CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF KUKAYEV v. RUSSIA

(Application no. 29361/02)

JUDGMENT

STRASBOURG

15 November 2007

FINAL

02/06/2008

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

In the case of Kukayev v. Russia,

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

Mr P. LORENZEN, *President,*
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr A. KOVLER, *judges,*

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 16 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 29361/02) 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 Khamzat Khasanovich Kukayev ("the applicant"), on 23 April 2002.

2. The applicant, who had been granted legal aid, was represented by lawyers of the Memorial Human Rights Centre (Moscow) and the European Human Rights Advocacy Centre (London). The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that his son had disappeared and subsequently died after being unlawfully apprehended. He complained of the absence of an adequate investigation into the matter, and also of the mental suffering he had endured on account of these events and the lack of effective remedies in respect of those violations. He relied on Articles 2, 3 and 13 of the Convention.

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

5. By a decision of 23 October 2006 the Court declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1945 and lives in Grozny.

8. The facts of the case as submitted by the parties are summarised in section A below (paragraphs 9-61). A description of the documents submitted by the Government is contained in section B below (paragraphs 62-66).

A. The facts

9. The applicant is the father of Aslanbek Kukayev, born in 1976, who at the material time was an officer of the special police unit of the Chechen Department of the Interior (*отряд милиции особого назначения при Управлении внутренних дел РФ по Чеченской Республике* – "the Chechen OMON") and lived in Grozny, together with his parents.

10. In early October 1999 the Russian Government launched a counter-terrorist operation in the Chechen Republic.

1. Events of 26 November 2000

11. The facts surrounding Aslanbek Kukayev's abduction are disputed by the parties.

(a) The applicant's account of events

12. The applicant did not witness his son's detention, and the following account is based on eyewitness statements submitted by him, including those of two police officers, Mr G. and Mr Dzh., and a civilian, Mr A.

13. On the morning of 26 November 2000 the applicant's son, along with another police officer, D., left home to report for duty at the headquarters of the Chechen OMON in the town of Gudermes. They were both wearing camouflage uniforms and had their OMON officers' identification cards.

14. At around 12 noon the applicant's son and D. were passing through Grozny central market in D.'s white VAZ 2106 Zhiguli car. At the same time federal servicemen were carrying out a special ("sweeping-up") operation in the vicinity of the marketplace. According to Mr G.'s statement, the military personnel belonged to a "mobile detachment" (*мобильный отряд*) stationed in the central part of Grozny.

15. The servicemen blocked D.'s vehicle and then took Aslanbek Kukayev and D. away in the direction of the headquarters of the federal military detachment Don-100. Some time later the soldiers seized the

Zhiguli car, which subsequently disappeared. The applicant submitted that the car had later been seen on several occasions at the Khankala federal military base.

16. At around 1 p.m. the applicant's son, D. and several other police officers of Chechen origin detained during the operation, including Mr Dzh., were put into a GAZ 66 truck with an emblem representing a rampant horse on its doors, which then drove off. According to Mr Dzh., the servicemen who apprehended them were hostile and offensive.

17. The truck having reached Ordzhonikidze Avenue in the centre of Grozny, the officer in charge ordered that Aslanbek Kukayev and D. be taken out of the truck. Mr Dzh. saw the applicant's son and D. being escorted by six federal servicemen towards the former Grozny Educational College building. The vehicle then drove on.

18. Several policemen of Chechen origin were detained during the "sweeping-up" operation at Grozny central market on 26 November 2000. Some of them were released later that day, including Mr Dzh. Aslanbek Kukayev and D. disappeared after being apprehended.

19. According to the applicant, on 27 November 2000 the central Russian television broadcaster announced that a number of members of illegal armed groups had been apprehended during a "sweeping-up" operation in the vicinity of Grozny central market. The applicant also enclosed information which he had obtained from the Internet site of Human Rights Watch to the effect that on 26 November 2000 the federal troops had carried out a "sweeping-up" operation at Grozny central market and that they had detained several people, some of them having subsequently disappeared.

(b) The Government's account of events

20. The Government relied on a reply from the Prosecutor General's Office (*Генеральная прокуратура РФ*) to the effect that, on 26 November 2000, during daylight hours, "unidentified men wearing camouflage uniforms and armed with firearms" had abducted the applicant's son and several other persons near Grozny central market. The bodies of those abducted were subsequently found at various times in Grozny.

