



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

FIRST SECTION

CASE OF GAKIYEV AND GAKIYEVA v. RUSSIA

(Application no. 3179/05)

JUDGMENT

STRASBOURG

23 April 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of Gakiyev and Gakiyeva v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinvernì,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 3179/05) 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 two Russian nationals, Mr Khalid Baykhayevich Gakiyev and Ms Malkan Shatayevna Gakiyeva (“the applicants”), on 14 January 2005.

2. The applicants were represented by lawyers of the Stichting Russian Justice Initiative (“SRJI”), an NGO based in the Netherlands with a representative office in Russia. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 24 October 2007 the President of the First Section decided to give the application priority (Rule 41 of the Rules of Court) and to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

4. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1952 and 1960 respectively. They live in the town of Argun, in the Shali District of the Chechen Republic.

6. The applicants are the parents of Mr Idris Khalidovich Gakiyev, born in 1980. At the material time the applicants and their son lived at 33 the Eighth of March Lane, in the town of Argun.

A. Events of 30 November 2003

1. The applicants' account

(a) Abduction of Idris Gakiyev

7. At about 2 a.m. on 30 November 2003 three armoured personnel carriers ("APCs") arrived at the applicants' house. A group of armed men wearing camouflage uniforms got off the vehicles and burst inside. The men wore no masks and had Slavic features; they did not identify themselves but the applicants inferred that they belonged to the Russian special task forces.

8. The servicemen severely beat the first applicant with the butts of their machine guns; when he lost consciousness, they left him lying on the floor. At some point they poured petrol over the first applicant's body. Then they seized Idris Gakiyev, took him outside and placed him in one of the APCs. Before leaving, the servicemen set the applicants' house on fire. Then they climbed into the APCs and drove away.

9. The second applicant went out into the street and cried. The first applicant somehow managed to get out of the burning house. Later, the fire was extinguished but the house had been demolished by then.

(b) Medical examination of the first applicant

10. The case file contains a medical certificate issued by the Argun Town Hospital on 30 November 2003, which reads as follows:

"... on 29 November 2003 [Khalid Gakiyev] applied to the Argun Town Hospital [for medical assistance] in relation to the bodily injuries inflicted on him.

He was examined by a traumatologist and a neuropathologist and prescribed with the requisite treatment."

11. According to the certificate, the first applicant was diagnosed with a closed craniocerebral injury, cerebral concussion, injuries to the right

parietal area, injuries and a bruise to the left cheekbone and orbital area, haemorrhage in the left eye and abrasions on the face, abdomen and hips.

2. Information submitted by the Government

12. At about 2 a.m. on 30 November 2003 unidentified armed persons in camouflage uniforms armed with machine guns and travelling in APCs entered the house at 11 Groznenskiy Lane, Argun, and kidnapped Mr Khuseyn Elmarzayev, born in 1981, and Mr Khaseyn Elmarzayev, born in 1985. Then the same persons drove to the house at 33 the Eighth of March Lane, Argun, and kidnapped Idris Gakiyev. After the kidnappings the perpetrators set both houses on fire.

B. Official investigation into Idris Gakiyev's disappearance

1. The applicants' account

13. After their son's abduction the applicants complained to various State agencies and officials, including the Russian President, the Russian State Duma, the Russian Ombudsman, the Russian Prosecutor General, the President of the Chechen Republic and the local administration. Most of those complaints were forwarded to the prosecutors' offices at different levels.

14. By letter of 2 December 2003 the prosecutor's office of the town of Argun ("the town prosecutor's office") requested the local administration to assess the damage to the applicants' house. They mentioned that "unidentified persons wearing camouflage uniforms and armed with machine guns" had inflicted bodily injuries on the first applicant and had kidnapped his son. On 5 December 2003 the commission formed by the local administration drew up an evaluation report, according to which the applicants' house had been completely demolished and could not be reconstructed.

15. On 6 December 2003 the town prosecutor's office instituted an investigation into the disappearance of Idris Gakiyev and two other inhabitants of Argun under Article 126 § 2 of the Russian Criminal Code ("aggravated kidnapping"). The case file was assigned the number 26075.

16. On 9 January 2004 the town prosecutor's office informed the second applicant that her complaint to the Plenipotentiary Representative of the Russian President in the Southern Federal District had been included in the investigation file. They further commented that the search for Idris Gakiyev, although fruitless so far, was under way.

17. On 21 January 2004 the prosecutor's office of the Chechen Republic informed the second applicant that investigative measures were being taken

to solve Idris Gakiyev's kidnapping and advised her to send further queries to the town prosecutor's office.

18. On 23 January 2004 the Chechen Department of the Federal Security Service ("the Chechen FSB") informed the second applicant that they were taking requisite measures to find Idris Gakiyev's kidnappers.

19. On 30 January 2004 the prosecutor's office of the Chechen Republic forwarded the second applicant's complaint to the town prosecutor's office and ordered that the search for Idris Gakiyev be pursued actively.

20. On 1 March 2004 the town prosecutor's office suspended the investigation in case no. 26075 for failure to identify those responsible and notified the first applicant accordingly.

21. On 29 March 2004 the town prosecutor's office informed the applicants that the investigation in case no. 26075 had been resumed.

2. Information submitted by the Government

22. On 1 December 2003 the town prosecutor's office instituted an investigation into aggravated kidnapping in case no. 26075.

23. On an unspecified date the house at 33 the Eighth of March Lane was inspected as a crime scene. Nothing was found or collected there.

24. On an unspecified date the second applicant was granted victim status and questioned. She stated that on 30 November 2003 she had been at home with her husband and son. At about 2 a.m. her son had heard someone knocking at the door; the first applicant had told him to open it. Then armed men in camouflage uniforms and helmets had burst inside the house; two of them had had night vision devices. They had started beating her son and husband. One of the armed men had thrown something inside the house and the house had caught fire. The second applicant had taken her unconscious husband outside the house. In the meantime the armed men had put her son in an APC and driven away. The second applicant had not seen how many APCs had been there. The unknown men had taken away an attaché case with documents. The house had been destroyed by fire. Later, the second applicant had learned that two other young men had been kidnapped on the same night under similar circumstances.

25. On unspecified dates the investigators granted victim status to Mr and Ms Elmarzayev, the parents of the two kidnapped young men, and questioned them. The Elmarzayevs stated that on 30 November 2003 an APC had driven into their courtyard. Then unknown armed men in camouflage uniforms and masks had entered their house and beaten up Mr Elmarzayev and his sons Khuseyn and Khaseyn. One of the armed men had thrown something inside the house and it had caught fire. Khuseyn and Khaseyn Elmarzayev had been taken out of the house, put inside the APC and driven away. Mr and Ms Elmarzayev had not seen the APC's registration number.

