russia*. A hearing was held 17 June 2003. See Press release issued by the Registrar of the Court on that date. The admissibility decision is: *Rakevich v. Russia*, App. No. 58973/00 (Eur. Ct. H.R. 5 Mar. 2002).

34. In a judgment issued on 28 October 2003, the Court found a violation of Convention Art. 5, § 1 (Right to liberty and security of the person) because the applicant's detention did not follow the procedure prescribed by Russian law, and Art. 5, § 4 (Right to speedy court proceedings to determine the lawfulness of detention) because Russian law did not entitle the applicant to a direct right of appeal to a court of law to test the lawfulness of her detention. The Court ordered the award of €3000, plus any chargeable tax, in respect of non-pecuniary damage. See *Rakevich v. Russia*, App. No. 58973/00 (Eur. Ct. H.R. 28 Oct. 2003).

35. *Mayzit v. Russia*, App. No. 63378/00 (Eur. Ct. H.R. 29 Apr. 2003).

36. *Kormacheva v. Russia*, App. No. 53084/99 (Eur. Ct. H.R. 6 May 2003).

37. *Baklanov v. Russia*, App. No. 68443/01 (Eur. Ct. H. R. 6 May 2003).

38. *Gusinskiy v. Russia*, App. No. 70276/01 (Eur. Ct. H. R. 22 May 2003).

of environmentalist Aleksandr Nikitin—has been communicated by the Court to the Russian government for comment and a decision should be forthcoming soon.³⁹ An application by Grigorii Pasko has also been accepted by the Court.⁴⁰

These judgments are individually noteworthy, but their real power lies in their effect on the Russian legal system as a whole. In the hierarchy of Russian law, the Convention and the caselaw that interprets it are on a par with the Russian Constitution itself.⁴¹ The legal norms established by the Convention as interpreted by the Court are considered superior to Russian federal, republican and provincial law. This is no small matter. The Constitutional Court, the Supreme Court and lower federal courts have all cited European Court cases—and not just those directly involving Russia—in their own rulings and decrees.⁴²

The power and importance of this interaction between Russia's domestic courts and the European Court cannot be understated. By signing the Convention, Russia has agreed to adopt an international set of legal standards and norms

39. Interview with legal expert of the Eur. Ct. of H.R. (27 Jun. 2003) (cited on condition of anonymity). After a complaint has been registered by the Court, the admissibility process is as follows: the President of one of the Court's Chambers (seven-member panels; the forty-member Court rarely sits in plenary session) assigns a judge to act as a Rapporteur on the complaint (ideally, a member of the Court with some experience with the domestic law in question). Based on the Rapporteur's report, the Chamber may declare the complaint inadmissible or it may communicate the complaint to the member-state concerned, requesting information. Following the government's and complainant's responses, an admissibility hearing may be scheduled.
40. Konstantin Katanyan, "Interview with Grigoriy Pasko: 'Grigoriy Pasko Prepares for Exams'", *Vremia MIN* 29 January 2003 (available in translation on: *Johnson's Russia List*, #7060, 13 February 2003).
41. See RF Constitution Arts. 15 §4, 17 §1, 46 §3, and 55 §§1 & 2. See also RF Law of Treaties, Art. 5 §3.
42. See, e.g., the Constitutional Court case "O proverke konstitutsionnosti polozhenii punktov 1 i 3 chasti pervoi stat'i 232, chasti chetvertoi stat'i 248 i chasti pervoi stat'i 258 Ugolovno-protsessual'nogo kodeksa RFSFR v sviazi s zaprosami Irkutskogo raionnogo suda Irkutskoi oblasti i Sovetskogo raionnogo suda goroda Nizhnii Novgorod", *Vestnik Konstitutsionnogo Suda RF* (hereinafter *VKS*) 1999 No. 4, 40-49. See also the Constitutional Court case "po delu o proverke konstitutsionnosti polozhenii chasti pervoi stat'i 47 i chasti vtoroi stat'i 51 Ugolovno-protsessual'nogo kodeksa RFSFR v sviazi s zhaloboi grazhdanina V.I. Maslova", *VKS RF* 2000 No. 5, 46-52.

