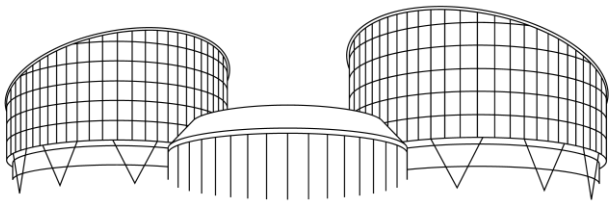

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF DAMAYEV v. RUSSIA

(Application no. 36150/04)

JUDGMENT

This version was rectified on 6 February 2013
under Rule 81 of the Rules of Court

STRASBOURG

29 May 2012

FINAL

22/10/2012

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

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

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 10 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 36150/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Imarali[1] Mutaliyevich Damayev ("the applicant"), on 7 October 2004.

2. The applicant was represented by lawyers of the Memorial Human Rights Centre ("Memorial"), an NGO registered in Moscow. The Russian Government ("the Government") were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative Mr G. Matyushkin.

3. On 11 January 2008 the Court decided to apply Rule 41 of the Rules of Court and to grant priority treatment to the application, as well as to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

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.

1. Rectified on 6 February 2013: the text was "Imar-Ali"

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in the village of Rigakhoy, in the Shatoy District of the Chechen Republic.

6. The applicant was married to Ms Maydat Tsintsayeva, born in 1975. The couple were the parents of six children: Mr Umar Damayev, born in 1994; Ms Zharadat Damayeva, born in 2000; Ms Dzhaneta Damayeva, born in 2000; Mr Umar-Khadzhi Damayev, born in 2002; Ms Zura Damayeva, born in 2003; and Ms Zara Damayeva, born in 2003.

A. Deaths of the applicant's relatives

1. The applicant's account

7. On 8 April 2004 the applicant went to a cemetery located outside the village of Rigakhoy. Umar Damayev was at school. The applicant's wife and five younger children were at home.

8. At about 1.30 p.m. on 8 April 2004 two military aircraft approached the village of Rigakhoy and started bombing it. The attack lasted for some twenty or thirty minutes. At about 2 or 2.30 p.m. two other military aircraft bombed the outskirts of the village.

9. The applicant heard the sound of explosions while he was at the cemetery. He rushed back to the village. On arrival he saw that his house had been completely destroyed. The applicant then found the dead bodies of his wife and five children. Umar Damayev, who had not been at home at the time of the aerial attack, survived.

10. Later the same day the applicant's six dead family members were buried.

2. Information submitted by the Government

11. In 1983 Mr M. built a house in the village of Rigakhoy without obtaining any construction permit. He did not register his title to ownership of the house.

12. In 2000 Mr M. left his house and the Damayev family unlawfully moved into it.

13. In the beginning of April 2004 a State agency in charge of the counter-terrorism campaign in the Chechen Republic obtained information that a group of thirty insurgents planning to perform terrorist attacks had been hiding in the vicinity of the villages of Rigakhoy and Tersenaul. Both villages were unpopulated at that time.

14. In order to protect the civilian population and in view of the impossibility of carrying out military ground operations in the area, the headquarters in charge of the counter-terrorism campaign decided to carry out targeted aerial bombing of the insurgents' base.

15. At 2.30 p.m. on 8 April 2004 four SU-25 airplanes fired missiles at the location of the insurgents' base. The insurgents were killed.

16. Inhabited villages and dwellings, including the house occupied by the Damayevs, were not hit by the missiles.

17. On 8 April 2004 an artillery shell kept in the applicant's house detonated. The applicant's wife and five children were killed by the explosion.

B. Investigation into the deaths of the applicant's relatives

1. The applicant's account

18. On 8 April 2004 residents of Rigakhoy reported the bombings and the applicant's relatives' deaths to the office of the military commander for the Shatoy District.

19. On 12 April 2004 the applicant complained about his relatives' deaths to the Shatoy District Department of the Interior.

20. At about 11 a.m. on 13 April 2004 a group of servicemen visited the village. They did not identify themselves; however, one serviceman said that he belonged to a military prosecutor's office. The servicemen told the applicant that, according to their sources, there had been an attack on rebel fighters in the Rigakhoy area. They also said that there were no grounds for instituting a criminal investigation, as the house had exploded because of a gas cylinder or a landmine. The servicemen examined the ruins of the applicant's house. The applicant requested that his relatives' bodies be exhumed. The servicemen replied that they had no forensic expert with them and promised to carry out an exhumation later.

