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**Bowring, Bill. (2009) Russia and Human Rights:  
Incompatible Opposites?**

***Göttingen Journal of International Law* 1 (2009)  
2, 257-278.**

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This is an author-produced version of a paper published in *Journal of Law and Society* (ISSN 0263-323X). This version has been peer-reviewed but does not include the final publisher proof corrections, published layout or pagination.

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Citation for this version:

Bowring, Bill (2009) Russia and Human Rights: Incompatible Opposites?  
*London: Birkbeck ePrints*. Available at: <http://eprints.bbk.ac.uk/785>

## **Russia and Human Rights: Incompatible Opposites?**

Bill Bowring\*

### Table of Contents

A. Introduction.....	34
B. The Size and Complexity of the Russian Federation.....	35
C. Russia's Rich History of Law Reform.....	36
D. The Reforms of the Perestroika Period.....	39
E. Human Rights Under Yeltsin.....	43
F. Human Rights in Putin's Russia .....	46
G. Conclusion .....	52

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## A. Introduction

Since the end of the Cold War and the collapse of the USSR in late 1991, Russia appeared from time to time to have made giant strides in the direction of full implementation of the rule of law, multi-party democracy, and protection of individual human rights. That is, there has been a serious engagement in the course of the last 20 years with the “three pillars” of the Council of Europe, which Russia joined in 1996, followed by ratification of the European Convention on Human Rights in 1998. The Russian Constitution of 1993, despite the controversial circumstances in which it was adopted, has stood the test of time; its democratic aspirations are beyond question.

But the same period has been scarred by a series of largely self-inflicted humanitarian disasters. The Case of the Communist Party, which took up so much of the time of the new Constitutional Court in 1992, its first full year, ended in a meaningless compromise.<sup>1</sup> In 1993 President Yeltsin stormed the Parliament (the Supreme Soviet) as it sat in the White House, tore up the existing constitution, and suspended the Constitutional Court, which dared to declare his actions unconstitutional. From 1994 to 1997, Russia was wracked by the First Chechen War, which ended in the Russian Federation’s defeat by one of its smaller subjects, and Chechnya’s de facto independence for two years. In 1999 the newly appointed Prime Minister, Vladimir Putin, decided to take revenge, and the Second Chechen War, which started in late 1999, led to extraordinary bloodshed and destruction, and to a continuing series of severe judgments against Russia in the European Court of Human Rights.<sup>2</sup> In 2003 then President Putin oversaw the arrest of Mikhail Khodorkovsky, his trial and imprisonment, and the break-up and state seizure of the most successful business in Russia, the YUKOS oil company.

A pessimistic view is well-founded. There has now been a flood of judgments against Russia concerning Chechnya.<sup>3</sup> And as I explore later in

<sup>1</sup> J. Henderson, ‘Making a Drama out of a Crisis: The Russian Constitutional Court and the Case of the Communist Party of the Soviet Union’, 19 *King’s College Law Journal* (2008) 3, 489-506.

<sup>2</sup> P. Leach, ‘The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights’, *European Human Rights Law Review* (2008) 6, 732-761.

<sup>3</sup> The author has assisted the applicants in many of these cases, through the European Human Rights Advocacy Centre (EHRAC), which, in partnership with the Russian

this article, relations between Russia and the Council of Europe are practically at breaking-point.

Does this mean that the human rights experiment in Russia has failed, indeed that it was bound to fail?

On the contrary: the thesis of this article is that Russia has, like all its European neighbours, a long and complex relationship with human rights – and with the rule of law and judicial independence, which are its essential underpinning.

I give two examples at this point. First, serfdom, *krepostnoye pravo*, was abolished in Russia in 1861. Slavery was finally abolished in the USA in 1866 - the American Anti-Slavery Society was founded in 1833.<sup>4</sup> Jury trial has since 2002 been available in all of Russia's 83 regions, except Chechnya. This is not an innovation forced on Russia after defeat in the Cold War. It is the restoration of an effective system of jury trial for all serious criminal cases, presided over by independent judges, which existed in Russia from 1864 to 1917. Jury trial was introduced in a number of Western European countries at about the same time as in Russia, though it had been strongly advocated by leading law reformers from the late eighteenth century.

In order to answer my questions, I start with the extraordinarily complex nature of the Russia Federation. Second, I explore the little-known history of law reform in Russia. Third, I turn to the Gorbachev period and the attempts to institutionalise the rule of law, human rights and constitutional adjudication. Fourth, I engage with the dramatic developments of the Yeltsin period, including accession to the Council of Europe. Fifth, I analyse the fact that simultaneously with his brutal prosecution of the war in Chechnya, Putin, for the first three years of his first term as President, pushed through a number of dramatic legal reforms.

## B. The Complexity of the Russian Federation

The Russian Federation is the largest and most complex in the world. When I wrote about this topic previously, in 2000<sup>5</sup> it was composed of no

human rights NGO, *Memorial*, he founded in 2003; see [www.londonmet.ac.uk/ehrac](http://www.londonmet.ac.uk/ehrac) (last visited 23 March 2009).

<sup>4</sup> See the African American Mosaic on the struggle of abolition and slavery, <http://lcweb.loc.gov/exhibits/african/afam007.html> (last visited 23 March 2009).

<sup>5</sup> B. Bowring, 'Ancient Peoples and New Nations in the Russian Federation: Questions of Theory and Practice', in S. Tierney (ed.), *Accommodating National Identity: New Approaches in International and Domestic Law* (2000), 211-232.

less than 89 “subjects of the Federation”. As of 1 March 2008, it has 83 subjects. The reason for this surprising “shrinking” are to be found in the Putin policy of centralisation, itself a potential cause for conflict.<sup>6</sup>

The subjects are as follows. First, and most significant from the point of view of human rights, Russia has 21 ethnic republics, the successors of the “autonomous republics” of the USSR, named after their “titular” people, with their own presidents, constitutions, and, in many cases, constitutional courts. There has been no reduction in the number of ethnic republics, not least because of the potential strength of their resistance. Next, there are 9 enormous *krais*, a word often translated as “region”, with their own appointed governors. In 2000 there were 6, with elected governors. The most numerous subjects of the Federation are the 46 *oblasts*, territorial formations inhabited primarily by ethnic Russians, also with governors. There were 49 *oblasts* in 2000. The 4 “autonomous *okrugs*” are also ethnic formations, and reflect a relative concentration of the indigenous peoples which give them their name. There were 10 of these in 2000, and the six which have disappeared have been “united” with larger neighbours, often in very controversial circumstances. For all their formal constitutional equality under the 1993 Constitution, they were for the most part located within other formations (*krais* and *oblasts*), with consequences which will be explored later in this chapter. There is a Jewish autonomous oblast, located in the Russian Far East. Finally, two “cities of federal significance”, Moscow and St Petersburg, are also subjects of the federation.

