COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF MUSAYEVA AND OTHERS v. RUSSIA

(Application no. 74239/01)

JUDGMENT

STRASBOURG

26 July 2007

FINAL

31/03/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Musayeva and Others v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 5 July 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 74239/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Russian nationals, Mrs Aminat Dautovna Musayeva, Mr Alamat Reshetovich Musayev and Mrs Elza Uvaysovna Zurapova ("the applicants"), on 20 September 2001.

2. The applicants, who had been granted legal aid, were represented by Mrs L. Khamzayeva, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants complained, in particular, of the torture and death of their relatives following their unlawful detention, of the absence of adequate investigation into these events, and the lack of effective remedies in respect of those violations. They relied on Articles 2, 3, 5 and 13 of the Convention.

4. On 29 August 2004 the President of the First Section decided to grant priority to the application under Rule 41 of the Rules of Court.

5. By a decision of 1 June 2006, the Court declared the application partly admissible.

6. The applicants and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1954, 1946 and 1977 respectively and live in the village of Gekhi, Urus-Martan District, Chechnya.

8. The facts of the case as submitted by the parties are summarised in section A below (paragraphs 9 - 55). A description of documents submitted by the Government is contained in section B below (paragraphs 56 - 59).

A. The facts

9. The first two applicants are a married couple. They have four children, two of whom – Ali Musayev, born in 1972, and Umar Musayev, born in 1977 – lived together with their parents in a household comprising two houses in Gekhi. The third applicant was married to Ali Musayev.

1. Detention of Ali and Umar Musayev

10. On 8 August 2000 a Russian armoured personnel carrier (APC) was attacked and blown up in the vicinity of Gekhi and the military responded with a “sweeping” operation in the village.

11. During this operation an armed man, who was being pursued by soldiers, entered the applicants' house and hid in one of the rooms. According to the Government, the man was A., a member of an illegal armed group. The servicemen strafed the house, using machine-guns and grenade-launchers. Two daughters and a grandson of the first two applicants, the second applicant, the third applicant, Ali Musayev and Umar Musayev were inside the house at the time. A two-year-old grandson of the first two applicants was in a car parked in the courtyard.

12. A. was killed when the military threw nine grenades into the house and shelled it from the APC. The servicemen then wrapped the corpse in a blanket and put it into Ali Musayev's car, a white Zhiguli. They then searched the house. Umar Musayev, who had been feeling ill that day and was lying in bed, was blindfolded and ordered to step out of the house and lie down.

13. Major S., an officer in command, seized the identity papers, car documents and car key belonging to Ali Musayev, who was then forced into the car. Umar Musayev was put into an APC which had no visible vehicle number. They were both taken away.

14. The first applicant later found out that the APC number was 108 and belonged to the Main Intelligence Department of the Ministry of Defence of

Russia (*Главное разведывательное управление Министерства Обороны РФ*).

15. Following their detention, Ali and Umar Musayev were brought to a temporary operational headquarters of the military commander's office situated near Gekhi. According to the first applicant, who referred to unnamed witness statements, Ali Musayev was beaten there by federal officers.

16. Thereafter the Musayev brothers were brought to the Urus-Martan Temporary Office of the Interior (*временный ОВД Урус-Мартановского района*, "the VOVD") and questioned. The first applicant submitted, with reference to the witnesses' accounts, that after the interrogation her sons and three other persons apprehended in Gekhi that day had again been brought to the temporary operational headquarters. At 5 p.m. the military released the other three persons, but not Ali and Umar Musayev, of whom there was no further news.

2. Search for Ali and Umar Musayev

17. Between 8 and 10 August 2000 federal troops sealed off the village of Gekhi. On the latter date, after restrictions were lifted, the first applicant went to Urus-Martan and notified the head of the district administration (*глава администрации*) of the detention of her sons.

18. She then went to the district military commander's office (*районная военная комендатура*) where she noticed her elder son's car in the courtyard. The first applicant applied to military commander G. with enquiries about her sons and the car. The military commander told the first applicant that he had no information concerning Ali and Umar Musayev and advised her to come back in two days. As regards the car, Mr G. stated that it was "unclean".

19. On the same date the first applicant also applied to the Urus-Martan prosecutor's office (*прокуратура Урус-Мартановского района*), claiming that her sons had been unlawfully detained.

20. On 11 or 12 August 2000 the first applicant went to the military commander's office again. Mr G. told her that he had not participated in the "sweeping" operation on 8 August 2000 and had no information about the whereabouts of her sons. Later, the military commander stated that the Musayev brothers had been taken to the main federal military base in Khankala. As to the car, Mr G. said that a database check had confirmed that it was "clean" and that the first applicant had to produce a power of attorney to recover the vehicle. The first applicant stated that she did not have this paper, as all the documents had been in the seized car, and the military commander refused to return the vehicle. In the first applicant's submission, the car was returned only on 4 October 2000, after her son-in-law had brought a copy of the power of attorney from a vendor from Dagestan.

21. During August and September 2000 the first applicant repeatedly applied to the military commander's office, the VOVD and prosecutors at various levels in connection with her sons' disappearance. She received hardly any substantive information from official bodies in reply to her enquiries. The responses were mainly formal ones stating that her requests had been forwarded to different prosecutor's offices.

22. In a letter of 11 September 2000 an acting prosecutor of the Urus-Martan District informed the first applicant that Ali and Umar Musayev were not detained in the VOVD, that they were not listed in the VOVD registration papers, and that no criminal proceedings had ever been brought against them. The letter further stated that information requests sent to military units had remained unanswered, and that the head of the Urus-Martan VOVD had been instructed to commence a criminal investigation into the disappearance of the Musayev brothers.

3. Discovery of the bodies of Ali and Umar Musayev

23. According to the applicants, on 11 August 2000 the Russian TV channel NTV showed Ali Musayev's body as that of a rebel fighter killed during the “sweeping” operation in Gekhi on 8 August 2000. The applicants did not submit a copy of that recording.

24. In early September a serviceman of a military unit stationed in the village of Tyangi-Chu produced a plan of a burial site near the cemetery of Gekhi, where, he claimed, Ali and Umar Musayev had been buried. According to the applicants, they had to pay for the indication of the site.

25. On 13 September 2000 the applicants notified the head of the administration of Gekhi, the Urus-Martan District Prosecutor's Office, the military commander's office and the district administration of Urus-Martan (*администрация Урус-Мартановского района*) that they were going to excavate the grave.