For a summary of the holding in the Maslova case, as well of other published and unpublished dispositions of the RF Constitutional Court, see Ger P. van den Berg, *Constitution of the Russian Federation Annotated with Summaries of Rulings and Other Decisions of Constitutional (Charter) Courts: 1990-2001*, 27 *Review of Central and East European Law* 2001 No. 2/3 (Irkutsk Court Ruling at 355-356). In addition to his chronological summaries of a decade of CC cases, Van den Berg has also arranged the CC dispositions as annotations to the 1993 RF Constitution, see *Constitutional Court: A Decade of Legal Reforms—Part 2: The Constitution of the Russian Federation Annotated*, 28 *Review of Central and East European Law* 2002-3 No.3/4, 273 ff.

as its own, prioritizing them above the legislation passed by its own Federal Assembly. That is a dictatorship of law if ever there was one. What makes such oversight palatable to Russian politicians and jurists is not only the European Court's care to extend a margin of appreciation to Russian practices. Russia's highest courts have embraced this caselaw and made it their own.⁴³ By so doing, European standards on a variety of fundamental issues have been imported into Russian law. In a very real sense, they *are* Russian law.

New Russian legislation has also been directly affected by the Convention. The most striking example is the new Criminal Procedure Code. Under the previous, Soviet-era Code, for example, the decision to detain a suspect (*podozrevaemyi*) or an accused (*obviniaemyi*) rested with the procurator, *not with a judge*. The new Code requires a *court of law* to make that determination according to strict standards. That difference makes all of the difference, and it is a change brought about by the obligations Russia undertook when it signed the Convention.

Aware of how difficult this change would be for procurators to swallow, Russian lawmakers planned to phase this element of the Code into practice eighteen months after the rest of the Code entered into effect in July 2001. But that spring the Russian Constitutional Court, making repeated direct references to the Convention in its decision, struck down the transitional period, and ordered the entire Code into effect at the same time.⁴⁴

One great effect of the Convention is its ability to jolt a conservative Russian judiciary into action. Shortly after this decision was published, I met with five Russian judges who specialized in criminal cases. They were extremely critical of the decision. One argued that judicially-supervised detention would require a doubling of judges in the system. Another maintained that such a shift of power from prosecutor to judge was at present impossible. Neither set of officials, he said, had the education, experience, or mentality for such an abrupt change.⁴⁵ Without pressure from the European Court, filtered through the Russian Constitutional Court, such basic reforms might still be distant aspirations.⁴⁶

43. This is in sharp contrast to the very mixed reception given the jurisprudence of the European Court of Human Rights in the United States Supreme Court on 26 June 2003. Compare Justice Kennedy's opinion for the Court in *Lawrence v. Texas*, 123 S.Ct. 2472, 2481 & 2483 (2003) (citing with approval the European Court's decisions that state restrictions on consensual homosexual conduct violated the European Convention on Human Rights) with Justice Scalia's dissent, at 2495 (referring to "the [Supreme] Court's discussion of these foreign views" as "meaningless [and] ... [d]angerous dicta.")

44. Constitutional Court case "O proverke konstitutsionnosti statei 90, 96, 122, i 216 Ugolovno-protsessual'nogo kodeksa RSFSR v sviazi s zhalobami grazhdan S.S. Malenkina, R.N. Martynova i S.V. Pustovalova", 14 March 2002; available at: <http://ks.rfnet.ru/pos/p6_02.htm>. See also Ger P. van den Berg, *op.cit.* note 42.