It is important to remember that of at least 150 nationalities in the Russian Federation, only 32 had their own territorial units<sup>7</sup>, including the Chechens. This number has now shrunk.

### C. Russia’s Rich History of Law Reform

The question is: what was there before? Was there a “legal culture” which was simply anathema to human rights? Was Russia simply the home of backwardness and despotism? Is it really the case that the Russians are condemned to catching up with the enlightened West from a position of le-

<sup>6</sup> B. Bowring, ‘The Russian Constitutional System: Complexity and Asymmetry’, in M. Weller (ed.), *Asymmetrical Autonomy Settlements: Asymmetrical Constitutional Designs as a Means of Accommodating Ethnic Diversity* (2009), forthcoming.

<sup>7</sup> D. R. Kempton, ‘The Republic of Sakha (Yakutia): The Evolution of Centre-Periphery Relations in the Russian Federation’, 48 *Europe-Asia Studies* (1996) 4, 587-613, 609.

gal barbarism? To answer these questions, a historical perspective is essential. What is frequently neglected is any recognition of Russia's own pre-revolutionary traditions, especially the reforms of Tsar Alexander (*Aleksandr*) II (1855-1881).

These had deeper roots still. The history of Russian law reform began at a climactic time for the UK and for Western Europe, the 18th century with its bourgeois revolutions. This history also contains a surprise for most Western scholars. A current textbook, based on a course of lectures at Moscow State University,<sup>8</sup> points out that the first Russian professor of law, S. E. Desnitsky (1740-1789), was a product not so much of the French enlightenment, that is of Diderot, Voltaire and Rousseau, but of the *Scottish* enlightenment.

Desnitsky studied in Scotland, under Adam Smith and others, from 1761 to 1767, when he received a Doctorate of Civil and Church Law from the University of Glasgow. He awoke to the ideas of the Scottish Enlightenment, and especially the philosophy of David Hume, and as well as the Scottish emphasis on Roman Law traditions and principles - the focus of Alan Watson's pathbreaking work on legal transplants.<sup>9</sup> In 1768, on the basis of his lengthy researches in Scotland, Desnitsky sent the Empress Catherine II his "Remarks on the institutions of legislative, judicial and penitentiary powers in the Russian Empire" - however, his suggestions were entirely unacceptable, and the work was sent to the archives. Amongst other radical proposals, Desnitsky urged the abolition of serfdom. He survived Catherine's rejection of these ideas, and became a full professor of law in 1777, shortly after the Pugachev uprising. He published books introducing Russians to the ideas of Adam Smith and John Millar. At Catherine's own instruction, he translated into Russian volume 1 of Blackstone's *Commentaries*, and this was published in Moscow in 1780-3. His courses included the history of Russian law, Justinian's *Pandects*, and comparisons of Roman and Russian law.<sup>10</sup> He died in the year of the French Revolution, and the *Declaration of the Rights of Man and of the Citizen*.

It should be noted that Desnitsky did not undertake a simple transmission of some already existing Western liberalism to Russia. The period of

<sup>8</sup> N. M. Azarkin, *Istoriya yuridicheskoi mysli Rossii: kurs lektsii (History of Legal Thought in Russia: Course of Lectures)* (1999).

<sup>9</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993).

<sup>10</sup> W. Butler, *Russian Law*, (1999), 24-25, and 52-53; see also A. Brown, 'The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii', in W. Butler (ed.), *Russian Law: Historical and Political Perspectives* (1977), 117-141.

his work was as much the period of the revolt of reason against autocracy in England as in Russia. Desnitsky was born only a few years after Thomas Paine.<sup>11</sup>

Thus, that there is a distinctively Russian tradition of thought and argument about human rights.<sup>12</sup> Russia's defeat by England and France in the Crimean War was the necessary stimulus to reform. Starting with the revolutionary Law on Emancipation of the Serfs in 1861, Alexander's reforms culminated in the Laws of 20 November 1864.<sup>13</sup> The new Laws introduced a truly adversarial criminal justice procedure, and made trial by jury obligatory in criminal proceedings. Judges were given the opportunity to establish real independence, in part by freeing them of the duty to gather evidence, and enabling them to act as a free umpire between the parties. The Procuracy lost its powers of "general review of legality", and became a state prosecutor on the Western model. The institution of Justices of the Peace was introduced. It is ironical that the Bolsheviks reinstated the pre-reform model of the procuracy.

Indeed, as Samuel Kucherov wrote in 1953: "Between 1864 and 1906, Russia offered the example of a state unique in political history, where the judicial power was based on democratic principles, whereas the legislature and executive powers remained completely autocratic."<sup>14</sup> A collection on jury trial in Russia contains an extensive memoir by one of the most distinguished judges of the period, A. F. Koni.<sup>15</sup> Moreover, it also reproduces the advocates' speeches and judicial summings-up in some of the most famous trials, for example the trial in 1878 of Vera Zasulich, charged with the attempted murder of the governor of St Petersburg, Trepov, whom she had

<sup>11</sup> Paine left England for the American colonies in 1774, and began writing his extraordinarily influential *Common Sense* in 1775. Its publication in 1776 was a sensation, selling at least 100,000 copies in that year alone. Its content was entirely unacceptable to the English ruling elite. His *Rights of Man* appeared in 1791, and he was forced to leave England, remaining in France for 10 years - he was imprisoned in 1793 after war broke out between England and France.

<sup>12</sup> B. Bowring, 'Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation', in E. Orucu (ed.), *Judicial Comparativism in Human Rights Cases* (2003), 159-182.