26. The investigators questioned Mr B., the applicants' neighbour, as a witness. He stated that on 30 November 2003 he had been awakened by the sound of the second applicant screaming, who had then told him about her son's abduction.

27. Ms I., Ms D. and Ms Dzh., the Elmarzayevs' neighbours, stated that on 30 November 2003 they had been awakened by the noise of APCs driving past. Then they had seen that the Elmarzayevs' house was burning and learned that Khuseyn and Khaseyn Elmarzayev had been kidnapped.

28. The commander of the UGA headquarters and the aide of the head of the Temporary Joint Group of Bodies and Units of the Russian Ministry of the Interior ("VOGOiP") informed the investigators that no special operations had been carried out in Argun on the night of 30 November 2003. The VOGOiP had no information on the kidnapping of Idris Gakiyev and the Elmarzayev brothers and had no APCs in their armouries.

29. On an unspecified date the first applicant was also questioned. He stated that he had been told by an undisclosed source in the FSB that his son had been kidnapped by servicemen of the internal troops of the Ministry of the Interior and then kept in the territory of the Khankala base together with Mr Ch.

30. Mr Elmarzayev was questioned again and stated that he had learned from an undisclosed source that the commander of "the oil regiment" could have been involved in his sons' kidnapping.

31. Later, Mr Elmarzayev stated that shortly before the kidnapping unknown men who had identified themselves as police officers had visited his house on two occasions and checked documents. Some servicemen of the department of the interior of Argun had told him that servicemen of special task force unit no. 34 could have been involved in the crime. At some point Mr Elmarzayev added that he had heard rumours that his sons had been kidnapped by a task force unit of the Ministry of the Interior under the command of Lieutenant-Colonel P. of the Khankala base.

32. The damage to the applicants' house was estimated at 147,113 Russian roubles.

33. On 29 February 2004 the first applicant lodged his civil claims in the criminal case concerning the damage to his house with the town prosecutor's office. On the same date he was granted civil plaintiff's status.

34. The investigators requested information on the kidnapping of Idris Gakiyev and the Elmarzayev brothers from law-enforcement agencies of the Chechen Republic. According to the replies received, no special operations had been carried out in Argun on 10 April 2003 and the three men had not been prosecuted for or suspected of participation in illegal armed groups.

35. The head of the Chechen FSB informed the investigators that Idris Gakiyev and the Elmarzayev brothers had participated in the State Duma elections on 7 December 2003 as they had signed the election register.

36. Servicemen of the task force unit of the town of Zlatoust, the Chelyabinsk Region, who had been on mission in Argun in November and December 2003, were questioned and stated that they knew nothing about the kidnapping of the residents of Argun on 30 November 2003.

C. Discovery of Idris Gakiyev's dead body

1. The applicants' account

37. At about 10.30 a.m. on 29 March 2004 unidentified corpses showing signs of violent death were found in a pit in the vicinity of a half-demolished nursery at Sapernaya Street in Grozny.

38. One of the corpses, referred to as "dead body no. 2", was in a camouflage uniform, a sailor's long-sleeve shirt and running shoes. The head was covered with a plastic bag and a sack; a piece of wire was wrapped round the neck. The first applicant identified the body as that of Idris Gakiyev.

39. Between 1 and 30 April 2004 the expert of the forensic bureau of Mozdok carried out a port-mortem examination of Idris Gakiyev's corpse. He established that the death had been caused by mechanical asphyxia and had occurred some three to nine days before the beginning of the autopsy.

40. On 15 June 2004 the Argun Town Polyclinic issued a medical certificate concerning Idris Gakiyev's death.

41. On 16 June 2004 the Agrun Town Registry Office issued a certificate in respect of Idris Gakiyev, according to which the violent death had occurred on 22 March 2004.

2. Information submitted by the Government

42. At about 10.30 a.m. on 29 March 2004 three dead bodies were discovered in a pit near a demolished kindergarten at Sapernaya Street in Grozny.

D. Official investigation into Idris Gakiyev's kidnapping and killing

1. The applicants' account

43. On 8 April 2004 the district prosecutor's office issued a certificate confirming that on 29 March 2004 three dead bodies showing signs of violent death, including that of Idris Gakiyev, had been discovered in Grozny.

44. On 8 April 2004 the district prosecutor's office granted the first applicant victim status in case no. 32027 on the ground that he had

sustained non-pecuniary damage caused by his son's violent death. On the same date the first applicant was notified of that decision.

45. On 22 April 2004 the Temporary Operational Group of the Russian Ministry of the Interior informed the second applicant that they had carried out an inquiry and established that the investigation into Idris Gakiyev's kidnapping in case no. 26075 had been opened on 6 December 2003 by the town prosecutor's office. They commented that the police had no further information on the identities of the perpetrators.

46. On 27 April 2004 the district prosecutor's office issued a certificate confirming that on 29 March 2004 two dead bodies showing signs of violent death, including that of Idris Gakiyev, had been discovered in Grozny.

47. On 28 April 2004 the town prosecutor's office forwarded criminal case no. 26075 to the district prosecutor's office pursuant to the territorial jurisdiction rules.

48. On 2 July 2004 the prosecutor's office of the Chechen Republic informed the second applicant that the case file concerning Idris Gakiyev's kidnapping had been transferred to the district prosecutor's office following the discovery of his dead body and that investigative measures were being taken to establish the perpetrators' identities.

49. On 22 October 2004 the SRJI, acting on the applicants' behalf, requested the town prosecutor's office to inform them of progress in the investigation in case no. 26075. On 27 December 2004 the prosecutor's office of the Chechen Republic replied that the investigation into Idris Gakiyev's kidnapping and subsequent killing had been resumed and that investigative measures were being taken to solve the crime.

50. On 2 November 2005 the SRJI requested an update on progress in the investigation from the town prosecutor's office and the prosecutor's office of the Chechen Republic. On 16 November 2005 the town prosecutor's office replied that case file no. 26075 had been transferred to the district prosecutor's office on 28 April 2004.

51. On 28 November 2005 the district prosecutor's office informed the SRJI that criminal case no. 32027 was pending before them. They noted that the case had been instituted following the discovery of five corpses, including that of Idris Gakiyev, in the pit in the Oktyabrskiy District of Grozny, and observed that the investigation had been suspended for failure to identify the perpetrators. They also mentioned that the first applicant had been admitted to the proceedings as a victim.

