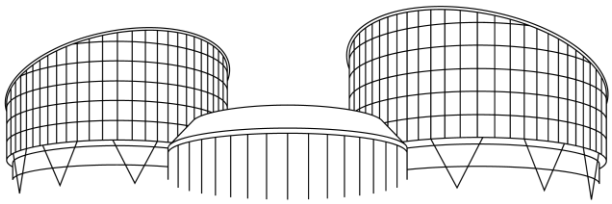

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF NAKAYEV v. RUSSIA

(Application no. 29846/05)

JUDGMENT

STRASBOURG

21 June 2011

FINAL

28/11/2011

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Nakayev v. Russia**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
George Nicolaou,
Mirjana Lazarova Trajkovska, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 31 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29846/05) 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 a Russian national, Mr Ibragim Nakayev ("the applicant"), on 27 June 2005.

2. The applicant, who had been granted legal aid, was represented by Mr D. Itslayev, a lawyer practising in Grozny, Chechnya. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged principally that he had been wounded as a result of the military action in December 1999 and that no effective investigation had taken place. He referred to Articles 2, 3, 6 and 13 of the Convention.

4. On 4 September 2008 the President of the First Section decided to grant the application priority under Rule 41 of the Rules of Court and to give notice of it to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

1. The applicant's wounding in 1999

5. The applicant was born in 1979 and lives in Urus-Martan, Chechnya.

6. In 1999 the Russian Government launched a counter-terrorist operation in Chechnya.

7. In the autumn of 1999, because of the armed clashes, the applicant and his family moved temporarily to the house of their relative, Mr S. Kh., at 9 Trudovaya Street, Martan-Chu, in Urus-Martan district. The village administration recorded the applicant as an internally displaced person.

8. According to the applicant, on 4 December 1999 between 11 a.m. and 12 noon advancing Russian federal forces subjected the area around Martan-Chu to indiscriminate shelling. He submitted that the army had used "Grad" ("*Град*") or "Uragan" ("*Ураган*"), multiple rocket launch systems, which were stationed about ten kilometres from the village. Several projectiles hit the village. One of them landed in the yard of Mr S. Kh. and hit a car which was parked there. The applicant was standing next to the car and received numerous splinter wounds, including to the head. According to the applicant's submissions made to the Court, in June 2005 a part of the projectile which had wounded the applicant remained in Mr S. Kh.'s yard.

9. On 19 December 1999 the administration of Martan-Chu issued a paper which stated that the applicant and his cousin had been wounded as a result of the bombardment of the village on 4 December 1999 and that on the same date they had been taken to the hospital in Novyie Atagi, in Grozny district.

2. The effect of the applicant's wounding on the state of his health

10. As a result of the wounding the applicant's health deteriorated; he had become unable to work, which was recognised in 2001 by a forensic examination as second-degree disability. He receives a monthly disability pension.

11. According to the submitted documents, the applicant underwent several rounds of treatment in connection with his injuries. Between 4 and 21 December 1999 the applicant was in Novyie Atagi hospital. On 2 February 2000 a splinter was removed from his head. Between 2 and 29 August 2001 the applicant received post-operative treatment.

12. On 2 November 2004 the Urus-Martan district hospital summarised the state of the applicant's health. According to the document, the applicant's health had been monitored by the hospital since 2000; he required constant rehabilitation therapy.

13. Between 25 and 29 April 2008 the applicant was examined by the experts of the Chechnya Bureau of Forensic Expertise. According to their evaluation, the applicant had a penetrating wound to the right part of the frontal lobe with damage to the brain; such a wound could have been caused by a shell splinter and was qualified as serious damage to the applicant's health.

3. The first round of the criminal investigation

14. On 11 March 2002 the applicant's mother wrote to the Russian Ombudsman and asked for assistance in relation to the applicant's situation. She indicated that her son had been injured on 4 December 1999 as a result of the shelling of Martan-Chu and that the family had been bearing the costs of complex medical interventions.

15. On 28 May 2003 the applicant's mother informed the Urus-Martan district prosecutor's office ("the district prosecutor's office") about the applicant's injury received during the bombardment on 4 December 1999. She alleged that the shelling of the village had been carried out by the servicemen of the "245th regiment".