<sup>13</sup> O. I Chistyakov & T. E Novitskaya (eds), *Reformi Aleksandr II (Reforms of Aleksandr II)* (1998).

<sup>14</sup> S. Kucherov, 'Courts, Lawyers and Trials under the Last Three Tsars (1953)', 304-305, in Z. Zile, *Ideas and Forces in Soviet Legal History: a Reader on the Soviet State and Law* (1992) 31.

<sup>15</sup> S. Kazantsev, *Sud Prisyazhnikh v Rossii: Gromkiye Ugolovniye Protsessi (Trial by Jury in Russia: Great Criminal Trials)* (1991).

shot in broad daylight and before witnesses. Koni, who was presiding judge, refused to be pressured by the authorities, and Zasluch was acquitted, a verdict which was respected by the authorities.

Despite the reactionary policies pursued by Alexander III and Nikolai II, the essence of these reforms continued until the Bolshevik Revolution.

#### D. The Reforms of the Perestroika Period

It would be inaccurate to say that the USSR had no place for human rights.<sup>16</sup> Stalin's Constitution, approved on 5 December 1936, shortly after the USSR joined the League of Nations in September 1934, contained paper guarantees of a number of fundamental rights. However, as Vyshinsky, the prosecutor of the notorious Moscow trials pointed out:

Proletarian declarations of rights frankly manifest their class essence, reflecting nothing of the desire of bourgeois declarations to shade off and mask the class character of the rights they proclaim.<sup>17</sup>

Nikolai Bukharin, the best-known member of the drafting Commission, who later boasted that he had written the text from the first word to the last, believed that the Constitution would be implemented. But he was himself a victim of the Great Purge, and was executed in 1938 after a show trial.

The Brezhnev USSR Constitution of 1977 (which provided the model for the 1978 Constitutions of the Russian Federation (RSFSR) and the Union Republics) contained Chapter 7, entitled "Basic Rights, Freedoms and Obligations of the Citizens of the USSR". It should not be surprising that social and economic rights were given priority, and were, indeed, delivered by the Communist state. These were the right to work (Art. 40), the right to leisure (Art. 41), the right to health care (Art. 42), the right to social security (Art. 43), the right to housing (Art. 44), the right to education (Art. 45), and the right to use the achievements of culture (Art. 46). It is generally recognised that the USSR provided first rate free education and health care; and every Soviet town had its art gallery, theatre and concert hall. The constitutional guarantee and genuine implementation of these rights was perhaps the main source of legitimacy of the Soviet state, and the reason it was not over-

<sup>16</sup> B. Bowring, 'Human Rights in Russia: Discourse of Emancipation or only a Mirage?', in *Istvan Pogany* (ed.), *Human Rights in Eastern Europe* (1995), 87-109, at 96-97.

<sup>17</sup> A. Vyshinsky, *The Law of the Soviet State* (1948), 554.



thrown, but collapsed, after its ideals had rotted away. Political and personal rights, which followed, were hedged about with phrases such as “in accordance with the interests of the people and in order to strengthen and develop the socialist system” (Art. 50, freedom of speech, of the press, and of assembly and meetings), so as to be meaningless in practice.

At an early stage, transition to a “law-governed state” was seen, by Gorbachev<sup>18</sup> (1988) and others, to be inextricably connected to the creation of a mechanism for constitutional adjudication.<sup>19</sup> In the words of Sergei Pashin, who drafted the Law of 6 May 1991 “On the Constitutional Court of the RSFSR”: “A Constitutional Court is an organ which is unknown to the state structure of Russia during the whole course of its existence.”<sup>20</sup>

The first step therefore was the creation of the Committee for Constitutional Supervision, the CCS.<sup>21</sup> Although such a body was first proposed by academics in 1977, there was no legislation until December 1988, when the CCS was founded “with the goal of guaranteeing the strictest correspondence of laws and Government decrees with the Constitution of the USSR”.<sup>22</sup> It started work in April 1990, and was dissolved, together with the other supreme organs of the Union, and the USSR itself, in December 1991.

The CCS worked within a context of much greater respect for international human rights norms than previously. On 10 February 1989 the Presidium of the Supreme Soviet passed a Decree recognising the compulsory jurisdiction of the UN’s International Court of Justice with respect to six

<sup>18</sup> M. Gorbachev, *Perestroika i Novoye Mishleniye dlya Nashei Strany i dlya vsevo Mira* (*Perestroika and New Thinking for our Country and for the Whole World*) (1987).

<sup>19</sup> A. Yakovlev, ‘The Political Philosophy of Perestroika’, in A. Aganbegyan, *Perestroika Annual* (1988); V. Kudryavtsev, ‘Towards a Socialist Rule of Law State’, in A. Aganbegyan, *Perestroika Annual* (1988); A. Vaksberg, ‘Legal Reforms and Basic Principles’, in A. Brumberg, *Chronicle of a Revolution: A Western-Soviet Inquiry into Perestroika* (1990); B. Kazaimirchuk, ‘On Constitutional Supervision in the USSR’, in W. Butler (ed.), *Perestroika and the Rule of Law: Anglo-Soviet and Soviet Perspectives* (1991).

<sup>20</sup> S. Pashin, *Kak obratitsya v konstitutsionni sud Rossii* (*How to apply to the Russian Constitutional Court*) (1992).

<sup>21</sup> A full account of the CCS and of the early days of the Russian Constitutional Court may be found in H. Hausmaniger, ‘The Committee of Constitutional Supervision of the USSR’, 23 *Cornell International Law Journal* (1990), 287-322; and H. Hausmaniger, ‘From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court’ 25 *Cornell International Law Journal* (1992) 305-337.

<sup>22</sup> Materials of the XIX All-Union Conference of the CPSU, Moscow 1988, 146.

UN human rights convention.<sup>23</sup> Schweisfurth commented that “this move marked a positive shift in the previously negative attitude of the Soviet Union towards the principle judicial organ of the United Nations”.<sup>24</sup>

He saw, rightly I think, these developments as exemplifying a farewell to the traditional strict positivistic approach to human rights.<sup>25</sup> The USSR had always ratified UN human rights treaties, but with no intention that they should apply within the Soviet Union, much less that there should be the possibility of interference in internal affairs.