21. On 13 April 2004 a Memorial employee arrived in Rigakhoy and filmed the scene of incident. The residents of Rigakhoy searched the ruins of the applicant's house and found a fragment of a numbered bomb in a shell hole. They also disinterred the bodies of the applicant's relatives and the Memorial employee filmed them. That same day the villagers saw another aircraft flying in the Rigakhoy area.

22. On an unspecified date the applicant requested that the prosecutor's office of the Chechen Republic institute criminal proceedings in relation to his relatives' deaths and to grant him victim status.

23. On 24 September 2005 the applicant's brother, Mr Mutalip Damayev, requested that the Vedenskiy District Prosecutor's Office inform him of the progress of the investigation into the deaths in Rigakhoy. He received no reply.

24. On 23 August 2007 the applicant's representatives asked the military prosecutor's office of the United Group Alignment ("the UGA prosecutor's office") to provide them with information on the progress of the investigation into the deaths of the applicant's relatives.

2. Information submitted by the Government

25. On 12 April 2004 the UGA prosecutor's office received a phone call from the Prime Minister of the Chechen Republic, informing them that at 2.30 p.m. on 8 April 2004 Mrs Damayeva and her five children had been killed as a result of an aerial bombardment.

26. On 13 April 2004 the UGA prosecutor's office's officials inspected the scene of the incident. According to the inspection report drawn up on the same day, there was a demolished stone building with no roof. One wall of the building was completely demolished, two were partially destroyed and one wall remained intact. Among the debris of the building there were two pillows, a blanket and metal kitchenware. There also were two consumer gas cylinders, one of which had a hole in it. The investigators took samples of the soil and collected metal fragments. There were also utility structures next to the building, some of them unfinished. In one of those there was a horse standing. In another one thirty-five cartridges of 5.45 mm calibre were found hidden in a plastic bottle. In a third structure the investigators found seventeen blank cartridges of 7.62 mm calibre. There was a cattle stable which was not damaged. There was a shell hole located within the distance of some 1.5 – 2 kilometres from the building.

27. On 16 April 2004 the UGA prosecutor's office instituted an investigation in case no. 34/00/0015-04d under Article 109 § 3 of the Russian Criminal Code (manslaughter).

28. The investigators questioned the applicant and three other people, Ms E., Mr Kh. and Mr A., as witnesses.

29. On 23 April 2004 the scene of incident was again inspected in the presence of Mr Mutalip Damayev. According to the additional inspection report, in front of the demolished building's façade there was a cone-shaped hole 3.20 metres long, 2.20 metres wide and 0.90 metres deep. The distance from the centre of the hole to the foundation of the façade wall was two metres. Mutalip Damayev explained that the hole had been a shell hole left on 8 April 2004. The investigators found eight metal fragments in the hole and twenty fragments around the building. There was a metal fragment found 6.7 metres from the epicentre of the hole. According to a specialist, it was a fragment of an artillery shell's stabiliser. Mutalip Damayev explained that his brother had brought that fragment home long before 8 April 2004. The investigators also found three other shell holes within 49, 131 and 158 metres from the epicentre of the first hole, respectively. In each of those holes there were metal fragments.

30. On unspecified dates expert explosive, aviation and forensic examinations were carried out.

31. The examination of the explosion established that the shell hole at the site of the Damayevs' house had emerged as the result of an explosion of an artillery shrapnel fougasse shell *(«артиллерийский осколочно-фугасный снаряд»)*, a type of a shell that is smaller than a general-purpose bomb *(«авиационная бомба»)*. The results of the explosion did not correspond to those of a general-purpose bomb explosion. The fragments of the shell found at the scene of the incident had not been fired from a cannon barrel, which proved that the shell had detonated because of its heating by an external object. Gas cylinders and a burner had been found at the scene of the incident, which corresponded with the hypothesis of the shell having been subjected to an external impact.