26. On the same date the second applicant exhumed the grave in the presence of a police officer and officials from the local administration and found four corpses, all of which showed signs of having met a violent death. He identified his sons' bodies by fragments of the remaining teeth. The other two bodies were identified as that of the man killed in the applicants' house on 8 August 2000 and that of a resident of Gekhi, who had been detained along with the Musayev brothers. It appears that the remains were examined by officials of the administration of Gekhi, who issued a certificate in this respect.

27. The police officer undertook no investigative actions at the excavation site. According to the Government, the applicants refused to submit the bodies for an autopsy on account of their national and religious traditions. The applicants buried the remains shortly afterwards, without taking photographs or inviting a medical doctor to attend before the burial.

28. On 7 September 2001 the Urus-Martan Town Court certified the death of Ali Musayev, upon the first applicant's request. The court heard evidence from two witnesses, who confirmed the first applicant's submissions about the detention of her son on 8 August 2000, the discovery of his body and his burial on 13 September 2000 at the Gekhi village cemetery. The court certified that Ali Musayev's death had occurred on 13 September 2000 in the village of Gekhi. It does not appear that a court certification of death was made in respect of Umar Musayev.

29. On 18 September and 9 October 2001 respectively the registry office of the Urus-Martan District issued death certificates for Ali Alamatovich Musayev, born in 1972, and Umar Alamatovich Musayev, born in 1977. The date and the place of death were recorded as 12 September 2000, Gekhi.

30. On 8 October 2001 a medical certificate of death was issued for Umar Musayev. Referring to the certificate of the administration of Gekhi and a certificate of the Urus-Martan prosecutor's office, the medical certificate stated that Umar Musayev's death had been caused by multiple stab wounds and severe injuries. The date and the place of death were recorded as 12 September 2000, Gekhi.

4. Official investigation

31. On 18 September 2000 the Urus-Martan VOVD refused to institute criminal proceedings in connection with the discovery of four bodies on 13 September 2000, referring to the absence of essential elements of a crime.

32. On 18 October 2000 the Urus-Martan prosecutor's office set aside the above decision and instituted criminal proceedings under Article 105 (2-a) of the Russian Criminal Code (murder of two or more persons). The case file was assigned the number 24047.

33. In a letter of 1 November 2000 the military prosecutor of military unit no. 20102 (*военная прокуратура – войсковая часть 20102*) informed the first applicant that a suspect in the blowing-up of the APC had been found in their house, and that her sons had been detained for an identity check in this connection. The letter confirmed that after being apprehended Ali and Umar Musayev had been brought to the Urus-Martan VOVD but stated that no further information about them was available, since they were not listed among the detained persons. The letter went on to say that on 13 September 2000 a burial site had been excavated by police officers who had found four male bodies there. Two of the bodies had been identified as those of the first applicant's sons. The letter also stated that Major S., the officer in charge of the operation, had left for his permanent location in Penza, and that efforts were being made to obtain information from him about the detention of Ali and Umar Musayev.

34. On 27 November 2000 the Urus-Martan prosecutor's office received a letter from a district prosecutor of the Penza Region informing him that on 15 November 2000 Major S. had been questioned about the operation of 8 August 2000. The transcript of this interview was enclosed. Major S. stated the following:

> "From 18 June until 22 September 2000 I was seconded to the town of Urus-Martan, the Chechen Republic. ...
>
> In addition to the Urus-Martan VOVD, military personnel of the troops of the interior and of the army (*военнослужащие из внутренних и федеральных войск*) and the military commander's company (*комендантская рота*) also took part in the operation [on 8 August 2000]. I cannot say which particular person was in command of the operation. From our department there was the head of the Urus-Martan VOVD, Lieutenant-Colonel Sh. There were also three generals, whose names I do not know, and military commander G. in the vicinity of the village of Gekhi.
>
> Acting on the instructions of the superiors of the alignment, I and a group of 30 – 35 men arrived by bus and APC in Gekhi at around 11 a.m. ... About 20 men in the group were police officers, the rest were army servicemen. I was in charge of the police officers, and the [army] servicemen were under the command of an officer with the rank of captain, whose name I do not know. I do not know in which particular military units those servicemen served and at whose disposal the APC with the vehicle number 108 was.
>
> During the "sweeping" operation we went to the courtyard of one of the houses. It was subsequently established that the house belonged to the Musayev family. ...
>
> I approached one of the windows and looked inside. I saw a man wearing an ammunition jacket and holding a pistol. Having seen me, the man fired ... at me. ... In response to the shots from the house, our personnel opened fire. ... [During the fight another] man came over to me and said that he lived in Moscow and was a relative of this family. ...
>
> One of the soldiers threw 6 grenades into the house, but the shots from the house did not stop. Then [we] started shooting at the criminal from the APC, and only then did the fire from the house cease, but the house caught fire. ...
>
> Only one man seemed to have been shooting from the house, and only one body was found inside. The soldiers put this corpse into a white car and the relative from Moscow also got into this vehicle. Then I went out and saw two cars near the house. The servicemen said that they had seized those cars. I cannot tell who ordered them to seize the cars. I did not give such an order. Besides, on the APC I noticed another detained man in a white shirt. I do not know who ordered that man to be detained. We escorted the detained men and two cars to the outskirts of Gekhi, where the command centre of the alignment was located. ... On the instructions of the superiors, the detained persons and the cars were left at the command centre. Upon my return from Gekhi, somebody told me that the detainees and the red car had been released. The detainees were not brought to the Urus-Martan VOVD, as upon my return there in the evening I saw neither the white car nor the persons apprehended during the fight at the Musayevs' house. I do not know whether they were brought to the military commander's office and who escorted them. ... Following the instruction of the

superiors, we left these detainees at the command centre, and I have no further information about them, or about the white car."

35. Having regard to the transcript, the prosecutor of the Urus-Martan District ordered the military commander G. to be questioned. According to the first applicant, that order was never complied with.

36. In a letter of 4 January 2001 the military prosecutor of military unit no. 20102 informed the Urus-Martan prosecutor's office and the first applicant that an inquiry had been carried out into the first applicant's allegations, and that no involvement of the military personnel of the Ministry of Defence or of the interior troops of the Ministry of the Interior in the detention of the Musayev brothers had been established, and therefore no criminal proceedings would be brought against the aforementioned personnel.