21. They also submitted, with reference to information provided by the Chechen Department of the Federal Security Service (*Управление Федеральной службы безопасности по Чеченской Республике*), that the federal forces had not conducted any special operations in the vicinity of Grozny central market on 26 or 27 November 2000.

2. The applicant's search for his son and the official investigation

22. According to the applicant, he learnt about his son's detention from his neighbour the next day. Immediately thereafter, he went to Gudermes, to

the headquarters of the Chechen OMON, and enquired about his son. He was told that neither his son nor D. had reported for duty.

23. The applicant and his younger son also went to Grozny central market and enquired of those who had been there on 26 November 2000 about Aslanbek Kukayev. In particular, they questioned servicemen from the mobile detachment, showing Aslanbek Kukayev's photograph; however, the servicemen refused to talk to them.

24. The applicant further applied repeatedly to a number of State bodies, including prosecutors at various levels, the Grozny military commander's office (*комендатура г. Грозного*), the regional and federal departments of the Russian Ministry of the Interior, the Federal Security Service (*Федеральная служба безопасности РФ* – "the FSB"), the Special Envoy of the Russian President in Chechnya for Rights and Freedoms (*Специальный представитель Президента Российской Федерации по соблюдению прав и свобод человека в Чеченской Республике*) and the Russian President's Office (*Администрация Президента РФ*). In his letters to the authorities the applicant referred to the circumstances of his son's detention and asked for assistance and details of the investigation. In most cases he received formal responses informing him that his requests had been forwarded to various prosecutors.

25. On 13 December 2000 the Grozny prosecutor's office (*прокуратура г. Грозного*) commenced a criminal investigation into the disappearance of the applicant's son and D. under Article 126 § 2 of the Russian Criminal Code (kidnapping of two or more persons by a group using firearms). The file was given the number 12332.

26. On 29 January 2001 the Grozny prosecutor's office joined the aforementioned criminal case with several other cases opened in connection with abductions near Grozny central market on 26 November 2000 and the subsequent disappearance of a number of persons, on the ground that all those offences had been committed by the same persons. The case file was assigned the number 12331.

27. On 30 January 2001 the Chechen Department of the FSB forwarded the applicant's letter to the military prosecutor of military unit no. 20102 (*военная прокуратура – войсковая часть 20102*).

28. On 13 February 2001 the Grozny prosecutor's office suspended the investigation in criminal case no. 12331 on account of the failure to identify those responsible.

29. On the same date the head of the special police unit at the Chechen Department of the Interior issued the applicant with a certificate confirming that Aslanbek Kukayev had been an officer of that unit since 24 August 2000 and that he had disappeared on 26 November 2000 in the vicinity of Grozny central market.

30. By a letter of 22 February 2001 the military prosecutor of military unit 20102 returned the applications by the mothers of Aslanbek Kukayev

and D. to the Grozny prosecutor's office. The letter stated that the applications in question had been forwarded to the military prosecutor of military unit no. 20102 by mistake, since no involvement of military personnel in the alleged offence had been established.

31. On 18 April 2001 the Grozny prosecutor's office resumed the investigation in criminal case no. 12331.

3. Discovery of the body of the applicant's son

32. It appears that at some point in 2001 a new mobile detachment replaced the one stationed in the central part of Grozny.

33. On 22 April 2001, during the inspection of the area for which they were responsible, the servicemen of the mobile detachment found two corpses bearing signs of having met a violent death in the basement of Grozny Educational College in Ordzhonikidze Avenue. The servicemen notified a district office of the Department of the Interior and the Grozny prosecutor's office. It appears that a forensic examination of the corpses was conducted later that day.

34. On 23 April 2001 the bodies were identified by relatives as those of Aslanbek Kukayev and D. On the same day the applicant buried his son.

35. According to the applicant, his son's body was found 50 metres away from the place where he had last been seen alive on 26 November 2000. The applicant further submitted that both on 26 November 2000 and during the period thereafter the area in question had been under the firm control of the federal mobile detachment. He also claimed that the area had been tightly secured by the federal forces, fenced with barbed wire and watchtowers, and inaccessible to civilians, and that even the police and officials of the prosecutor's office had been required to obtain special leave to have access to the area on 22 April 2001. The applicant submitted a hand-drawn map of the area. In the Government's submission, "it was not established during the investigation that the area where the dead bodies of the applicant's son and D. had been found had been secured and that there had been no free access there".