32. On 23 April 2004 the UGA prosecutor's office exhumed the bodies of the applicant's family members.

33. The forensic examination established that the deaths of Maydat Tsintsayeva, Zharadat Damayeva, Dzhaneta Damayeva, Umar-Khadzhi Damayev, Zura Damayeva and Zara Damayeva had been caused by bodily injuries inflicted as a result of the house collapsing, by their respiratory tracts becoming blocked by loose soil or by crushing of their bodies because of the weight of solid objects. There was no data showing that the injuries could have been caused by an explosion. It was impossible to establish the exact time and causes of their deaths, owing to their relatives' refusal to authorise an autopsy.

34. The clothing of the dead persons was undamaged, which proved that their deaths had not been caused by the detonation of a general-purpose bomb.

35. The aviation expert report established that the pilots who had carried out the aerial attack and the officials in charge of its planning had not breached any rules or regulations.

36. The investigation established that the decision by the military superiors to bomb the area had been lawful and well-founded. The pilots who had performed the task had not violated any laws. The Damayevs' house had been destroyed because of an explosion, which had been caused by the victims, of an artillery shell that had been kept inside the house. There had been no causal link between the actions of the pilots and the Damayevs' deaths.

37. On 16 August 2005 the investigation was closed for lack of evidence of a crime in the actions of the servicemen.

38. Despite specific requests from the Court, the Government refrained from disclosing the documents in the investigation file, except for a record of an inspection of the scene of the incident dated 13 April 2004 and a record of an additional inspection of the scene of the incident dated 23 April 2004. The record of 13 April 2004 included a number of photographs

presumably showing the remains of the applicant's house. However, the poor quality of the faxed photographs did not allow for study of the scene of the incident or for identification of the objects shown in them. Relying on information obtained from the Prosecutor General's Office, the Government stated that disclosure of the information collected in the course of the preliminary investigation would breach the rights of the parties to the criminal proceedings and thus violate Article 161 of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW

39. For a summary of relevant domestic law see *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §§ 108-26, 24 February 2005.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

40. The applicant complained that his wife and five children had been killed by State agents and that the domestic authorities had failed to carry out an effective investigation into their deaths. He relied on Article 2 of the Convention, which reads as follows:

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

A. The parties' submissions

1. The Government

41. The Government contested that argument.

42. They claimed at the outset that the applicant had failed to exhaust domestic remedies available to him in respect of the complaint under Article 2 of the Convention. First, he had not instituted civil proceedings claiming damages caused by unlawful actions of State authorities. Second, the applicant had not lodged any court complaints about the investigators' actions or omissions. Third, he had not appealed to a court against the prosecutor's decision of 16 August 2005 to close the investigation.

43. The Government claimed that the applicant's relatives had been killed by the explosion of an artillery shell unlawfully kept in their house, and not because of the aerial attack. They concluded that their deaths were not attributable to the State.

44. They further pointed out that the village of Rigakhoy had been unpopulated by 8 April 2004 and thus submitted that the authorities in charge of planning the aerial attack had not been aware that the applicant's family could have been in that area. The applicant had failed to duly register his place of residence and the federal troops could not therefore have been reasonably expected to take into account possible casualties among civilians when planning the operation.

45. The Government further insisted that the investigation into the deaths of the applicant's relatives had been effective. In particular, they noted that the following investigative measures had been taken: four witnesses had been questioned; the scene of the incident had been inspected twice; and three types of expert examination had been carried out. No autopsies had been conducted because the applicant had been reluctant to permit them. The investigation had established that the Damayevs' deaths had not been caused by the aerial bombardment. The criminal proceedings against the military servicemen had been closed because no crime had taken place. The prosecutors' offices which had dealt with the investigation had been independent in their actions.

2. The applicant

46. The applicant maintained his complaints. He insisted that he had not been made aware of the decision of 16 August 2005 and thus could not have appealed against it. Moreover, he emphasised that the investigating authorities had not kept him informed of the progress of the investigation at any point in time. The applicant also doubted that a complaint to a court would have been an effective remedy in his case, as some of the key witnesses would not have been able to afford to travel to another district of the Chechen Republic in order to attend a court hearing. He further stated

that the civil law remedies suggested by the Government would not have provided him with any prospects of success.

47. The applicant further submitted that the Government had failed to substantiate their allegation that his family had died as a result of an artillery shell explosion. He pointed out that his refusal to allow autopsies of his family members did not absolve the State authorities from their obligation to obtain detailed information about the cause of their deaths.