52. In December 2005 the town prosecutor's office informed the SRJI that case no. 26075 had been transferred to the district prosecutor's office.

53. On 22 December 2005 the applicants' representatives requested the district prosecutor's office to inform them of the progress in the investigation.

54. On 23 January 2006 the district prosecutor's office informed the SRJI that the investigation in case no. 32027 had been suspended on 6 July 2005 for failure to identify those responsible.

55. On 13 March 2008 the first applicant was informed that case no. 32027 had been transferred to the Investigative Committee of the Prosecutor's Office of Russia in the Chechen Republic.

2. Information submitted by the Government

56. On 29 March 2004 the district prosecutor's office instituted an investigation into the murder of three persons under Article 105 § 2 of the Russian Criminal Code in case no. 32027.

57. A witness who had seen the dead bodies in the pit on 28 March 2004 was questioned.

58. On 30 April 2004 post-mortem reports were drawn up in respect of the three unidentified corpses. It was stated that an unidentified person, referred to as "dead body no. 1", had died of asphyxia by a loop round his neck some three to nine days before the expert examination, which had been carried out on 1 April 2004. An unidentified person referred to as "dead body no. 2" had died under the same circumstances. An unidentified person referred to as "dead body no. 3" had died of asphyxia as well but had also suffered an open cranial trauma with broken skull bones.

59. On an unspecified date the first applicant identified one of the dead bodies as his son, Idris Gakiyev. He was then granted victim status in case no. 32027 and questioned.

60. The town prosecutor's office decided to transfer the investigation file in case no. 26074 to the district prosecutor's office pursuant to the territorial jurisdiction rules.

61. On 13 May 2004 the district prosecutor's office joined case no. 26075 to case no. 32027. The joined case file was assigned the number 32027.

62. The investigators questioned ten servicemen of the task force unit of the town of Zlatoust, the Chelyabinsk Region. The Government did not disclose their last names. The servicemen stated that in November – December 2003 they had been on mission in Argun but had not heard of its residents' kidnapping on 30 November 2003.

63. The Chechen FSB informed the investigators that they had no information concerning Idris Gakiyev and the Elmarzayev brothers.

64. The investigators checked whether Idris Gakiyev had been kept in any temporary detention facilities of the Chechen Republic.

65. On an unspecified date a former investigator of the district prosecutor's office was questioned. He stated that on 29 March 2004 the police had informed the district prosecutor's office that the remains of five dead bodies had been found in two pits at Sapernaya Street in Grozny; two corpses had been skeletonised and three others had borne obvious marks of

a violent death. Two criminal cases had been instituted that had later been joined under the number 32027.

66. On 19 January 2008 Mr Elmarzayev was again questioned as a victim. He stated that the armed men travelling in the APC and an UAZ vehicle who had kidnapped his sons on 30 November 2003 belonged to the task force unit under the command of Mr P. The servicemen had taken his sons' identity papers and driver's licenses and his unemployment registration card. That information remained unconfirmed.

67. The first applicant and Mr Elmarzayev refused to disclose their sources of information, claiming that they feared for their lives.

68. The investigation in case no. 32027, which had so far failed to identify the perpetrators, was ongoing. The implication of any law-enforcement agencies in the crime had not been established.

69. Despite specific requests by the Court, the Government did not disclose any documents of the investigation file in case no. 32027. Relying on the information obtained from the Prosecutor General's Office, the Government stated that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure since the file contained information of a military nature and personal data concerning witnesses or other participants in the criminal proceedings.

II. RELEVANT DOMESTIC LAW

70. For a summary of relevant domestic law see *Akhmadova and Sadulayeva v. Russia*, no. 40464/02, §§ 67-69, 10 May 2007.

THE LAW

I. THE GOVERNMENT'S OBJECTION REGARDING NON-EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

71. The Government contended that the application should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation of the kidnapping and murder of Idris Gakiyev had not yet been completed. It was also open to the applicants to complain about inaction of the investigators to higher prosecutors' offices or to courts, as

well as to lodge civil claims for pecuniary and non-pecuniary damages, which they had failed to do.

72. The applicants contested that objection. They stated that the criminal investigation had been pending for five years without producing any meaningful results and thus had proved to be ineffective. Moreover, they pointed out that a complaint about investigators' inaction lodged with a court could not produce any positive results as domestic courts were not allowed to order investigative measures directly.

B. The Court's assessment

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

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

75. 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.

76. 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. A civil court is unable to pursue any independent investigation and is incapable, without the benefit of the

conclusions of a criminal investigation, of making any meaningful findings regarding the identity of the perpetrators of fatal assaults or disappearances, still less of establishing their responsibility (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-21, 24 February 2005). In the light of the above, the Court confirms that the applicants were not obliged to pursue civil remedies.

77. The Court observes that the applicants complained to the law-enforcement authorities immediately after the kidnapping of Idris Gakiyev and that an investigation into kidnapping and then murder has been pending since 1 December 2003. The applicants and the Government dispute the effectiveness of the investigation.

78. As regards criminal-law remedies provided for by the Russian legal system, 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 applicants' complaints. Thus, it decides to join this objection to the merits of the case and considers that the issue falls to be examined below.

II. THE COURT'S ASSESSMENT OF THE EVIDENCE AND THE ESTABLISHMENT OF THE FACTS

A. The parties' arguments

79. The applicants maintained that it was beyond reasonable doubt that the men who had kidnapped and then killed Idris Gakiyev were State agents. In support of their complaint they referred to the following facts. The armed men who had abducted Idris Gakiyev had Slavic features and had spoken Russian without an accent, which proved that they were not of Chechen ethnic origin. They had arrived in APCs, military vehicles only available to Russian troops and security forces, and used night vision devices. There had been no grounds to suggest that illegal armed groups could have been involved in the crime.

80. The Government rejected the applicants' allegations. They argued that it had not been proved that Idris Gakiyev had been abducted by State agents. The investigation file contained no information on special operations carried out on 30 November 2003 in Argun. The Government doubted that the neighbours questioned as witnesses could have recognised the noise made by APCs. They further observed that a considerable number of APCs and weapons had been stolen from Russian arsenals in the 1990s, and some had been captured by members of illegal armed groups in the course of battles with the federal military, while camouflage uniforms and night vision devices could have been freely purchased by anyone. The fact that the perpetrators had had Slavic features and spoken Russian did not prove

their attachment to the Russian military because groups of Ukrainian, Belorussian and ethnic Russian mercenaries had committed crimes in the territory of the Chechen Republic.

