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Meeting:	1179 meeting (24-26 September 2013) (DH)
Item reference:	Communication from a NGO (The Human Rights Centre "Memorial " (Moscow)) (29/07/13) in the Khashiyev group of cases against Russian Federation (Application No. 57942/00)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion :	1179 réunion (24-26 septembre 2013) (DH)
Référence du point :	Communication d'une ONG (The Human Rights Centre "Memorial " (Moscow)) (29/07/13) dans le groupe d'affaires Khashiyev contre Fédération de Russie (Requête n° 57942/00) (***anglais uniquement***)

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Submissions to the Committee of Ministers made by the Human Rights Centre "Memorial" (Moscow) under Rule 9(2) of the Rules of the Committee of Ministers concerning general measures in the *Khashiyev* group of cases

29 July 2013

1. These observations are submitted to the Committee of Ministers of the Council of Europe within the framework of assessment of the general measures in the *Khashiyev* group of cases concerning the violations of the European Convention on Human Rights by the Russian security forces in the course of the conflict in the Chechen Republic of the Russian Federation.

2. The submissions deal with two cases of this group where applications made under Article 125 of the Russian Code of Criminal Procedure were made and heard by domestic courts on the merits.

3. We support the submissions made by Stichting Russian Justice Initiative and other NGOs of 2 May 2013 (DH-DD(2013)491). Our research and experience in different fields of criminal law and in different regions also confirms that the applications made under Article 125 of the Code of Criminal Procedure are likely to be dismissed without a hearing. This includes the situations where the supervising prosecutors quash the investigator's decision challenged by a party to criminal proceedings before the court hearing. The court seized of the application for judicial review of investigator's decisions decides then to terminate the proceedings because the impugned decision no longer exists. The legality of the impugned decision and its conformity with the Convention rights is thus not assessed by the court. However, once the court ruling is final the investigator again adopts the same decision as the one initially challenged. Consequently, this practice allows investigators and prosecutors to avoid any judicial review of their decisions by blocking the remedy under Article 125 and to prevent the applicant from obtaining any redress.

4. We note that whereas the cases discussed in the submissions of 2 May 2013 were dismissed by domestic courts on technical grounds, in the cases discussed below the applications made under Article 125 of the Code of Criminal Procedure were considered on the merits. In the two cases discussed below, the domestic courts applied Resolution no. 472/6 of the Investigative Committee of the Chechen Republic. Human Rights Centre "Memorial" submits that in view of the outcome of the cases and the domestic courts' reasoning both under Article 125 and under Resolution no. 472/6 these remedies under those provisions cannot be considered as effective measures of the implementation of the European Court judgments in the *Khashiyev* group of cases.

5. These submissions will set out the underlying factual circumstances, the applicants' submissions to the domestic courts and the rulings given by the latter following the European Court's judgments in the cases of *Abdulkadyrova and others v. Russia* and *Dubayev and Bersnukayeva v. Russia*. These submissions will then assess the effectiveness of the remedies provided under Article 125 of the Code of Criminal Procedure and Resolution no. 472/6.

***The case of* Abdulkadyrova and others**

6. On 8 January 2009 the European Court of Human Rights delivered a judgment in the case of *Abdulkadyrova and others v. Russia* (no. 27180/03). On 5 June 2009 this judgment became final. The applicants in this case are Mrs. Nurzhan Supyanovna Abdulkadyrova, born in 1973, Mr. Shamkhan Ayndayevich Dzhabayev, born in 1995, Mr. Zumrat Ayndayevich Dzhabayev, born in 1993, Ms. Kheda Ayndayevna Dzhabayeva, born in 1991. The applicants live in Urus-Martan, Chechnya. The applicants are relatives of Mr. Ayndi Aliyevich Dzhabayev, born in 1967. On 8 September 2002 during a military operation the applicants' relative had been taken away by the Russian military from his house and disappeared.

7. Criminal case no. 61152 was opened into the disappearance of Ayndi Dzhabayev. However, his whereabouts and the identities of the perpetrators of the crime have not been established.

8. On 12 November 2012 one of the applicants Ms. Nurzhan Abdulkadyrova submitted a motion to the investigator in charge of the case and asked to undertake a number of specific measures which, in the applicants' opinion, were needed for the effective investigation of the case (see attachment 1). She further asked the investigator to refer the case to the military investigative department.

