



Use of gas against terrorists during the Moscow theatre siege was justified, but the rescue operation afterwards was poorly planned and implemented

In today's Chamber judgment in the case [Finogenov and others v. Russia](#) (applications no. 18299/03 and 27311/03), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

No violation of Article 2 (right to life) of the European Convention on Human Rights concerning the decision to resolve the hostage crisis by force and use gas;

Violation of Article 2 of the Convention concerning the inadequate planning and implementation of the rescue operation;

Violation of Article 2 concerning the ineffectiveness of the investigation into the allegations of the authorities' negligence in planning and carrying out the rescue operation as well as the lack of medical assistance to hostages.

The case concerned the siege in October 2002 of the "Dubrovka" theatre in Moscow by Chechen separatists and the decision to overcome the terrorists and liberate the hostages using gas.

Principal facts

The 64 applicants were hostages or relatives of those taken hostage on 23 October 2002 in a Moscow theatre (also known as the "Nord-Ost" or "Dubrovka" theatre) by a group of more than 40 terrorists belonging to the Chechen separatist movement.

For the next three days more than 900 people were held at gunpoint in the theatre. The theatre was also booby-trapped and 18 suicide bombers were positioned among the hostages.

The terrorists demanded, among other things, the total withdrawal of Russian troops from the territory of Chechnya.

A crisis cell under the command of the Federal Security Service ("the FSB") was set up to conduct negotiations and liberate hostages. FSB designed a plan of liberation of the hostages by military force, in absolute secrecy; in addition, the crisis cell made preparations for the eventual mass evacuation of hostages and medical assistance to them. Those preparations were based on the assumption that in the event of escalation the hostages would be injured in an explosion or by gunshots. Several rescue services were deployed on the site; in addition, certain city hospitals had their admission capacity increased and were given additional equipment; additional medics were mobilised; ambulance stations were warned about the possible mass deployment of ambulances;

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

and the doctors received instructions on sorting the victims on the basis of the gravity of their condition.

In the meantime, negotiations were carried out with the terrorists. Several hostages were released and some food and drinking water accepted. Several people were killed by the terrorists during that period; it is not clear whether those shot were subjected to exemplary executions or killed for resisting the terrorists or because the terrorists thought they had infiltrated the theatre to spy on them.

In the applicants' opinion, the terrorists were prepared to negotiate further. However, the authorities considered that there was a real risk of the hostages being killed on mass either by execution or in an explosion. Therefore, in the early morning of 26 October at about 5-5.30 a.m., the Russian security forces pumped an unknown narcotic gas into the main auditorium through the building's ventilation system and the special squad stormed the building. All the terrorists were killed. While the majority of the hostages were liberated, 125 of them died either on the spot or in the city hospitals,. Some of those who survived continue to suffer from serious health problems.

The applicants claimed that the rescue operation was chaotic on all fronts, starting with the evacuation of the hostages and their sorting, then during their transportation to the hospitals and, finally, on their arrival at the hospitals. In particular, unconscious hostages were piled up on the ground outside the building with some of them dying simply because they were laid on their backs and suffocated on their own vomit or tongues. According to the applicants, there were not enough ambulances, so the hostages were transported to hospitals in ordinary city buses without medical staff and without any assistance from traffic police to facilitate their quick arrival. The medical staff in the hospitals were not equipped to receive so many victims, had not been informed of the use of gas or its properties and did not have appropriate equipment. Furthermore, the rescue teams, ambulances and hospitals had not had enough Nalaxone, the antidote to the gas, in stock. They also submitted a report by a microbiologist (an American university professor), which concluded that the authorities should have anticipated a significant number of deaths as well as the need for immediate medical intervention and that pre-existing illnesses would not have contributed significantly to the lethal effects of the gas. Press interviews with former hostages, rescue workers and bus drivers, and video recordings showing the evacuation were also produced to corroborate the applicants' allegations.

The Government submitted that the decision to storm the building had fully complied with domestic norms, as well as Russia's international obligations and had only been taken once negotiations had failed. Hostages themselves subsequently testified that they saw no other solution as the terrorists had told them that they were prepared to die. Evacuation and transportation of hostages had been quick and well-organised and the hospitals had been ready and equipped to admit them. In general, the rescue operation had been carried out in the most efficient way possible, given the circumstances.