16. On 14 August 2003 the applicant's mother complained about the applicant's injuries to the Urus-Martan district police department ("the ROVD") and requested the authorities to institute a criminal investigation into the events.

17. On 16 September 2003 the ROVD refused to institute criminal proceedings in connection with the applicant's wounding on 4 December 1999. The decision stated that the authorities had conducted an inquiry, which had established the following: a number of armed clashes, including exchanges of gunfire, had taken place between Russian forces and illegal armed groups in the area of the applicant's residence in 1999. As a result of the bombardment of Martan-Chu the applicant was injured, which had been confirmed by the witness statements of Ms R. N., Mr R. Kh. and Mr B. The projectile, which had hit the yard of Mr S. Kh. and wounded the applicant, had been launched by one of the parties to the conflict. However, it was impossible to establish which party had launched the projectile. Thus, taking into consideration that the applicant had been injured as a result of an accident, the request for the institution of criminal proceedings was to be rejected pursuant to Article 24 § 1 (2) of the Criminal Procedure Code owing to the lack of *corpus delicti*.

18. On 16 September 2003 the ROVD informed the applicant about their decision concerning the refusal to institute criminal proceedings.

4. Proceedings for compensation for damage

19. On 15 April 2004 the applicant brought proceedings against the Ministry of Finance. The applicant stated that as a result of the wounding on 4 December 1999 he had become incapacitated and unfit for work. He demanded compensation for pecuniary damage in the amount of 184,256 Russian roubles (RUB) and non-pecuniary damage in the amount of RUB 1,500,000.

20. In response to the applicant's specific request, on 19 November 2004 the Martan-Chu administration issued a note that they "had no information about unprovoked artillery and air strikes" on the village, except for the air

strikes which had occurred on 5 December 1999 and hit the households of Mr L.I. and Mr S.E.

21. On 2 December 2004 Urus-Martan Town Court ("the town court") rejected the applicant's claim. It stated that although as a result of the shelling on 4 December 1999 the applicant had been wounded and became partially incapacitated, he had failed to provide sufficient evidence which would allow the court to establish a causal link between the actions of the artillery of the Russian armed forces and the damage alleged by the applicant. In its ruling the court referred to the decision of 16 September 2003 to refuse criminal proceedings.

22. On 8 December 2004 the Martan-Chu administration issued a note to confirm that both on 4 and 5 December 1999 the village had been subjected to indiscriminate bombardment from the direction of the advancing Russian forces. On 4 December 1999 one of the projectiles had hit Mr S. Kh.'s yard and had destroyed his property, as confirmed by an official evaluation of damages and by witness statements. The shelling was also confirmed by the villagers' statements. At the relevant time the applicant had been registered as an internally displaced person, was living with his relatives in Martan-Chu and had become partially incapacitated as a result of the injury received on 4 December 1999.

23. The applicant appealed against the judgment of 2 December 2004 alleging that the town court had been partial and had failed to assess the evidence properly.

24. On 28 December 2004 the Chechnya Supreme Court upheld the judgment. It found that the applicant's appeal concerned reassessment of the evidence examined by the first-instance court and confirmed that the applicant had failed to substantiate his allegations with appropriate evidence. The Supreme Court also pointed out that the applicant had failed to appeal against the authorities' refusal to institute criminal proceedings on 16 September 2003, and emphasised that that decision was still valid and therefore had served legitimately as the basis for the court's findings.

5. The criminal proceedings after January 2005

25. On 28 January 2005 the applicant asked the town court to set aside the ROVD decision not to institute criminal proceedings and to oblige the authorities to open a criminal investigation into his injuries.

26. On 18 February 2005 the town court allowed the applicant's complaint and quashed the decision of 16 September 2003. The court stated that the police had failed to carry out basic investigative measures such as the examination of the crime scene, collection of evidence and forensic assessment of the applicant's health.

27. On 29 May 2006 the applicant wrote to the ROVD and referred to the court decision of 18 February 2005. He asked about the latest developments in the case.