81. The applicants' son had died almost four months after the date of his kidnapping, which proved that he had been kidnapped for a ransom and kept in detention by insurgents. Moreover, Idris Gakiyev had died of asphyxia. The Government suggested that such a silent method of murder was more likely to be used by insurgents kidnapping people for a ransom.

82. The Government also pointed out that, while both the first applicant and Mr Elmarzayev had claimed to have heard rumours of military involvement in the crime, they had not been unanimous as regards the presumed identities of the perpetrators. They had mentioned servicemen of different State agencies, such as the internal troops of the Ministry of the Interior, the "oil regiment", special task force unit no. 34 and police task force units. Neither of the victims had disclosed their sources of information and thus had impeded the investigation.

83. The perpetrators had stolen an attaché case with some documents and had set the applicants' house on fire. This proved that they had pursued a certain aim and had had a criminal intent and therefore obviously could not have been servicemen of law-enforcement agencies.

B. The Court's evaluation of the facts

1. General principles

84. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. When, as in the instant case, the respondent Government have exclusive access to information capable of corroborating or refuting the applicants' allegations, any lack of cooperation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Taniş and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005-...).

85. The Court points out that a number of principles have been developed in its case-law when it is faced with the task of establishing facts on which the parties disagree. As to the facts that are in dispute, the Court reiterates its jurisprudence confirming the standard of proof "beyond reasonable doubt" in its assessment of evidence (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (see *Taniş and Others*, cited above, § 160).

86. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336, and *Avşar v. Turkey*, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.

87. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, such as in cases where persons are under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Tomasi v. France*, 27 August 1992, §§ 108-11, Series A no. 241-A; *Ribitsch*, cited above, § 34; and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

88. These principles apply also to cases in which, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible explanation of what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see *Taniş*, cited above, § 160).

89. Lastly, when there have been criminal proceedings in the domestic courts concerning those same allegations, it must be borne in mind that criminal-law liability is distinct from international-law responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions, which are to be interpreted and applied on the basis of the objectives of the Convention and in the light of the relevant principles of international law. The responsibility of a State under the Convention, for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense (see *Avşar*, cited above, § 284).

2. *Establishment of the facts*

90. The Court notes that despite its requests for a copy of the investigation file into the abduction and murder of Idris Gakiyev, the Government did not produce any documents from the case file. The Government referred to Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has already found this explanation

insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-... (extracts)).

91. In view of this, and bearing in mind the principles referred to above, the Court finds that it can draw inferences from the Government's conduct in respect of the well-foundedness of the applicants' allegations. The Court will thus proceed to examine crucial elements in the present case that should be taken into account when deciding whether the applicants' son can be presumed dead and whether his death can be attributed to the authorities.

92. The applicants claimed that the persons who had taken Idris Gakiyev away on 30 November 2003 and then killed him had been State agents.

93. The Government suggested that those who had kidnapped and then killed Idris Gakiyev could have been members of paramilitary groups wishing to obtain a ransom. However, the domestic investigation did not establish that any claims for ransom had ever been addressed to the applicants. The fact that the kidnappers stole certain documents and burned the applicants' house does not in itself indicate their involvement in insurgence activities. Nor does it seem conceivable that only rebel fighters could use strangulation to kill others. Therefore, the Government's allegation was not specific or supported by any material. The Court would stress in this regard that the evaluation of the evidence and the establishment of the facts is a matter for the Court, and it is incumbent on it to decide on the evidentiary value of the documents submitted to it (see *Çelikbilek v. Turkey*, no. 27693/95, § 71, 31 May 2005).

94. Moreover, the Court considers it very unlikely that the APCs stolen by paramilitary groups in the 1990s could have moved freely through Russian federal military check-points without being noticed. It thus finds that the fact that a large group of armed men in uniform travelling in APCs arrived in Argun at 2 a.m. and abducted three young men strongly supports the applicants' allegation that these were State servicemen. From the early stage of the proceedings the authorities were informed by the relatives of the missing men that Idris Gakiyev and the Elmarzayev brothers had been detained by unknown men in the APCs and the investigators had been asked to look into that possibility (see paragraphs 24 and 25 above). The domestic investigation also accepted factual assumptions as presented by the applicants and took steps to check whether law-enforcement agencies were involved in the kidnapping (see paragraphs 28 and 34 above).

95. The Court observes that where the applicants make out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to a lack of documents, 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 *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005, and *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II).

96. Taking into account the above elements, the Court is satisfied that the applicants have made out a prima facie case that their son was apprehended by State servicemen. The Government's statement that the investigation did not find any evidence to support the involvement of the military or law enforcers in the kidnapping is insufficient to discharge them from the above-mentioned burden of proof. Drawing inferences from the Government's failure to submit the documents which were in their exclusive possession or to provide another plausible explanation of the events in question, the Court considers that Idris Gakiyev was abducted on 30 November 2002 by State servicemen during an unacknowledged security operation.

97. The next point to be considered by the Court is whether there is a link between Idris Gakiyev's abduction and his death.

98. According to the Government, Idris Gakiyev died some three to nine days before 1 April 2004 (see paragraph 58 above), that is, almost four months after his abduction. The Court is precluded from examining the data contained in the forensic report drawn up on Idris Gakiyev's post-mortem examination due to the Government's failure to submit a copy of it. In such circumstances the Court is ready to draw inferences from the Government's unwillingness to produce this document.

99. It is not entirely clear whether Idris Gakiyev spent the time between his abduction and death in the hands of his kidnappers or under the control of other persons or at liberty. The only information available in this respect is contained in the letter by the Chechen FSB stating that the State Duma election register of 7 December 2003 was signed with Idris Gakiyev's name (see paragraph 35 above). Given that Idris Gakiyev's immediate family had no news of him between 30 November 2003 and 29 March 2004, the Court considers it highly doubtful that, should he have been released by the kidnappers at some point during this period, the young man would perform his civic duty instead of trying to contact his parents. Therefore, the Court is not persuaded that on 7 December 2003 Idris Gakiyev was at liberty.

100. Lacking any other plausible explanation, the Court considers that Idris Gakiyev remained under the control of State servicemen from the moment of his abduction until his killing. It does not deem it necessary to establish whether he was guarded throughout the whole period of unregistered detention and then killed by the same persons who had kidnapped him since in any event the responsibility for his fate lies with the State.