48. The applicant claimed that the investigation had been ineffective, as witness interviews and the inspection of the crime scene had been delayed. Moreover, although the Government had referred to certain investigative measures, they had not produced any documents pertaining to them.

B. The Court's assessment

1. Admissibility

49. The Court will examine the arguments of the parties concerning the Government's plea of non-exhaustion of domestic remedies in the light of the provisions of the Convention and its relevant practice (for a relevant summary, see *Estamirov and Others v. Russia*, no. 60272/00, §§ 73-74, 12 October 2006).

50. 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.

51. 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 applicant was not obliged to pursue civil remedies.

52. As regards the criminal-law remedies suggested by the Government, such as an appeal against the decision to close the investigation of 16 August 2005 and complaints to a court about the prosecutor's office's omissions or inactions, the Court observes that the deaths of the applicant's family members were reported to the authorities on 8 April 2004 (see paragraph 25 above) and the investigation into the killings commenced on 16 April 2004 (see paragraph 27 above). The applicant and the Government dispute the effectiveness of the investigation.

53. The Court considers that this part of the Government's objection raises issues concerning the effectiveness of the investigation which are closely linked to the merits of the applicant's complaints under Article 2 of the Convention. Thus, it decides to join this objection to the merits of the case and considers that the issue falls to be examined below.

54. The Court further considers, in the light of the parties' submissions, that the complaints raise serious issues of fact and law under the Convention. They are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) General principles

55. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted (see *Velikova v. Bulgaria*, no. 41488/98, § 68, ECHR 2000-VI). Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII). The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324).

56. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III). This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Andreou v. Turkey*, no. 45653/99, § 49, 27 October 2009).

57. As the text of Article 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force,

and even against avoidable accident (see *Makaratzis v. Greece* [GC], no. 50385/99, § 58, ECHR 2004-XI).

58. Article 2 covers not only intentional killing but also the situations in which it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. However, the deliberate or intended use of lethal force is only one factor to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (see *Isayeva v. Russia*, no. 57950/00, § 173, 24 February 2005).

59. In keeping with the importance of Article 2 in a democratic society, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, § 150).

60. The State's responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life (see *Ergi v. Turkey*, 28 July 1998, § 79, *Reports of Judgments and Decisions* 1998-IV, and *Isayeva*, cited above, § 176).

61. As to the facts that are in dispute, the Court recalls 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 *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25).

62. The Court has also noted the difficulties for applicants to obtain the necessary evidence in support of allegations in cases where the respondent Government are in possession of the relevant documentation and fail to submit it. Where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to the lack of such 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, among many other authorities, *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005, and *Solomou and Others v. Turkey*, no. 36832/97, § 67, 24 June 2008).

63. 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 *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, even if certain domestic proceedings and investigations have already taken place (see *Khalitova v. Russia*, no. 39166/04, § 53, 5 March 2009).

(b) The deaths of the applicant's family members

(i) Imputability of the deaths to the State

64. The Government insisted that the deaths of the applicant's relatives were not imputable to the State. It must therefore first be determined whether the State's responsibility is engaged (see *Umayeva v. Russia*, no. 1200/03, § 76, 4 December 2008).

65. The Court notes that, despite its requests for a copy of the entire file covering the investigation into the deaths of the applicant's family members, the Government refused to produce the documents from the case file – other than two records of crime scene inspections – on the grounds that they were precluded from providing them by Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has found this explanation insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII (extracts)).

66. In view of the foregoing and bearing in mind the principles referred to above, the Court finds that it can draw inferences from the Government's conduct in this respect.

67. It is undisputed between the parties that there was an aerial bombardment of the Rigakhoy area on 8 April 2004.

68. At the same time, in the Government's submission, the explosion at the applicant's house which caused the deaths of his family members was not a result of the bombardment in question but a product of someone's attempt to dismantle the artillery shell (see paragraphs 36 and 43 above). The Court observes in this connection that it appears improbable that any reasonable person would try to extract highly explosive material from an artillery shell at home in the vicinity of five minor children. Such a course

of events appears even less probable considering that an artillery attack was taking place in the area on the day of the explosion. The Court thus cannot follow the Government's line of reasoning.

69. In such circumstances and in the absence of any reasonable explanation of what happened on 8 April 2004 in Rigakhoy having been given by the Government, the Court considers it established that the applicant's wife's and children's deaths were caused by the federal military aerial attack. Hence, the Court finds that the six deaths were imputable to the State.