36. On 3 May 2001 the Forensic Examinations Bureau of the Chechen Republic (*Республиканское бюро судмедэкспертизы*) issued a medical death certificate (*врачебное свидетельство о смерти*) in respect of Aslanbek Khamzatovich Kukayev, born in 1976. The document stated that the applicant's son had died on 26 November 2000 as a result of gunshot wounds.

37. On 1 June 2001 the civil registry office of the Leninskiy District of Grozny certified the death of the applicant's son. The date and the place of death were recorded as 26 November 2000, Grozny.

38. On 7 August 2001 a military expert medical commission of the Chechen Department of the Interior (*военно-врачебная комиссия УВД МВД РФ по Чеченской Республике*) issued a certificate stating that

Aslanbek Kukayev, an officer of the special police unit of the Chechen Department of the Interior, had died on 26 November 2000 as a result of a "gunshot wound to the head and fracture of the cranial bones".

39. On 10 August 2001 the commander of the Chechen OMON drew up a report on the result of the internal investigation into the death of their officer, Aslanbek Kukayev. The report stated that on 26 November 2000 Aslanbek Kukayev and D. had left for the Zavodskoy District of Grozny to perform an operational task and had gone missing during a special "sweeping-up" operation in the vicinity of Grozny central market. On 22 April 2001 their bodies, bearing signs of a violent death, had been found in the basement of one of the destroyed buildings in Ordzhonikidze Avenue.

40. According to the Government, at some point the applicant and his wife had received compensation in connection with the death of their son, a police officer on duty. Under domestic law such compensation was payable for the loss of a breadwinner and comprised for each of them insurance payments of 19,786.25 Russian roubles (RUB – approximately 580 euros (EUR)), a lump-sum payment of RUB 44,365.80 (approximately EUR 1,300) and a pension in the amount of RUB 1,078.22 (approximately EUR 30).

4. Further investigation

41. In a letter of 21 May 2001 the Grozny prosecutor's office informed the applicant, in reply to a query from him, that on 12 May 2001 the file in criminal case no. 12331 concerning Aslanbek Kukayev's disappearance and the subsequent discovery of his body had been sent to the military prosecutor of military unit no. 20102 for further investigation.

42. On 1 July 2001 the Grozny prosecutor's office informed the applicant that the criminal proceedings in case no. 12331 had been suspended on 28 May 2001 on the ground of failure to identify those responsible.

43. On 7 August 2001 the Russian President's Office forwarded the applicant's complaint to the Prosecutor General's Office.

44. In a letter of 21 August 2001 the Southern Federal Circuit Department of the Prosecutor General's Office (*Управление Генеральной Прокуратуры РФ в Южном федеральном округе*) informed the applicant that his complaints concerning the ineffective investigation into the abduction of his son had been forwarded to the prosecutor's office of the Chechen Republic (*прокуратура Чеченской Республики*).

45. On 24 August 2001 the Russian Presidential Commission on Rights and Freedoms (*Комиссия по правам человека при Президенте РФ*) forwarded the applicant's complaint concerning the ineffective investigation into the killing of his son to the Prosecutor General's Office for examination. The latter, in its turn, forwarded the complaint to the prosecutor's office of the Chechen Republic on 3 September 2001.

46. By a letter of 10 September 2001 the prosecutor's office of the Chechen Republic requested the Grozny prosecutor's office to send it the file in criminal case no. 12331 so as to enable it to investigate the applicant's complaints relating to the ineffective investigation into his son's death.

47. On 10 October 2001 the Russian Ministry of the Interior informed the applicant that his complaint had been sent to the prosecutor's office of the Chechen Republic for examination.

48. On the same date the prosecutor's office of the Chechen Republic forwarded case file no. 12331, comprising 222 pages, to the Grozny prosecutor's office for further investigation. The latter reopened the proceedings instituted in the above-mentioned criminal case on 15 October 2001 and then adjourned them a month later on the ground that it was impossible to identify the perpetrators. At some point the case file was referred to the prosecutor's office of the Zavodskoy District of Grozny (*прокуратура Заводского района г. Грозного* – "the Zavodskoy District prosecutor's office").

49. On 15 November 2001 the prosecutor's office of the Chechen Republic referred the applicant's complaint to the Grozny prosecutor's office.