During its short existence the CCS heard 29 cases. Some of these were of considerable significance, demonstrating the seriousness with which the CCS took human rights. Here are a few examples.

First, in the *Unpublished Laws Case* of 29 November 1990 the CCS ruled that all unpublished USSR regulations (there were many such ‘secret’ laws) violated international human rights standards and would lose their force unless published within three months.<sup>26</sup> Second, in the *Right to Defence Counsel Case*, the CCS (petitioned by the Union of Advocates), decided that the USSR law of 10 April 1990 on reforms to the criminal law, which restricted the right to defence counsel, violated both the Constitution and international standards. Third, in the *Ratification of the Optional Protocol Case*, (4 April 1991), in a move which put the USSR ahead of the UK and the US, the CCS requested the Supreme Soviet to secure ratification by the USSR of the First Optional Protocol to the UN *International Covenant on Civil and Political Rights* (ICCPR).<sup>27</sup> The USSR had ratified the ICCPR – in 1973 – but not the Protocol, which enables individual complaint to the UN’s Human Rights Committee by a person complaining of a violation. There was a commendably prompt and positive response. On 5 July 1991

<sup>23</sup> Reported in 4 *Interights Bulletin* (1989) 3: the treaties were the 1948 Genocide Convention; the 1984 Convention Against Torture; the 1949 Convention for the Suppression of Traffic of Persons; the 1952 Convention on the Political Rights of Women; the 1965 Convention on the Elimination of Racial Discrimination; and the 1979 Convention on the Elimination of Discrimination Against Women.

<sup>24</sup> T. Schweisfurth, ‘The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions’, *European Journal of International Law* (1990) 2, 110, 111.

<sup>25</sup> B. Bowring, ‘Positivism versus Self-determination: The Contradictions of Soviet International Law’, in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 133-168.

<sup>26</sup> *Vedomosti Svezda Narodnikh Deputatov SSSR i Verkhovnoy Sovyeta SSSR*, 1990 No.50, 1080.

<sup>27</sup> *VSN D SSSR* *ibid*, 1991 No.17, 502; see also *Sovetskaya Iustitsiya* 1 23 December 1991, 17.

the Supreme Soviet adopted two Resolutions acceding to the Optional protocol and recognising the jurisdiction of the HRC.<sup>28</sup> Fourth, in the *Dismissal on Attainment of Pensionable Age Case*, the CCS considered the USSR Presidium Decree amending labour law by adding as a ground for termination by the employer “attainment by the worker of pensionable age with entitlement to old age pension”. The CCS declared:

“The rights and freedoms granted to citizens in carrying out any form of activity in the field of work and occupation not forbidden by law form a most important part of human rights, and indicate the level of social protection attained in a society. In a law-governed state every human must be guaranteed equality of opportunity in the possession and use of these rights [...] The principle of equality before the law is enshrined in the Constitution, in statutes, and in international legal acts on human rights and freedoms [...] and its main guarantee is the prohibition of discrimination.”<sup>29</sup>

Finally, there was the *Residence Permit Case* of 11 October 1991, where the CCS decided that *propiska*, the Soviet system of registration, plainly contradicted that rights freely to move around and to choose one’s place of residence, which is to be found in several international human rights treaties, but was not then part of the Soviet Constitution. This is an issue which has continued to exercise the Constitutional Court of the Russian Federation.

Savitskii believed that the role of the CCS “was a secondary one and amounted to the publication of a number of purely symbolic ‘conclusions’ that were binding on no-one”.<sup>30</sup> I disagree. Indeed, in the view of Van Den Berg, the work of the CCS “in the field of human rights on the whole was positive”; it was not an illogical institution; he considered that “[i]n fact it had much more power than most constitutional courts in the world [...]”.<sup>31</sup>

<sup>28</sup> *Vedomosti SSSR*, 1991 No.29, 842, 843.

<sup>29</sup> *Vedomosti SSSR*, 1991 No.17, 501.

<sup>30</sup> V. Savitskii, ‘Will there be a judicial power in the new Russia?’, 19 *Review of Central and East European Law* (1993) 6, 639-660, 651.

<sup>31</sup> G. Van Den Berg, ‘Human Rights in the Legislation and the Draft Constitution of the Russian Federation’, 18 *Review of Central and East European Law* (1992), 197-251, 206, 207.

And on 5 September 1991 the USSR adopted a *Declaration of the Rights and Freedoms of Man*, followed by the *Declaration of Rights and Freedoms of the Person and Citizen* adopted by the Russian Federation on 5 September 1991. This was then incorporated into the 1978 Constitution of the Russian Federation.

## E. Human Rights under Yeltsin

There can be no question of the importance for the Russian Federation of its accession to the Council of Europe on 28 February 1996, or its ratification of the European Convention of Human Rights on 5 May 1998<sup>32</sup>. To many observers, the Council of Europe's invitation to Russia, and the political decisions to accede and to ratify, were a great surprise.<sup>33</sup> The USSR had considered that the principles of state sovereignty and non-interference in internal affairs were the two cornerstones of international law, and it was a great surprise that even the Communists and nationalists in the Russian parliament voted in favour. Yet Russia was now accepting an unprecedented degree of external supervision and intervention, with the prospect of compulsory judgments and the payment of large sums of compensation. It was perhaps even more surprising that the Council of Europe was prepared to accept Russia, given that the First Chechen War was in full swing.

The road to ratification was opened by the publication of the *Conception of Judicial Reform* published on 24 October 1991, after several years work, by Sergei Pashin<sup>34</sup>, Sergei Vitsin<sup>35</sup> and others, and the enactment on 22 November 1991 of the *Declaration of the Rights and Freedoms of the Person and Citizen* by the Supreme Soviet of the RSFSR. The Constitutional Court<sup>36</sup>, created as the USSR reached its death-throes, started work in January 1992, followed on 26 June 1992 by enactment of the Law "On the Status of Judges of the Russian Federation", on 27 April 1993 by enactment of the Law "On Complaining to Court About Activities and Decisions

<sup>32</sup> The date of deposition of the Instrument of Ratification at Strasbourg.

