



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

THIRD SECTION

CASE OF VOVK AND BOGDANOV v. RUSSIA

(Application no. 15613/10)

JUDGMENT

Art 2 (procedural) • Positive obligations • Failure to investigate explosion of grenade in a residential area causing severe injuries • Failure to verify possible involvement of military personnel in the loss of grenade • Failure to elucidate the extent of negligence in taking “measures that were necessary and sufficient to avert the risks inherent in a dangerous activity” • Compensation claim dismissed for lack of evidence of the grenade belonging to or being improperly guarded by the State

STRASBOURG

11 February 2020

FINAL

11/06/2020

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

In the case of Vovk and Bogdanov v. Russia,

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Paulo Pinto de Albuquerque,

Dmitry Dedov,

María Elósegui,

Erik Wennerström,

Lorraine Schembri Orland, *judges*,

and Stephen Phillips, *Section Registrar*,

Having regard to:

the application 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 two Russian nationals, Mr Sergey Sergeyevich Vovk (“the first applicant”) and Mr Artem Aleksandrovich Bogdanov (“the second applicant”), on 15 February 2010;

the decision of 3 May 2017 to give notice of the application to the Russian Government (“the Government”);

the parties’ observations,

Having deliberated in private on 14 January 2020,

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

INTRODUCTION

The application concerns the explosion of a VOG-17 grenade from an AGS-17 grenade launcher in the residential area of Chita on 21 April 2008, in which the applicants, aged 13 and 7 at the time, sustained serious injuries, and the domestic authorities’ alleged failure to conduct an effective investigation into their complaint. The criminal proceedings into the explosion were suspended many times for failure to identify the perpetrator and were eventually discontinued as time-barred. The applicants’ civil claim for compensation in respect of non-pecuniary damage was dismissed for lack of evidence of the previously fired but unexploded grenade belonging to the State or of negligence on the part of the authorities in having abandoned it.

THE FACTS

1. The first and second applicants were born in 1995 and 2000, respectively, and live in Chita. The applicants were represented initially by their mothers Ms T.N. Vovk and Ms M.V. Bogdanova, and subsequently by Ms A.V. Kopteyeva, a lawyer practising in Chita.

2. The Russian Government (“the Government”) were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Grenade explosion

4. On 21 April 2008 a grenade exploded in a residential area in “micro-district no. 6” in Chernovskiy district in Chita (hereinafter “micro-district no. 6”). Five children were wounded as a result of the explosion. The first and second applicants, who were 13 and 7 years old at the time, were among the victims.

5. The first applicant sustained open multiple displaced fractures of both shin bones, foreign bodies (shrapnel) in the soft tissue of the shins, and traumatic shock. He was hospitalised in the Regional Children’s Hospital in Chita where he received emergency treatment and surgery to both legs. His first period in hospital lasted until 30 May 2008. He was subsequently hospitalised from 16 June until 5 September 2008, from 19 until 30 January 2009, and from 19 January until 16 February 2010 for further treatment and surgery.

6. The second applicant sustained a penetrating wound to the stomach with an injury to the intestine and intra-abdominal bleeding, a perforating wound to the soft tissue of the chest, a blunt shrapnel wound to the soft tissue of the small pelvis and right hip, traumatic shock, and cardiopathy. He was hospitalised in the same hospital where he received emergency treatment and surgery. His stay in hospital lasted until 16 May 2008.

7. In the course of the subsequent pre-investigation inquiries and investigation both boys’ injuries were classified as life threatening injuries constituting grievous harm to health (*опасные для жизни повреждения, причинившие тяжкий вред здоровью*), according to forensic medical examination reports of 22 October 2008 (ordered in respect of the first applicant by an inspector from the unit for juvenile affairs of the Chernovskiy district police on 31 July 2008) and of 18 November 2008 (ordered in respect of the second applicant by an investigator from the investigation unit of the Chernovskiy district police on 31 October 2008).

B. Criminal proceedings

8. At 6 p.m. on 21 April 2008 the explosion was reported to the Chernovskiy district police in Chita. A pre-investigation inquiry was carried out. The scene of the incident was inspected. Samples from the epicentre of the explosion were taken for examination. The examination established the

explosion of 30-mm projectile VOG-17 from an AGS-17 heavy grenade launcher.

9. On 26 April 2008 the investigation unit of the Chernovskiy district police opened a criminal case and commenced an investigation under Article 222 § 1 of the Criminal Code (illegal acquisition, transfer, sale, storage, transportation, or bearing of firearms, ammunition, explosives, or explosive devices) against an unidentified individual who had acted in violation of the federal Arms Act by having acquired, transported and stored explosive devices which had been found by the second applicant near garages in the proximity of school no. 30 in micro-district no. 6 (hereinafter “school no. 30”). The case was given the number 160304.

10. On 12 May 2008 the Chernovskiy district prosecutor’s office examined the criminal case and gave instructions to carry out investigative actions in order to ensure full and thorough investigation.

11. In parallel proceedings an inspector from the unit for juvenile affairs of the Chernovskiy district police carried out a pre-investigation inquiry aimed at verifying whether the first applicant had committed criminal acts. It was established that on 20 April 2008 when playing outside with two other children the second applicant had found a cylinder-shaped metal object in a ditch near garages situated 200 metres from school no. 30 and had taken it home. At about 5 p.m. the next day near his block of flats the second applicant had handed the object to the first applicant who had dropped it on the tarmac. That had caused an explosion in which five children had been injured including the first applicant. The explosion had also damaged the windows of a flat located on the ground floor of a nearby block of flats. In her decision of 30 April 2008 the inspector concluded that there had been the elements of the crimes provided for by Article 118 § 1 (infliction of grievous bodily harm by negligence) and Article 168 (destruction and damage to property by negligence) of the Criminal Code in the first applicant’s actions. However, since he had not reached the age of criminal liability, criminal proceedings could not be instituted against him. On 5 May 2008 that decision was annulled as unlawful by the Chernovskiy district prosecutor’s office, which ordered an additional pre-investigation inquiry. The inspector’s new decision of 16 May 2008 not to institute criminal proceedings against the first applicant in view of his minor age was again annulled by the district prosecutor’s office on 19 May 2008, and an additional inquiry was ordered. On 19 May 2008 the applicants’ mothers lodged a complaint with the district prosecutor’s office, expressing their disagreement with the investigating authority’s pre-investigation inquiry into the first applicant’s criminal liability, as well as alleging that the investigation in the criminal case opened on 26 April 2008 had not been conducted properly. On 21 May 2008 their complaint was dismissed. No criminal proceedings were instituted against the first applicant and the file

of the pre-investigation inquiry was joined to the file of criminal case no. 160304.

12. In the course of the investigation in the latter case two explosives-expert reports were obtained. According to an expert report of 10 June 2008, one of the objects found at the site of the explosion was the head of a 30-mm projectile which had been fired through a bore. According to an expert report of 11 July 2008, metal debris from the site of the explosion included fragments of the body of a 30-mm VOG-17 grenade which had been fired through the bore of an AGS-17 heavy grenade launcher.

13. On 23 August 2008 an investigator from the investigation unit of the Chernovskiy district police suspended the investigation in accordance with Article 208 § 1 (1) of the Code of Criminal Procedure on the grounds that the perpetrator had not been identified.

14. The next day the head of the investigation unit annulled that decision for failure to thoroughly investigate the case and resumed the investigation.