50. On 25 March 2002 the Grozny prosecutor's office informed the applicant that the criminal proceedings instituted in connection with the abduction and killing of his son had been suspended, as it was impossible to identify the alleged perpetrators, and that all possible steps to that effect had been taken.

51. It does not appear that any investigative activity took place between November 2001 and December 2005; the applicant's attempts to have the criminal proceedings resumed proved unsuccessful.

52. On 4 November 2005 the present application was communicated to the Russian Government.

53. On 16 December 2005 the Zavodskoy District Prosecutor's Office resumed the proceedings in criminal case no. 12331.

54. By a decision of 22 December 2005 the investigator in charge, referring to the fact that, during the examination of the materials in case no. 12331 concerning the abduction of the applicant's son and other persons, he had discovered that the bodies of the applicant's son and D., bearing signs of having met a violent death, had been found on 22 April 2001, ordered the institution of criminal proceedings in relation to the matter under Article 105 § 2 (a), (c) and (g) of the Russian Criminal Code (murder of two or more persons committed by a group and involving the act of kidnapping).

55. On 16 January 2006 the investigation in case no. 12331 was suspended, on the ground that it was impossible to identify those responsible.

56. On 1 March 2006 that decision was set aside and the criminal proceedings were reopened. The investigation was then stayed on 1 April and 21 August 2006 and resumed on 21 July 2006 and 16 January 2007 respectively.

57. According to the applicant, in March 2006 he was summoned to the Zavodskoy District Prosecutor's Office and informed that the investigation had been resumed. The applicant was not given access to the case file, let alone allowed to make copies of any documents.

58. Referring to the information provided by the Prosecutor General's Office, the Government submitted that, on 13 December 2000, the authorities had commenced an investigation into the abduction of the applicant's son and D. and subsequently, following the discovery of their bodies, into their murder and the theft of D.'s car. The investigation had been suspended and resumed on several occasions, but to date had failed to identify the alleged perpetrators. The investigation had been reopened most recently on 16 January 2007 and was being supervised by the Prosecutor General's Office. According to the Government, the applicant was duly informed about all decisions taken during the investigation.

59. The Government further submitted that the applicant had been questioned on 27 January and 30 April 2001 and on 20 December 2005 and that his wife, Aslanbek Kukayev's mother, had been questioned on 21 December 2005. According to the Government, the applicant had never made any statements concerning the fact that D.'s vehicle, which had disappeared on 26 November 2000, had later been seen at the Khankala federal military base. The applicant and his wife had been granted the status of victims on 20 and 21 December 2005 respectively and on 21 December 2005 had been recognised as civil parties seeking damages in the criminal proceedings. Relatives of other persons kidnapped on 26 November 2000 had also been questioned.

60. The investigating authorities had also questioned four persons, including Mr Dzh., all of whom, in the Government's words, "were apprehended by the federal forces on 26 November 2000 during a special operation and were later released", as well as four police officers, including Mr G., and the servicemen who had found the bodies of the applicant's son and D. The Government did not specify on what date witness statements had been obtained and submitted that all the witnesses concerned had testified that they had no information regarding the perpetrators of the offences in question.

61. They stated next that on 23 April 2001 the corpses of Aslanbek Kukayev and D., found on 22 April 2001, had been examined by forensic medical experts, who had drawn up a report on 17 May 2001 stating that the death of the aforementioned two persons could have been caused by injuries sustained as a result of firearms shots. The Government stated that the investigating authorities had sent a number of queries to various State

bodies on 19 December 2000, 3 January, 18 April, 8 May and 28 May 2001, and 18 December 2005. In their submission, on 3 March 2006 the investigators had sent a request to the Novosibirsk prosecutor's office to question the officers of the Novosibirsk special police unit who had served in Chechnya between 20 and 28 November 2001 (rather than 2000). It is unclear whether any reply was received to this query. On 20 March and 11 August 2006 the investigators had requested the town and district offices of the interior of the Chechen Republic to carry out a search so as to establish those responsible. None of the necessary information on the subject had been received, according to the Government, apart from the reply from the Chechen Department of the Federal Security Service to the effect that it had no information about the alleged perpetrators. According to the Government, the authorities had also undertaken other investigative measures; however, they did not specify what those measures had been.