70. The Court will now examine whether the use of lethal force by the federal military in the Rigakhoy area was compatible with the general principles of protection of the right to life enshrined in Article 2 of the Convention.

(ii) Compatibility of the use of lethal force by State agents with Article 2 of the Convention

71. The Court considers that since no martial law and no state of emergency had been declared in the Chechen Republic at the material time, and no derogation had been made under Article 15 of the Convention, the military operation in question has to be judged against a normal legal background (see *Isayeva*, cited above, § 191).

72. The Court is mindful of the fact that not every death imputable to the State entails a breach of Article 2 of the Convention. The use of lethal force by State agents may be justified in certain circumstances, provided that it is "no more than absolutely necessary" (see, with further references, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 94, ECHR 2005-VII).

73. However, in the present case the Government have not put forward any argument capable of justifying the use of lethal force against civilians. On the contrary, they merely denied State responsibility for the deaths of the applicant's wife and children.

74. Assuming, nonetheless, that the aerial bombardment of 8 April 2004 pursued a legitimate aim of protecting others from illegal acts of insurgents operating in the Rigakhoy area, the Court points out that it is precluded from assessing how the bombardment was planned and executed owing to the Government's failure to provide any information on the military operation in question. The only detail concerning the planning of the bombardment that could be extracted from the Government's submissions is that the officers in charge of the military operation in Rigakhoy were unaware of the fact that the area was inhabited (see paragraph 44 above). Considering that by the time of the events the Damayevs had lived in their home for a few years, this very allegation hints either at a lack of coherent intelligence information available to those who planned and carried out the

bombardment or at a blatant disregard for any safety and humanitarian considerations on the part of the officers.

75. In such circumstances the Court does not deem it necessary to establish whether the actions of the military in the present case were no more than absolutely necessary for achieving any legitimate aim.

76. Recalling its above finding as to the imputability of the deaths to the State (see paragraph 69 above) and in the absence of any justification for the use of lethal force put forward by the Government, the Court concludes that the applicant's family members died because of the disproportionate use of lethal force by State agents.

77. Accordingly, the Court finds that there has been a violation of Article 2 of the Convention in respect of Maydat Tsintsayeva, Zharadat Damayeva, Dzhaneta Damayeva, Umar-Khadzhi Damayev, Zura Damayeva and Zara Damayeva.

(c) The alleged inadequacy of the investigation

78. 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 *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I). The essential purpose of such an 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 or was not justified in the circumstances or otherwise unlawful, 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).

79. In the present case, the deaths of the applicant's wife and five children were investigated. The Court now must assess whether the investigation in question met the requirements of Article 2 of the Convention.

80. The Court notes at the outset that the information on the progress of the investigation at its disposal is extremely sparse, because the documents from the case file remain undisclosed by the Government. It thus has to assess the effectiveness of the investigation on the basis of the few

documents submitted by the parties and the sparse information on its progress presented by the Government.

81. The Court observes that the investigation into the six deaths was only initiated on 16 April 2004 (see paragraph 27 above), eight days after the incident. Such a significant delay in the commencement of the investigation – into deaths caused by a major explosion – was in itself prone to hampering the overall effectiveness of the investigation, as it could have precluded the authorities from collecting crucial evidence. It does not seem plausible that the authorities remained unaware of the incident until 12 April 2004, when the Prime Minister of the Chechen Republic informed the UGA prosecutor's office of the aerial bombardment of 8 April 2004 (see paragraph 25 above). However, assuming that the domestic authorities first took cognisance of the applicant's relatives' deaths on 12 April 2004, the Government have not put forward any explanation as to why the UGA prosecutor's office only opened a criminal case four days later. The Court considers that the delay in commencement of the criminal proceedings in the present case was unjustifiably long and inevitably contributed to the ineffectiveness of the investigation.

82. The Court further points out that such a basic investigative step as an inspection of the scene of the incident was only carried out for the first time on 13 April 2004, five days after the discovery of the dead bodies (see paragraph 26 above). The Government produced no explanation for the fact that such a vital investigative measure needed to collect crucial evidence had not been carried out immediately.