101. Having regard to the above, the Court finds it established that Idris Gakiyev was killed by State servicemen following his abduction and that the State authorities are to be held responsible for his death.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

102. The applicants complained that Idris Gakiyev had been detained and then killed by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation of the matter. They relied on Article 2 of the Convention, which reads:

“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. The parties’ submissions

103. The Government contended that the domestic investigation had obtained no evidence to the effect that any servicemen of law-enforcement agencies had been involved in Idris Gakiyev’s kidnapping or killing. The Government claimed that the investigation met the Convention requirement of effectiveness, as all measures envisaged in national law were being taken to identify the perpetrators. The applicants could have studied non-confidential case materials. The investigation had been suspended and resumed on numerous occasions, which proved that measures had been taken to solve the crime.

104. The applicants maintained their complaints. They stressed that the first applicant had identified dead body no. 2 found in the pit in Grozny as Idris Gakiyev. The applicants invited the Court to draw conclusions from the Government’s unjustified failure to submit the documents from the case file to them or to the Court.

B. The Court’s assessment

1. Admissibility

105. The Court considers, in the light of the parties’ submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. Further, the

Court has already found that the Government's objection concerning the alleged non-exhaustion of domestic remedies should be joined to the merits of the complaint (see paragraph 78 above). The complaint under Article 2 of the Convention must therefore be declared admissible.

2. Merits

(a) The alleged violation of the right to life of Idris Gakiyev

106. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324, and *Avşar*, cited above, § 391).

107. The Court has already found it established that the applicants' son was killed by State servicemen and that his death can be attributed to the State (see paragraph 101 above). In the absence of any justification in respect of the use of lethal force by State agents, the Court finds that there has been a violation of Article 2 in respect of Idris Gakiyev.

(b) The alleged inadequacy of the investigation

108. 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", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family and carried out with reasonable promptness and expedition. It should also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was lawful and justified in the circumstances, and should afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09,

ECHR 2001-III (extracts), and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

109. In the present case, the kidnapping and murder of Idris Gakiyev were investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

110. The Court notes at the outset that the documents from the investigation were not disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the few documents submitted by the applicants and the sparse information on its progress provided by the Government.

111. The Court first observes that the authorities were informed of Idris Gakiyev's abduction shortly after the incident. According to the Government, the investigation into the kidnapping commenced on 1 December 2003, that is, on the day following the incident. The Court notes that the applicants were probably not notified of it promptly and believed that the proceedings had been instituted on 6 December 2003. Nonetheless, it is ready to accept the Government's assertion regarding the date of institution of the investigation in case no. 26075.

112. The Court further points out that it is unable to draw a time-line of the investigation as the Government failed to inform it of the dates on which investigative measures had been taken. However, the sparse data at its disposal allows concluding that at least some of such measures, including crucial ones, were delayed in breach of the obligation to exercise exemplary diligence in dealing with a serious crime (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II).

113. It appears that a number of essential investigative steps were never taken. Most notably, there is no evidence in the case file that the investigators took any steps to establish the identity of the owner of the APC seen at the crime scene on 30 November 2003. Nor is it clear whether the investigators have ever tried to verify the information provided by the first applicant and Mr Elmarzayev concerning the involvement of particular law-enforcement units in their sons' kidnapping (see paragraphs 29-31 and 66). The Court observes in this respect that, although the Government referred to interviews of servicemen of one unit that had been on mission in the Chechen Republic on 30 November 2003 (see paragraphs 36 and 62 above), they did not indicate in what manner that unit could have been linked to the units mentioned by the two victims.

114. The Court also notes that even though the first applicant was eventually granted victim status, he was not informed of significant developments in the case. Accordingly, the investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings (see *Oyur v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III).

115. Lastly, the Court notes that the investigation in case no. 26075 was suspended on 1 March 2004, that is, three months after it had been commenced. It was resumed on 29 March 2004 and then joined with the investigation in case no. 32027 on 13 May 2004. It is not clear whether any progress in the investigation was achieved after that date. It follows from the information submitted by the applicants that the proceedings in case no. 32027 were suspended on 6 July 2005. The Court assumes that no significant investigative steps have been taken in this case from then until January 2008, when Mr Elmarzayev was questioned following the communication of the present case to the Government, that is, for two years and six months. The Government did not advance any plausible explanation for this particularly lengthy period of inactivity, especially in criminal proceedings relating to such a serious crime.

116. The Court will now examine the limb of the Government's objection that was joined to the merits of the application (see paragraph 78 above). Inasmuch as it concerns the fact that the domestic investigation is still pending, the Court notes that the authorities' failure to take necessary and urgent investigative measures undermined the effectiveness of the investigation in its early stages. Furthermore, the Government mentioned that the applicants had the opportunity to apply for judicial or administrative review of the decisions of the investigating authorities in the context of exhaustion of domestic remedies. The Court observes in this respect that the applicants, having no access to the case file and not being properly informed of the progress of the investigation, could not have effectively challenged the actions or omissions of the investigating authorities before a court or a higher prosecutor. Besides, after a lapse of time some investigative measures that ought to have been carried out promptly could no longer usefully be conducted. Therefore, it is highly doubtful that the remedies relied on would have had any prospects of success. Accordingly, the Court finds that the criminal-law remedies relied on by the Government were ineffective in the circumstances of the case and rejects their objection as regards the applicants' failure to exhaust these domestic remedies.

117. In the light of the foregoing, the Court holds that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance and death of Idris Gakiyev, in breach of Article 2 in its procedural aspect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

118. The applicants complained that as a result of their son's abduction and killing and the State's failure to investigate it properly they had endured mental suffering. Furthermore, the first applicant complained that at the time of his son's abduction he had been beaten and that no effective

investigation was conducted into the incident. They relied on Article 3 of the Convention, which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties’ submissions

119. The Government disagreed with these allegations and argued that the investigation had not established that either applicant had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention. They also stated that the first applicant had sustained minor bodily injuries and that, under Russian law, an investigation into infliction of such injuries was opened upon a victim’s request. Since the first applicant had failed to lodge such a request, the investigation into infliction of minor bodily injuries on him had been commenced in case no. 26075. The first applicant had been granted victim status in that case and meticulously questioned about the circumstances of the infliction of injuries on him. He had undergone an expert medical examination. The investigation in this respect had not been completed.

120. The applicants maintained their submissions. They stressed, in particular, that they feared for their lives. In their observations of 7 April 2008 on the admissibility and merits of the case they also complained for the first time that Idris Gakiyev had been ill-treated by Russian servicemen prior to his death and that there had been no effective investigation into the ill-treatment.