28. On 15 June 2006 the ROVD referred to their previous decision of 16 September 2003 not to institute criminal proceedings.

29. On 4 April 2008 the applicant again wrote to the ROVD and referred to the town court decision of 18 February 2005.

30. On 21 April 2008 the district prosecutor's office remitted inquiry file no. 1159/809 opened in connection with the applicant's complaint to the ROVD for additional examination and decision on the merits. Following this development, the ROVD carried out a number of investigative measures.

31. The Government, in response to the Court's request, submitted thirty-five pages from the investigation file dated between April and July 2008. They argued that the remaining documents (no list or number of which has been provided) could not be disclosed, in the absence of guarantees by the Court to protect the data containing State secrets. Referring to Article 161 of the Criminal Procedural Code, the Government stated that the remaining documents could not be divulged without harming the interests of the investigation and the interests of the participants to the proceedings. The submitted documents and the parties' submissions may be summarised as follows.

32. On 23 April 2008 the investigator examined Mr S.Kh.'s household and noted marks of shrapnel on some walls. Nothing of relevance to the investigation was collected.

33. According to the Government's submissions, in April 2008 the local police in Martan-Chu had questioned two neighbours and the applicant's cousin, who confirmed the circumstances in which the applicant was wounded on 4 December 1999. The police also questioned Mr M., who at the relevant time had headed the local administration in Martan-Chu. He corroborated the applicant's submissions and testified that he had inspected Mr S.Kh.'s household shortly after the explosion and recorded the destruction. None of these statements were made available to the Court.

34. The police also obtained copies of the applicant's medical file from the Achkhoy-Martan hospital.

35. According to the documents submitted, Mr S.Kh. died in May 2004.

36. The criminal investigation file was eventually opened by the ROVD on 2 May 2008 under Article 111 part 2 of the Criminal Code – causing of serious injuries by universally dangerous means.

37. The applicant was questioned on 23 April and 18 June 2008 (only the record of the latter has been submitted to the Court). He explained that on 4 December 1999 at about noon he and his cousin had been wounded as a result of a shell exploding in the courtyard of Mr S. Kh.'s house.

38. On 13 May 2008 the Chechnya Bureau of Forensic Expertise concluded that the applicant's injuries could have been caused by a piece of shrapnel and that they constituted grievous bodily harm.

39. On 18 June 2008 the applicant was accorded the status of a crime victim in the proceedings.

40. On 18 June 2008 the applicant's mother was questioned. She gave similar account about the applicant's wounding and about the treatment he had to undergo. She indicated that she was not aware who exactly had shelled the village, but she had heard that these were troops headed by General Shamanov.

41. On 26 June 2008 the applicant sought an award of RUB 1,500,000 in compensation for damage to his health against the perpetrators of the crime. On the same day the investigator accorded the applicant the status of a civil claimant.

42. On 2 July 2008 the investigation was adjourned for failure to identify the culprits. The decision stated that in order to identify the persons who had committed the crime the investigator had sent a number of requests for information to the various bodies of the Ministry of Defence and the Ministry of the Interior. Nothing of relevance to the investigation was obtained. No copies of any such requests or answers have been submitted to the Court.

43. On 5 November 2008 the investigative department of the Ministry of the Interior of Chechnya ordered that the investigation be resumed. The reason for the decision was that unspecified investigative measures had not been taken.

44. In February 2009 the applicant collected additional statements from his cousin, two neighbours and his mother and submitted them to the Court. These detailed statements concern the shelling and subsequent developments. In particular, the applicant's cousin stated that the attack had been carried out from the north and with the use of multiple-launch rocket systems. He further stated that for several years after the event parts of the "Grad" rockets could be found in the village and described the one found in their courtyard. He alleged that on 4 December 1999 twenty-eight rockets ("Grad" is designed to launch forty projectiles) had hit the village and listed other households and places where the explosions had taken place. He alleged that in early December 2008 an investigator had collected one part of the projectile from the village for an expert evaluation. The applicant's mother alleged that the investigator had informed her on the telephone that the expert report had identified the metal object collected in autumn 2008 in Martan-Chu as the tail part of the "Grad" missile. It appears that the investigation is still pending.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