83. The Government listed a number of investigative steps that had been taken to solve the deaths of the applicant's family members. For instance, they claimed that the applicant and three other individuals had been questioned as witnesses (see paragraph 28 above), the scene of the incident had been inspected twice (see paragraphs 26 and 29 above), different expert examinations had been carried out (see paragraph 30 above) and the dead bodies had been exhumed (see paragraph 32 above). However, in the absence of detailed information on those steps, the Court cannot reach the conclusion that the measures taken were prompt and sufficient for an effective investigation to have been carried out.

84. Furthermore, it does not follow from the information submitted by the Government that any military personnel member involved in the aerial bombardment of the Rigakhoy area on 8 April 2004 was ever questioned in connection with the investigation in case no. 34/00/0015-04d.

85. Accordingly, the Court considers that the domestic investigative authorities demonstrably failed to act of their own motion and breached their obligation to exercise exemplary diligence and promptness in dealing with such a serious incident (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII).

86. Turning to the part of the Government's objection that was joined to the merits of the case (see paragraph 53 above), the Court observes the following.

87. In the Government's submission, the applicant failed to complain about the prosecutor's decision to terminate the investigation on 16 August 2005 (see paragraph 42 above). However, the Court points out in this respect that the Government have not provided any proof capable of demonstrating that the applicant was in fact notified of the decision in question. Moreover, the fact that the applicant's brother and representatives requested information on the progress of the investigation in 2005 and 2007 (see paragraphs 23 and 24 above) suggests that the applicant was not duly informed of the decision to close the investigation and thus could not have promptly appealed against it. The Court accordingly considers that the applicant, having had no access to the case file and having not been properly informed of the progress of the investigation, could not have effectively challenged any actions or omissions of the investigating authorities before a court (see *Umayeva*, cited above, § 96).

88. The Government also mentioned that the applicant had had the opportunity to apply for judicial review of the actions or omissions of the investigating authorities in the context of exhaustion of domestic remedies. The Court observes that, owing to the time that had elapsed since the events complained of, certain investigative steps that ought to have been carried out much earlier could no longer be usefully conducted. The Court therefore finds that it is highly doubtful that the remedy in question would have had any prospects of success (see, among other authorities, *Taymuskhanovy v. Russia*, no. 11528/07, § 113, 16 December 2010).

89. Accordingly, the Court considers that the criminal-law remedies cited by the Government were ineffective in the circumstances of the case and rejects the Government's objection in this part as well.

90. Lastly, in the Court's view, it follows from the fact that the applicant was not promptly informed of significant developments in the investigation and of the fact that it had been terminated that 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 *Oğur v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III).

91. In the light of the foregoing, the Court finds that the domestic authorities failed, in breach of Article 2 in its procedural aspect, to conduct an effective investigation into the circumstances in which Maydat Tsintsayeva, Zharadat Damayeva, Dzhaneta Damayeva, Umar-Khadzhi Damayev, Zura Damayeva and Zara Damayeva died.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

92. The applicant complained that as a result of the deaths of his wife and five children he had suffered severe mental distress in breach of 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

93. The Government claimed that the applicant's mental suffering was not imputable to the State, which had not been responsible for the deaths of his family members.

94. The applicant maintained the complaint and submitted that he had suffered profound distress caused by the deaths of his wife and five children.

B. The Court's assessment

1. Admissibility

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

2. Merits

96. The Court reiterates 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, for example, *Tanlı v. Turkey*, no. 26129/95, § 159, ECHR 2001-III (extracts)). In such cases the Court would normally limit its findings to Article 2.

97. Given that the applicant's relatives were neither detained nor missing before their deaths, the Court is not persuaded that in the present case, despite its gruesome circumstances, the applicant sustained uncertainty, anguish and distress characteristic of the specific phenomenon of disappearances (see, by contrast, *Luluyev and Others v. Russia*, no. 69480/01, § 115, ECHR 2006-XIII (extracts)).

98. In such circumstances, the Court considers that it cannot be held that the applicant's suffering reached a dimension and character distinct from the

emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation.

99. Accordingly, the Court finds no violation of Article 3 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION AND OF ARTICLE 1 OF PROTOCOL No. 1

100. In his initial application of 7 October 2004 and the application form of 7 October 2005, the applicant complained under Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1 that "his house [had been] destroyed in breach of these provisions". The Court considers that these complaints fall to be examined under Article 8 of the Convention and Article 1 of Protocol No. 1.