B. The Court’s assessment

1. Admissibility

(a) The complaint concerning Idris Gakiyev

121. The Court notes at the outset that the applicants complained that their son had been subjected to ill-treatment prior to his death for the first time on 7 April 2008, that is, more than six months after the discovery of Idris Gakiyev’s dead body. Even assuming that this complaint is not time-barred, it should nonetheless be declared inadmissible for the following reason.

122. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see

Ireland v. the United Kingdom, 18 January 1978, § 161 in fine, Series A no. 25).

123. The Court has found it established that Idris Gakiyev was detained on 30 November 2002 by State servicemen forces and died while in their hands as a result of the use of force (see paragraphs 96 and 101 above). However, it does not have a copy of Idris Gakiyev's post-mortem examination and, due to the scarcity of information at its disposal, is not in a position to establish the exact circumstances of his death. It has nothing to rely on except for the information submitted by the Government that only dead body no. 3 had received a blow to the head (see paragraph 58 above). Considering that the first applicant identified dead body no. 2 his son (see paragraph 38 above), the Court assumes that Idris Gakiyev's corpse bore no traces of ante-mortem injuries but a strangulation mark. In such circumstances the Court cannot find it established that Idris Gakiyev had been tortured or otherwise ill-treated prior to his death.

124. It follows that this part of the application is manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

125. As to the alleged violation of procedural guarantees of Article 3, the Court considers that in the absence of any reliable information about the ill-treatment of Idris Gakiyev this complaint raises no separate issue from that examined above under Article 2 and to be examined below under Article 13 of the Convention (see *Luluyev and Others v. Russia*, no. 69480/01, § 107, ECHR 2006-... (extracts)).

(b) The complaints in respect of the applicants

126. The Court notes that the part of the complaint under Article 3 of the Convention concerning the applicants' mental suffering is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The complaint concerning the first applicant's ill-treatment

i. Compliance with Article 3

127. The Court observes at the outset that the first applicant corroborated his allegations that State servicemen had beaten him by statements from his wife, who witnessed the beating, and a medical certificate of 30 November 2003 (see paragraph 10 above).

128. Moreover, in their observations the Government admitted that bodily injuries had been inflicted on the first applicant on 30 November

2003 and that the investigation into that incident had been pending in case nos. 26075 and 32027.

129. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Tekin v. Turkey*, 9 June 1998, § 52, *Reports* 1998-IV).

130. The Court has found it established that Idris Gakiyev was apprehended on 30 November May 2000 by State agents (see paragraph 96 above). The evidence submitted corroborates the allegation that during his son's abduction the first applicant was beaten and sustained the injuries recorded in the medical certificate issued on the same date (see paragraph 10 above). The Court considers that this treatment reached the threshold of "inhuman and degrading".

131. Therefore, there has been a violation of Article 3 of the Convention in respect of the applicant on account of the ill-treatment by the servicemen.

ii. Effective investigation

132. The Court notes that the first applicant raised the complaint concerning ill-treatment by State servicemen before the investigating authorities when describing the circumstances of his son's apprehension. According to the Government, the investigation into the incident was pending in case nos. 26075 and 32027. However, after five years it produced no tangible results.

133. For the reasons stated above in paragraphs 108-117 in relation to the procedural obligation under Article 2 of the Convention, the Court concludes that the Government have failed to conduct an effective investigation into the ill-treatment of the first applicant.

134. Accordingly, there has been a violation of Article 3 also in this respect.

(b) The complaint concerning the applicants' mental suffering

135. The Court notes that while a family member of a "disappeared person" can claim to be a victim of treatment contrary to Article 3 (see *Kurt v. Turkey*, 25 May 1998, §§ 130-34, *Reports* 1998-III), the same principle would not usually apply to situations where the person taken into custody has later been found dead (see *Tanlı v. Turkey*, no. 26129/95, § 159, ECHR 2001-III (extracts)). However, if a period of initial disappearance is long it may in certain circumstances give rise to a separate issue under Article 3 (see *Gongadze v. Ukraine*, no. 34056/02, §§ 184-186, ECHR 2005-XI).

136. The Court observes that the applicants' son was abducted on 30 November 2002. His remains were found on 29 March 2004, that is, four months later. In the Court's opinion, this period, during which the

applicants suffered uncertainty, anguish and distress characteristic of the specific phenomenon of disappearances, was sufficiently long to give rise to an issue under Article 3 of the Convention. The applicants' distress during that period is attested by their numerous efforts to prompt the authorities to act. Moreover, their uncertainty about Idris Gakiyev's fate was aggravated by their exclusion from monitoring the progress of the investigation (see *Kukayev v. Russia*, no. 29361/02, §§ 107-08, 15 November 2007).

137. In view of the above, the Court finds that there has been a breach of Article 3 of the Convention in respect of the applicants.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

138. The applicants further stated that upon his abduction Idris Gakiyev had been detained in violation of the guarantees of Article 5 of the Convention, which reads, in so far as relevant:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. The parties' submissions

139. The Government asserted that Idris Gakiyev had not been kept in any detention facilities and claimed that there had been no breach of the guarantees set out in Article 5 of the Convention.

140. The applicants reiterated the complaint.

B. The Court's assessment

1. Admissibility

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

2. Merits

142. The Court has previously noted the fundamental importance of the guarantees contained in Article 5 to secure the right of individuals in a democracy to be free from arbitrary detention. It has also stated that unacknowledged detention is a complete negation of these guarantees and discloses a very grave violation of Article 5 (see *Çiçek v. Turkey*, no. 25704/94, § 164, 27 February 2001, and *Luluyev and Others*, cited above, § 122).

143. The Court has found it established that Idris Gakiyev was abducted by State servicemen on 30 November 2003. His detention was not acknowledged, was not logged in any custody records and there exists no official trace of it. In accordance with the Court's practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan*, cited above, § 371).

144. In view of the foregoing, the Court finds that from 30 November 2003 until the moment of his death Idris Gakiyev had been held in unacknowledged detention without any of the safeguards contained in Article 5. This constitutes a particularly grave violation of the right to liberty and security enshrined in Article 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

145. The applicants complained that they had been deprived of effective remedies in respect of the alleged violations of Articles 2 and 3, contrary to Article 13 of the Convention, which provides:

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

A. The parties’ submissions

146. The Government contended that the applicants had had effective remedies at their disposal as required by Article 13 of the Convention and that the authorities had not prevented them from using them.