15. In the course of the investigation witnesses and victims of the explosion and forty-six residents of the nearby blocks of flats were questioned.

16. It was established that sand had been brought to a building site for the construction of a block of flats in micro-district no. 6 by drivers M., N. and P. from the Chitaspetsstroy construction company. The company dispatcher and the driver, P., were questioned. The dispatcher stated that sand had been transported from the Olimpiyskiy kompleks building site situated in the Zabaykalskiy Military District. P. averred that he had transported sand from a warehouse of the Stroyinvest company. He had also transported sand from a former ski depot at the Zabaykalskiy Military District, but (according to him) that sand had been delivered to another micro-district of the town.

17. The first applicant's mother complained to the Chernovskiy district prosecutor's office that she had not been informed about developments in the investigation and investigative activities carried out by the investigation unit of the Chernovskiy district police. Her complaint was dismissed and on 15 September 2008 she complained further to the Zabaykalskiy regional prosecutor's office, which dismissed her complaint in a decision of 24 September 2008, holding that a victim could only have access to the material of the criminal case after the completion of the investigation.

18. On 9 October 2008 the acts of the unidentified perpetrator were reclassified under Article 225 § 1 (improper discharge of duties by a person entrusted with guarding firearms, ammunition, explosives, or explosive devices, if this has entailed their theft or destruction or other serious consequences) and Article 348 (loss of military property) of the Criminal Code. A deputy head of the Chernovskiy district police forwarded "material extracted from case no. 160304 in relation to crimes of an unidentified

person under Article 348 and Article 225 § 1 of the Criminal Code for taking a lawful decision” to the Chita garrison military prosecutor of the Siberian Military Circuit, who forwarded it to the head of the military investigation division of the Chita garrison.

19. On 17 October 2008 investigation in criminal case no. 160304 was assigned to Investigator S. from the investigation unit of the Chernovskiy district police, who informed the applicants’ mothers on 21 October 2008 that the case had been transferred to the competent authority for investigation under Article 225 § 1 of the Criminal Code.

20. On 22 October 2008 the deputy head of the military investigation division of the Chita garrison issued a decision on “the transfer of a report of a crime according to jurisdiction”. He stated that the report of the crime concerning the explosion of ammunition (*сообщение по факту взрыва боеприпаса*) had been received on 13 October 2008 from the Chita garrison military prosecutor; the pre-investigation inquiry into the report of the crime (*проверка сообщения о преступлении*) had established that on 9 April 2008 VOG-17 “grenades” from an AGS-17 heavy grenade launcher, which had passed through the bore of a grenade launcher during firing, had been brought to a building site in micro-district no. 6 in a delivery of sand; that on 20 April 2008 they had been found by children; and that subsequently they had exploded as a result of careless handling. The involvement of military personnel in the loss of the said grenades had not been established. The military investigating authorities were only competent to investigate crimes committed by service personnel, and the case should therefore be transferred to the Chernovskiy district police, who were competent to investigate crimes committed by the civilian population. The file of the pre-investigation inquiry carried out by the military investigating authorities in relation to crimes under Article 225 § 1 and Article 348 of the Criminal Code was joined to criminal case no. 160304.

21. On 24 and 30 October 2008, respectively, an investigator of the Chernovskiy district police ordered that the second and first applicants be acknowledged as victims of the crime, who had sustained physical and psychological harm. The investigator stated that before 9 April 2008 at an unidentified place an unidentified person who had been entrusted with guarding firearms, ammunition and explosive devices had failed to carry out his or her duties properly. As a result, a VOG-17 grenade from an AGS-17 grenade launcher had been lost. The grenade had been fired through the bore of a grenade launcher. On 9 April 2008 it had been brought in a sand delivery to a building site in micro-district no. 6. On 20 April 2008 it had been found by children. In the evening of 21 April 2008 it had exploded near block of flats no. 14 (a) in micro-district no. 6 as a result of careless handling, causing serious damage to the children’s health. This summary of the facts was reiterated in the investigating authorities’ subsequent decisions.

22. On 24 October 2008 the second applicant was questioned as a victim in the presence of his mother. Other victims were also questioned.

23. On 9 November 2008 an investigator from the investigation unit of the Chernovskiy district police suspended the investigation under Article 208 § 1 (1) of the Code of Criminal Procedure on the grounds that the perpetrator had not been identified.

24. On 10 November 2008 a deputy head of the Chernovskiy district prosecutor's office found that the investigation had been flawed and requested that measures be taken to establish where the ammunition had been found by the children and where it had been stored, and to identify the person responsible for its loss as a result of a failure to comply with the requirements for its storage. He also ordered that a certain D. should be granted victim status alongside the other victims.

25. On 24 November 2008 the decision to suspend the investigation was annulled and the investigator was instructed to take the measures enumerated in the prosecutor's request.

26. In November 2008 the applicants' mothers wrote to the military investigation department of the Investigative Committee at the prosecutor's office of the Russian Federation for the Siberian Military Circuit that though the letter of 21 October 2008 (see paragraph 19 above) had not indicated the name of the investigating authority to which the case had been transferred, they believed, in view of the new classification of the crime under Article 225 § 1 of the Criminal Code, that the case had been transferred for investigation to the military investigation department of the Investigative Committee at the prosecutor's office of the Russian Federation for the Siberian Military Circuit. Since they had not received any news, they asked that they be provided with information concerning any progress in the investigation.

27. On 14 December 2008 an investigator of the investigation unit of the Chernovskiy district police suspended the investigation again on the same grounds as before.

28. On 19 December 2008 the deputy head of the Chernovskiy district prosecutor's office requested the annulment of the decision to suspend the investigation, and reiterated his request to take the measures previously requested by him. Except for granting a certain D. victim status, those measures had not been taken.

29. On 27 December 2008 the head of the investigation unit of the Chernovskiy district police annulled the decision of 14 December 2008 and resumed the investigation, ordering that those measures should be carried out.

30. On 24 December 2008 the applicants' mothers requested that an investigator from the investigation unit of the Chernovskiy district police provide them with procedural documents concerning the investigative activities carried out in the course of the investigation. Their request was

unsuccessful, and on 10 February 2009 they lodged a complaint with the Chernovskiy district prosecutor's office. On 12 February 2009 the investigator provided the applicants' mothers with the requested documents. In a decision of 13 February 2009 the district prosecutor's office held that a delay in providing documents concerning the investigation had been in breach of the statutory time-limits and that the prosecutor's office had taken (unspecified) measures in respect of those violations.

31. On 13 February 2009 an investigator of the investigation unit of the Chernovskiy district police suspended the investigation again on the same grounds as before.

32. On 3 March 2009 the deputy head of the Chernovskiy district prosecutor's office reiterated the request for the investigating authority to comply with the previously given instructions.

33. On 11 March 2009 the decision to suspend the investigation of 13 February 2009 was annulled.

34. On 11 April 2009 an investigator of the investigation unit of the Chernovskiy district police suspended the investigation again on the same grounds as before, after receiving a report from the criminal search unit of the Chernovskiy district police that it had neither been possible to establish where the ammunition had been found by the children and where it had been stored, nor to identify the person responsible for its loss.

35. On 14 January 2010 the latter decision was annulled.

36. On 16 June 2011 the investigation was suspended as before, under Article 208 § 1 (1) of the Code of Criminal Procedure, for failure to identify the perpetrator.