45. The applicant complained that the attack of 4 December 1999 constituted a violation of the right to life. He also alleged that no effective investigation of the attack was carried out, in breach of Article 2 of the Convention, which reads as follows:

> "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. Arguments of the parties

1. The Government

46. The Government considered that the complaint should be dismissed as inadmissible. First, they pointed out that the applicant had failed to exhaust domestic remedies. They considered that the applicant had failed to make full use of his procedural position in the criminal proceedings, which conferred on him the right to submit requests, motions and complaints against the actions of the investigative authorities. He could also claim damages from the investigating authorities in civil proceedings. The Government referred to a number of complaints about the actions of the investigative authorities lodged by the victims in Chechen courts where such complaints had been granted. At the same time, the Government conceded that the applicant had made partial use of these remedies.

47. They further argued that the applicant's complaint under Article 2 should be dismissed as manifestly ill-founded, since he had failed to adduce any relevant evidence to prove that the attack had been carried out by State agents. They argued that the witnesses questioned within the framework of the investigation, including the applicant, had failed to indicate who had carried out the shelling of Martan-Chu or to indicate the type of weapons

used. The examination of Mr S.Kh.'s household had not produced any results and no fragments of explosive devices had been found there. They further underlined the discrepancies between the three documents issued by the administration of Martan-Chu in 2004 as to the date of shelling – 4 or 5 December 1999. Thus, in their view, the applicant's allegation was not supported by any additional, independent evidence.

48. Finally, in respect of the investigation, the Government argued that it had complied with the standards set by the national legislation and by the Convention. They pointed out that the establishment of the facts had been hampered by the applicant's turning to the law-enforcement authorities in May 2003, which was three and a half years after the events. By that time the material evidence of the crime had been lost and it had become impossible to identify the military units which had been stationed in the vicinity of Martan-Chu. Nevertheless, the Government stressed that the investigators had taken all steps possible in such situation: they had questioned a number of witnesses, inspected the scene and ordered a forensic expert assessment of the applicant's injuries. They had sent requests to various military and law-enforcement bodies in order to check the version advanced by the applicant. The investigation had also taken steps to check other possible versions of the event – that Trudovaya Street in Urus-Martan had been mined or shelled by illegal armed groups. They stressed that the investigation was ongoing and that measures aimed at elucidating the circumstances of the crime were continuing to be taken.

2. The applicant

49. The applicant argued that he had exhausted domestic remedies, but that they had turned out to be ineffective. His attempt to obtain compensation through civil proceedings had been rendered futile by the absence of conclusions from the criminal investigation. The investigation remained passive, and the decision of Urus-Martan Town Court to open the investigation of 18 February 2005 remained unenforced for several years. Finally, he argued that he had applied to the Court within the six-month limit, which was to be calculated from the date when his civil claim had finally been rejected (28 December 2004).

50. He further argued that he had submitted sufficient evidence that lethal force had been used against him by the State on 4 December 1999 and that the Government had failed to justify it. He considered that he had proven that the attack had been carried out by multiple rocket launch systems such as "Grad", which could not have been available to illegal armed groups. The Government failed to submit another explanation of the events or to disclose the documents from the investigation file, which could allow the Court to draw negative inferences.

51. The applicant then argued that the authorities had failed to carry out an investigation into the attack. The authorities were aware of the crime

prior to his application to the police in May 2003, in view of the obligation for medical institutions to report victims of violent crimes to the police. In any event, since May 2003 no criminal investigation has been carried out, despite sufficient evidence and witness statements. The applicant pointed out that in December 2008 the investigator had collected a rocket part from the household of Mr N.M. in Martan-Chu, but had failed to question the latter to find out how this object had ended up in his courtyard. Finally, the applicant noted that since the investigation had been adjourned, he had no access to the entire file and therefore could not effectively appeal against further decisions.