<sup>33</sup> See B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?', 6 *European Human Rights Law Review* (1997), 629; B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Four Years On', 4 *European Human Law Review* (2000), 362.

<sup>34</sup> His career is described below.

<sup>35</sup> Now professor, indeed a general, in the University of the Ministry of the Interior, in Moscow.

<sup>36</sup> A. Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006* (2008).

which Violate the Rights and Freedoms of Citizens”. On 16 July 1993 a great experiment, led by Sergei Pashin, began with enactment of the new Part X to the Criminal Procedural Code (UPK), which introduced jury trial, as an experiment, in nine Russian regions.<sup>37</sup>

The dissolution, by force, of the Supreme Soviet and suspension of the Constitutional Court in October 1993 appeared to throw the whole process of reform into doubt. But the new Constitution of the Russian Federation, adopted by (dubious) referendum on 12 December 1993, contained many human rights provisions taken straight from the ECHR and UN instruments. The Constitutional Court was revived on 24 June 1994, with a new Law which the judges themselves had drafted, and an increased complement of 19 judges. It was a positive omen that continuity was retained, with all the pre-1993 judges keeping their positions, including the controversial former Chairman – and now once again Chairman - Valerii Zorkin.

An initial test of the renewed Constitutional Court was presented by the First Chechen War. On 31 July 1995 the Constitutional Court of the Russian Federation delivered its decision on the constitutionality of President Yeltsin’s decrees sending Federal forces into Chechnya.<sup>38</sup> The Court was obliged in particular to consider the consequences of Russia’s participation in AP II.<sup>39</sup> As Gaeta pointed out<sup>40</sup>:

The Court determined that at the international level the provisions of Protocol II were binding on both parties to the armed conflict and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia’s international obligations under Additional Protocol II to the 1949 Geneva Conventions. Nonetheless, the Court sought to excuse this

<sup>37</sup> For analysis of these developments see F. J. M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (1993); G. Smith, *Reforming the Russian Legal System* (1996); P. Solomon (ed.), *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order* (1997); P. Solomon, ‘Courts and Their Reform in Russian History’, in P. Solomon (ed.), *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order* (1997), 3-20.

<sup>38</sup> An unofficial English translation of this judgement was published by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, CDL-INF (96) 1.

<sup>39</sup> The RF is a party to the 1949 Geneva Conventions. The Soviet Union ratified both the 1977 Additional Protocols on 29 September 1989 to become effective on 29 March 1990. The Russian Federation deposited a notification of continuation on 13 January 1992.

<sup>40</sup> P. Gaeta, ‘The Armed Conflict in Chechnya before the Russian Constitutional Court’, *7 European Journal of International Law* (1996), 563.

non-compliance because Protocol II had not been incorporated into the Russian legal system.

Despite an order of the Court, incorporation has still not taken place. And Chechnya was de facto independent for two years, although it was not recognised by any state.

On 25 January 1996, despite the First Chechen War, and after fierce debate, the Parliamentary Assembly of the CoE (PACE) voted by a two thirds majority to admit Russia, and on 21 February 1996 the Russian State Duma approved, by 204 votes to 18.<sup>41</sup> Vladimir Lukin, then Chair of the Duma's International Affairs Committee, assured deputies that the benefits of Council membership would more than justify the Euro 12 m a year dues<sup>42</sup>. The upper house, the Federation Council, unanimously agreed.

When on 28 February 1996, the Russian Foreign Minister signed the European Convention on Human Rights (ECHR) and other CoE treaties, he did so pursuant to the long list of obligations accepted by Russia, set out in PACE Opinion 193(1996) of 25 January 1996.<sup>43</sup> In February 1998 the Duma once again voted overwhelmingly to ratify the ECHR, and it entered into force for Russia on 1 November 1998. In this way, Russia fulfilled one of the most important commitments which it made on accession to the CoE. Russia has satisfied most of its obligations, including the transfer of the penitentiary system from the Ministry of the Interior to the Ministry of Justice, in 1998, and enactment of new judicial procedural laws.

However, a very important obligation was:

“[...] to sign within one year and ratify within three years from the time of accession, Protocol No.6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession;”

Accordingly, on 16 May 1996 President Yeltsin issued a Decree ordering the government to present to the Duma within one month a law on ratification of Protocol 6, and on 2 August he announced an unofficial moratorium on executions. However, the Duma refused to ratify Protocol 6, and

<sup>41</sup> Federal Law No.19 - F3. The text is set out in S. A. Glotov, *Pravo Soveta Evropi I Rossii [The Law of the Council of Europe and Russia]* (1996), 118.

<sup>42</sup> S. Parish, *OMRI Daily Digest*, 22 February 1996. Lukin is now the Human Rights Ombudsman.

<sup>43</sup> See S. A. Glotov, *supra* note 41, 82-89.

also refused to enact a law on moratorium. In August 1999 the Russian Government once more submitted Protocol 6 to the Duma for ratification. This met a similar fate. The matter was resolved indirectly when, in February 1999, the Federal Constitutional Court held<sup>44</sup> that in order for the death penalty to be applied in Russia, the accused must in every part of Russia have the right to a trial by jury. At that time trial by jury existed in only 9 of 89 regions of Russia.

## F. Human Rights in Putin's Russia

From 2000 to 2003 President Putin expressly referred to himself as following in the footsteps of the great reforming Tsar, Alexander II, and his law reforms of 1864. Putin too presided over creation of a system of justices of the peace; installation of jury trial throughout Russia with the exception of Chechnya; enhanced judicial status; a much reduced role for the prosecutor in criminal and civil trials. I have analysed Putin's speeches and the events of this period.<sup>45</sup> The reforms of 2001-2003 were driven through the Russian Parliament by Dmitrii Kozak of the President's Administration.<sup>46</sup> These included the three new procedural codes enacted from 2001 to 2003, Criminal,<sup>47</sup> Arbitrazh (Commercial),<sup>48</sup> and Civil,<sup>49</sup> as well as the radical improvements to Yeltsin's Criminal Code of 1996, 257 amendments in all, which were enacted on 8 December 2003.<sup>50</sup>

Further reforming legislation were accompanied by the more controversial amendments of 17 December 2002 to the Laws "On the Constitutional Court", "On the Judicial System of the Russian Federation", and "On the Status of Judges in the Russian Federation", and the new Law "On the

<sup>44</sup> Decision of 2 February 1999, No. 3-P, *Rossiskaya Gazeta*, 10 February 1999, English summary in Venice Commission, *Bulletin on Constitutional Case-Law*, Edition 1999-1, 96-98.