Article 8, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for ... his home ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

1. The Government

101. The Government claimed that the applicant had failed to exhaust domestic remedies available to him, as he had not applied for special compensation for loss of housing and property granted to residents of the Chechen Republic, to which he was entitled pursuant to national law.

102. They further claimed that the investigation had established that the destruction of the applicant's house had not been caused by military actions and thus had not been imputable to the State.

103. The Government also argued that the applicant had failed to substantiate the claim that his property had been damaged by relevant documents, such as records of damage assessment issued by domestic authorities.

104. The applicant had not registered his place of residence as that of the house, which had in any event been unlawfully built by Mr M., and thus had not obtained the right to live there. Accordingly, in the Government's submission, Article 8 of the Convention and Article 1 of Protocol No. 1 were inapplicable to the present case.

2. The applicant

105. In his observations on the admissibility and merits of the application of 26 June 2008, the applicant for the first time submitted a detailed description of his complaints regarding the destruction of his house. He did not provide any documents in support of his complaints.

106. The applicant also claimed that he could not have been expected to claim compensation for loss of the property at the national level. In order to be eligible for such compensation, he would have had to produce documents confirming his title to ownership of the destroyed property. However, he had not been able to do so because his family had lived in a house built in breach of planning regulations.

B. The Court's assessment

107. The Court points out at the outset that the applicant's complaints concerning the destruction of his home are clearly distinct from the complaint concerning the deaths of his family members. They cannot be regarded as closely connected to the complaints raised under Article 2 of the Convention and thus may be examined separately.

108. The Court observes that both the initial application and the application form expressed the applicant's complaint in relation to the destruction of his house extremely succinctly and abstractly. The applicant's submissions did not contain any details of those claims and did not refer to any supporting documents. It was only stated that the applicant's house had been destroyed. Furthermore, no documents or detailed claims were submitted at any stage of the proceedings.

109. The Court considers that the nature of the violation alleged under Article 1 of Protocol No. 1 requires that the complaint brought under this heading should provide at least a brief description of the property in question. Given that by the time of submitting the applicant's observations on the admissibility and merits of the application, that is, by June 2008, over four years had elapsed since the violation alleged, it is reasonable to expect that by that time the applicant would have already taken measures to record

and evaluate his pecuniary losses and be able to provide this information to the Court.

110. However, nothing in the materials at the Court's disposal suggests that the applicant ever did so. Furthermore, it is clear from the nature of the proceedings instituted into the deaths of the applicant's family members that they did not concern any property issues or the applicant's right to respect for his home.

111. Thus, even assuming that the applicant regarded all possible remedies provided by domestic law ineffective, the Court reiterates that the applicant failed to substantiate his complaints.

112. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

113. The applicant further complained that he had not had any effective domestic remedies in relation to his complaints under Article 2 of the Convention, as well as those under Article 8 of the Convention and Article 1 of Protocol No. 1. He relied on Article 13, which reads as follows:

> "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."

114. The Government contested that argument. They asserted that the applicant could have complained about the prosecutor's office's actions or omissions to a higher prosecutor or a court. Further, he had had the right to claim civil damages.

115. The applicant claimed that he had been deprived of effective remedies because he had not been promptly informed of the fact that the criminal proceedings had been terminated.

A. Article 13 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1

116. The Court notes that it has declared the applicant's complaints under Article 8 of the Convention and Article 1 of Protocol No. 1 inadmissible. It therefore considers that the applicant did not have an arguable claim of a violation of these Convention provision. Accordingly, his complaints under Article 13 that had had no effective remedies in relation to the complaint under Article 8 and Article 1 of Protocol No. 1 must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

B. Article 13 taken in conjunction with Article 2 of the Convention

117. The Court observes that the complaint made by the applicant under this Article has already been examined in the context of Article 2 of the Convention. Having regard to the findings of a violation of Article 2 under its procedural head (see paragraph 91 above), the Court considers that, whilst the complaint under Article 13 taken in conjunction with Article 2 is admissible, there is no need to separately examine this complaint on its merits (see *Shaipova and Others v. Russia*, no. 10796/04, § 124, 6 November 2008, and *Khumaydov and Khumaydov v. Russia*, no. 13862/05, § 141, 28 May 2009).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

119. The applicant claimed that as a result of the bombing of his house a number of household items, agricultural machines and livestock had been destroyed. He claimed 13,500 euros (EUR) for two agricultural machines, EUR 4,070 for furniture, EUR 7,700 for clothing and jewellery and EUR 26,300 for thirty-seven heads of livestock. He also claimed EUR 13,000 for the destroyed house.