37. On 27 December 2013 an acting head of the Chernovskiy district investigation unit of the Chita police discontinued, in accordance with Article 24 § 1 (3) of the Code of Criminal Procedure, the criminal proceedings in the case on the grounds that the prosecution of the offence under Article 225 § 1 of the Criminal Code, which belonged to the category of minor offences (*преступление небольшой тяжести*), was time-barred by virtue of Article 78 § 1 (a) of the Criminal Code.

C. Civil proceedings

38. The applicants' mothers brought civil proceedings in the applicants' interests against the Ministry of Finance of the Russian Federation and the Chita police, seeking non-pecuniary damages in the amount of 2,000,000 roubles each. They asserted that the State was responsible for its failure to ensure the safety of the explosive device and to identify and prosecute the people who had been involved in its unlawful circulation. They stated that grenades for VOG-17 grenade launchers were entirely excluded from civilian circulation and could only be stored in storage facilities of military units of the Ministry of Defence of the Russian

Federation, the Ministry of the Interior of the Russian Federation and other authorised State organs. The investigating authorities had failed to identify those who had committed the crime under Article 225 § 1 of the Criminal Code. The applicants' mothers argued that, as the victims of the crime, their children were entitled to compensation from the State.

39. At an open hearing held on 17 June 2009 the Tsentralniy District Court of Chita heard the applicants' mothers and their representative, representatives of the respondents (who argued that the claims were unfounded because any harm sustained as a result of a crime should be compensated by those who had committed it), and a prosecutor from the Tsentralniy district prosecutor's office of Chita (who also requested that the claims be dismissed). The District Court examined the decisions taken by the investigating authority in the criminal proceedings, noting that the perpetrator had not been identified. It therefore dismissed the claims, holding that under Articles 151 and 1064 § 1 of the Civil Code non-pecuniary damage was to be compensated in full by the person who had inflicted it, save for cases provided for by law. Domestic law did not provide for the State's obligation to compensate for non-pecuniary damage sustained as a result of a crime, including where the State had been unable to prevent or solve a crime.

40. The applicants' mothers appealed against that judgment. At an open hearing held on 9 September 2009 the Zabaykalskiy Regional Court heard evidence from the applicants' mothers, a representative of the Chita police, and a prosecutor from the Zabaykalskiy regional prosecutor's office, who requested that the appeal be dismissed. The court fully endorsed the findings of the first-instance court and upheld the judgment, reiterating that the State was not responsible for harm sustained as a result of an unsolved crime. It rejected as hypothetical the applicants' mothers' argument that the grenade must have been stored at the premises of the Ministry of Defence and that the State should be held responsible for the Ministry's failure to ensure its proper storage. It held that there was no evidence that the grenade had been State property or that it had not been properly stored.

41. The applicants' mothers lodged an application for supervisory review of the judgments of the Tsentralniy District Court of Chita and the Zabaykalskiy Regional Court. On 28 December 2009 Judge B. of the Zabaykalskiy Regional Court dismissed the application. She reiterated that the law did not provide for the State's obligation to compensate for damage caused by unsolved crimes. Therefore, there was no basis in domestic law for awarding the applicants compensation for non-pecuniary damage.

D. Other information

42. According to information on the Internet site of the Ministry of Defence of the Russian Federation (www.mil.ru), AGS-17 grenade

launchers and VOG-17 grenade have been and are still used by Russian military units during military exercises.

RELEVANT LEGAL FRAMEWORK

43. The Arms Act 1996 (Federal Law no. 150-FZ) distinguishes between civilian arms, service arms and battlefield arms. Battlefield arms and ammunition are used exclusively by the State armed forces, the federal organs of executive power operating, *inter alia*, in the spheres of internal affairs, emergency relief and execution of criminal punishments, and other authorised State organisations.

44. Under Government decree no. 1314 of 1997 (adopted for enforcement of the Arms Act), as in force at the material time, circulation of battlefield arms and ammunition (including their manufacture, sale, transfer, acquisition, storage, bearing, transportation and destruction) was carried out by military units and organisations of the Ministry of Defence, Ministry of the Interior and other authorised State organs. All cases of theft, loss and damage had to be reported by service personnel or staff to their superiors who, in their turn, reported them further to competent authorities specifying the model, calibre, series, number and year of manufacture of each item, organised an investigation, and took measures for the search of stolen or lost items. Stolen or lost arms and ammunition had to be removed from the records of the State organisation concerned by the established protocol after obtaining confirmation from the Main Information Centre of the Ministry of the Interior of the Russian Federation or the Ministry's regional organ that the stolen or lost items had been recorded as such. Damaged materiel had to be removed from the records of the State organisation concerned following the drawing up of a legal document by a specially created commission, after which it had to be disposed of or destroyed in the established order.

45. Article 222 § 1 of the Criminal Code, as in force at the material time, provided for criminal liability for illegal acquisition, transfer, disposal, storage, transportation, or bearing of firearms, ammunition, explosives, or explosive devices, punishable by, *inter alia*, deprivation of liberty for the period of up to four years.

46. Under Article 225 § 1 of the Criminal Code, as in force at the material time, improper discharge of duties through negligence by a person entrusted with guarding firearms, ammunition, explosives, or explosive devices, if this had entailed their theft or destruction or other serious consequences, was a crime against public safety punishable by, *inter alia*, deprivation of liberty for the period of up to two years.

47. Under Article 348 of the Criminal Code, as in force at the material time, loss of military property by negligence was a crime against military service punishable by, *inter alia*, deprivation of liberty for the period of up to two years.

48. Under Article 78 § 1 (a) of the Criminal Code, as in force at the material time, the limitation period for the prosecution of minor offences (that is to say offences punishable by deprivation of liberty for a period not exceeding three years) was two years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

49. The applicants complained under Article 6 and Article 13 of the Convention that the State had refused to pay compensation for the non-pecuniary damage sustained by them as a result of the explosion of the grenade. Their civil claim had been rejected because no proper investigation into the incident had been carried out and the service personnel and authorities responsible for the loss of the grenade had not been established by the investigating authority. The State had therefore failed to ensure an effective judicial response in relation to the incident.

50. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case and that it is not bound by the characterisation given by an applicant or a Government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998 I; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018). The Court considers that the applicants' complaints should be examined from the standpoint of Article 2 of the Convention in as much as they are related to the applicants' life-threatening injuries as a result of the explosion of the grenade. Article 2, in so far as relevant to the present case, reads as follows:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ...”

51. The Government contested the applicants' arguments. They argued that the applicants had not exhausted domestic remedies by failing to lodge a court appeal against actions and decisions of the investigating authorities in the criminal proceedings instituted in relation to their children's injuries. The applicants had also failed to bring an action for compensation for a violation of their right to criminal proceedings within a reasonable time in accordance with the Compensation Act (Federal Law no. 68-FZ of 30 April 2010 on Compensation for Violation of the Right to a Trial within a Reasonable Time or the Right to Enforcement of a Judgment within a Reasonable Time). The civil proceedings initiated by the applicants were not an effective remedy because the damage sustained by them had to be reimbursed by the tortfeasor and not by the State. By bringing an action against State authorities the applicants had knowingly used an improper remedy.

52. The Government further stated that in 2016, a year before the Government had been given notice of the application, the material of the pre-investigation inquiries and the criminal proceedings, as well as the material of the civil proceedings, had been destroyed upon expiration of a time-limit for their storage, which had made it difficult for the Government to prepare their position in the case. They submitted a certificate concerning the destruction of the case file in the criminal proceedings on 31 December 2014 upon the expiration of the one-year storage period.