9. On 14 December 2012 the investigator made a ruling on the motion. He refused to refer the case to the military investigative department and to undertake a seizure of the documents in the archives of the Ministry of Defense and the Ministry of Interior. The investigator accepted to undertake investigative activities with several servicemen. However, there is no information that such activities have been undertaken (see attachment 2).

10. On 18 March 2013 the first applicant challenged the investigator's refusal to refer the case to the military investigative department before the Urus-Martan Town Court (see attachment 3). This application has been submitted under the provisions of Article 125 of the Code of Criminal Procedure (judicial consideration of complaints). The first applicants stressed that there was ample evidence that the responsibility for the crime lay with the servicemen of the FSB and that the crime was committed during a special operation. The investigators in charge of the case identified the names of several servicemen who had taken part in the operation. However, the civilian investigators were not able to conduct the necessary investigative measures with the participation of these servicemen. The investigators were not also able to identify the identity of the FSB members who took part in the

operation. The problems with the investigation of the case were due to the lack of cooperation from the military and security agencies. The applicant's representatives also noted that there is no evidence in the criminal file supporting other versions of the events. The first applicant also indicated that under Article 38 of the 2010 Investigative Committee Act the servicemen of the FSB, of the Internal Troops of the Ministry of Interior and of the Ministry of Defense may only be investigated by the military investigative departments.

11. On 25 March 2013 the Urus-Martan Town Court rejected the first applicant's complaint (see attachment 4). The Town Court referred to the Resolution no. 472/6 of 31 January 2011 jointly adopted by the Military Investigative Department for the South Military Circuit and the Investigative Department for the Chechen Republic of the Investigative Committee of the Russian Federation. This direction set out the criteria for the transmission of cases from civilian to military investigators. Among the criteria was that of the commission of crimes during the special operations and the investigation of the version of the responsibility of the servicemen for the crimes. The applicants' representatives submitted that the case fell under that criterion. However, the District Court found that the applicant had failed to establish that the servicemen of either of military and/or security forces were involved in the commission of the crime against the applicant's relatives. This finding stands in direct contradiction to the finding of the European Court of Human Rights' finding that "Ayndi Dzabayev died following his unacknowledged detention by State servicemen". (see judgment paragraph 123)

12. On 3 April 2013 the first applicant appealed the judgment of the Urus-Martan Town Court to the Supreme Court of the Chechen Republic (see attachment 5). On 8 May 2013 the impugned judgment was upheld on appeal. The Supreme Court of the Chechen Republic decided that it was precluded from assessing factual allegations and making findings of fact under para. 1 of the Plenary Resolution of the Russian Supreme Court of 1 February 2009 no. 1. No further ordinary remedies are available to the applicants (attachment 6).

The case of Dubayev and Bersnukayeva

13. On 11 February 2010 the European Court of Human Rights delivered a judgment on the case of *Dubayev and Bersnukayeva v. Russia* (nos. 30613/05 and 30615/05). On 28 June 2010 this judgment became final. The applicants in this case are Mr. Rizvan Dubayev born in 1955 and Ms. Saudat Bersnukayeva, born in 1949. Both applicants live in the town of Urus-Martan, Chechnya. The applicants' sons Islam Dubayev, born in 1982, and Roman Bersnukayev, born in 1983, were members of the illegal armed groups which were fighting the federal troops in the mountains of the Urus-Martan district. On 13 March 2000 they surrendered to the Russian federal troops in hope to be released under the 1999 Amnesty Act. According to the authorities, the applicants' relatives were detained from 13 to 17 March 2000 in the temporary district department of the interior for Urus-Martan district. Then a decision on their

amnesty has been adopted. According to the authorities, the applicants' relatives were released on 17 March 2000. However, the applicants have not seen their relatives since. The applicants' relatives disappeared.

14. A criminal case no. 24071 was opened in relation to the disappearance of Islam Dubayev and Roman Bersnukayev. However, the whereabouts of the applicants' relatives and the identities of the perpetrators of the crime have not been established.

15. On 19 December 2012 the applicants submitted a motion to the investigator in charge of the case and asked to undertake a number of specific measures which, in the applicants' opinion, were needed for the effective investigation of the case (see attachment 7). The applicants further asked the investigator to refer the case to the military investigative department. The reasons for this were the military investigative department's exclusive jurisdiction of the crimes committed by servicemen (article 38 of the 2010 Investigative Committee Act) and the civilian investigators' constant failure to obtain evidence held by the military and security forces.