B. Documents submitted by the Government

1. The Court's requests for the investigation file

62. In November 2005, when the application was communicated to them, the Government were invited to produce a copy of the investigation file in criminal case no. 12331 opened into the abduction and murder of Aslanbek Kukayev. Relying on the information obtained from the Prosecutor General's Office, the Government replied that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses. They, however, agreed to produce several documents, "disclosure of which did not contravene the requirements of Article 161". In February 2006 the Court reiterated its request and suggested that Rule 33 § 3 of the Rules of Court be applied. In reply, the Government submitted a few additional documents but refused to produce the entire investigation file for the aforementioned reasons.

63. On 23 October 2006 the application was declared admissible. At that stage the Court once again invited the Government to submit the investigation file and to provide information concerning the progress of the investigation. In February 2007 the Government informed the Court of the latest dates on which the investigation had been suspended and reopened and produced several documents pertaining to the period after April 2006. Overall, the Government produced 67 documents running to 74 pages from the case file, which, as could be ascertained from the page numbering, comprised at least 235 pages. The documents included:

(a) copies of the reports by the two servicemen who had found the bodies of the applicant's son and D. on 22 April 2001;

(b) numerous procedural decisions suspending and reopening the investigation in case no. 12331;

(c) a number of investigators' decisions taking up case no. 12331;

(d) decisions granting the status of victims in case no. 12331 to relatives of some of the persons missing since 26 November 2000, but not to the applicant;

(e) letters dated 17 December 2005 notifying the applicant and D.'s mother of the transfer of the case to the Zavodskoy District Prosecutor's Office;

(f) numerous letters informing the applicant and relatives of other victims of the suspension and reopening of the criminal proceedings in case no. 12331.

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

2. Letters from the Russian courts

65. The Government enclosed a number of letters from various higher courts in Russia, stating that the applicant had never lodged any complaints about the allegedly unlawful detention of his son or challenged in court any actions or omissions of the investigating or other law-enforcement authorities.

3. Domestic courts' decisions

66. The Government also produced copies of domestic court decisions taken in unrelated sets of civil or criminal proceedings. These included three first-instance judgments by which federal servicemen, privates or junior officers had been convicted of criminal offences committed in the Republic of Ingushetia or the Chechen Republic; a first-instance judgment and appeal decision awarding compensation for damage to property inflicted by servicemen in Ingushetia; a first-instance judgment and appeal decision awarding damages to the first applicant in *Khashiyev and Akayeva v. Russia* (nos. 57942/00 and 57945/00, judgment of 24 February 2005) in connection with the death of his relatives in Chechnya; and a first-instance judgment and appeal decision awarding compensation for omissions on the part of the investigating authorities during the investigation into a person's abduction in the Republic of Karachayevo-Cherkessia, the person in question having subsequently been released.

II. RELEVANT DOMESTIC LAW

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

68. Article 125 of the new Code provides that the decision of an investigator or prosecutor to dispense with criminal proceedings or to terminate criminal proceedings, and other decisions and acts or omissions which are liable to infringe the constitutional rights and freedoms of the parties to criminal proceedings or to impede citizens' access to justice may be appealed against to a district court, which is empowered to check the lawfulness and grounds of the impugned decisions.

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

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The applicant's victim status

70. The Government did not make any express objections regarding the applicant's status as a victim in the present case, but argued that his claims for compensation in respect of his son's death were groundless, given that he had already been paid a certain amount at domestic level.

71. The applicant contended that the Government's reference to the fact that he and his wife had been paid a certain amount in connection with their son's death was irrelevant in the circumstances of the present case, given that such payments were usually made to members of the family of any police officer who died on duty, without the question of State responsibility for the death being considered.

72. In so far as the Government's argument could be interpreted as an objection concerning the applicant's victim status, the Court considers that the payment in question cannot deprive the applicant of his victim status within the meaning of Article 34 of the Convention, as, firstly, the Russian authorities made no acknowledgment of the alleged violations and, secondly, in any event, the compensation in question was paid to the applicant on the basis that his son had been a police officer and had died on

duty and not on the basis of any alleged violations of Convention rights. The Government's objection should therefore be dismissed.

B. The applicant's alleged failure to exhaust domestic remedies

1. Submissions by the parties

73. The Government contended that the application should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation into the abduction and death of the applicant's son had not yet been completed. They also argued that it had been open to the applicant to file court complaints about the allegedly unlawful detention of his son or, in accordance with Article 125 of the Russian Code of Criminal Procedure, to challenge in court any actions or omissions of the investigating or other law-enforcement authorities during the investigation; however, he had not availed himself of any such remedy. In this connection, the Government referred to the letters from the Russian courts (see paragraph 65 above).