53. Relying on an opinion by an investigator from the investigation division of the Zabaykalskiy regional police, the Government argued that there were no reasons to believe that there had ever been a person responsible for storage of explosive devices, whose failure to carry out his or her duties had led to the loss of the grenade subsequently found by the applicants. The investigation had not identified the owner of the grenade. It had not established that the grenade had belonged to the State. Nor had it established that the grenade had been found by the children as a result of someone's failure to properly carry out his or her duties when guarding arms and explosive devices. It had been established that the grenade had been fired. Hence, it could not have been stored in any guarded storage facility. No elements of crimes under Article 222, Article 225 or Article 348 of the Criminal Code could be detected in this case.

54. The applicants stated that their mothers had lodged various complaints concerning the investigation with the prosecutor's office and that, without timely and full access to the case documents and in the absence of full information about the progress of the investigation, they had been unable to challenge effectively the actions or omissions of the investigating authorities in a court. Furthermore, given that from the very outset the investigation had not been effective, it was highly doubtful that a court appeal would have had any prospects of success. They considered such a remedy ineffective in the circumstances. The applicants further stated that the Compensation Act had been adopted after they had lodged the application with the Court, and that, given the outcome of the domestic criminal and civil proceedings, it had made no sense to use any other remedy.

55. The applicants submitted that the VOG-17 grenade launcher had been developed in the early 1970s and since then had been used by the army. Grenades for the VOG-17 had been entirely excluded from civilian circulation and could only be stored in the warehouses of military units of the Ministry of Defence, the Ministry of the Interior and other authorised State organs. One could therefore safely assume that the grenade which had caused the explosion (in which their children had suffered) had belonged to the State. Owing to the special legal regime for arms and ammunition, the State had to be responsible for those who were authorised to possess arms and ammunition and their employers. It would have been possible for the

State to plead lack of responsibility if the grenade had been from the time of the Second World War. However, this had not been the case. The position taken by the authorities that the State had in no way been involved in the explosion of the modern ordnance in peacetime in a residential area did not stand up to any criticism.

56. The applicants argued that there had been good reasons to believe that the grenade (which, according to the experts, had been fired but had not exploded) had been used during military exercises, that it had not been collected afterwards, and that it had then been transported in a sand delivery to the building site in the town. The investigating authority had not questioned service personnel in order to verify that version immediately after the incident, concentrating instead on the first applicant's criminal liability – a thesis wholly lacking any credibility. The investigating authority had delayed the reclassification of the offence under Article 225 § 1 of the Criminal Code. The investigation carried out by the Chernovskiy police had been doomed to fail because it had concerned service personnel and closed military facilities. The investigation should have established, *inter alia*, which military unit had carried out military exercises in the vicinity of the place from which sand had been brought to the building site in Chita, the details concerning the inspection of the military range in order to find and collect the used munitions, and the authorities responsible for the safety of the site after the exercises. The military authorities and service personnel responsible for the loss of the grenade had not been established. This had made it impossible for the applicants to prove the State's liability and to obtain compensation in civil proceedings.

A. Admissibility

57. The Court notes that the Government did not challenge the applicability of Article 2 of the Convention. Indeed, in view of the fact that the applicants were the survivors of a grenade explosion who received life threatening injuries, Article 2 is applicable (*Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, §§ 144 and 146-50, 25 June 2019; see also *Akdemir and Evin v. Turkey*, nos. 58255/08 and 29725/09, § 46, 17 March 2015, and *Sarur v. Turkey*, no. 55949/11, § 27, 2 May 2017).

58. The Court considers that the Government's objections concerning domestic remedies raise issues relevant for the effectiveness of the investigation which are closely linked to the merits of the applicants' complaints, and that therefore these objections should be joined to the merits and examined below.

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

B. Merits

1. General principles

60. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe, requires the State not only to refrain from the “intentional” taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This substantive positive obligation entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. It applies in the context of any activity, whether public or not, in which the right to life may be at stake (see *Nicolae Virgiliu Tănase*, cited above, §§ 134-35). This is the case, for example, in respect of the management of dangerous activities (see *Iliya Petrov v. Bulgaria*, no. 19202/03, §§ 54 and 56, 24 April 2012, which concerned a serious injury to an eleven-year-old child after he had been accidentally electrocuted in an unsecured electrical substation; *Pereira Henriques v. Luxembourg*, no. 60255/00, §§ 54-63, 9 May 2006; *Kudra v. Croatia*, no. 13904/07, §§ 106-07, 18 December 2012, which concerned incidents on or near a building site; and *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, § 158, 28 February 2012, which concerned industrial activities), within the context of emergency relief (see *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, §§ 158-59, ECHR 2008 (extracts)), or in respect of death in a public place (see *Banel v. Lithuania*, no. 14326/11, §§ 64-65 and 68, 18 June 2013, which concerned a thirteen-year-old boy’s death from injuries sustained when part of a balcony had broken off from a building and had fallen on him while he had been out playing).

61. The substantive positive obligation at issue must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (*Budayeva and Others*, cited above, § 135; see also *Nicolae Virgiliu Tănase*, cited above, § 136).

62. The Court further reiterates that the State’s duty to safeguard the right to life must be considered to involve also the procedural positive obligation to have in place an effective independent judicial system capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (*Nicolae Virgiliu Tănase*, cited above, § 137).

63. In cases concerning unintentional infliction of death and/or lives being put at risk unintentionally, the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be

obtained. Where agents of the State or members of certain professions are involved, disciplinary measures may also be envisaged (see *Nicolae Virgiliu Tănase*, cited above, § 159).

64. Although the Convention does not guarantee, as such, a right to have criminal proceedings instituted against third parties, even in cases of non-intentional interferences with the right to life or physical integrity there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2. Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority that goes beyond an error of judgment or carelessness. Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question – fully realising the likely consequences and disregarding the powers vested in them – failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy that individuals may exercise on their own initiative (see *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 71 and 93, ECHR 2004-XII, and *Oruk v. Turkey*, no. 33647/04, §§ 56-66, 4 February 2014).

65. The Court reiterates further that in cases “involving life-threatening injuries, as in the event of death”, as soon as the authorities become aware of the incident, they “must make all reasonable efforts given the practical realities of investigation work, including by having in place the necessary resources,” to ensure that on-site and other relevant evidence is collected promptly and with sufficient thoroughness so as to secure the evidence and to eliminate or minimise any risk of omissions that may later undermine the possibilities of establishing liability and of holding the person(s) responsible accountable. That responsibility lies with the authorities and cannot be left to the initiative of the victim or his or her next-of-kin. The obligation to collect evidence applies at least until such time as the nature of any liability is clarified and the authorities are satisfied that there are no grounds for conducting or continuing a criminal investigation (see *Nicolae Virgiliu Tănase*, cited above, §§ 161-62).

66. Once it has been established in such an initial investigation that a life-threatening injury has not been inflicted intentionally, a civil remedy is normally regarded as sufficient, save for cases involving exceptional circumstances where it is necessary to pursue an effective criminal investigation, as noted in paragraph 64 above (*ibid.*, §§ 163-64).

67. In the event that various legal remedies (civil as well as criminal) are available, the Court will consider whether such remedies as are provided for in law and applied in practice, could – taken together – be said to have constituted legal means capable of establishing the facts, holding

accountable those at fault and providing appropriate redress to the victim. The choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting States' margin of appreciation. There are different avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still have fulfilled its positive duty by other means (*ibid.*, § 169).