16. On 23 December 2012 the applicants received a reply from the investigator. He agreed to interrogate a number of witnesses but only if their whereabouts were established. However, he did not provide any information about what had been done to identify and about the most part of the measures needed for the effective investigation of the case. The investigator further refused to refer the case to the military investigative department (see attachment 8).

17. On 15 March 2013 the applicants appealed the investigator's latter decision to the Urus-Martan Town Court (see attachment 9). This application has been submitted under the provisions of Article 125 of the Code of Criminal Procedure. The applicants' representative stressed that there was ample evidence that the responsibility for the crime lied with the servicemen of the FSB and that the servicemen of other military agencies could have been involved whose names were quoted. It was argued that the civilian investigators were not able to interrogate most of the witnesses and to undertake other investigative measures because of the lack of cooperation from the military agencies. The applicants' representatives also indicated that under Article 30 of the 2010 Investigative Committee Act the servicemen of the FSB, of the Internal Troops of the Ministry of Interior and of the Ministry of Defense may only be investigated by the military investigative departments.

18. On 22 March 2013 the Urus-Martan Town Court rejected the applicants' representative's complaint (see attachment 10). The Town Court referred to the Regulation no. 472/6 of 31 January 2011 jointly adopted by the Military Investigative Department for the South Military Circuit and the Investigative Department for the Chechen Republic of the Investigative Committee of the Russian Federation. This direction set out the criteria for the transmission of cases from civilian to military investigators. Among the criteria was that of the commission of

crimes during the special operations and the investigation of the version of the responsibility of the servicemen for the crimes. The applicants' representatives submitted that the case fell under that criterion. However, the Town Court found that the applicant had failed to establish that the servicemen of either military and/or security forces were involved in the commission of the crime against the applicant's relatives. This finding was made regardless of the European Court of Human Rights' finding that "Islam Dubayev and Roman Bersnukayev must be presumed dead following their unacknowledged detention by State servicemen". (See judgment paragraph 122)

19. On 1 April 2013 the applicants' representatives appealed the judgment of the Urus-Martan Town Court to the Supreme Court of the Chechen Republic (see attachment 11). On 17 April 2013 the latter dismissed the applicants' appeal on the same grounds as in the case brought by Ms. Abdulkadyrova (see attachment 12). No further ordinary remedies are available to the applicants.

Ineffectiveness of the remedy under Article 125 of the Code of Criminal Procedure

20. The applicants' representatives submit that the present cases are among the first where an appeal under Article 125 of the Code of Criminal Procedure was heard on the merits following a European Court judgment concerning the events of the conflict in the Chechen Republic.

21. However, the findings of fact made by both trial and appeal courts were manifestly contrary to those of the European Court of Human Rights. Thus the District Court ruled in both cases that it was not proven that the members of the Russian military were involved in the disappearances of the applicant's relatives. This amounts not only to a disregard of the findings of the European Court but also fails to contribute to the implementation of its judgments.

22. The interpretation of Article 125 of the Code of Criminal Procedure by the Supreme Court of the Chechen Republic which heard the two above-mentioned cases on appeal only confirmed the ineffectiveness of the remedy. Indeed, whereas the applicants argued that the findings of fact made by the District Court were contrary to the judgments of the European Court, the Supreme Court of the Chechen Republic decided it was not competent to make any findings of fact under Article 125.

23. Indeed, it is prohibited to a court seized of an application under Article 125 to prejudge the merits of a criminal case, which includes assessment of the factual circumstances of a crime, of evidence and of qualification of acts or omissions under the Criminal Code (para. 1 of the Plenary Resolution of the Russian Supreme Court of 1 February 2009 no. 1).

24. The issue in the two case discussed above was, however, one of jurisdiction, not guilt or innocence of perpetrators. It would be inconceivable that the issue of whether a civilian or a military investigator has jurisdiction could be decided without the establishment of the fact of involvement or not of the military

personnel, even if against a lower standard of proof than that of beyond reasonable doubt.

25. In turn, this leads to the situation where Resolution no. 472/6 and Article 30 of the 2010 Investigative Committee Act are deprived of judicial enforcement. Indeed, the delimitation of the respective jurisdiction of civilian or military investigators is not effectively a subject of judicial oversight: an affected party cannot have its complaint that the case was allocated to the wrong investigator considered on the merits.

26. The conclusion is that proceedings under Article 125 do not provide redress in cases of ineffective investigations into enforced disappearances in Chechnya, even if the shortcomings of the investigation and State responsibility for the alleged violations of the Convention rights have been established by a final judgment of the European Court of Human Rights.