45. Interview with judges from Azov, Rostov, Ulyanovsk, and Vologda, in Ann Arbor, MI (Mar. 2002).

It must be said, however, that the concerns of these Russian judges are not without some basis. A 1992 Russian law on habeas corpus—formally establishing judicial review of arrest, pre-trial detention and other police practices—was killed in the cradle by Soviet-era judicial and police personnel opposed to the reform.⁴⁷ Russian lawyers, whom I have met, see on a daily basis the difference between the law as written and the law as applied. Criminal justice systems the world over have a strange feature, and Russia's system is no exception. The official on the lowest rung of the ladder—the police officer on the street—is first to make the most crucial and difficult decisions: to arrest, to search, to interrogate, to shoot. Most command-and-control systems work on the opposite principle: generals think, soldiers act.

Nowhere is this fact more obvious than in Chechnya, on which subject I would like to make a few closing comments. Large-scale violence in Chechnya is a massive stumbling block to Russia's acceptance as a coequal in the Council of Europe. Lord Judd, reporting on the conflict in April 2000, was dismayed at how the European Court of Human Rights had been sidelined there.⁴⁸

This situation has changed for the better. Roughly 170 applications have been received by the Court concerning events in Chechnya since April 2000. The bulk of them allege violations of the Convention by the Russian military for killings, torture, extrajudicial detention and destruction of property. A number of the applications refer directly to the detention camp at Chernokozovo.⁴⁹

Thus far, six applications from Chechnya have been declared admissible by the Court for hearing on their merits.⁵⁰ The applications concern bom-

46. According to the US Department of State, under the new Criminal Procedure Code, the Procuracy has opened 25% fewer criminal cases, the courts have rejected 15% of requests for arrest warrants, and the number of suspects held in pretrial detention dropped 30%. Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices—2002: Russia* 2 (31 Mar. 2003).
47. See, e.g., Todd Foglesong, "Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia", 14 *Wis. Int'l L.J.* 1996, 541.
48. "I find it unbelievable that our governments have not so far found a way of referring some of the allegations and issues to the court. That is feebleness at the beginning of the twenty-first century. What on earth is the point of having these institutions if our governments are not prepared to act? [...] I conclude by saying to my Russian friends that the Council of Europe is about human rights or it is about nothing. Unless you feel a genuine commitment to the battle for human rights, you are wasting your time by coming to this Assembly". *Reports of the Debate of the 2000 Session—2nd Part (6 April 2000, 10AM)*, available at: <[http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/asp/doc/ListCR\(SQL\).asp](http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/asp/doc/ListCR(SQL).asp)>; see also *Hum. Rts. Watch World Rep.* 2001, *supra* note 7, 319.
49. Interview with legal expert of the Eur. Ct. of H.R. (27 Jun. 2003) (cited on condition of anonymity).
50. *Khashiyev & Akayeva v. Russia*, App. Nos. 57942/00 & 57945/00 (Eur. Ct. H.R. 19 Dec. 2002); *Isayeva, Yusupova & Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00 57949/00 (Eur. Ct. H.R. 19 Dec. 2002); *Isayeva v. Russia*, App. No. 57950/00 (Eur. Ct. H.R. 19 Dec. 2002).

bardments of a refugee convoy and the village of Katyr-Yurt and the killing of civilians in a Grozny suburb.

Any day now,⁵¹ the Court is expected to release a decision on the admissibility of an application brought by thirteen Chechens last October.⁵² The case is called *Shamayev and Twelve Others v. Georgia and Russia*. Georgian authorities had arrested thirteen men, alleging them to be Chechen guerrillas, and Russia demanded their extradition. Fearing the worst, the applicants' representatives sent an emergency notice to the Court alleging that their rights to life (Art. 2) and to be free of torture, inhuman or degrading treatment (Art. 3) were in jeopardy if extradited to Russia and that their detention in Georgia was in violation of Art. 5, §§ 1, 2, & 4. The Court immediately used its Rule 39 powers to request that the Georgian authorities stay extradition until Russia gave official assurances that the suspects would be treated decently and their right to contact the Court would be unabridged.⁵³ The Court also notified the Russian government of the detainees' application under Rule 40 (urgent notification of an application) and gave the case priority in its docket under Rule 41. Nevertheless, five of the men were extradited to Russia days after the Court acted on the applicants' urgent request. It appears, however, that the Court's immediate action did result in a stay of extradition for the remaining eight detainees, who remained in Tblisi even after the expiration of the Court's interim measures under Rule 39.⁵⁴ As to the five applicants who were extradited despite the Court's interim measures, the Russian authorities gave guarantees to the Court of unhindered access for the applicants to appropriate medical treatment, legal advice, and to the Court itself. The Russian authorities also assured the Court that the applicants would not face capital punishment and that their health and safety would be protected.⁵⁵