37. On 18 December 2000 the Urus-Martan prosecutor's office suspended the criminal proceedings in case no. 24047 for failure to establish the identity of the alleged perpetrators. The first applicant was notified of that decision in a letter of 18 January 2001.

38. On 7 August 2001 the Urus-Martan prosecutor's office quashed the decision of 18 December 2000, stating that the investigation had been incomplete and that, in particular, no forensic medical examination of the bodies had been carried out and the witnesses who had identified the corpses had not been questioned. The prosecutor's office thus ordered that the investigation be resumed.

39. On an unspecified date the first applicant received a letter from the Urus-Martan prosecutor's office dated 24 August 2001. The letter contained a restatement of the facts of the detention of Ali and Umar Musayev and the discovery of their bodies and informed the first applicant that a criminal investigation had been commenced and that the case file had been assigned the number 24047. The letter also stated that the first applicant would be informed of any further developments in the case.

40. On 8 September 2001 the criminal proceedings in case no. 24047 were adjourned as it was impossible to establish the identity of the alleged perpetrators. The proceedings were then resumed pursuant to a decision of the Urus-Martan prosecutor's office dated 1 April 2002 and suspended a month later.

41. On 22 July 2002 the prosecutor's office of the Chechen Republic (*прокуратура Чеченской Республики*, "the republican prosecutor's office") set aside the decision of 1 May 2002 and resumed the investigation, ordering the investigators "to study thoroughly the circumstances of the Musayev brothers' disappearance and to establish the identity of those responsible".

42. On 22 August 2002 the Urus-Martan prosecutor's office granted the first applicant the status of victim of a crime and civil claimant.

43. On 26 August 2002 the Urus-Martan prosecutor's office suspended the investigation into the death of the Musayev brothers.

44. In a letter of 27 August 2002 the Prosecutor General's Office informed the first applicant that the investigation into her sons' death had been resumed on 19 July 2002 and was being supervised by them.

45. Between 26 August 2002 and 14 October 2004 the proceedings remained suspended and there were no developments in the case.

46. In September 2004 the present application was communicated to the Russian Government. On 14 October 2004 the Urus-Martan prosecutor's office resumed the investigation, referring to the fact that a number of essential steps had not previously been taken and giving detailed instructions to the investigators as to what measures should be taken.

47. In a letter of 14 October 2004 the Urus-Martan prosecutor's office informed the first applicant that the proceedings in criminal case no. 24047 had been recommenced on that date.

48. On 14 November 2004 the Urus-Martan prosecutor's office notified the first applicant of the suspension on the same date of the preliminary investigation into her sons' murder in the absence of those responsible.

49. It appears that at some point the investigation was resumed, then suspended on 21 April 2005 and recommenced on the same date. It was then suspended on 21 May and 31 October 2005 and resumed on 30 September 2005 and 18 August 2006 respectively.

50. Referring to the information provided by the Prosecutor General's Office, the Government submitted that the investigation into the murder of Ali and Umar Musayev had commenced on 18 October 2000 and had then been suspended and resumed on several occasions, but had so far failed to identify those responsible. According to the Government, the applicants were duly informed about all decisions taken during the investigation. They further submitted that the first applicant had been questioned on 20 October and 12 December 2000, 4 April 2002, 19 and 23 October 2004 and 1 April 2005 and had been granted the status of victim and been declared a civil claimant on 20 October 2000 and 22 August 2002 respectively. The second applicant had been questioned as a witness on 23 October 2000, 5 April, 20 and 23 October 2002 and 12 April 2005. Apart from the first two applicants, the investigating authorities had also questioned at least 18 witnesses, including the applicants' relatives and acquaintances, residents of Gekhi, the head of the local administration and a number of servicemen of law-enforcement agencies who had been working in the Chechen Republic at the material time. The Government referred in particular to the statement of Mr M., an investigator of the Urus-Martan prosecutor's office, to the effect that military commander G. had told him that the Musayev brothers had been detained and then released. The Government did not specify on which date this statement had been made. They also submitted that military commander G. had not been questioned

during the investigation, as he had been killed on 29 November 2001 in a terrorist attack. The Government did not indicate any other names of the servicemen who had allegedly been questioned by the investigators.

51. According to the Government, it was impossible to identify other witnesses in the case, but the search for them was currently under way. The Government further stated that the applicants had refused to disclose the place of burial of Ali and Umar Musayev and allow the investigating authorities to exhume the bodies so as to enable forensic experts to examine them. Finally, the Government stated that the investigating authorities had sent a number of queries to various State bodies on 16 December 2000, 20 and 26 October 2002, 20 October, 1 and 14 November 2004, 28, 30, 31 January, 3 February, 23 and 25 March and 5 May 2005 and undertaken other investigative actions, but did not specify what those actions had been.

5. Civil proceedings

52. On unspecified dates the first two applicants issued separate sets of civil proceedings against the Ministry of Finance in the Basmanny District Court of Moscow ("the District Court"), seeking compensation for non-pecuniary damage in connection with the unlawful detention of their sons.

53. On 23 December 2003 and 21 May 2004 the District Court delivered two similar judgments. It established that on 8 August 2000 in the house of the Musayev family in the village of Gekhi, Urus-Martan District, a member of an illegal armed group had been found and killed, as he had shown armed resistance. The applicants' sons, Ali Musayev and Umar Musayev, were detained and escorted to the Temporary Office of the Interior of the Urus-Martan District so as to establish the circumstances of the above-mentioned incident. On 13 September 2000 their corpses were found at the outskirts of Gekhi, and criminal proceedings were instituted in this connection but later suspended, as no culprits could be identified. The court further stated that under Article 1069 of the Civil Code of Russia the State was liable only for damages for its agents' actions that were unlawful. It then noted that the military operation in Chechnya had been launched by virtue of Presidential Decree no. 2166 of 30 November 1994, and Governmental Decree no. 1360 of 9 December 1994 which had been found constitutional by the Constitutional Court of Russia on 31 July 1995, except for two provisions of the governmental decree. In the latter respect the court noted that the said two provisions had never been applied to the applicants and that "it did not follow from the evidence submitted that there was a causal link between the loss by [the first two applicants] of their sons and any unlawful actions on the part of the State bodies". The court concluded that the applicants' claims were not based on domestic law and dismissed them accordingly.