147. The applicants reiterated the complaint.

B. The Court’s assessment

1. Admissibility

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

2. Merits

149. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. According to the Court’s settled case-law, the effect of Article 13 of the Convention is to require the provision of a remedy allowing the competent domestic authority both to deal with the substance of a relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision. However, such a remedy is only required in respect of grievances which can be regarded as “arguable” in terms of the Convention (see *Halford v. the United Kingdom*, 25 June 1997, § 64, *Reports* 1997-III).

150. As regards the complaint of lack of effective remedies in respect of the applicants’ complaint under Article 2 and the first applicant’s complaint of ill-treatment under Article 3, the Court emphasises that Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-62, ECHR 2002-IV, and *Süheyla Aydın v. Turkey*, no. 25660/94,

§ 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 183, 24 February 2005).

151. It follows that in circumstances where, as here, a criminal investigation into violent death was ineffective and the effectiveness of any other remedy that may have existed, including civil remedies, was consequently undermined, the State has failed in its obligation under Article 13 of the Convention.

152. Consequently, there has been a violation of Article 13 in conjunction with Article 2 of the Convention in respect of Idris Gakiyev's deprivation of life, and with Article 3 of the Convention in respect of the first applicant's ill-treatment by the servicemen.

153. In so far as the complaint under Article 13 concerns the existence of a domestic remedy in respect of the complaint that Idris Gakiyev had been ill-treated by State servicemen, the Court notes that this part of the complaint under Article 3 was found to have been unsubstantiated (see paragraph 124 above). Accordingly, the applicants did not have an "arguable claim" of a violation of a substantive Convention provision and, therefore, there has been no violation of Article 13 of the Convention in this respect.

154. As regards the violation of Article 3 of the Convention found on account of the applicants' mental suffering as a result of the disappearance of their son, their inability to find out what had happened to him and the way the authorities had handled their complaints, the Court notes that it has already found a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention on account of the authorities' conduct that led to the suffering endured by the applicant. The Court considers that, in the circumstances, no separate issue arises in respect of Article 13 in connection with Article 3 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

155. In their initial application form the applicants stated that they had been discriminated against on the grounds of their ethnic origin. They invoked Article 14 of the Convention, which provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

156. In the observations on admissibility and merits of 7 April 2008 the applicants stated that they no longer wished their complaints under Article 14 of the Convention to be examined.

157. The Court, having regard to Article 37 of the Convention, finds that the applicants do not intend to pursue this part of the application, within the meaning of Article 37 § 1 (a). The Court also finds no reasons of a general character, affecting respect for human rights, as defined in the Convention, which require the further examination of the present complaints by virtue of Article 37 § 1 of the Convention *in fine* (see *Stamatios Karagiannis v. Greece*, no. 27806/02, § 28, 10 February 2005).

158. It follows that this part of the application must be struck out in accordance with Article 37 § 1 (a) of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

159. In the observations on admissibility and merits of 7 April 2008 the applicants referred to the statement by the Chechen FSB of which they had learned from the Government after the communication of the present application. The statement read that Idris Gakiyev had participated in the State Duma elections on 7 December 2003. The applicants then vaguely claimed that, as a result of his kidnapping by State servicemen, Idris Gakiyev had been deprived of his right to participate in the elections to the State Duma. They invoked Article 3 of Protocol No. 1 to the Convention, which reads:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

160. The Court does not deem it necessary to establish whether the applicants have complied with the six-month rule in respect of this complaint or whether or not it is manifestly ill-founded because it considers it inadmissible for the following reasons.

161. The Court reiterates at the outset that a person, non-governmental organisation or a group of individuals must, in order to be able to lodge a petition in pursuance of Article 34, claim “to be the victim of a violation ... of the rights set forth in the Convention...” While it is true the rules of admissibility governed by Article 35 must be applied with some degree of flexibility and without excessive formalism, Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28); it does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention or permit individuals to complain against a law simply because they feel that it contravenes the Convention (see *Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142). The same applies to events or decisions which are alleged to

infringe the Convention (see *Fairfield and Others v. the United Kingdom* (dec.), 24790/04, 8 March 2005).

162. The existence of a victim of a violation, that is to say, an individual who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX). Therefore, in order for an applicant to be able to claim to be a victim of a violation of the Convention, he must be able to show that he has been directly affected by the impugned measure (see *Sanles and Sanles v. Spain* (dec.), no. 48335/99, 26 October 2000).

163. Turning to the particular circumstances of the present case, the Court observes that Idris Gakiyev's remains were discovered on 29 March 2004 and that his parents raised this complaint for the first time on 7 April 2008, that is, more than four years after the presumed date of death. In this connection, the Court observes that in various cases where an applicant died in the course of the proceedings, it has taken into account the statements of the applicant's heirs or close family members who expressed the wish to pursue the proceedings before the Court (see *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI). The Court notes, however, that the present case must be distinguished from those cases which were introduced by the applicants themselves and only continued by their relatives after their subsequent death.

164. The Court notes that it is clear from the submissions of the applicants that they do not maintain that they were personally affected by the alleged violation of their son's right to participate in elections. The complaint under Article 3 of Protocol No. 1 is brought solely on behalf of the late Idris Gakiyev. The Court shall now establish whether the applicants have standing to raise it.

165. The Court has held on many occasions that individuals who are the next of kin of persons who have disappeared while in the custody of State authorities in circumstances giving rise to issues under Articles 2 and 5 of the Convention may apply as applicants in their own right (see, among many other authorities, *Taş v. Turkey*, no. 24396/94, 14 November 2000; *Orhan v. Turkey*, no. 25656/94, 18 June 2002; and *Luluyev and Others*, cited above). Moreover, it has followed this approach in the present case (see paragraphs 102-117 and 138-144 above). The Court emphasises nonetheless that this is a particular situation governed by the nature of the violations alleged and considerations regarding the effective implementation of fundamental provisions of the Convention system (see, *mutatis mutandis*, *Biç and Others v. Turkey*, no. 55955/00, § 22, 2 February 2006).

166. At the same time the Court has already established in its jurisprudence that relatives of a deceased person could not be considered as victims in respect of complaints concerning alleged interference with

freedom of thought, conscience and religion and freedom of expression or lack of effective remedies (see *Georgia Makri and others v. Greece* (dec.), no. 5977/03, 24 March 2005, and *Fairfield and Others*, cited above).