74. The applicant disputed that objection. He claimed that the fact that the investigation into the circumstances of the disappearance and death of his son was still pending cast doubt upon its effectiveness and that, in any event, he had not been informed of the conduct of the investigation, and therefore had been unable to appeal in time against decisions taken in the context of the investigation. The applicant also contended that the Government had not demonstrated that the remedies to which they had referred were effective and, in particular, were capable of leading to the identification and punishment of those responsible, as required by the Court's settled case-law in relation to complaints under Article 2 of the Convention.

2. The Court's assessment

75. The Court notes that, in its decision of 23 October 2006, it considered that the question of exhaustion of domestic remedies was closely linked to the substance of the present application and that it should be joined to the merits. It will now proceed to assess the parties' arguments in the light of the Convention provisions and its relevant practice.

76. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to use first the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate

domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 65-67; and, most recently, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64, 27 June 2006).

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

78. In the present case, in so far as the Government argued that the applicant had not lodged a court complaint about his son's detention, the Court observes that in the period between 26 November 2000 and 22 April 2001, when Aslanbek Kukayev remained missing, the applicant actively attempted to establish his whereabouts and applied to various official bodies (see paragraphs 22-24), whereas the authorities had never acknowledged that they had detained the applicant's son. In such circumstances, and in particular in the absence of any proof to confirm the very fact of the detention, even assuming that the remedy referred to by the Government was accessible to the applicant, it is more than questionable whether a court complaint about the unacknowledged detention of the applicant's son by the authorities would have had any prospects of success. Moreover, the Government have not demonstrated that the remedy indicated by them would have been capable of providing redress in the applicant's situation – in other words, that the applicant's recourse to this remedy would have led to the release of Aslanbek Kukayev, particularly given the fact that the formal date of his death was subsequently recorded as 26 November 2000, and to the identification and punishment of those responsible.

79. As regards the period after 22 April 2001, the date on which the corpse of the applicant's son was found, a court complaint about his detention would clearly have been an inadequate remedy.

80. In the light of the foregoing, the Court considers that it has not been established with sufficient certainty that the remedy advanced by the Government would have been effective within the meaning of the Convention. The Court finds that the applicant was not obliged to pursue

that remedy, and that this limb of the Government's preliminary objection should therefore be dismissed.

81. To the extent the Government argued that the investigation was still pending and that the applicant had not complained to a court about the actions or omissions of the investigating or other law-enforcement authorities during the investigation, in accordance with Article 125 of the Russian Code of Criminal Procedure, the Court firstly observes that the Government did not indicate which particular actions or omissions of the investigators the applicant should have challenged before a court. It further notes that the legal instrument referred to by the Government became operative on 1 July 2002 and that the applicant was clearly unable to have recourse to the remedy invoked by the Government prior to that date. As regards the period thereafter, the Court considers that this limb of the Government's preliminary objection raises issues which are closely linked to the question of the effectiveness of the investigation, and it would therefore be appropriate to address the matter in the examination of the substance of the applicant's complaints under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

82. The applicant complained that his son had disappeared after having been apprehended by representatives of the federal forces and had later been found dead, and that the domestic authorities had failed to carry out an effective investigation into the matter. He relied on Article 2 of the Convention, which provides:

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

A. Alleged failure to protect the right to life

1. Submissions by the parties

83. The applicant argued that it was beyond reasonable doubt that his son had been detained and killed by representatives of the federal forces. In particular, he pointed out that the fact that his son had been abducted and then found dead, and also the fact that the abduction had taken place at Grozny central market on 26 November 2000, had never been disputed by the Government. Moreover, it had been formally certified that the applicant's son had been killed on the day on which he had been detained, 26 November 2000. The applicant insisted that, contrary to the Government's allegations, on the date in question the federal forces had carried out a "sweeping-up" operation at Grozny central market – this fact having been confirmed by the written statements from three eyewitnesses (see paragraph 12 above) and by the information from Human Rights Watch (see paragraph 19 above) – and had apprehended his son.