68. The national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined (see *Öneryıldız*, cited above, § 93).

69. In the context of the exercise of military activity under the responsibility of the State the dangerousness of which is not in doubt and is fully known to the domestic authorities, the national authorities have an obligation to take the appropriate measures in order to protect the lives of the people concerned (see *Oruk*, cited above, § 67). The Court stated in the case of *Oruk* that where risks emanated from a military firing range containing unexploded ordnance it was primarily the responsibility of the military authorities to ensure the safety and supervision of the area to prevent access to it and minimise the risk of the ordnance being moved. To this end, signs warning of the dangerous nature of the area should have been put in place to clearly delineate the perimeter of the area where there had been a risk. In the absence of such signs, it had been for the State to ensure that the firing range had been cleaned up in order to eliminate all unexploded ordnance. The Court found that the shortcomings in that case in terms of safety had been such that they had exceeded mere negligence on the part of army personnel in the locating and destruction of unexploded ordnance. In view of the seriousness of the shortcomings observed, the violation of right to life of the applicant's ten-year-old son could not be remedied merely by an award of damages (*ibid.*, §§ 59-66).

2. Application of the general principles in the instant case

70. The Court observes that the investigating authorities inspected the site of the explosion and took samples for examination by experts. Five days after the incident they initiated criminal proceedings under Article 222 § 1 of the Criminal Code against the unidentified individual who had acquired, transported and stored the explosive device which had been found by the second applicant in micro-district no. 6. In the course of the ensuing

investigation explosives-expert reports were obtained and victims and witnesses were questioned. Five months after the incident the acts of an unidentified perpetrator were reclassified as crimes against public safety and military service under Article 225 § 1 (negligence on the part of personnel entrusted with guarding firearms, ammunition and explosives) and Article 348 (loss of military property) of the Criminal Code, respectively (see paragraphs 46-47 above). A month after the reclassification regular decisions to suspend the investigation for failure to identify the perpetrator followed, until the discontinuation of the criminal proceedings for the reasons that the prosecution had become time-barred.

71. The investigation established the facts as follows. Before 9 April 2008 at an unidentified place an unidentified person, entrusted with guarding firearms, ammunition and explosive devices, had failed to carry out his duties properly. As a result, a VOG-17 grenade (which had been fired through the bore of a AGS-17 grenade launcher) had been lost. On 9 April 2008 the grenade had been brought in a sand delivery to a building site in micro-district no. 6. On 20 April 2008 it had been found by children. On 21 April 2008 it had exploded near a block of flats in micro-district no. 6 as a result of careless handling by the applicants, causing grievous harm to their health.

72. This version of the facts, as well as the classification of the crime as criminal negligence on the part of personnel entrusted with guarding battlefield arms and ammunition, remained unchanged until the end of the investigation (see paragraphs 21 and 37 above). The applicants' arguments concerning the failure of the investigation to verify the involvement of military personnel in the loss of the grenade are not therefore without foundation.

73. Since ammunition such as VOG-17 grenades could only be lawfully used by State-authorized organisations operating, *inter alia*, in the spheres of defence and internal affairs (see paragraph 43 above), the investigation should have identified such State organisations and their officials or service personnel and verified whether the procedure provided for by the legislation for cases of the loss or damage of ammunition (see paragraph 44 above) had been carried out by them. If the investigation considered, as it did, that there had been possible negligence on the part of military personnel in ensuring that ammunition had not been lost, then it had to establish, for example, whether the fired but unexploded VOG-17 grenade could have been abandoned after military training activities. The Court notes, however, that there is no indication as to what actions had been carried out and what the results of those actions had been in order for the military investigation division of the Chita garrison to conclude that the involvement of military personnel in the loss of the grenade had not been established as a result of its pre-investigation inquiry, which lasted nine days (see paragraph 20 above). Nor is there any such indication in the decisions by the civilian

investigating authorities in the case, including the most recent decision of 27 December 2013, while the material of the military pre-investigation inquiry had been joined to the criminal case initiated into the explosion (see paragraphs 20, 21, 23, 27, 31, 34, 36 and 37 above). The decisions to suspend the investigation were repeatedly annulled following the intervention of the prosecutor's office which insisted – the last time on 3 March 2009, that is to say more than ten months after the tragic accident – that investigative actions had to be carried out in order to establish, *inter alia*, the place where the grenade in question had been stored and to identify the person responsible for its loss (see paragraphs 24-25, 28-29 and 32-33). There is no indication in the case file as to what investigative actions, if any, had been carried out in order to establish those facts.

74. In sum, there is nothing in the case file to indicate that, having established facts which pointed to possible negligence on the part of military personnel, the investigating authorities made all reasonable efforts in accordance with their procedural obligation under Article 2 of the Convention to collect relevant evidence which would enable clarification of the nature of any liability to satisfy the authorities that there were no grounds to continue a criminal investigation (see paragraph 65 above). They further failed to elucidate the extent of any negligence on the part of military personnel in taking “measures that were necessary and sufficient to avert the risks inherent in a dangerous activity”, which might constitute exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2 (see paragraphs 64 and 69 above).

75. As regards the Government's objections (see paragraph 51 above), the Court is not convinced that a court appeal against one or more decisions to suspend the investigation could have been an effective remedy in the circumstances of the present case, in which those decisions were regularly annulled following requests by the prosecutor's office. A court appeal could only have had the same effect and the Government did not explain how that could have changed the way the investigation had been carried out. Furthermore without access to the case file or proper information on the progress of the investigation (see paragraphs 17, 26 and 30 above) the applicants could not have challenged the acts or omissions of the investigating authorities before a court. Nor is the Court convinced that the applicants should be required to claim compensation for the length of the criminal proceedings under the Compensation Act, given that they did not as such complain about the length of the proceedings. The Government's objections should therefore be dismissed.

76. The Court furthermore observes that the applicants availed themselves of the civil remedy, seeking compensation for non-pecuniary damage suffered as a result of the explosion, and arguing that the State had to assume responsibility for its failure to ensure that the unexploded grenade

was not lost and for its failure to identify and prosecute those at fault. In dismissing their action the civil courts chose to rely unreservedly on the results of the investigation, stating that there was no evidence that the grenade had belonged to the State or that it had not been properly guarded.

77. The foregoing considerations are sufficient to enable the Court to conclude that the criminal and civil remedies in the applicants' case, taken together, did not constitute an effective judicial response promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim, essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.

There has accordingly been a violation of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicants each claimed 70,000 euros (EUR) in respect of non-pecuniary damage, stating that they had suffered serious health damage with long-term consequences.

80. The Government noted that any award under Article 41 of the Convention should be made in accordance with the Court's case-law.

81. In view of the seriousness of the violation concerning the procedural obligation of the State in a situation involving an interference with the right to life of the applicants, who sustained serious injuries demanding complex treatment at the age of thirteen and seven, the Court finds it appropriate to award each applicant EUR 40,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. The applicants also claimed legal costs incurred before the Court, relying on a legal services agreement with their representative, Ms A.V. Kopteyeva, which amounted to 95,000 Russian roubles.

83. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award

the sum of EUR 1,400, which is the equivalent of the amount claimed, for legal costs for the proceedings before the Court.

C. Default interest

84. The Court considers it appropriate that the default interest rate 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 objections as to the exhaustion of domestic remedies and *rejects* them;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 2 of the Convention;
4. *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 currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 40,000 (forty thousand euros), plus any tax that may be chargeable, to each applicant in respect of non-pecuniary damage;
 - (ii) EUR 1,400 (one thousand four hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (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;
5. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 11 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Pinto de Albuquerque and Elósegui is annexed to this judgment.