120. The Government insisted that the damage to the applicant's property had not been caused by State agents' actions. They also submitted that the applicant could have requested compensation of such damage at the national level.

121. The Court points out that it has declared the applicant's complaints under Article 8 of the Convention and Article 1 of Protocol No. 1 inadmissible. In such circumstances, the applicant's claims for compensation for pecuniary damage caused by the alleged violations are to be rejected.

2. Non-pecuniary damage

122. The applicant claimed EUR 300,000 for non-pecuniary damage caused by the deaths of his family members and EUR 20,000 for such damage caused by the destruction of his house and belongings.

123. The Government considered the claims excessive.

124. The Court points out that it has found violations of Article 2 of the Convention in respect of the deaths of the applicant's wife and five children. In such circumstances, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations. It finds it appropriate to award the applicant EUR 300,000 under the head in question, plus any tax that may be chargeable on this amount.

B. The applicant's request for an investigation

125. The applicant also requested, referring to Article 41 of the Convention, that an independent investigation which would comply with the Convention standards be conducted into the deaths of his family members. He relied in this connection on the case of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-03, ECHR 2004-II).

126. The Government did not comment on this part of the applicant's just satisfaction claims.

127. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, its judgments are essentially declaratory in nature and, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; *Akdivar and Others v. Turkey* (Article 50), 1 April 1998, § 47, *Reports* 1998-II; and *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

128. In the Court's opinion, the present case is distinguishable from the one referred to by the applicant. The *Assanidze* judgment ordered the

respondent State to secure the applicant's release so as to put an end to violations of Article 5 § 1 and Article 6 § 1. The Court further notes its above finding that in the present case the effectiveness of the investigation had already been undermined at the early stages by the domestic authorities' failure to take essential investigative measures (see, for instance, paragraphs 81 and 82 above). It is therefore very doubtful that the situation existing before the breach could be restored. In such circumstances, having regard to the established principles cited above, the Court finds it most appropriate to leave it to the respondent Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention (see *Kukayev v. Russia*, no. 29361/02, § 134, 15 November 2007).

C. Costs and expenses

129. The applicant also claimed 1,238.30 British pounds (GBP) for costs and expenses incurred before the Court. In particular, he claimed GBP 715 in legal fees, GBP 175 in postal and administrative fees and GBP 348.30 in translation fees. In support of his claims the applicant provided invoices issued by translators. No documents justifying the other expenses were submitted.

130. The Government stated that, according to the Court's practice, only expenses actually incurred should be reimbursed.

131. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and are also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

132. The Court notes that the applicant produced invoices from translators for the total amount of GBP 348.30 (approximately EUR 442). It notes that the applicant neither submitted any documents in support of his claim for administrative costs nor any invoices to support the amounts claimed for lawyers' fees. In such circumstances, the Court is not satisfied that the applicant has shown that such expenses were actually incurred. Accordingly, the Court considers it reasonable to award the sum of EUR 442 covering translation fees in connection with the proceedings before the Court.

D. Default interest

133. 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. *Declares* the complaints under Articles 2 and 3 of the Convention, as well as the complaints under Article 13 taken in conjunction with Article 2 of the Convention, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 2 of the Convention in respect of Maydat Tsintsayeva, Zharadat Damayeva, Dzhaneta Damayeva, Umar-Khadzhi Damayev, Zura Damayeva and Zara Damayeva;

3. *Holds* that there has been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which Maydat Tsintsayeva, Zharadat Damayeva, Dzhaneta Damayeva, Umar-Khadzhi Damayev, Zura Damayeva and Zara Damayeva died;

4. *Holds* that there has been no violation of Article 3 of the Convention in respect of the applicant;

5. *Holds* that there is no need to examine the complaint under Article 13 in conjunction with Article 2 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, 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 300,000 (three hundred thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
      (ii) EUR 442 (four hundred and forty-two euros) plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 29 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Nina Vajić
Deputy Registrar	President