84. The Government acknowledged that the applicant's son had been abducted near Grozny central market on 26 November 2000 and had later been found dead, but insisted that there were no grounds for holding the State liable for the alleged violation of his right to life. In that connection they relied on the reply of the Prosecutor General's Office to the effect that the investigation had obtained no evidence that Aslanbek Kukayev had been abducted by representatives of the federal forces; they also relied on information provided by the Chechen Department of the FSB stating that there had been no special operation in the vicinity of Grozny central market on 26 or 27 November 2000. On the other hand, the Government relied on witness statements by four persons, including Mr Dzh., all of whom, in the Government's words, "were apprehended by the federal forces on 26 November 2000 during a special operation and were later released". Later the Government explained that they had only mentioned the special operation in so far as it had been referred to by those witnesses during questioning. The Government also asserted that members of illegal armed formations within the territory of the Chechen Republic had on numerous occasions used forged police officers' identity cards to enter the dwellings of local residents, seize them and kill them, and that officers of the law-enforcement bodies had often become the target of rebel fighters.

2. The Court's assessment

85. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the authorities are under a duty to protect them.

Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited therein).

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

87. In the present case, the Court observes that the Government denied both that the State bore responsibility for the killing of the applicant's son and that the federal armed forces had conducted any special ("sweeping-up") operations near Grozny central market on 26 November 2000. On the other hand, they acknowledged the specific facts underlying the applicant's version of Aslanbek Kukayev's disappearance and death. In particular, it is common ground between the parties that the applicant's son, along with a number of other persons, was abducted by armed men in camouflage uniforms in the vicinity of Grozny central market during the daylight hours of 26 November 2000. It has therefore first to be established whether the armed men belonged to the federal armed forces.

88. The Court notes in this connection that the fact that on the date in question a special operation had been carried out by the federal forces at Grozny central market was confirmed by a number of witness statements, including those quoted by the Government (see paragraph 84 above) and those submitted by the applicant (see paragraph 12 above), as well as by the report of the commander of the Chechen OMON on the results of the internal investigation into Aslanbek Kukayev's murder (see paragraph 39 above). Moreover, the materials in the Court's possession do not reveal that any armed people other than federal servicemen were present at the scene of the abduction of the applicant's son. In particular, there is nothing in the witness statements to suggest the involvement of any illegal fighters, whilst officer Dzh.'s statements clearly indicate that federal servicemen were involved in Aslanbek Kukayev's detention (see paragraphs 16-17 above). In such circumstances, the Court finds it established that the applicant's son was apprehended by State agents in the course of a special operation on 26 November 2000.

89. The parties further agreed, and it had clearly been established in the domestic proceedings, that Aslanbek Kukayev had died as the result of a

murder, and that his corpse had been found at the same place and on the same date as the corpse of officer D., with whom he had been abducted. Moreover, the formal date of Aslanbek Kukayev's death, 26 November 2000, as indicated in the relevant certificates (see paragraphs 36-38 above), remained uncontested by the Government.

90. On the facts of the case, it is therefore clear that the applicant's son was taken into custody and killed on the same date. The Court notes in this connection that it was never alleged by the Government, or suggested by the evidence adduced, that the applicant's son had been released immediately, or shortly, after being apprehended. In such circumstances the Court is bound to conclude that the applicant's son died whilst being detained by the federal forces. In the absence of any plausible explanation on the part of the Government as to the circumstances of Aslanbek Kukayev's death, it further finds that the Government have not accounted for the death of the applicant's son during his detention and that the respondent State's responsibility for this death is therefore engaged.

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

B. Alleged inadequacy of the investigation

1. Submissions by the parties

92. The applicant argued that the investigation in the present case could hardly be regarded as effective, according to the Convention standard. Although it had been pending for over six years, having been suspended and reopened on numerous occasions, it had not so far resulted in the identification and punishment of those responsible, despite abundant evidence pointing to the alleged perpetrators, including evidence indicating the military unit to which they belonged, its location and its emblem. Moreover, the investigating authorities had failed to take a number of essential measures, namely to examine the scene of the crime adequately, to perform ballistic tests, to find and question eyewitnesses to the abduction of the applicant's son and to investigate the applicant's allegations that the car in which his son had left on the day of his disappearance had later been seen at the Khankala federal military base. The authorities had also failed to treat the investigation as urgent and to keep the applicant abreast of the latest developments in the case. The applicant further pointed out that, even though Aslanbek Kukayev's body had been found on 22 April 2001, the proceedings in connection with the murder of the applicant's son, as opposed to his abduction, had not been commenced until 22 December 2005.