<sup>45</sup> B. Bowring, 'Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights', in K. Hober (ed.), *The Uppsala Yearbook of East European Law 2004* (2005), 89-116.

<sup>46</sup> The author worked as an expert for the Council of Europe with Mr Kozak on the draft of the new Criminal Procedural Code; Kozak is the most effective public servant in Russia.

<sup>47</sup> Into force on 1 July 2002.

<sup>48</sup> Into force in September 2002.

<sup>49</sup> Into force in January 2003.

<sup>50</sup> Federal Law No.162-FZ "On Amendments and Modifications of the Criminal Code of the Russian Federation".

Advokatura and Advocates' Activities" of 3 June 2002.<sup>51</sup> The Council of Europe had substantial expert input into all of this new legislation. However, the initial phase of legal reform from 2000, which included enactment of the new procedural codes referred to in the next paragraph, came to a definitive end in late 2003, simultaneously with the arrest of Mr Khodorkovsky and the destruction of YUKOS.

However, simultaneously with the speeches reported above, Putin was prosecuting with unprecedented ruthlessness a new conflict in Chechnya. It should be no surprise that in the course of the year 2000 the Russian government demonstrated the reality of its attitude to the ECHR. Experts who examined the correspondence between the Secretary General of the Council of Europe and the Foreign Minister of the Russian Federation concluded that the explanations provided by the Russian Federation "were not adequate and that the Russian Federation has failed in its legal obligations as a Contracting State under Article 52 of the Convention."<sup>52</sup>

The conclusion was:

Our conclusion in regard to point B is that the replies given by the Russian authorities are characterised by a total absence of any reference to the case-law of the Court and, most often, to the text of the Convention itself. They are characterised either by a total lack of information (in regard to Articles 3, 5 and 6 of the Convention and Article 2 of Protocol No. 4 and other provisions guaranteeing rights and freedoms) or by their general and evasive nature (in respect of Article 2 of the Convention).

The death penalty has continued to pose problems under Putin. Russia has not executed a convicted person since 1999. But the Criminal Procedural Code of 2001 extended jury trial to the whole of Russia except Chechnya, where it should be introduced not later than 1 January 2007. This would then, of course, trigger the restoration of the death penalty. However, on 15 November the State Duma adopted at first reading a draft law which

<sup>51</sup> For analysis of these more recent developments, see P. Solomon & T. Foglesong, *Courts and Transition in Russia. The Challenge of Judicial Reform* (2000); P. B. Stephan, 'Review of Peter H. Solomon, Jr. and T. S. Foglesong *Courts and Transition in Russia: The Challenge of Judicial Reform*', 117 *Political Science Quarterly* (2002) 1,165-167; P. H. Solomon, 'Judicial Power in Russia: Through the Prism of Administrative Justice', 38 *Law & Society Review* (2004) 3, 549-582.

<sup>52</sup> T. Bán *et al.*, Consolidated Report Containing an Analysis of the Correspondence between the Secretary General of the Council of Europe and the Russian Federation under Article 52 of the European Convention on Human Rights, 26 June 2000, SG/Inf(2000)24, at [http://www.coe.int/t/e/human\\_rights/cddh/2.\\_activities/Art52CM\\_en.asp](http://www.coe.int/t/e/human_rights/cddh/2._activities/Art52CM_en.asp) (last visited 27 April 2009).



changes the date for introduction of jury trials in Chechnya from 1 January 2007 to 1 January 2010.<sup>53</sup> The (good) reason they gave was that lists of potential jurors must be compiled by municipalities, which do not yet exist in Chechnya. On 27 December 2006, the draft law was signed by the President; and it was published in the Russian Gazette and came into force on 31 December 2006, in the nick of time.<sup>54</sup> So Russia has another three years before the death penalty will automatically become available once more.

Nonetheless, one of the more encouraging trends in the Putin era is that the Constitutional Court has consistently begun to refer to and apply the jurisprudence of the European Court of Human Rights.<sup>55</sup> The breakthrough was made in the case of *Maslov*, decided on 27 June 2000.<sup>56</sup> The case concerned the constitutionality of Articles 47 and 51 of the Criminal Procedural Code, and the issue at stake was the right to defence counsel following detention. According to the Code, a person in detention as a “suspected person” or an “accused”, was entitled as of right to the presence of a defender. But this was not the case for a person brought to a police station to be interrogated as a “witness”, even though attendance was compulsory, and might well lead to transformation into a suspect or accused. The Court not only referred to Article 14 of the ICCPR and Articles 5 and 6 of the ECHR, but for the first time cited the jurisprudence of the European Court of Human Rights. The Court held that the Code must not be read literally, since this would violate the spirit of the Constitution and of the Convention as interpreted by the Court.

Anton Burkov<sup>57</sup> has reviewed the 54 judgments by August 2004 citing the ECHR out of 215 altogether since the founding of the RCC in 1991, 166 since Russia’s accession to the Council, and 116 since ratification.<sup>58</sup> Like Trochev, however, he is critical of the failure of the RCC to evaluate the case-law to which it refers, or even to reference it properly.

The Justices of the RCC also played a leading role in another legal breakthrough. In the Soviet period, the USSR was perhaps the most assiduous ratifier of UN instruments, but never allowed these to have any serious

<sup>53</sup> <http://prima-news.ru/eng/news/2006/11/17/37095.html> (last visited 20 April 2009).

<sup>54</sup> [http://www.demokratia.ru/archive-ru/2007/obzor\\_zakonov\\_109.zip](http://www.demokratia.ru/archive-ru/2007/obzor_zakonov_109.zip) (last visited 20 April 2009).

<sup>55</sup> W. B. Simons, ‘Russia’s Constitutional Court and a Decade of Hard Cases: A Post-script’, 28 *Review of Central and East European Law* (2003) 3-4, 655-678.

<sup>56</sup> Case 11-P of 27 June 2000 – Trochev, *supra* note 36, 175, note 238.