Political scientists are virtually unanimous on the importance of the rule of law for democracy, and rightly so. But how do you build the rule of law? How does it get put in place and how does it remain there? These are

51. The Court handed down its decision, holding the application admissible and joining the Russian Government's preliminary objections to the merits, on 16 September 2003. As of 14 November 2003, only the French version of the decision was available from the Court. See *Deuxième Section Décision sur la Recevabilité de la requête no 36378/02 présentée par Abdul-Vakhab Shamayev et 12 autres contre la Géorgie et la Russie*, 16 septembre 2003. See Postscript for a brief discussion of this decision.
52. See press releases issued by the Registrar of the Court on 10 October, 6 November, and 26 November 2002. The case is *Shamayev & 12 others v. Georgia & Russia*, App. No. 36378/02 (Eur. Ct. H.R. filed 4 Oct. 2002).
53. See *supra* footnote 16.
54. Press Release Issued by the Registrar of the Court, 29 April 2003, available at: <<http://www.echr.coe.int/eng/press/2003/aug/announcehearingsseptember2003.htm>>.
55. Press Release Issued by the Registrar of the Court, 26 November 2002, available at: <<http://www.echr.coe.int/eng/press/2002/nov/shamayev26.11.2002.htm>>.

as much philosophical questions as practical ones. The European Court prods and pushes Russia toward needed reforms, but it does so through the filter of Russian law, imposing on Russia only what Russia has agreed to accept. It is a strange dictatorship of law, one perhaps not contemplated when Russia signed the European Convention on Human Rights. But it is also one which, if it does not overwhelm the European system, has great potential to benefit the Russian one.

Postscript

At the time the lecture upon which this article is based was given, only three judgments had been handed down by the Court against Russia. Following the delivery of this lecture, the European Court has issued four more judgments against Russia. Below is a brief summary of the holding in each case. The complete judgment in each, like all admissibility decisions and judgments issued by the Court, are available via HUDOC, at the Court's website: <<http://www.echr.coe.int/>>.

The Court issued judgments in two cases involving the non-execution of civil judgments. See *Ryabykh v. Russia*, App. No. 52854/99 (Eur. Ct. H.R. 24 Jul. 2003); *Timofeyev v. Russia*, App. No. 58263/00 (Eur. Ct. H.R. 23 Oct. 2003). Both cases concerned the applicants' unsuccessful attempts to collect judgment debts won against the state. Citing *Burdov v. Russia*, the Court found a violation of Art. 6, § 1 in both cases and a violation of Art. 1 of Protocol No.1 in *Timofeyev*. In *Timofeyev*, the Court noted the numerous and lengthy delays, adjournments and obstructions the applicant suffered in his attempts to enforce a civil judgment awarded in his favor. In *Ryabykh*, the Court noted the detrimental effects of the Russian legal procedure of supervisory review (*nadzor*) on the applicant's rights under the Convention, in particular on the fundamental principles of *res judicata* and the finality of judgments. Nevertheless, in both cases the Court made no award of just satisfaction because the applicants had failed to submit an itemized accounting of claims for financial compensation within the Court's required time-limits.