In the aftermath of the events the Moscow City Prosecution Office ("the MPO"), opened a criminal investigation. As to the terrorist act itself, the terrorists and their supporters were identified, and most of the circumstances of the hostage taking established. An accomplice to the terrorists outside the theatre was brought to trial and convicted. At the same time, the MPO repeatedly refused to investigate the actions of the authorities during the crisis. Thus, in October 2003 the investigation issued its intermediate conclusions and, relying on the autopsy results, found that the 125 hostages had died from a combination of individual weaknesses and chronic illnesses, exacerbated by the stress of three days of captivity, and that the gas used had at best had an "indirect effect" on their demise. The death of the hostages was therefore attributed to "natural" factors and not the use of the gas by the FSB. Further, relying on the reports of the public health officials and rescue structures, which generally described the rescue

operation as successful, the MPO decided that there was no need to examine that issue further.

During the investigation a large number of other witnesses were also questioned. Many of them, in particular ordinary doctors and paramedics as well as rescue workers,, described the rescue operation in a much more critical tone. In particular, they testified to:

- an absence of centralised coordination on the field as well as amongst various rescue and medical services;
- not knowing what kind of treatment the victims had already received (and notably confusion as to which hostages had received Nalaxone injections as those who had been injected had not been identified with a mark, resulting in some receiving two or three shots);
- heavy trucks and bulldozers blocking the circulation around the theatre;
- a lack of medical staff and equipment in buses transporting the victims;
- ambulance teams and bus drivers not knowing where to take the victims (which resulted in some hospitals receiving simultaneously far too many patients in a critical state)
- not having any information about the use of gas, let alone instructions as to how to deal with opiate poisoning; and,
- a shortage of the antidote.

In the following years the applicants and a group of Russian parliamentarians repeatedly tried to reopen the investigation into the alleged negligence of the authorities during the storming and the rescue operation. However, the MPO replied that there was no case to answer.

Complaints, procedure and composition of the Court

The applicants complained that the use of force by the security forces had been disproportionate, the use of gas having done more harm than good. They also complained that the rescue operation had been inadequately planned and carried out and that there had been a lack of medical assistance provided to the hostages. Lastly, they alleged that the criminal investigation had focused on the siege itself and had failed to effectively bring to light any inadequacies in the authorities' organisation of the rescue operation. They relied in particular on Article 2 (right to life).

The application was lodged with the European Court of Human Rights on 26 April 2003 and on 18 August 2003.

Judgment was given by a Chamber of seven, composed as follows:

Nina **Vajić** (Croatia), *President*,
 Anatoly **Kovler** (Russia),
 Peer **Lorenzen** (Denmark),
 Elisabeth **Steiner** (Austria),
 Khanlar **Hajiyev** (Azerbaijan),
 Linos-Alexandre **Sicilianos** (Greece),
 Erik **Møse** (Norway), *Judges*,

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Whether the gas used by the authorities could be described as “lethal force”

The authorities on numerous occasions declared that the gas had been harmless, and that according to the official medical examinations of the bodies, no direct causal link had existed between the use of the gas and the death of the hostages. The Court was not given an exact formula of the gas. It was prepared to accept that some of the victims had indeed died of pre-existing health problems. However, it is contrary to common sense to conclude that 125 people of different ages and physical conditions had died almost simultaneously and in the same place because of various illnesses, immobility, stress and lack of fresh air. Even if the gas had not been a “lethal force” but rather a “non-lethal incapacitating weapon”, it had been dangerous and even potentially fatal for a weakened person, so the case clearly falls within the ambit of Article 2.

Decision to storm the theatre and use gas

More important than the question of the use of force during the storming of the theatre, which could be justified on the ground of “defending any person from unlawful violence” (Article 2 § 2 of the Convention), is the question of whether less drastic means could have been used to resolve the hostage crisis.

The Court stressed that in situations of such a scale and complexity, it was prepared to grant the domestic authorities a margin of appreciation, even if now, with hindsight, some of the decisions taken by the authorities could appear open to doubt,

It was too speculative to assert that the terrorists would not carry out their threats: everything suggested the contrary. The situation – heavily armed, well-trained terrorists who were dedicated to their cause making unrealistic demands such as the withdrawal of Russian troops from Chechnya – had been alarming. The first days of negotiations had failed and the hostages were becoming more and more vulnerable both physically and psychologically. There had therefore been a real, serious and immediate risk of mass human losses and the authorities had every reason to believe that a forced intervention had been “the lesser evil”.

Although the solution, using a dangerous and even potentially lethal gas, had put at risk the lives of hostages and hostage-takers alike, it had left the hostages a high chance of survival. Indeed, the use of gas facilitated the liberation of the hostages and reduced the likelihood of an explosion.