B. Admissibility

1. Exhaustion of domestic remedies

52. The Government argued that the applicant had failed to exhaust domestic remedies.

53. The Court notes that the Russian legal system provides, in principle, two avenues of recourse for the victims of illegal and criminal acts attributable to the State or its agents, namely civil and criminal remedies.

54. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents, the Court has already found in a number of similar cases that this procedure alone cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-121, 24 February 2005, and *Estamirov and Others*, cited above, § 77). Nevertheless, the applicant sought to obtain such compensation, but on 28 December 2004 his claim was dismissed in the final instance, at least partially due to the absence of conclusions from the criminal investigation. The Government's objection in this regard is thus dismissed.

55. As regards criminal-law remedies, the Court observes that the applicant complained to the law-enforcement authorities and that an investigation is pending. The parties dispute the effectiveness of the investigation.

56. The Court considers that the Government's objection raises issues concerning the effectiveness of the investigation which are closely linked to the merits of the applicant's complaints. Thus, it decides to join this objection to the merits of the case and considers that the issue falls to be examined below.

2. Other issues as to the admissibility

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. Applicability of Article 2 of the Convention

58. The Court notes that the applicant's injuries included a splinter wound to the head damaging brain tissue and resulting in a permanent serious disability (see paragraphs 10-13 above). This is sufficient to bring the complaint within the ambit of Article 2, which protects the right to life in situations where potentially lethal force is employed, notwithstanding the fact that as a result of subsequent medical interventions the applicant's life has been saved (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 49-55, ECHR 2004-XI; *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 174, 24 February 2005; *Goncharuk v. Russia*, no. 58643/00, § 74, 4 October 2007).

2. Alleged ineffectiveness of the investigation

59. The Court will first examine the applicant's complaint concerning the effectiveness of the investigation of the potentially lethal attack against him.

60. The Government stressed that the investigation of the applicant's complaint within the criminal-law procedure had been carried out in accordance with the national legislation. The applicant had been made fully aware of the progress of the investigation and had not appealed against the actions of the law-enforcement agents. The applicant could have appealed against any decision on the basis of Article 46 of the Constitution and Article 125 of the Code of Criminal Procedure, but had failed to do so. In any event, the effectiveness of the investigation was largely undermined by the applicant's late submission of his complaint – three and a half years after the attack had occurred – by which time the establishment of the facts had become impossible.

61. The Court reiterates that 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", 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 v. the United Kingdom*,

27 September 1995, § 161, Series A no. 324, and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I). Relevant principles developed by the Court on this subject, including situations where the victim has survived, may be found in the *Isayeva and Others* (cited above, §§ 209-213).

62. In the present case the parties disputed the effectiveness of the investigation carried out by the Urus-Martan ROVD. The Government argued that the late application to the authorities lay at the heart of the investigation's failure to establish the circumstances of the crime. The Court observes first of all that even though the applicant's mother wrote to the Russian Ombudsman in 2002, it was not until May 2003 that a proper complaint about the attack was submitted to the prosecutor's office (see paragraphs 15 and 16 above). Thus, there was a delay of three and a half years before the matter was brought to the attention of a competent domestic authority. The applicant argued that this delay was attributable to the Government, since the medical services should have transmitted the information about his injuries to the relevant bodies in 1999 or in 2000. The applicant also submitted that he had undergone extensive treatment for his injuries (see paragraphs 16-17 above), which could partially explain that delay.

63. The Court has previously considered situations where the authorities were found to be under the obligation to conduct the investigation on their own motion if there were serious reasons to believe that they were aware of the allegations at the time, in the absence of a formal complaint (see *Goncharuk*, cited above, § 68). Turning to the present case, the Court accepts that the authorities were required to conduct an investigation into the potentially lethal attack upon the applicant. However the question as to when this information became available to them remains open.

64. The Court notes that the wounding occurred in December 1999 in the Urus-Martan district, during a period characterised by significant civil strife in the Chechen Republic and in the area, which, at the time, had been the scene of a violent confrontation between the federal armed forces and rebel fighters (see *Isayeva and Others*, cited above, § 178, and *Umarov v. Russia* (dec.), no. 30788/02, 18 May 2006). The applicant was treated in the Novye Atagi hospital of Grozny district between 4 and 21 December 1999, and then again in February 2000 and August 2001. It thus appears reasonable that if the applicant had considered that a crime had been committed, he should have informed the law-enforcement authorities in one of these locations at the time, or at the latest when their normal functioning was resumed. In the absence of such initiative on the part of the applicant, the Court is unable to conclude that the authorities were at that time made aware of the alleged crime.