In *Smirnova v. Russia*, App. Nos. 46133/99 & 48183/99 (Eur. Ct. H.R. 24 Jul. 2003), the Court found violations of the Convention in a case in which two applicants alleged excessively long pre-trial detentions and subsequent re-detentions in the same criminal case; one applicant was detained for over four years in total and the other applicant more than one and one-half years in total. One applicant also alleged the unlawful withholding of her national identity paper—the "internal passport" required for employment, medical care, currency exchange, domestic travel, etc. The Court found a violation of Art. 5, §§ 1 & 3 in the repeated re-detaining of the applicants in the course of one criminal investigation. The Court also found a violation of Art. 6, § 1 due to

the unreasonably long period of the legal proceedings. Finally, the Court found that the withholding of one applicant's internal passport worked a violation of Art. 8 of the Convention (right to respect for private and family life) because the document was essential for everyday life in Russia; its deprivation, therefore, represented a continuing interference with the applicant's private life. The Court awarded the applicants €3500 and €2000, respectively, in just satisfaction in respect of non-pecuniary damage and €1000 jointly in respect of costs and expenses.

In *Rakevich v. Russia*, App. No. 58973/00 (Eur. Ct. H.R. 28 Oct. 2003), the Court found two violations of the Convention in a case involving a woman detained in a mental hospital against her will. The Court held that the applicant's right to liberty and security of the person under Art. 5, § 1 had been violated because the applicant's detention did not follow the procedure prescribed by Russian law. Although a judge was required to decide whether Rakevich should be detained in the hospital within five days of receiving the hospital's application, the Russian court took thirty-nine days to decide, during which time Rakevich was detained in the mental hospital. The Court also found a violation of Art. 5, § 4 (Right to speedy court proceedings to determine the lawfulness of detention) because Russian law did not entitle the applicant with a direct right of appeal to a court to test the lawfulness of her detention. The Court ordered the award of €3000, plus any chargeable tax, in respect of non-pecuniary damage.

An interesting development should also be noted in the admissibility decision in *Shamayev and Twelve Others v. Georgia and Russia*. As noted above, the Court held the application admissible against both Georgia and Russia for a future hearing on the merits. In addition, the Court ordered that a fact-finding mission be sent to both countries (under Rule 42 § 2 of its Rules of Procedure) to take evidence from certain applicants who have been extradited to Russia and from the applicants who remain in the custody of Georgia.

Although the mission was originally scheduled to take place during the last week of October 2003, the Georgian government requested and received an adjournment of the mission in light of the general election held in that country on 2 November 2003 (the request, sent by fax, expressed concern for the personal security of members of the mission). The mission to Russia was also adjourned following a last-minute communication to the Court by the Russian government that the Stavropol Regional Court (under whose jurisdiction the extradited applicants are detained) had refused to grant the mission access to the detainees at the present stage of its proceedings. The preliminary reaction of the Court to this bold refusal is instructive:

The Court has informed the Russian Government that, in these circumstances, and owing in particular to the lateness with which the Court was given notice thereof, it will have to adjourn the mission to Russia. It also informed the Government that the local court

was contacted purely out of courtesy. The issue of access to the applicants is a matter of international law—in particular the European Convention on Human Rights, which, under Russian law, takes precedence over domestic law—and, therefore, falls to be decided solely by the European Court of Human Rights. The Court drew attention to Article 38 § 1 of the Convention, which provides that the State concerned is to furnish all necessary facilities for the effective conduct of any investigation undertaken by the Court. Moreover, Article 34 of the Convention requires the High Contracting Parties not to hinder in any way the effective exercise of the right of individual application.⁵⁶

The fact-finding mission to both countries has been rescheduled for early 2004.

56. “Fact-finding Missions in the Case of Shamayev and Others v. Georgia and Russia,” Press Release Issued by the Registrar, # 528, 24 October 2003, available at: <<http://www.echr.coe.int/Eng/Press/2003/oct/Fact-findingmissionShamayev.htm>>.