54. On 8 July 2004 the Moscow City Court rejected an appeal by the first applicant and upheld the judgment of 23 December 2003.

55. It is unclear whether the second applicant appealed against the judgment of 21 May 2004, and, if so, what the outcome of the appeal was.

B. Documents submitted by the Government

1. The Court's requests for the investigation file

56. In September 2004, at the communication stage, the Government were invited to produce a copy of the investigation file in criminal case no. 24047 opened into the killing of Ali and Umar Musayev. Relying on the information obtained from the Prosecutor General's Office, the Government replied that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses. In March 2005 the Court reiterated its request and suggested that Rule 33 § 3 be applied. In reply, the Government stated that the submission of the case file would breach the relevant national legislation, given that it contained classified information of a military nature and personal data concerning witnesses. At the same time, the Government suggested that a Court delegation could have access to the file at the place of the preliminary investigation with the exception of "the documents [disclosing military information and personal data concerning the witnesses], and without the right to make copies of the case file and transmit it to others".

57. On 1 June 2006 the application was declared partly admissible. At that stage the Court again invited the Government to submit the investigation file and to submit information concerning the progress in the investigation. In September 2006 the Government informed the Court of the latest dates on which the investigation had been suspended and reopened and produced 39 documents running to 47 pages from the case file, which, as could be ascertained from the page numbering, comprised at least 423 pages. The documents included:

(a) a procedural decision of 18 October 2000 instituting criminal proceedings in connection with the discovery of four bodies on 13 September 2000;

(b) numerous procedural decisions suspending and reopening criminal proceedings in connection with the killing of the applicants' relatives;

(c) a number of investigators' decisions taking up case no. 24047

(d) letters informing the first applicant of the suspension and reopening of the criminal proceedings in case no. 24047.

58. The Government did not furnish the Court with any other documents from the case file.

2. Letters from the Russian courts

59. The Government enclosed a number of letters from various higher courts in Russia, stating that the applicants had never lodged any such complaints about the allegedly unlawful detention of their relatives or challenged in court any actions or omissions of the investigating or other law-enforcing authorities.

II. RELEVANT DOMESTIC LAW

60. Until 1 July 2002 criminal-law matters were governed by the 1960 Code of Criminal Procedure of the RSFSR. On 1 July 2002 the old Code was replaced by the Code of Criminal Procedure of the Russian Federation.

61. Article 161 of the new CCP enshrines the rule that data from the preliminary investigation may not be disclosed. Part 3 of the same Article provides that information from the investigation file may be divulged with the permission of a prosecutor or investigator but only in so far as it does not infringe the rights and lawful interests of the participants in the criminal proceedings and does not prejudice the investigation. It is prohibited to divulge information about the private life of the participants in criminal proceedings without their permission.

62. The Law on Complaints to Courts against Actions and Decisions Violating the Rights and Freedoms of Citizens (as revised by the Federal Law of 14 December 1995) provides that any citizen has the right to lodge a complaint with a court when he or she considers that his or her rights have been infringed by an unlawful action or decision of a State agency, local self-government body or an institution, enterprise or association, non-governmental organisation or official or State employee. Complaints may be lodged either directly with a court or with a higher State agency, which must review the complaint within one month. If the complaint is rejected by the latter or there has been no response on its part, the person concerned has the right to bring the matter before a court.

63. Under Section 5 of the Law on Operational Search Activities, an individual who considers that his rights and freedoms have been violated by the bodies carrying out the operational search activities can complain of those actions to a higher body carrying out the operational search activities, a prosecutor or a court.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

A. Submissions of the parties

64. The Government requested the Court to declare the case inadmissible as the applicants had failed to exhaust domestic remedies. They claimed that the applicants could have complained to a court under Article 46 of the Russian Constitution, Section 5 of the Law on Operational Search Activities and the Law on Complaints to Courts against Actions and Decisions Violating the Rights and Freedoms of Citizens about the unlawful detention of their relatives or about the unlawful actions of personnel of law-enforcement agencies, but had failed to do so. In support of their argument, the Government referred to the letters from the Russian courts which they had submitted to the Court (see paragraph 59).

65. The applicants contested the Government's objection. They pointed out that immediately after their relatives' detention and thereafter they had repeatedly applied to law-enforcement bodies, including various prosecutors. This avenue had proved futile, however, given that the criminal investigation had now been pending for several years but had failed to find and identify those responsible. The applicants also stated that there was no specific requirement in national law to have recourse to any other remedy once criminal proceedings were instituted and an investigation was under way. The applicants contended that, in any event, in the absence of an effective investigation any other remedy, including a civil claim, would also be rendered ineffective by the fact that court decisions would be based on the findings made within the context of the criminal investigation, which had so far failed to establish whether State agents had been involved in the murder of the Musayev brothers. In this latter respect the applicants referred to the judgments of Basmanny District Court of 23 December 2003 and 21 May 2004 which had dismissed their claims for compensation for non-pecuniary damage in connection with the unlawful detention on the ground that it had not been established that the applicants had lost their relatives as a result of State agents' unlawful actions.

B. The Court's assessment

66. The Court notes that, in its decision of 1 June 2006, it considered that the question of exhaustion of domestic remedies was closely linked to the substance of the applicants' complaints and that it should be joined to the

merits. It will now proceed to assess the parties' arguments in the light of the Convention provisions and its relevant practice.

67. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to use first the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52; *Akdivar and Others*, cited above, p. 1210, §§ 65-67; and, most recently, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64, 27 June 2006).

68. It is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicants have not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68, or *Cennet Ayhan and Mehmet Salih Ayhan*, cited above, § 65).

69. In the present case, in so far as the Government argued that the applicants had not lodged a complaint in court about the detention of Ali and Umar Musayev, the Court observes that in the period between 8 August and 13 September 2000, when their relatives remained missing, the applicants actively attempted to establish their whereabouts and applied to various official bodies (see paragraphs 17 – 21 above), whereas the authorities denied that they had ever detained the Musayev brothers (see paragraph 22 above). In such circumstances, and in particular in the absence of any proof to confirm the very fact of the detention, even assuming that the remedy referred to by the Government was accessible to the applicants, it is more than questionable whether a court complaint about the unacknowledged detention of the applicants' relatives by the authorities would have had any prospects of success. Moreover, the Government have not demonstrated that the remedy indicated by them would have been capable of providing redress in the applicants' situation, namely that the applicants' recourse to this remedy would have led to the release of the

Musayev brothers and the identification and punishment of those responsible.