65. In any event, even if one were to assume that the authorities had been apprised of the applicant's injury and were thus under an obligation to

act on their own motion, the total passiveness of the law-enforcement authorities prior to May 2003 should have been apparent to the applicant. However, it does not appear that he had questioned the effectiveness of the proceedings prior to this date.

66. Once the complaint was lodged, on 16 September 2003 the prosecutor's office decided not to open a criminal investigation due to the absence of evidence of a crime. On an appeal by the applicant, in February 2005 a court found that the decision had been taken without any serious probing into the allegations, and ordered that a new set of proceedings take place (see paragraph 26 above). Despite this order, it was not until April 2008 that the new round of investigating actions took place.

67. The Court has stated on many occasions that speediness is an important element of a criminal investigation. It thus accepts that the effectiveness of the investigation was hindered by the initial delay. It also agrees that the initial delay in the present case has been unusually protracted and that it was attributable to the applicant. The question is whether this delay was such as to render all the subsequent investigation ineffective.

68. In previous cases the Court concluded that the delays in the opening of proceedings which could have been attributable to the applicant were insignificant in view of the subsequent protractions of the investigation (see, for example, *Mezhidov v. Russia*, no. 67326/01, § 69, 25 September 2008, where the maximum delay attributable to the applicant constituted nine months) or that there existed special reasons such as medical treatment which could have explained a delay of two years and one month in submitting the complaint (see *Umayeva v. Russia*, no. 1200/03, § 88, 4 December 2008).

69. Turning to the present case, the Court notes that the applicant's reference to the medical treatment as well as other possible factors such as the feelings of insecurity and vulnerability (see, mutatis mutandis, *Menteş and Others v. Turkey*, 28 November 1997, § 59, 1997-VIII) are relevant and account for some part of the time in question. However, they fall short of explaining why the information about a crime so serious as the applicant alleges reached the prosecutor's office with a delay of three and a half years. The Court thus accepts that at least some of the investigation's eventual problems resulted from the applicant's failure to raise his complaint in due time.

70. At the same time, it is important to note that the authorities have not directly cited the passage of time as the reason for their subsequent inactivity, nor was the applicant reproached for this in court or later in the proceedings. Furthermore, the delays which occurred after May 2003 in the taking of the most important steps are not attributable to the applicant. In particular, it remains unexplained as to why the order of the Urus-Martan district court to resume the investigation was not complied with for more than three years.

71. As to the substance of the investigation, the Court notes that despite the delays, some important investigative steps were taken in 2003 and then in 2008. Thus, a number of eyewitnesses gave accounts of the circumstances of the attack. The applicant was questioned on three occasions. A forensic expert report was ordered, carried out and confirmed the applicant's statements about the time and nature of his injuries. The applicant was granted the status of a victim in the proceedings.

72. However, the Court also notes that although the applicant brought forward a serious complaint – that of an attack at the village by a powerful and non-discriminatory weapon – a number of elements in the documents submitted from the investigation file, taken together, produce an impression of a series of grave and unexplained failures to act.

73. First and foremost, the Court is concerned that, on the one hand, in his submissions before the Court the applicant consistently mentioned that parts of the missiles which had hit the village were still present in 2003 and 2008 in some of the houses in Martan-Chu. In their submissions to the Court in February 2009 the applicant, his mother and cousin insisted that parts of one such device had been collected by the investigator in the autumn of 2008 and submitted for an expert examination. On the other hand, it notes the absence of any reference to this in the documents produced by the Government. To the contrary, the Government allege that the materials of the case file contain no reference to the "Grad" projectiles or any other clue as to the nature of the explosive device which had injured the applicant. The Court assumes that the documents made available to it have been selected so as to demonstrate to the maximum extent possible the effectiveness of the investigation in question. It can therefore be said that no steps were taken to collect and examine the parts in question, which should be regarded as a major failure of the investigation.