<sup>57</sup> A. Burkov, *The Impact of the European Convention on Human and Application on Russian Law: Legislation and Application in 1996-2006* (2007).

<sup>58</sup> *Id.*, 36.

internal effect. Thus, content must be given to Article 15 of the 1993 Constitution<sup>59</sup>, which provides not only that the Constitution itself has “the highest legal force and direct effect”, but, by Article 15.4

Generally recognised principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian federation than provided for by law, the rules of the international treaty shall apply.

The apotheosis of this new relationship seemed to have truly arrived with the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003. The Resolution is entitled *On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation*.<sup>60</sup> The Supreme Court consulted widely in composing this Resolution: participants in discussion included justices of the RCC, Justice Kovler, and other experts.<sup>61</sup>

However, Russia began to lose a number of high-profile cases in the Strasbourg Court. In May 2004, in *Gusinskiy v Russia*<sup>62</sup> the Court held that Russia had acted in bad faith in using the criminal justice system to force a commercial deal, by arresting the TV magnate. In July 2004, in *Ilaşcu and Others v Moldova and Russia*<sup>63</sup> the majority of the Grand Chamber of the Court found that Russia rendered support to Transdniestria, which broke away from Moldova, amounting to “effective control”. The first six Chechen applicants against Russia won their applications to Strasbourg in February 2005.<sup>64</sup> In April 2005 in *Shamayev and 12 others v Russia and Geor-*

<sup>59</sup> The 1993 Constitution can be found in English at <http://www.kremlin.ru/eng/articles/ConstMain.shtml> (last visited 02 April 2009).

<sup>60</sup> Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation, 10 October 2003, English translation to be found on the web-site of the Supreme Court, at <http://www.supcourt.ru/EN/resolution.htm> (last visited 02 April 2009).

<sup>61</sup> Although former justice, now consultant, at the Constitutional Court, Tamara Morshchakova, takes the view that the resolution itself violates the Constitution – conversations with the author.

<sup>62</sup> *Gusinskiy v. Russia*, ECHR, Application no. 70276/01, decision of 19 May 2004.

<sup>63</sup> *Ilaşcu and Others v Moldova and Russia*, ECHR, Application no. 48787/99, decision of 8 July 2004.

<sup>64</sup> These applicants were represented, from 2000, by the author and his colleagues from the European Human Rights Advocacy Centre, which he founded, in partnership with the Russian human rights NGO “Memorial”, with EU funding, in 2002.

*gia*<sup>65</sup>, the Court condemned Russia for deliberately refusing to cooperate with the Court despite diplomatic assurances; and in October 2002 the Court had given “interim measures” indicating to Georgia that Chechens who had fled to Georgia should not be extradited to Russia pending the Court’s consideration.

In 2006, the European Court of Human Rights delivered 102 judgments against the Russian Federation. The Court received 10 569 new applications (the highest from any one of the Council of Europe’s 47 member states). At the beginning of 2007, there were 19 300 cases against Russia pending before the Court. This represented no less than 21,5 per cent of the total of cases from all of the 47 states which are now members of the Council of Europe<sup>66</sup>.

Furthermore, a September 2006 report of the Committee on Legal Affairs and Human Rights (CLAH) of PACE observed that “after the prompt reactions to the first European Court’s judgments, the execution process has slowed down in the adoption of further legislative and other reforms to solve important structural problems [...]” This is diplomatic language describing what is essentially a freezing of Russia’s relations with the Court. Such a frosty relation between Russia and the Court is simply not sustainable, since what is at stake is the very authority, and the integrity, of the Strasbourg enforcement mechanism.

These expressions of regret by CoE institutions, and the defeats in the cases noted above, received a stunning riposte from the Russian authorities when, on Wednesday 20 December 2006, the Russian State Duma (lower house of parliament) voted to refuse ratification of Protocol 14 to the ECHR. This Protocol, which must be ratified by every one of the CoE’s 46 member states in order to come into force, is designed to streamline the procedure of the Strasbourg Court, so as to reduce the backlog of cases (now about 80,000 cases), and shorten the time needed to deliver a decision (now 5-6 years for a “fast-track” case, up to 12 years for other cases). The Vice-Speaker of the Duma, the nationalist Sergey Baburin, complained “[...] our voluminous membership fees (Euro 12m, the same as the UK) are being

<sup>65</sup> *Shamayev and 12 others v Russia and Georgia*, ECHR, Application no. 36378/02, decision of 12 April 2005.

<sup>66</sup> Survey of Activities, 2006, Registry of the European Court of Human Rights, Strasbourg, 2007, available at <http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/SurveyofActivities2006.pdf> (last visited 02 April 2009).

used for attacks on our country” by the CoE.<sup>67</sup> The Duma’s decision was described in the *Kommersant* newspaper as “The Duma ‘Gives It’ to the European Court.”<sup>68</sup> Alexei Mitrofanov, deputy chairman of the Duma’s legislation committee, said that the Duma decision was “a direct order from the Kremlin... it is also a mystery what we can achieve by all this. We should simply have explained our grievances to the West”.<sup>69</sup>

The Secretary General of the CoE, Terry Davis, immediately issued a Declaration expressing his disappointment that “essential and long-overdue changes [...] must be put on hold.”<sup>70</sup> This is a rare response, and in diplomatic terms very strongly worded.

Any impression that the Duma had somehow thwarted Putin’s genuine intent was dispelled when, on 11 January 2007 he met members of the “Civil Society Institutions and Human Rights Council”. Former Constitutional Court judge and leading human rights supporter Tamara Morshchakova asked him specifically about the refusal to ratify Protocol 14. Putin replied:

“Unfortunately, our country is coming into collision with a politicisation of judicial decisions. We all know about the case of *Ilascu*, where the Russian Federation was accused of matters with which it has no connection whatsoever. This is a purely political decision, an undermining of trust in the judicial international system. And the deputies of the State Duma turned their attention also to that [...]”<sup>71</sup>

The Council went on in February 2007 to analyse in depth the failure of Russia (and other states, especially Turkey) to cooperate with the Court.<sup>72</sup>

<sup>67</sup> <http://humanrightshouse.org/Articles/7680>. (last visited 02 April 2009).