70. As regards the period after 13 September 2000, the date on which the corpses of the Musayev brothers were found, a court complaint about their detention would clearly have been an inadequate remedy.

71. In the light of the foregoing, the Court considers that it has not been established with sufficient certainty that the remedy advanced by the Government would have been effective within the meaning of the Convention. The Court finds that the applicants were not obliged to pursue that remedy, and that this limb of the Government's preliminary objection should therefore be dismissed.

72. To the extent the Government argued that the applicants had not complained to a court about the actions or omissions of the investigating or other law-enforcing authorities, the Court considers that this limb of the Government's preliminary objection raises issues which are closely linked to the question of the effectiveness of the investigation, and therefore it would be appropriate to address the matter in the examination of the substance of the applicants' complaints under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

73. The applicants complained of the killing of their relatives and the failure of the domestic authorities to carry out an effective investigation in this respect. They relied on Article 2 of the Convention, which provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Alleged failure to protect the right to life

1. Arguments of the parties

74. The applicants first pointed out that it was undisputed that on 8 August 2000 Ali and Umar Musayev had been taken away from their

home by federal servicemen under the command of Major S. and delivered to the Urus-Martan Temporary Office of the Interior. They referred further to Major S.'s statement to the effect that "on the instructions of the superiors, the detained persons and the cars had been left at the command centre", to the fact that they had purchased from a federal officer a plan of a burial site where the bodies of Ali and Umar Musayev had been found, and to the fact that Ali Musayev's body had been shown on NTV as that of a killed rebel fighter. The applicants argued that, in such circumstances, there was no doubt that federal servicemen had intentionally killed the Musayev brothers. They also pointed out that no evidence had been submitted that the deprivation of their relatives' lives had been justified under Article 2 § 2 of the Convention.

75. The Government conceded that the applicants' relatives had been apprehended by the federal officers and then found dead, but contended that there were no grounds to claim that the right to life of the applicants' relatives had been breached by the State. They referred to a reply of the Prosecutor General's Office stating that the investigation had not established that the killing of the Musayev brothers had been committed by representatives of the federal power structures. The Government specifically referred to the statement of Mr M., an investigator of the Urus-Martan prosecutor's office, to the effect that military commander G. had allegedly told him that the Musayev brothers had been detained and then released.

2. The Court's assessment

(a) General considerations

76. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom,* judgment of 27 September 1995, Series A no. 324, §§ 146-147).

77. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible

explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (see, amongst other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited therein).

78. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV).

(b) Application in the present case

79. The Court observes that although the Government denied the State's responsibility for the killing of the applicants' two relatives, they acknowledged the specific facts underlying the applicants' version of the Musayev brothers' detention and deaths. In particular, it is common ground between the parties that on 8 August 2000 Ali and Umar Musayev were apprehended by federal servicemen in the course of a special operation and delivered to the temporary headquarters of the federal forces near the village of Gekhi. It was not alleged by the Government that the applicants' relatives had had any pre-existing injuries or active illnesses. The Court further notes the Government's reference to the statement of Mr M., an investigator of the Urus-Martan prosecutor's office, to the effect that military commander G. had allegedly told him that the Musayev brothers had been detained and then released. It notes that this statement has not been corroborated by any other witness statements, such as, in particular, that of military commander G., who was never questioned, or any other evidence. The Government did not produce a transcript of Mr M.'s interview to which they referred, any formal records attesting the date of the Musayev brothers' arrest or release or any others documents. The Court therefore regards the statement referred to by the Government as unreliable and untenable on the facts and finds it established that Ali and Umar Musayev were apprehended in good health and placed in custody under the control of the State.

80. The parties further agreed that four dead bodies were found in a burial site on the outskirts of Gekhi on 13 September 2000. Two of the bodies were identified as those of the Musayev brothers, whilst the two other corpses were that of Mr A., a man killed in the applicant's house on 8 August 2000, and that of a resident of Gekhi detained on the same date, along with the applicants' relatives. The identity of the deceased and the violent nature of their deaths were acknowledged by the domestic authorities, who had instituted criminal proceedings into the murder, and

were never disputed by the Government. The Court also notes that the formal date of the Musayev brothers' death, 12 September 2000, remained undisputed by the Government.

81. On the facts of the case, it is therefore clear that the applicants' relatives were taken into custody in apparent good health and their bodies later found showing signs of having met a violent death. The Court considers it established that the applicants' relatives died whilst detained by the federal forces. In the absence of any plausible explanation on the part of the Government as to the circumstances of the Musayev brothers' deaths, it further finds that the Government have not accounted for the deaths of Ali and Umar Musayev during their detention and that the respondent State's responsibility for these deaths is therefore engaged.

82. Accordingly, there has been a violation of Article 2 of the Convention in this respect.

B. Alleged inadequacy of the investigation

1. Submissions of the parties

83. As regards the procedural aspect of Article 2 of the Convention, the applicants claimed that the authorities had defaulted in their obligation to carry out an effective investigation into the circumstances of the deaths of Ali and Umar Musayev. They argued that the investigation had fallen short of the Convention standards. In particular, it does not appear that the authorities adequately investigated the possible involvement of the military personnel in the killing of Ali and Umar Musayev. Furthermore, the identity of the generals in charge of the "sweeping" operation that had been conducted in the village of Gekhi on 8 August 2000 were never established. Moreover, the investigating authorities never attempted to eliminate substantial discrepancies between the accounts of the events of 8 August 2000 made by the first applicant and Major S. by confronting them.

84. The Government claimed that the investigation into the death of the applicants' relatives met the Convention requirement of effectiveness, as all measures envisaged in national law were being taken to identify the perpetrators.

2. The Court's assessment

(a) General considerations

85. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction

the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures (see *İlhan v. Turkey* [GC] no. 22277/93, § 63, ECHR 2000-VII).

86. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Ögur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III). The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (with regard to autopsies, see, *inter alia*, *Salman* cited above, § 106; concerning witnesses, *inter alia*, *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence, *inter alia*, *Gül v. Turkey*, no. 22676/93, § 89, judgment of 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard.