74. In view of its above findings about the failures of the investigation, as well as their disregard for several years of the court order which followed the applicant's complaint, the Court concludes that the applicant should be considered to have exhausted the domestic remedies available to him within the context of the criminal investigation. It therefore dismisses the Government's preliminary objection in this respect.

75. Furthermore, regardless of the initial delay attributable to the applicant, the Court finds on the basis of what has been established above that the authorities failed to carry out an effective investigation into the circumstances of the applicant's injuries. There has therefore been a violation of Article 2 in this respect.

3. Alleged failure to protect the right to life

76. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances where deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from

which in peacetime no derogation is permitted under Article 15. 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, particularly where deliberate lethal force is used, taking into consideration not only the actions of State agents who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, §§ 146-150; *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 171, *Reports* 1997-VI; and *Oğur v. Turkey* [GC], no. 21594/93, § 78, ECHR 1999-III). The same applies to an attack where the victim survives but which, because of the lethal force used, amounted to attempted murder (see *Isayeva and Others*, cited above § 171).

77. As to the facts of the case, the Court notes that in order to be able to assess the merits of the applicant's complaints and in view of the nature of the allegations, it requested the Government to submit a copy of the complete criminal investigation file in the present case. The Government submitted some thirty-five pages of the file (see paragraph 31 above). The quantity and contents of the remaining documents were not specified. The Court reiterates that the conduct of the parties when evidence is being obtained has to be taken into account (see *Ireland v. the United Kingdom*, pp. 64-65, § 161, Series A no. 25) and that it can draw inferences from the Government's conduct in this respect. In so far as the Government mentioned Article 161 of the Code of Criminal Procedure, the Court observes that in previous cases it has found this explanation insufficient to justify the withholding of key information requested by it (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII).

78. The Court reiterates that, according to its settled case-law, the State bears the burden of providing a plausible explanation for injuries and deaths occurring to persons in custody or where individuals were found injured or dead in areas under the exclusive control of the authorities and there was prima facie evidence that State agents could be involved. If in such situations the Court is prevented from reaching factual conclusions owing to the lack of documents which are in the Government's exclusive possession, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government, and if they fail in their arguments issues will arise under Article 2 and/or Article 3 (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II; *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005; *Goygova v. Russia*, no. 74240/01, § 94, 4 October 2007; and *Goncharuk*, cited above, § 80).

79. However, in the present case the Court notes that the applicant's contention of the attack in December 1999 being perpetrated by the State

was for the first time raised in March 2003. Even thought the Government acknowledged that on 4 December 1999 the applicant received splinter wounds, they denied that the State was responsible for it, because it was impossible to establish the perpetrators of the injuries. They also stressed that in their testimonies before the investigator none of the witnesses had alleged that he or she had been aware of the identities of the perpetrators or of the type of weapons used. The Government denied that any other material traces of the crime had been identified by the investigators once such proceedings started. Finally, the Government questioned the reliability of the information notes issued by the Martan-Chu village administration, in view of the inconsistencies between them (see paragraphs 20 and 22 above) and suggested that the applicant could have been injured as the result of an explosion of a mine or of a shell launched by an illegal armed group.

80. The Court reiterates that the investigation was unable to come up with any definitive answers explaining the origins of the explosion. Further more, having regard to the fact as established above that the applicant significantly contributed to the investigation's delay, the Court does not find that he has made an arguable claim of the State's responsibility for the attack in question. In such circumstances, it does not find it possible to shift the burden of proof to the respondent Government. Nor does it find that the evidence submitted by the parties is sufficient to make the findings of a breach of Article 2 in its substantive limb to the requisite standard of proof (see *Zubayrayev v. Russia*, no. 67797/01, § 73, 10 January 2008, and *Tovsultanova v. Russia*, no. 26974/06, § 88, 17 June 2010).