The Court therefore concluded that, in the circumstances, the authorities’ decision to end the negotiations and resolve the hostage crisis by force by using gas and storming the theatre had not been disproportionate and had not, as such, breached Article 2.

Rescue operation – planning and implementation

While the Court was prepared to give to the authorities some leeway insofar as the military aspects of the operation were concerned, the Court scrutinised more closely the evacuation and medical assistance to the hostages.

The Court stressed that the rescue operation had not been spontaneous. Even if the use of the gas was kept secret from the medics and the rescue services, the large number of people in need of medical assistance had come as no surprise, and some general preparations could have been made in advance.

Despite that, it was evident that the authorities had not been sufficiently prepared. The Government could provide no written documents with a comprehensive description of the evacuation plan. Indeed, the crisis cell ordered the deployment of hundreds of doctors, rescue workers and others to assist the hostages but it seemed that little had been done to coordinate the work of those services. That flaw was corroborated by many eye-witnesses and other evidence, namely several video recordings of the evacuation, showing that everyone seemed to have been working on their own initiative. Nor did the original evacuation plan provide instructions as to how information about victims and their condition was to be exchanged between the various rescue services. This had probably resulted in certain hostages having been injected more than once with the antidote, whereas others did not get their injections. Nor could any sorting be seen on the video: bodies had been placed haphazardly, and this had been confirmed by witnesses who testified to having seen dead bodies placed in the same buses as those who were still alive. Although mass transportation had been provided, many witnesses had also noted a lack of medical assistance in buses. Furthermore, there had been no clear plan for distribution of victims amongst the various hospitals. The hospitals' admission capacity had been increased, but, according to witness statements by doctors and paramedics, the ambulance teams and bus drivers had no idea where to take the victims: as a result, many ambulances and city buses transported victims to the closest hospitals thus creating bottlenecks and delaying medical assistance to the victims.

Moreover, the video recording showed how the hostages had been exposed to the gas for more than two hours, from 5.30 a.m., when the storming began, until at least 7.05 a.m., when the mass evacuation had started. It was not clear why the evacuation had started so late and why, if there had been at least 90 minutes between the gas dispersal and the mass evacuation, medics and rescue workers had not been informed of the use of gas. If they had had some kind of forewarning, perhaps the majority of the hostages would have been placed in the recovery position, instead of face-up with the increased risk of suffocation that that had involved.

Post-mortem reports showed that the majority of the hostages had died between 8 and 8.30 a.m., that is on their way to hospital or shortly after their arrival. Immediate medical assistance had therefore been crucial. However, little information is available as to what kind of care the hostages had received on the spot and many witnesses testified to a shortage of the antidote.

The Court therefore found that, as a whole, the Russian authorities had not taken all feasible precautions to minimise the loss of civilian life as the rescue operation had been inadequately prepared and carried out, in violation of Article 2.

Investigation

The Court noted that the investigation into the terrorist act itself had been quite ample and successful.

However, the investigation into the rescue operation had been manifestly incomplete. First and foremost, the formula of the gas has never been revealed. Next, the investigative team had made no attempt to question all the members of the crisis cell such as FSB officers who could have given more information about the planning of the operation as well as the decision to use gas and its dosage. Nor had the special squad been questioned or other chance witnesses, such as those who had helped the FSB to plant the gas recipients. It was indeed surprising that all of the crisis cell's working papers had been "destroyed". As a result, the Court cannot know when the decision to use the gas had been taken and by whom, how much time the authorities had had to evaluate the possible side-effects of the gas and why other services participating in the rescue operation had been informed about the use of gas with such delay. Other important information had not been established either such as: how many doctors had

been on duty in the hospitals ready to admit victims and whether that number was sufficient; what instructions ambulances and city buses had been given as to where they were to transport victims; which officials had coordinated efforts on the spot and what instructions they had received; why it had taken an hour and a half to start the mass evacuation; and, how much time it had taken to kill the terrorists and neutralise the bombs.

Lastly, the investigative team, which included FSB representatives and experts in explosive devices directly responsible for the planning and carrying out of the storming and the rescue operation, had not been independent.

The Court concluded that the investigation into the authorities' alleged negligence during the rescue operation had been neither thorough nor independent and had not therefore been effective, in further violation of Article 2.

Just satisfaction

The Court held under Article 41 that Russia was to pay all 64 applicants a total award – as regards non-pecuniary damage – of 1,254,000 euros (EUR), and EUR 30,000, jointly, for costs and expenses. Two of the applicants who do not live in Russia were awarded EUR 2,000, each, for the travel expenses incurred when they participated in the domestic proceedings in Russia.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.