P.L.
J.S.P.

JOINT CONCURRING OPINION OF JUDGES PINTO DE ALBUQUERQUE AND ELÓSEGUI

A. The scope of the case and the subject matter of the applicants' complaints

We agree with the finding of a violation of Article 2 of the European Convention on Human Rights (the “Convention”) but would like to clarify the meaning of our vote.

The applicants raised a complaint under the substantive limb of Article 2 and the parties discussed the issue in their observations. In particular, they emphasised the existence of a “special regime” for the storage and circulation of military weapons and ammunition as well as the exclusive military ownership of the relevant grenade, thereby demonstrating the responsibility of the State. In this context, the applicants adamantly affirmed that “it [could] be safely assumed that the shots for the VOG-17 grenade launcher belonged to the Russian Federation, which should be responsible for improper storage of ammunition”¹. They further added that “the shots for the VOG-17 grenade launcher, which was developed in the early 1970s and adopted by the Soviet Army, ha[d] been completely withdrawn from civil circulation and [were] only to be stored in warehouses of military units and units of the Ministry of Defense of the Russian Federation, the Ministry of Internal Affairs of the Russian Federation and other military formations, which [were] organs of the military organization of the state”. Finally, they insisted that²:

“the findings of experts are established and are not disputed by the authorities that the shot from the VOG-17 grenade launcher is a modern ammunition. In this case, the position of the authorities that the state is in no way involved in the explosion of grenades in peacetime in the residential sector, does not stand up to any criticism.”

The Government reacted to these allegations, by stating that “the present case [did] not contain evidence and co-existence of sufficiently strong, clear and concordant inferences or un rebutted presumptions which would allow the European Court of Human Rights (‘the Court’) to charge the Government with infliction of bodily harm ...”³. They added, “[t]hus, the case file does not provide sufficient evidential basis to enable the Court to find ‘beyond reasonable doubt’ that the Russian authorities were responsible for infliction of bodily harm to the ... children”⁴.

The applicants’ complaints regarding the responsibility of the State for the injuries sustained by them, as children, as well as the Government’s

¹ Paragraph 29 of the applicants’ observations.

² Paragraph 30 of the applicants’ observations.

³ Paragraph 38 of the Government’s observations.

⁴ Paragraph 39 of the Government’s observations.

denial of any such responsibility, called for an inquiry into the State’s substantive obligations under Article 2.

Although the Court questioned the parties on this issue, it did not address this matter specifically in the judgment. In fact, the Court specifically asked the parties whether “the State’s liability as an owner of dangerous goods and/or employer of persons [was] at fault”, especially in relation to the “exclusion of arms and ammunition from civil circulation, special rules for their storage, use and disposal”⁵. It is true that the Court mentioned the general principles governing the substantive positive obligation under Article 2⁶, but it refrained from applying those principles to the case at hand. The omission of the Court is even more puzzling in view of the version of the facts and the classification of the crime that the Court considered as established by the domestic criminal investigation⁷, which pointed to “possible negligence on the part of military personnel”⁸.

Consequently, we find that, in addition to the procedural obligations, the Court should have examined the State’s obligations under the substantive limb of Article 2. That is exactly what we propose to do in this opinion, after a brief mention of the procedural limb of Article 2.

B. Examination under the procedural limb of Article 2

In general, we agree with the assessment of the shortcomings of both the criminal and civil proceedings at the domestic level. In addition to the criticisms in the judgment, we would add that the investigating authority did not question the military personnel immediately after the incident involving the young victims, concentrating instead on the criminal liability of these victims. This line of investigation focusing on the criminal liability of the victims themselves was clearly wrong. The correct line of investigation focusing on crimes against public safety and military service under Article 225 § 1 (negligence on the part of personnel entrusted with guarding firearms, ammunition and explosives) and Article 348 (loss of military property) of the Criminal Code was belated, since it took five months after the incident for the acts of an unidentified perpetrator to be reclassified under these provisions. In our view, this is the main shortcoming of the internal criminal investigation, since it made it impossible to gather the relevant witness testimony and real evidence. This erroneous initial approach was compounded by the fact that the material from the pre-investigation inquiries and the criminal proceedings, as well as the material from the civil proceedings, was destroyed upon expiry of the time-limit for their storage.

⁵ See the questions put to the parties in the present case.

⁶ Paragraphs 60 and 61 of the judgment.

⁷ Paragraphs 71 and 72 of the judgment.

⁸ The expression is repeated twice in paragraphs 73 and 74 of the judgment.

Furthermore, we agree with the logical assumption of the Court in the following passage⁹:

“Since ammunition such as VOG-17 grenades could only be lawfully used by State-authorised organisations operating, *inter alia*, in the spheres of defence and internal affairs ..., the investigation should have identified such State organisations and their officials or service personnel and verified whether the procedure provided for by the legislation for cases of the loss or damage of ammunition ... had been carried out by them.”

On the basis of this assumption, the Court found that¹⁰:

“In sum, there is nothing in the case file to indicate that, having established facts which pointed to possible negligence on the part of military personnel, the investigating authorities made all reasonable efforts in accordance with their procedural obligation under Article 2 of the Convention to collect relevant evidence which would enable clarification of the nature of any liability to satisfy the authorities that there were no grounds to continue a criminal investigation ...”

We do not understand why the Court timidly limited its findings of a violation to “their procedural obligation under Article 2 of the Convention”.

The same logical assumption that sustained the finding of a procedural violation of Article 2 (“VOG-17 grenades could only be lawfully used by State-authorised organisations operating, *inter alia*, in the spheres of defence and internal affairs”) could and should have led the Court to a finding on the substantive limb of this Article as well. The evidence in the file consistently supported that conclusion. For unexplained reasons, the Court stayed half way in its analysis.

C. Examination under the substantive limb of Article 2

1. *The Convention obligation to criminalise negligent actions and omissions*

In the present judgment, the Court reiterates existing case-law that does not necessitate criminal law remedies when death or life-threatening injury is inflicted unintentionally. This problematic approach was crystallised in a recent judgment of the Grand Chamber, *Nicolae Virgiliu Tănase v. Romania*. In that case it held that civil remedies would suffice when “death or a life-threatening injury has not been inflicted intentionally”, either by the State or by a private person¹¹. The Grand Chamber has added another alarming aspect to this loose approach by extending it to State agents, whereas previously it was confined to private parties¹². Although, in

⁹ Paragraph 73 of the judgment.

¹⁰ Paragraph 74 of the judgment.

¹¹ *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 163, 25 June 2019. For earlier case-law see, among others, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Vo v. France* [GC], no. 53924/00, § 94, ECHR 2004-VIII.

¹² See, among other authorities, *Sinim v. Turkey*, no. 9441/10, § 62, 6 June 2017.

the current case, the Court acknowledges that life-endangering offences should not go unpunished, it still adheres to *Nicolae Virgiliu Tănase* and holds that criminal investigations would be necessary only under “exceptional circumstances”¹³. The Court’s approach must be challenged as it is both incompatible with international law and contrary to Council of Europe member State practice.