87. In this context, there must also be an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 102-04; and *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000-III, §§ 106-07). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

(b) Application in the present case

88. The Court observes that some degree of investigation was carried out into the killing of the applicants' relatives. It must assess whether that investigation met the requirements of Article 2 of the Convention. The Court notes in this respect that its knowledge of the criminal proceedings at issue is limited to the materials from the investigation file selected by the

respondent Government (see paragraphs 57 - 58 above). Drawing inferences from the respondent Government's behaviour when evidence is being obtained (*Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp.64-65, § 161), the Court will assess the merits of this complaint on the basis of the available information in the light of these inferences.

89. The Court notes that the authorities were immediately made aware of the detention of the Musayev brothers, as the first applicant personally visited the local administration, the district military commander's office and the district prosecutor's office in the days following 8 August 2000, this fact having not been disputed by the Government. However, despite the first applicant's numerous complaints, the authorities made no attempts to investigate the circumstances of the detention and disappearance of Ali and Umar Musayev during the period when they remained missing.

90. Moreover, the authorities were instantly aware of the deaths of the applicants' relatives, as the burial site in which the dead bodies were found was excavated in the presence of the police. The Court is struck by the fact that following the discovery on 13 September 2000 of four bodies which showed signs of having met a violent death, the authorities refused to institute criminal proceedings in this respect with reference to “the absence of the constituent elements of a crime”. It further notes that the official investigation was not commenced until 18 October 2000, which was more than two months after the detention of the applicants' relatives and more than a month after the discovery of their remains. The Court sees no reasonable explanation for such long delays where prompt action was vital.

91. The Court further notes that once the investigation was opened it was plagued with inexplicable shortcomings in taking the most essential steps. In particular, it is clear that no forensic examination or autopsy of the bodies was ever carried out. The Government alleged that after the applicants had buried their relatives, they had refused to disclose the location of the grave to the authorities and to allow a forensic examination. The Court observes in this respect that on 13 September 2000 the second applicant notified the local authorities and the police of his intention to excavate the burial site, according to a plan which he had obtained from a serviceman, and that the exhumation took place in the presence of a number of officials, including a police officer. The police could at least have ensured that proper forensic photographs be taken on the spot, but even this most basic action was not taken. Moreover, it does not appear that the scene of the incident at the applicants' house or the site where the remains of the Musayev brothers and two other men had been found was ever inspected by the investigating authorities in the context of the criminal proceedings.

92. The Court also finds that the investigation can only be described as dysfunctional when it came to establishing the extent of the military and security personnel's involvement in the deaths of the applicants' relatives.

Indeed, although it was acknowledged by the domestic authorities that Ali and Umar Musayev had been apprehended by federal military officers in the course of a "sweeping" operation, delivered to the headquarters and left there (see paragraphs 33 – 34 above), it does not appear that any meaningful efforts were made to investigate the possible involvement of the aforementioned personnel in the murder. The Court is sceptical about the Government's submission that the investigating authorities had questioned a number of servicemen and officials of law-enforcement agencies who had worked in Chechnya at the material time, as the Government did not produce any documents relating to the interviews, such as transcripts of questioning, nor did they indicate the names of any of those officials or servicemen. The only document containing witness statements, namely a transcript of Major S.'s interview, was submitted to the Court by the applicants.

93. The Court specifically notes that, in breach of a prosecutor's order (see paragraph 35 above), the authorities failed to question military commander G., despite his apparently important role in the Musayev brothers' detention. The Court cannot accept the Government's argument that it had been impossible to question Mr G., as he had died in a terrorist attack. It notes in this respect that the investigation was opened on 18 October 2000 and, upon receipt of the witness statements of Major S. on 27 November 2000, the prosecutor of the Urus-Martan District ordered Mr G. to be questioned, whilst, according to the Government, Mr G. was killed on 29 November 2001. No reasonable explanation was submitted to the Court as to why the investigators failed to comply with the prosecutor's order for a whole year.

94. Furthermore, there was a substantial delay in granting the status of victim to the first applicant. Whilst the investigation commenced on 18 October 2000, it was not until August 2002 that the first applicant was declared a victim in the case, which afforded her minimum guarantees in the criminal proceedings. The Court finds the Government's statement that the first applicant had been granted the status of victim on 20 October 2000 (see paragraph 50 above) unreliable, as they did not produce any documentary evidence in support of this affirmation, whilst the applicants, for their part, submitted a copy of the decision of 22 August 2002 declaring the first applicant a victim in criminal case no. 24047. Moreover, it appears that before – and even after – the said decision was taken, the information concerning the progress in the investigation was provided to the first applicant only occasionally and fragmentarily.

95. Finally, the Court observes that the investigation remained pending from October 2000 to August 2002, when it was suspended for over two years and not resumed until October 2004. After that it remained pending at least until August 2006. Between October 2000 and August 2006 the investigation was adjourned and reopened at least seven times. The

prosecutors on several occasions ordered certain steps to be taken (see paragraphs 35 and 46 above), but there is no evidence that those instructions were ever complied with.

96. In the light of the foregoing, and with regard to the inferences drawn from the respondent Government's submission of evidence, the Court is bound to conclude that the authorities failed to carry out a thorough and effective investigation into the circumstances surrounding the deaths of Ali and Umar Musayev. It accordingly dismisses the Government's preliminary objection as regards the applicants' failure to exhaust domestic remedies within the context of the criminal proceedings, and holds that there has been a violation of Article 2 of the Convention on that account.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. Submissions of the parties

97. The applicants next alleged that their relatives had been ill-treated after having been detained, which constituted a violation of Article 3 of the Convention. They referred to the medical certificate of death issued on 8 October 2001 in respect of Umar Musayev, confirming that there had been multiple stab wounds and bruises on the latter's head and chest. They further submitted that the authorities had failed to conduct an effective investigation in this respect, in violation of their procedural obligation under Article 3 of the Convention.

98. The Government made no comments as regards the document referred to by the applicants. They relied on a reply of the Prosecutor General's Office stating that the investigation had not established that the Musayev brothers had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention.

B. The Court's assessment

1. Alleged ill-treatment of Umar Musayev

99. The Court reiterates that the authorities have an obligation to protect the physical integrity of persons in detention. Where an individual, when taken into police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. Otherwise, torture or ill-treatment may be presumed in favour of the claimant and an issue may arise under Article 3 of the Convention (see *Tomasi v. France*, judgment of

27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-11, and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

100. The Court has established above that the applicants' relatives were taken into custody in good health, without any injuries (see paragraph 79 above). It further notes that the medical certificate of death (no. 51) issued on 8 October 2001 in respect of Umar Musayev confirmed the presence of various injuries on his body. The Government provided no plausible explanation as to the origin of those injuries, which must therefore be considered attributable to a form of ill-treatment for which the authorities were responsible.

101. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Salman*, cited above, § 114). The Court has previously had before it cases in which it has found that there has been treatment which could only be described as torture (see *Aksoy*, cited above, p. 2279, § 64; *Selmouni*, cited above, § 105; *Dikme v. Turkey*, no. 20869/92, §§ 94-96, ECHR 2000-VIII; and, among recent authorities, *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 116, ECHR 2004-IV (extracts)).

102. Having regard to the document submitted by the applicants, which certified the presence of multiple injuries and stab wounds on Umar Musayev's body, the Court finds that the treatment inflicted on him involved very serious and cruel suffering that may be characterised as torture within the meaning of Article 3 of the Convention.

103. Accordingly, there has been a breach of Article 3 of the Convention in this regard.

104. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation (see *Salman*, cited above, § 117).

2. Alleged ill-treatment of Ali Musayev

105. The Court observes that the applicants did not submit any documentary evidence, such as medical certificates, confirming the presence of injuries on Ali Musayev's body. It is therefore unable to establish, to the necessary degree of proof, that Ali Musayev had been ill-treated, and finds that this complaint has not been substantiated.

106. Against this background, the Court finds no violation of Article 3 of the Convention in respect of Ali Musayev.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

107. The applicants complained that Ali and Umar Musayev had been detained in breach of the guarantees of Article 5 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

108. The applicants stated that there had been no grounds for their relatives' arrest or detention, and in particular, no reason to believe that they had committed any criminal offence. At the time of their apprehension, the Musayev brothers had been at home with other family members, had identity papers, had no firearms, and had not attempted to assist A., the man who had run into their house, or to resist the federal servicemen. They voluntarily reported to the district office of the Interior for questioning. Furthermore, the officers who had taken the Musayev brothers away had not given any reason for their detention. The applicants thus argued that their relatives had been detained in breach of the guarantees of Article 5 of the Convention.

109. The Government conceded that the applicants' two relatives had been detained by the federal servicemen and escorted to the temporary headquarters for questioning. However, they argued that after the Musayev brothers had been delivered to the headquarters "their whereabouts had been

unknown" and that the investigation "had obtained no evidence that they had been detained in violation of Article 5".

110. The Court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. In that context, it has repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. To minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5 (see, among other authorities, *Çakıcı* cited above, § 104).

111. It has been established above that the applicants' relatives were apprehended on 8 August 2000 by federal servicemen and were not seen until 13 September 2000, when their corpses were found in a mass grave. The Government produced no formal acknowledgement of or justification for the detention of the applicants' relatives during the period in question. The Court thus concludes that Ali and Umar Musayev were victims of unacknowledged detention in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation of their right to liberty and security enshrined in Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

112. The applicants complained about the absence of effective remedies in respect of the violations alleged under Articles 2, 3 and 5, contrary to Article 13 of the Convention. This Article provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

113. The applicants contended that the investigation into the murder of Ali and Umar Musayev had been pending with no tangible results for several years, and that their attempt to obtain compensation for non-pecuniary damage for the unlawful detention of their relatives had proved unsuccessful, and that they therefore had no effective remedies against the aforementioned violations, contrary to Article 13 of the Convention.

114. The Government argued that the applicants had had effective remedies at their disposal enshrined in Article 13 of the Convention and that

the authorities had not prevented them from using those remedies. In particular, the first applicant was declared a victim and a civil claimant in the criminal case opened in connection with the killing of her sons and she had received reasoned replies to all her complaints. Besides, the applicants had had an opportunity to complain of the actions or omissions of the investigating authorities in court.

115. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions by the authorities of the respondent State (see *Aksoy*, cited above, § 95).

116. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; *Assenov and Others*, cited above, § 117; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Orhan*, cited above, § 384).

117. In view of the Court's findings above with regard to Article 2 and Article 3, in so far as the treatment inflicted on Umar Musayev was concerned, these complaints were clearly "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The applicants should accordingly have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation for the purposes of Article 13.

118. It follows that in circumstances where, as in the present case, the criminal investigation into the death was ineffective (see paragraph 96 above) and the effectiveness of any other remedy that may have existed,

including the civil remedies, was consequently undermined, the State has failed in its obligation under Article 13 of the Convention.

119. Consequently, there has been a violation of Article 13 of the Convention in connection with Articles 2 and 3 of the Convention, in so far as this latter provision was breached as a result of the treatment inflicted on Umar Musayev.

120. As regards the applicants' reference to Article 5 of the Convention, the Court refers to its findings of a violation of this provision set out above. It considers that no separate issues arise in respect of Article 13 read in conjunction with Article 5 of the Convention, which itself contains a number of procedural guarantees related to the lawfulness of detention.

VI. COMPLIANCE WITH ARTICLE 38 § 1 (a) OF THE CONVENTION

121. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu*, cited above, § 70). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government's part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI). In a case where the application raises issues of the effectiveness of the investigation, the documents of the criminal investigation are fundamental to the establishment of facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility stage and at the merits stage (see *Tanrıkulu*, cited above, § 70).

122. The Court observes that it has on several occasions requested the Government to submit a copy of the investigation file opened into the killing of the applicants' relatives. The evidence contained in that file was regarded by the Court as crucial to the establishment of the facts in the present case. In reply, the Government produced only copies of procedural decisions instituting, suspending and reopening criminal proceedings, those of investigators' decisions taking up the criminal case and letters informing the first applicant of the suspension and reopening of the criminal proceedings in the case. They refused to submit any other documents, such as transcripts of witness interviews, reports on investigative actions and

others, with reference to Article 161 of the Russian Code of Criminal Procedure.