Ineffectiveness of the Resolution no. 472/6

27. Under Article 30 of the 2010 Investigative Committee Act only military investigative departments have jurisdiction over the crimes allegedly committed by servicemen of the Armed Forces and any other federal agencies with military service.

28. Resolution no. 472/6 was adopted in order to define the respective jurisdiction of civilian and military investigators in charge of the investigations of crimes committed in the course of the conflict in the Chechen Republic.

29. If construed as giving effect to Article 30 of the 2010 Investigative Committee Act, Resolution no. 472/6 could contribute to the execution of the Court's judgments of the *Khashiyev* group for two main reasons. Firstly, if the investigation of crimes in the commission of which Russian military servicemen are implicated is conducted by military investigators, this complies with the delimitation of jurisdiction between civilian and military investigators.. Secondly, military investigators do have authority over military servicemen, including commanders in terms of summoning them for interrogations, obtaining access to military archives, expert analysis of military documentation etc. Consequently, these investigations, even if they still fall short of the requirements of procedural limbs of Articles 2 and 3 of the Convention, ensure better quality than those conducted by civilian investigators. The victims thus have an interest in the crimes against them and their family members be investigated by military investigations where there are credible allegations or established facts of the involvement of military servicemen.

30. This is not achieved by the Resolution no. 472/6. As interpreted by the District Court it requires the identity of the servicemen involved to be established beyond reasonable doubt in order for the jurisdiction of the military investigators to even be triggered. Not only is this too high a threshold for the victims to meet, but, as shown above, Resolution no. 472/6, as interpreted by the Supreme Court of the Chechen Republic, is deprived of judicial enforcement, insofar as the courts cannot assess the evidence of the implication of the military.

Conclusion

31. For the reasons set out above, Human Rights Centre "Memorial" submits that the remedy provided under Article 125 of the Code of Criminal Procedure does not allow for the correction of the shortcomings of investigations even if the applications made under this provision are heard on the merits. It is also submitted that Resolution no. 472/6 rather than providing clear guidance on the delimitation of jurisdictions between different departments of the Investigative Committee, it in reality prevents cases from being referred to the military investigators.

32. In light of the foregoing, the Government of the Russian Federation should be invited to explain:

- why cases where the involvement of Russian servicemen has been established by the European Court are investigated by civilian, but not military investigators, as provided for in Article 30 of the 2010 Investigative Committee Act;
- what is the rationale behind the requirement that in order to refer the case to military investigators the victims must be able to identify the servicemen implicated in the crime by name (as per the above-mentioned judgments of the Urus-Martan District Court);
- how Resolution no. 472/6 can be enforced by courts, if they consider that any establishment of a fact is prohibited in proceedings under Article 125 of the Code of Criminal Procedure (as per the above-mentioned judgments of the Supreme Court of the Chechen Republic);
- how the remedy under Article 125 of the Code of Criminal Procedure assists in remedying the shortcomings of investigations and providing redress to the victims if no fact can be established in the course of the proceedings (as per the above-mentioned judgments of the Supreme Court of the Chechen Republic).

33. The Government of the Russian Federation should be encouraged to assign cases where the involvement of Russian servicemen has been established by the European Court to military rather than civilian investigators.

Respectfully submitted,

Kirill Koroteev,

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LIST OF ATTACHMENTS

Concerning the case of *Abdulkadyrova and others*:

1. First applicant's motion to the Investigative Committee of 31 October 2012
2. Investigator's decision of 14 December 2012
3. First applicant's complaint to the Urus-Martan Town Court of 18 March 2013
4. Judgment of the Urus-Martan Town Court of 25 March 2013
5. First applicant's appeal against the judgment of the Urus-Martan Town Court to the Supreme Court of the Chechen Republic of 3 April 2013
6. Appeal judgment of the Supreme Court of the Chechen Republic of 8 May 2013

Concerning the case of *Dubayev and Bersnukayeva*:

7. Applicants' motion to the investigator of 19 December 2012
8. Investigator's decision of 23 December 2012
9. Applicants' complaint to the Urus-Martan Town Court of 15 March 2013
10. Judgment of the Urus-Martan Town Court of 22 March 2013
11. Applicants' appeal against the judgment of the Urus-Martan Town Court to the Supreme Court of the Chechen Republic of 1 April 2013
12. Appeal judgment of the Supreme Court of the Chechen Republic of 17 April 2013