The United Nations Human Rights Committee’s (“the Human Rights Committee”) recent General Comment No. 36 on Article 6 (right to life) of the International Covenant on Civil and Political Rights serves as a guide to understanding the international law trend in remedying unintentional threats to the right to life. The Human Rights Committee has held that per the duty to protect the right to life by law, States are obligated to investigate and prosecute potential cases of unlawful deprivation of life, to provide full reparation, and notably, mete out punishment¹⁴. Accordingly, States are under an obligation to adopt a “protective legal framework” that must include criminal sanctions against threats to life. Notably, acts that are likely to result in deprivation of life, such as negligent homicide, must be sanctioned by criminal law¹⁵. In this context, the Human Rights Committee has held that States must refrain from opting merely for administrative or disciplinary measures if there is enough evidence for criminal prosecution¹⁶. The Human Rights Committee has also held that States must take preventive measures against repetition of right to life violations¹⁷, which indicates the significance of criminal investigations in order to discover the truth and establish responsibility¹⁸.

The domestic law of Council of Europe member States is evidence of a European consensus in favour of providing criminal-law remedies for unintentional deaths or life-threatening injuries. For instance, at least 31 member States provide criminal-law remedies for death or injuries due to medical negligence¹⁹. Accordingly, the Court cannot fall back on the States’ margin of appreciation in this regard.

¹³ Paragraphs 66 and 74 of the judgment.

¹⁴ United Nations Human Rights Committee (UNHRC), General Comment No. 36, 30 October 2018, para. 19.

¹⁵ UNHRC, General Comment No. 36, para. 20.

¹⁶ UNHRC, General Comment No. 36, para. 27.

¹⁷ UNHRC, General Comment No. 36, para. 28.

¹⁸ See, e.g., *Khashiyev and Akayeva v. Russia* (nos. 57942/00 and 57945/00, § 121, 24 February 2005), where the Court held that “a civil action is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings as to the perpetrators of fatal assaults, and still less to establish their responsibility”. Besides the existence of criminal law remedies, the effectiveness of criminal investigations may be essential for the functioning of other remedies. See *Banel v. Lithuania* (no. 14326/11, § 71, 18 June 2013), where the Court pointed out that the “applicant would have faced serious difficulties in her attempts to have her civil claim for compensation granted” due to the ineffectiveness of the criminal proceedings.

¹⁹ *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 123, 19 December 2017.

Against this backdrop, the Court's persistent leniency towards unintentional infringement of the right to life, especially in its forms of error of judgment and carelessness, which can cause dramatic losses in terms of human life, is confusing, to say the least. In spite of remaining linguistically attached to the statement of principle in *Calvelli and Ciglio v. Italy*²⁰, according to which the Convention did not necessarily require the provision of a criminal-law remedy when the right to life had been infringed unintentionally, the Court has on several occasions made it clear that criminal remedies would be necessary, such as when human-caused harm resulted from operation of waste-collection sites and military activities²¹. As a matter of fact, it seems that the exception has become the rule, since the Court has found more often than not that the lack of criminal remedies constituted a violation of Article 2.

2. *The specific conditions of the incident involving the children*

Although the legal and administrative framework with respect to battlefield ammunition is present in Russia²², it must be questioned whether it functioned to effectively protect and deter the applicants from harm. Furthermore, considering the exclusive military use of the grenades, it must be examined whether the State had taken the necessary operative measures to protect the applicants' right to life.

The substantive obligations of the respondent State must be examined with regard to the specific conditions of the incident.

First, it is crucial to keep in mind that grenades are lethal weapons, strictly for military use. Grenades and grenade launchers are classified as "light weapons" by the Organisation for Security and Co-operation in Europe (OSCE), namely weapons that are intended for use by a group of armed or security forces²³. The OSCE Document on Small Arms and Light Weapons lays down detailed guidelines for documenting and stockpiling of light weapons, including training of personnel, thereby demonstrating the comprehensive care needed to store them. Furthermore, under the Protocol on Incendiary Weapons (Protocol III) to the United Nations Convention on Certain Conventional Weapons, to which Russia has been a party since 1982, grenades and grenade launchers are considered "incendiary weapons"²⁴. Several limitations to the use of incendiary weapons are stipulated in Article 2 of Protocol III. In particular, subparagraph 3 of the

²⁰ *Calvelli and Ciglio*, cited above, § 51.

²¹ See some examples in *Sinim*, cited above, § 62.

²² Paragraphs 43 to 48 of the judgment.

²³ OSCE Document on Small Arms and Light Weapons, 24 November 2000, <https://www.osce.org/fsc/20783?download=true> at 1.

²⁴ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the 1980 Convention on Certain Conventional Weapons, Geneva, 10 October 1980. Entry into force: 2 December 1983.

Article provides that Parties may not use incendiary weapons in an area with a concentration of civilians. Although the Protocol is applicable to the use of incendiary weapons for a military attack, the extensive safeguards for civilians demonstrate the danger posed by grenades and the necessary degree of care.

Second, it is highly significant to point out that the applicants were children at the time of the event. Children are a vulnerable group which benefits from heightened protection under the Convention and human rights law in general. The Human Rights Committee has noted that States are obligated to take “special measures of protection” towards children, as they are considered “individuals in [a] situation of vulnerability”²⁵. Similarly, the Court has established that children, especially young ones, are more vulnerable than adults and need particular protection by the authorities²⁶. In particular, authorities should bear in mind that children are likely to play with ammunition, believing it to be harmless²⁷. UNICEF has found that children constitute approximately 20 to 30 per cent of casualties caused by explosive weapons²⁸. Children left with disabilities are also severely hindered from enjoying their rights and are more likely to be exploited²⁹.

Finally, States have an obligation to “afford general protection to society” when the right to life is at stake due to the dangerous nature of the relevant activity, especially military activities³⁰. Therefore, the present application must be examined against the backdrop of risks posed by grenades, the State ownership thereof, and the vulnerability of children; and thus against the State’s substantive obligation to effectively protect the right to life.

3. *The existing legal and administrative framework in Russia*

The primary substantive obligation of the State under Article 2 is the duty to adopt a legislative and administrative framework that should provide effective protection from threats to the right to life³¹. Accordingly, the mere existence of a framework is not sufficient; it must also be implemented in order to provide adequate protection. The Court has interpreted the duty to set up a necessary framework “so as to make its safeguards practical and effective”³². In another case, since the applicant was not claiming that the

²⁵ UNHRC, General Comment No. 36, para. 23.

²⁶ *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 35, 10 April 2012.

²⁷ *Oruk v. Turkey*, no. 33647/04, § 64, 4 February 2014.

²⁸ UNICEF, Focus: Explosive remnants of war (2013), https://www.unicef.org/sowc2013/focus_war_remnants.html.

²⁹ UNICEF, Devastating Impact: Explosive weapons and children, https://www.unicef.org/protection/Devastating_Impact_low_res.pdf at 5.

³⁰ *Ercan Bozkurt v. Turkey*, no. 20620/10, § 54, 23 June 2015, and *Oruk*, cited above, § 44.

³¹ *Öneryıldız v. Turkey* [GC], no. 48939/99, § 89, ECHR 2004-XII.

respondent State sought to deliberately harm the individuals, it had to be determined whether the State had taken all the necessary measures to prevent the injuries suffered by them³³.