167. The Court observes that the rights to vote and stand for election are implicit in Article 3 of Protocol No. 1; however, they are not absolute (see *Py v. France*, no. 66289/01, § 46, ECHR 2005-I (extracts)). It reiterates that certain Convention rights – for instance, the rights bestowed in Article 8 – belong to the category of non-transferable rights (see *Thévenon v. France* (dec.), no. 2476/02, 28 February 2006) and considers that the right to vote, which is closely linked to one's person owing to its very nature, should be included in this category.

168. It is obvious that the applicants were not in any manner affected by Idris Gakiyev's inability to vote in the Russian State Duma elections. Moreover, they have failed to show any legitimate interest which could have entitled them to complain of a violation of Article 3 of Protocol No. 1 on behalf of their late son (see, by contrast, *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, § 29, 5 July 2005).

169. Accordingly, the Court finds that the applicants do not have the requisite standing under Article 34 of the Convention in respect of the alleged violation of Article 3 of Protocol No. 1 concerning Idris Gakiyev and that this part of the application must be rejected as incompatible *ratione personae* with the provisions of the Convention in accordance with Article 35 §§ 3 and 4.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

170. 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

171. The applicants claimed damages in respect of the lost wages of their son. They asserted that even though Idris Gakiyev had been unemployed at the time of his abduction, it was reasonable to suppose that he would have found a job and earned at least the official minimum wage and that he would have financially supported the applicants. The first and second applicants claimed 310,639.45 and 354,765.33 Russian roubles (RUB) respectively (approximately 8,800 and 9,900 euros (EUR)). The applicants also claimed damages in the amount of RUB 147,113 (approximately EUR 4,100) for their destroyed house.

172. The Government regarded these claims as unfounded.

173. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicants' relatives and the violation of the Convention, and that this may, in an appropriate case, include compensation in respect of loss of earnings. However, the Court is not persuaded that the applicants, who have not yet reached their respective retirement age, have any legal basis to claim subsistence from Idris Gakiyev. Moreover, the Court emphasises that the applicants have never raised before it a complaint related to the alleged violation of their property rights and finds no causal link between the above violations of Articles 2, 3, 5 and 13 of the Convention and the damage the applicants sustained as a result of the destruction of their house. It therefore dismisses the applicants' claims under this head.

B. Non-pecuniary damage

174. The applicants claimed EUR 50,000 each in respect of non-pecuniary damage for the suffering they had endured as a result of the loss of their son and the indifference shown by the authorities towards them.

175. The Government found the amounts claimed exaggerated.

176. The Court has found a violation of Articles 2, 5 and 13 of the Convention in respect of the applicants' late son, as well as violations of Article 3 in respect of the applicants themselves. The Court thus accepts that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It finds it appropriate to award the applicants jointly EUR 35,000, plus any tax that may be chargeable thereon.

C. Costs and expenses

177. The applicants were represented by the SRJI. They submitted an itemised schedule of costs and expenses that included research at a rate of EUR 50 per hour and the drafting of legal documents submitted to the Court and the domestic authorities at a rate of EUR 50 per hour for SRJI lawyers and EUR 150 per hour for SRJI senior staff. They also claimed translation fees, confirmed by invoices, and administrative expenses that were not supported by any evidence. The aggregate claim in respect of costs and expenses related to the applicants' legal representation amounted to EUR 9,131.30.

178. The Government submitted that the applicants' claims for just satisfaction had been signed by five lawyers, while two of them had not been mentioned in the powers of attorney issued by the applicants.

179. The Court points out that the applicants had given authority to act to the SRJI and its three lawyers. The applicants' claims for just satisfaction

were signed by five persons in total. The names of three of them appeared in the powers of attorney, while two other lawyers collaborated with the SRJI. In such circumstances the Court sees no reasons to doubt that the five lawyers mentioned in the applicants' claims for costs and expenses took part in the preparation of the applicants' observations.

180. The Court has to establish whether the costs and expenses indicated by the applicants' relatives were actually incurred and, second, whether they were necessary (see *McCann and Others*, cited above, § 220).

181. Having regard to the details of the information, the Court is satisfied that these rates are reasonable and reflect the expenses actually incurred by the applicants' representatives.

182. As to the necessity of the expenses, the Court notes that this case was rather complex and required a certain amount of research and preparation. It notes at the same time that, due to the application of Article 29 § 3 in the present case, the applicants' representatives submitted their observations on admissibility and merits in one set of documents. Furthermore, the case involved little documentary evidence, in view of the Government's refusal to submit the case file. The Court thus doubts that legal drafting was necessarily time-consuming to the extent claimed by the representatives.

183. Having regard to the details of the claims submitted by the applicants, the Court finds it appropriate to award them EUR 4,500, together with any value-added tax that may be chargeable to the applicants, the award to be paid into the representatives' bank account in the Netherlands, as identified by the applicants.

D. Default interest

184. 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. *Decides* to strike the application out of its list of cases in accordance with Article 37 § 1 (a) of the Convention in so far as it concerns the applicants' complaint under Article 14 of the Convention;
2. *Decides* to join to the merits the Government's objection as to non-exhaustion of criminal domestic remedies and rejects it;

3. *Declares* the complaints under Articles 2, 5 and 13 of the Convention, as well as the complaints under Article 3 of the Convention regarding the alleged ill-treatment of the first applicant and the applicants' mental suffering, admissible and the remainder of the application inadmissible;
4. *Holds* that there has been a violation of Article 2 of the Convention in respect of Idris Gakiyev;
5. *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 Idris Gakiyev's abduction and death;
6. *Holds* that there has been a violation of Article 3 of the Convention in respect of the first applicant on account of the ill-treatment by servicemen;
7. *Holds* that there has been a violation of Article 3 of the Convention in respect of the failure to conduct an effective investigation into the ill-treatment of the first applicant;
8. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicants on account of their mental suffering;
9. *Holds* that there has been a violation of Article 5 of the Convention in respect of Idris Gakiyev;
10. *Holds* that there has been a violation of Article 13 of the Convention in respect of the alleged violation of Article 2 of the Convention and of Article 3 of the Convention in respect of the first applicant on account of the ill-treatment;
11. *Holds* that there has been no violation of Article 13 of the Convention in respect of the alleged violation of Article 3 of the Convention on account of Idris Gakiyev's alleged ill-treatment;
12. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3 on account of the applicants' mental suffering;

13. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 35,000 (thirty-five thousand euros) in respect of non-pecuniary damage to the first and second applicants jointly, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on this amount;

(ii) EUR 4,500 (four thousand five hundred euros), in respect of costs and expenses, to be paid into the representatives' bank account in the Netherlands, plus any tax that may be chargeable to the applicants;

(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;

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

Done in English, and notified in writing on 23 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President