123. The Court notes in this connection that the Government did not request the application of Rule 33 § 2 of the Rules of Court, which permits a restriction on the principle of the public character of the documents deposited with the Court for legitimate purposes, such as the protection of national security and the private life of the parties, and the interests of justice. The Court further notes that the provisions of Article 161 of the Code of Criminal Procedure, to which the Government referred, do not preclude disclosure of the documents from a pending investigation file, but rather set out a procedure for and limits to such disclosure. The Government failed to specify the nature of the documents and the grounds on which they could not be disclosed (see, for similar conclusions, *Mikheyev v. Russia*, no. 77617/01, § 104, 26 January 2006). The Court also notes that in a number of comparable cases that have been reviewed by or are pending before the Court, similar requests have been made to the Russian Government and the documents from the investigation files submitted without reference to Article 161 (see, for example, *Khashiyev and Akayeva v. Russia* cited above, § 46, and *Magomadov and Magomadov v. Russia* (dec.), no. 58752/00, 24 November 2005). For these reasons, the Court considers the Government's explanations concerning the disclosure of the case file insufficient to justify withholding the key information requested by the Court.

124. Having regard to the importance of cooperation by the respondent government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court finds that the Russian Government fell short of their obligations under Article 38 § 1 (a) of the Convention on account of their failure to submit copies of the documents requested in respect of the murder of Ali and Umar Musayev.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

126. The applicants claimed compensation for lost earnings of their breadwinners, Ali and Umar Musayev, in the amount of EUR 100,000 for each of them and for each of the three minor children of the third applicant and Ali Musayev. The applicants did not substantiate the amount sought; nor did they indicate whether their two relatives had been gainfully employed at the time of their arrest, and, if so, what occupation they had had and what wages they had received.

127. The Government argued that the applicants' claims under this head were speculative, excessive and unfounded. They also pointed out that the children of the third applicant and Ali Musayev were not listed among the applicants, and therefore their claims should not be taken into account.

128. The Court observes that it has awarded compensation in respect of lost earnings in cases where a violation of Article 2 in its substantive aspect has been found (see, among other authorities, *Salman* cited above, § 137, or *Imakayeva v. Russia*, no. 7615/02, § 213, 9 November 2006). However, in those cases the applicants had produced detailed and reliable calculations in support of their claims (see *Salman* cited above, § 135, or *Imakayeva* cited above, §§ 210-11), whereas in the present case the applicants, while claiming a considerable amount, provided no information or documents to corroborate their claims. In the absence of any relevant information which would enable the Court to assess the amount of the pecuniary damage allegedly sustained by the applicants, it makes no award under this head.

2. Non-pecuniary damage

129. The applicants claimed EUR 50,000 each in respect of non-pecuniary damage for the moral suffering which they had endured as a result of the loss of their close relatives.

130. The Government considered the applicants' claims to be excessive and submitted that should the Court find a violation of the applicants' rights, a token amount would suffice.

131. The Court observes that it has found a violation of Articles 2, 3, 5 and 13 of the Convention on account of the unacknowledged detention and death of the applicants' relatives, the treatment endured by one of the applicant's relatives before he had died and the absence of effective remedies to secure domestic redress for the aforementioned violations. The Court has also found a violation of Article 38 § 1 (a) of the Convention on account of the Government's failure to submit the materials requested by the Court. The applicants must have suffered anguish and distress as a result of all these circumstances. Having regard to these considerations, the Court awards, on an equitable basis, EUR 45,000 to each of the first and second applicants and EUR 40,000 to the third applicant for non-pecuniary damage, plus any tax that may be chargeable on these amounts.

B. Costs and expenses

132. The applicants claimed EUR 10,330 for the costs and expenses incurred by them at the domestic level, which included the expenses for the medical treatment of the second applicant, the amount paid for the plan of the burial site, and transport and postal expenses. They did not submit any documents in support of this claim. The applicants also claimed EUR 12,413 in respect of costs and expenses relating to their legal representation in the proceedings before the Court. They submitted a certificate issued by the Director of the Moscow Bar Association confirming that under the contract between the applicants and their representative the lawyer's fee was equal to the aforementioned amount.

133. The Government contested the applicants' claim for EUR 10,330, stating that it had not been corroborated by any documentary evidence. They further argued that the amount of the lawyer's fee could not be considered as reasonable and necessary and that it was much higher than the usual level of fees payable in Russia for legal services.

134. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *McCann*, cited above, § 220).

135. The Court notes firstly that the applicants have not submitted any documents to substantiate their claim for the amount of EUR 10,330. It therefore accepts the Government's argument and makes no award in this respect. As regards the applicants' claim for costs relating to their legal representation before the Court, the applicants submitted a certificate in support of this claim. However, they did not submit any calculations, or a schedule of costs which would indicate the time actually spent by the applicants' lawyer on dealing with their case and the applicable rates, or any document confirming that they had actually paid the amount indicated. Furthermore, they submitted only one set of observations during the proceedings before the Court and it does not appear those observations involved much effort on the part of the applicants' representative or required much research. In such circumstances, having regard to the above criteria and the complexity of the case, the Court awards the applicants EUR 1,000 for costs and expenses, less EUR 715 received by way of legal aid from the Council of Europe, plus any tax, including value-added tax, that may be chargeable.

C. Default interest

136. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection of non-exhaustion;

2. *Holds* that there has been a violation of Article 2 of the Convention as regards the killing of Ali and Umar Musayev;

3. *Holds* that there has been a violation of Article 2 of the Convention on account of the authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the killing of Ali and Umar Musayev;

4. *Holds* that there has been a violation of Article 3 of the Convention on account of the treatment suffered by Umar Musayev;

5. *Holds* that no separate finding is necessary under Article 3 of the Convention in respect of the alleged deficiencies in the investigation into the treatment suffered by Umar Musayev;

6. *Holds* that there has been no violation of Article 3 of the Convention in respect of Ali Musayev;

7. *Holds* that there has been a violation of Article 5 of the Convention in respect of Ali and Umar Musayev;

8. *Holds* that there has been a violation of Article 13 in respect of the alleged violations of Article 2 and the alleged violation of Article 3 of the Convention in respect of Umar Musayev;

9. *Holds* that no separate issue arises under Article 13 in respect of the alleged violation of Article 5 of the Convention;

10. *Holds* that there has been a failure to comply with Article 38 § 1 (a) of the Convention in that the Government refused to submit the documents requested by the Court;

11. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 45,000 (forty-five thousand euros) to each of the first and second applicants and EUR 40,000 (forty thousand euros) to the third applicant in respect of non-pecuniary damage;

(ii) EUR 285 (two hundred and eighty-five euros) in respect of costs and expenses;

(iii) any tax, including value-added tax, that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

12. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President