First, if the State organises or authorises an activity that is inherently dangerous, such as the use of explosive devices, it “must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum”³⁴. It must be noted that the Court first developed this standard in relation to army personnel participating in military training³⁵. The Court then applied the standard to cases where individuals were harmed while doing their job³⁶. Accordingly, since the applicants were not in any way associated with the army, nor were they harmed while performing their job, it is clear that the State must be subject to a much higher standard than merely reducing the risks to a reasonable minimum. Therefore, it must be questioned whether the regulatory framework is “geared to the special features of the activity in question, with particular regard to the level of the potential risk to human lives involved”³⁷. The Government decree of 1997 *prima facie* provides for an extensive and detailed reporting mechanism against possible losses of weapons and ammunition. That being said, if obtaining sand or similar material from military areas for construction purposes is common practice, the law should particularly account for additional control as it puts civilians at risk of contact with dangerous weapons.

4. *Effectiveness of the existing legal and administrative framework in Russia*

In addition to adopting an effective regulatory framework, States must also ensure compliance with the law. In the present judgment, the Court refers to comprehensive case-law in this regard³⁸. Yet the Court is reluctant to examine the relevant obligations: despite the applicants’ demands that the responsibility of the State be established, the Court only tiptoes around “possible negligence”, and contradicts itself by acknowledging “established facts” that point to the State’s negligence³⁹.

The Court’s reluctance to examine substantive obligations of the State is puzzling given its extensive reference to *Oruk v. Turkey* regarding the

³² *Öneryıldız*, cited above, § 69. With regard to protection of safety in public places see *Ciechońska v. Poland*, no. 19776/04, § 69, 14 June 2011.

³³ *Oruk*, cited above, § 57.

³⁴ *Stoyanovi v. Bulgaria*, no. 42980/04, § 61, 9 November 2010.

³⁵ *Stoyanovi*, cited above, § 61.

³⁶ *Binişan v. Romania*, no. 39438/05, §§ 6-9, 20 May 2014, and *Mučibabić v. Serbia*, no. 34661/07, § 12, 12 July 2016.

³⁷ *Cevrioğlu v. Turkey*, no. 69546/12, § 51, 4 October 2016.

³⁸ Paragraph 60 of the judgment.

³⁹ Paragraph 74 of the judgment.

obligation to take appropriate measures to protect lives⁴⁰. In fact, it is all the more puzzling given that the Court has persistently examined substantive obligations of the State in negligence cases, especially when children are harmed in relation to military activities, e.g. *Paşa and Erkan Erol v. Turkey* (lack of security measures around land mined by the army and used by villagers)⁴¹. Even in cases where the Court did not find a violation of Article 2, it has considered the substantive limb, e.g. *Sarıhan v. Turkey* (obligations of the State to prevent the applicant from entering a landmine zone)⁴². Similarly, the Court extensively questioned whether the State’s substantive obligations had been fulfilled in *Iliya Petrov v. Bulgaria* (effectiveness of law to prevent injury after accidental electrocution in an unsecured electrical substation)⁴³ and *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey* (failure to prevent a seven-year-old boy from freezing to death on his way home from school in a blizzard)⁴⁴.

As to the applicable standard, it must initially be noted that the Court employs a diverging causality test to establish substantive obligations, including determining responsibility when Article 2 has been infringed as a result of an omission of the State⁴⁵. The Court’s approach is highly fact and context-dependent, and can hardly be deemed consistent. It has varied from finding State responsibility due to “failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm”⁴⁶, to a test as ambiguous as “display[ing] due diligence in protecting the right to life”⁴⁷, or to one as stringent as a “causal link established between the gross negligence attributable to the State and the loss of human lives”⁴⁸.

In the present judgment, the Court (only theoretically) offers the consideration “whether ... the grenade could have been abandoned after military training activities”⁴⁹, which is a rather high threshold that demands a direct causal link between the State’s action and the applicants’ injuries. In contrast, previous case-law has established that harm may be attributed to the State’s inaction and namely to a failure to monitor compliance with the

⁴⁰ Paragraph 69 of the judgment.

⁴¹ *Paşa and Erkan Erol v. Turkey*, no. 51358/99, §§ 32-38, 12 December 2006.

⁴² *Sarıhan v. Turkey*, no. 55907/08, §§ 54-57, 6 December 2016.

⁴³ *Iliya Petrov v. Bulgaria*, no. 19202/03, §§ 58-65, 24 April 2012.

⁴⁴ *İlbeyi Kemaloğlu and Meriye Kemaloğlu*, cited above, §§ 40-41.

⁴⁵ For a comprehensive academic analysis see Laurens Lavrysen, *Human Rights In A Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Intersentia, 2016, p. 131 et seq.

⁴⁶ *E. and Others v. the United Kingdom*, no. 33218/96, § 99, 26 November 2002. This is an Article 3 (ill-treatment) case and the relevant standard should *a fortiori* apply to the right to life.

⁴⁷ *İlbeyi Kemaloğlu and Meriye Kemaloğlu*, cited above, § 47.

⁴⁸ *Öneryıldız v. Turkey* [GC], cited above, § 135.

⁴⁹ Paragraph 73 of the judgment.

law. For instance, in *Iliya Petrov v. Bulgaria*, the Court found that the lack of a system for monitoring the proper application of safety rules in the operation of high-voltage electrical installations was the determining factor in the occurrence of the accident⁵⁰. Significantly, in *Cevrioğlu v. Turkey*, although the proper implementation of the relevant inspection mechanism might not have absolutely prevented the death of the applicant's son, the Court found it sufficient that it would have "increased the possibility of identifying and remedying the failings" of the system⁵¹. It is also significant that where the State is engaged in a dangerous activity, it is under an obligation to govern the "operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks"⁵².

As pointed out by the Court in the present judgment, "at an unidentified place an unidentified person responsible for guarding the firearms, ammunition and the explosive devices, had failed to carry out his duties properly"⁵³ and this person responsible for guarding this particular ammunition (a 30-mm VOG-17 grenade from an AGS-17 heavy grenade launcher which had been launched⁵⁴) could only have been a member of the military personnel. It also follows from the sequence of events that the supervision of the military personnel involved was insufficient as well, since there is no indication that the conduct of the personnel was subject to control. For instance, there is no indication of an inventory being taken after activities involving the use of grenades, or of a periodic inventory for that matter. Nor is there any indication that the designated supervisory authority, the Main Information Centre or regional organ of the Ministry of the Interior, played any role in supervising the recording of lost weapons and ammunition. Accordingly, it should be concluded that the State authorities have failed in their obligation to monitor compliance with the law.

D. Compensation

The Court awarded each applicant EUR 40,000 in respect of non-pecuniary damage. This amount would obviously be excessive in the case of a mere procedural violation of Article 2, according to the case-law of the Court. The truth is that the Court decided this "[i]n view of the seriousness of the violation concerning the procedural obligation of the State in a situation involving an interference with the right to life of the applicants, who sustained serious injuries demanding complex treatment at

⁵⁰ *Iliya Petrov*, cited above, § 63.

⁵¹ *Cevrioğlu*, cited above, § 69.

⁵² *Öneryıldız v. Turkey* [GC], cited above, § 90.

⁵³ Paragraph 71 of the judgment.

⁵⁴ Paragraph 21 of the judgment.

the age of thirteen and seven”⁵⁵. In other words, the Court went well beyond the reasonable amount for a procedural violation of Article 2, in view of the gravity of the consequences that this incident has had for the applicants. By so doing, the Court is ultimately imputing these injuries to the negligence of the Russian State.

In any event, since we believe that there has also been a substantive violation of Article 2 of the Convention in the present case, we had no qualms about voting for this amount of compensation.

⁵⁵ Paragraph 81 of the judgment.