81. Accordingly, the Court finds no violation of the substantive limb of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

82. The applicant argued that the situation disclosed a violation of Article 3, in view of the suffering caused to him and also in view of the Government's failure to carry out a proper investigation into his complaints. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

83. The Government disputed this complaint.

84. The Court considers that the consequences described by the applicant were a result of the use of lethal force the origins of which cannot be established. Thus, whereas the Court considers that the complaint is admissible, having regard to its above findings concerning the right to life it does not find that any separate issues arise under Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

85. The applicant complained under Article 6 about unfairness of the proceedings concerning his compensation claim in 2004 and during the review of his complaint in 2005.

86. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of this provision.

87. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

88. The applicant submitted that he had no effective remedies in respect of the violations alleged, contrary to Article 13 of the Convention. This Article reads:

> "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."

89. The Government disputed this complaint and argued that the applicant had failed to use the domestic remedies available to him.

90. The Court observes that the complaint made by the applicant under this Article has been examined in the context of the procedural obligation arising under Article 2 of the Convention. Having regard to the findings of a violation of Article 2 in its procedural aspect (see paragraph 75 above), the Court considers that, whilst the complaint under Article 13 taken in conjunction with Article 2 is admissible, there is no need for a separate examination of this complaint on its merits (see *Shaipova and Others v. Russia*, no. 10796/04, § 124, 6 November 2008; and *Tovsultanova*, cited above, § 115).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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. Pecuniary damage

92. The applicant claimed compensation for lost wages, as he had become incapable of work as a result of the injuries. He claimed 2,069,740 Russian roubles (RUB) under this heading.

93. The Government regarded this sum as unsubstantiated and unreasonable.

94. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention, and that this may, in an appropriate case, include compensation in respect of loss of earnings. Having regard to its above conclusions that there has been no violation of Article 2 in its substantive aspect, the Court finds that there is no direct causal link between the alleged violation of the applicant's right to life and the loss of income. Accordingly, it makes no award under this head.

B. Non-pecuniary damage

95. The applicant claimed that he had been wounded as a result of the unlawful use of lethal force by the State and that no proper investigation of the incident had been carried out. He asked for compensation for non-pecuniary damage, the amount of which he left to the determination of the Court.

96. The Government denied the violations alleged, but considered that if the Court was minded to find the violations such finding would be adequate just satisfaction in the applicant's case.

97. The Court has found a violation of the procedural aspect of Article 2, and finds it appropriate to award the applicant EUR 24,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

C. Costs and expenses

98. The applicant claimed EUR 9,110 for costs and expenses incurred before the Court and before the domestic authorities. He submitted that the lawyer had charged EUR 150 per hour of legal work. He presented a

breakdown of the time spent by his representative, which included 60.5 hours of legal work. He claimed reimbursement of postal and administrative costs in the amount of EUR 85. He also submitted a copy of the legal representation agreement of 15 September 2008.

99. The applicant requested the Court to order the payment of the fees awarded under this heading directly into the representative's account in Chechnya, Russia.

100. The Government did not contest those claims.

101. The Court may make an award in respect of costs and expenses in so far that they have been actually and necessarily incurred and are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V, and *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, the Court awards the applicant the total sum of EUR 4,000, less the EUR 850 he received in legal aid from the Council of Europe, together with any value-added tax that may be chargeable to the applicant. The award made under this heading is to be paid into the representative's bank account in Russia, as identified by the applicant.

D. Default interest

102. 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. *Joins to the merits* the Government's objection as to the non-exhaustion of domestic remedies in respect of the complaint brought under Article 2 of the Convention and rejects it;

2. *Declares* the complaints concerning the attack of 4 December 1999 and the absence of investigation thereof as submitted under Articles 2, 3 and 13 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances of the attack of 4 December 1999;

4. *Holds* that there has been no violation of Article 2 in respect of the attack on the applicant;

5. *Holds* that no separate issues arise under Article 3 of the Convention;

6. *Holds* that no separate issues arise under Article 13 of the Convention;

7. *Holds*

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

(i) EUR 24,000 (twenty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,150 (three thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect costs and expenses, to be paid into the representative's bank account in Russia, as identified by the applicant;

(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;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President