<sup>68</sup> [http://www.kommersant.com/p732043/r\\_500/State\\_Duma\\_European\\_Court/](http://www.kommersant.com/p732043/r_500/State_Duma_European_Court/) (last visited 02 April 2009).

<sup>69</sup> <http://en.rian.ru/analysis/20061225/57808422.html> (last visited 02 April 2009).

<sup>70</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1078355&BackColorInternet=F5CA75&BackColorIntranet=F5Ca75&BackColorLogged=A9BACE> (last visited 02 April 2009).

<sup>71</sup> The official transcript of this exchange has since the election of President Medvedev been removed from the President’s website; but it is accurately reported at <http://www.demos-center.ru/reviews/15999.html> (last visited 16 April 2009). See also <http://www.novayagazeta.ru/data/2007/02/01.html> (last visited 16 April 2009).

<sup>72</sup> See the Report of the CLAHR, PACE, Member states’ duty to co-operate with the European Court of Human Rights, Doc.11183, 9 February 2007; I gave evidence to PACE in the course of preparation of this Report.

In an unusual move, PACE passed a further follow-up Resolution on 2 October 2007. This stated, in part:

“6. Illicit pressure has also been brought to bear on lawyers who defend applicants before the Court and who assist victims of human rights violations in exhausting domestic remedies before applying to the Court. Such pressure has included trumped-up criminal charges, discriminatory tax inspections and threats of prosecution for “abuse of office”. Similar pressure has been brought to bear on NGOs who assist applicants in preparing their cases.

7. Such acts of intimidation have prevented alleged victims of violations from bringing their applications to the Court, or led them to withdraw their applications. They concern mostly, but not exclusively, applicants from the North Caucasus region of the Russian Federation [...]”<sup>73</sup>

Such public condemnation of a Council of Europe member state is without precedent.

On 15 April 2008 PACE published an introductory memorandum by Dick Marty, its Rapporteur on the situation in the North Caucasus. He highlighted ongoing human rights violations by security forces, including enforced disappearances, torture, and extrajudicial executions, and noted impunity for these violations of international law. The memorandum, entitled “Legal remedies for human rights violations in the North Caucasus,” characterised the human rights situation in the region as “by far the most alarming” in all 47 Council of Europe member states.<sup>74</sup>

## G. Conclusion

Other scholars in this special issue are tackling the August 2008 war between Georgia and Russia. Georgia claims against Russia at the Interna-

<sup>73</sup> PACE Resolution 1571 (2007), at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1571.htm#1> (last visited 02 April 2009).

<sup>74</sup> Human Rights Watch “Council of Europe Failing on Russia. Urgent Need for Vigorous Monitoring in the North Caucasus”, available at <http://www.hrw.org/english/docs/2008/04/15/russia18548.htm> (last visited 02 April 2009) and see also [http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20080411\\_ajdoc21\\_2008.pdf](http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20080411_ajdoc21_2008.pdf) (last visited 02 April 2009).

tional Court of Justice are now under way, and Georgia is seeking to interest the Prosecutor at the International Criminal Court in investigating alleged war crimes by Russians.

In my view, the most significant proceedings are now taking place before the Strasbourg Court. It will be recalled that a very large number of Chechen cases, including violations of Article 3 of the ECHR, the prohibition of torture and inhuman and degrading treatment, have been brought against Russia arising out of the conflict since 1999. The applicants have won more than 30, many with the assistance of EHRAC.

Applications relating to the August War have been made from both the Russian and Georgian sides. In October 2008 the president of the Strasbourg Court, Jean-Paul Costa, announced that “[w]e have received very close to 2,000 applications [...] from people living in South Ossetia, against Georgia. There will be a massive increase in the workload of the court. We cannot just throw away these cases.”<sup>75</sup> It is plain that these applications are supported by Russia.

On 6 February 2009 Georgia lodged an interstate application against Russia, alleging serious and mass violations. Its initial application was lodged on 11 August 2008, and on 12 August the Court’s President applied interim measures. And on 12 February 2009 EHRAC and its partner in Georgia the Georgian Young Lawyers Association announced<sup>76</sup> that they had jointly lodged 32 groups of cases on behalf of 132 Georgian citizens who allege killing or injuring of civilians, destruction of property, and illegal detention by Russian soldiers. Some complaints rely on Article 3 of the ECHR. However, it is highly unlikely that any judgments will be delivered for at least three years.

I therefore return to my starting thesis. Will Russia leave, or be forced to leave, the Council of Europe? I think this is very unlikely. First, the reforms which have sought to bring Russia into line with Council of Europe standards and expectations are not alien implants, but to a large extent the restoration of the great reforms of the 1860s. Second, the Convention itself is now very much part of Russian law, and an intrinsic part of the education of the new generations of Russian lawyers and judges. Third, Russian human rights defenders, despite increasingly onerous NGO legislation, continue to promote human rights in every possible forum, not least at Strasbourg.

<sup>75</sup> <http://www.alertnet.org/thenews/newsdesk/L6112324.htm> (last visited 02 April 2009).

<sup>76</sup> [http://www.londonmet.ac.uk/londonmet/library/k13142\\_3.pdf](http://www.londonmet.ac.uk/londonmet/library/k13142_3.pdf) (last visited 02 April 2009).

Finally, Russia, like its legal predecessor the USSR, takes international law very seriously indeed. Its commitment in terms of diplomatic and financial resources to the United Nations and the European regional organisations is substantial. Russia always wishes to demonstrate that it complies meticulously with its obligations. Indeed, in 2007 the European Court of Human Rights heard 192 complaints against Russia. Russia won just 6, and in 11 there was a friendly settlement. Russia paid in full the orders for compensation in every case it lost, millions of Euros.<sup>77</sup> It should be recalled that the EU, despite considerable pressure from Strasbourg, and despite its prominent commitment to human rights, has not yet ratified the European Convention on Human Rights.

<sup>77</sup> See *Anastasiya Kornya* "In the European Court they understand the words 'SIZO' and 'Kresty' without translation" *Vedomosti* 22 February 2008, at <http://www.vedomosti.ru/newspaper/article.shtml?2008/02/22/142259> (last visited 02 April 2009).