93. The Government claimed that the investigation into Aslanbek Kukayev's disappearance and death had met the Convention requirement of

effectiveness, as all measures provided for by national law were being taken to identify the perpetrators. According to the Government, the length of the investigation was justified in the light of the complicated situation in Chechnya.

2. The Court's assessment

94. 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 *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures (see *İlhan v. Turkey* [GC] no. 22277/93, § 63, ECHR 2000-VII).

95. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Ögur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard. In this context, there must also be an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 102-04, and *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000-III, §§ 106-07). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

96. In the instant case, the Court observes that some degree of investigation was carried out into the disappearance and murder of the applicant's son. It must assess whether that investigation met the requirements of Article 2 of the Convention. The Court notes in this connection that its knowledge of the criminal proceedings at issue is limited to the materials selected by the respondent Government from the investigation file (see paragraphs 62-64 above). Drawing inferences from

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

97. The Court notes that once the investigation into the disappearance of the applicant's son was opened on 13 December 2000 it was plagued with inexplicable shortcomings in taking the most essential steps in a situation where prompt action was vital. In particular, the Court cannot but agree with the applicant's argument that despite the fact that a number of eyewitnesses, and above all officers Dzh. and G., whose statements were referred to by the Government, pointed out that Aslanbek Kukayev had been apprehended by federal servicemen and even indicated the military unit to which they had belonged and its location and emblem, it does not appear that any meaningful efforts were made to investigate the possible involvement of the aforementioned personnel in the abduction and murder of the applicant's son. Furthermore, it does not appear, and the Government did not submit any relevant information in this regard, that any examination was ever carried out either of the place where the applicant's son had been abducted, or of the place where his dead body was discovered, or that any expert tests or examinations were conducted. In this latter connection, the Court is sceptical about the Government's statement to the effect that on 23 April 2001 the corpses of Aslanbek Kukayev and D. were examined by forensic experts, who drafted a report on its results in May 2001, as the Government did not produce this report or any other relevant documents on this subject.

98. The Court is also perplexed by the fact that even though Aslanbek Kukayev's body was found on 22 April 2001, the investigation into his murder was not formally opened until 22 December 2005, when, during the examination of the materials in case no. 12331 concerning the abduction of the applicant's son and other persons, the investigator in charge came across the information regarding the discovery of the body. In such circumstances it appears more than doubtful that the murder of the applicant's son was being investigated at all until 22 December 2005.

99. The Court further notes that it is not quite clear whether the applicant was ever recognised as a victim in the criminal proceedings in question. The Government alleged that the status of victim had been granted to the applicant on 20 December 2005, but did not submit any relevant decision or other document to substantiate this. Even assuming that this allegation is true, the Court notes the Government's failure to explain such a considerable delay in taking one of the most essential steps in the investigation, which would have afforded minimum procedural guarantees to the applicant. It is also clear in this connection that before the decision to grant the status of victim was allegedly taken, he had been unable to study the case file as he had no procedural rights to participate in the investigation. Moreover, it has

been alleged by the applicant that even after that time, namely in March 2006, he was denied access to the file. It also appears that before – and even after – the applicant was allegedly declared a victim, information concerning progress in the investigation was provided to him only occasionally and fragmentarily.

100. Finally, the Court observes that the investigation remained pending from December 2000 to November 2001, when it was suspended for over four years and not resumed until December 2005. The Government did not advance any plausible explanation for such a considerable period of inactivity. After it was resumed the investigation remained pending at least until January 2007. Between December 2000 and January 2007 it was adjourned and reopened at least six times.

101. The Court thus notes in respect of the Government's argument concerning the applicant's alleged failure to appeal in a court against the actions of omission of the investigators under Article 125 of the Russian Code of Criminal Procedure that in a situation where the effectiveness of the investigation was undermined from a very early stage by the authorities' failure to take necessary and urgent investigative measures, where the investigation was repeatedly stayed and reopened, where the applicant was unable to access the case file at least until December 2005, and most probably thereafter, and where he was only informed of the conduct of the investigation occasionally, it is highly doubtful that the remedy invoked by the Government would have had any prospects of success. Moreover, the Government have not demonstrated that this remedy would have been capable of providing redress in the applicant's situation – in other words, that it would have rectified the shortcomings in the investigation and would have led to the identification and punishment of those responsible for the abduction and death of his son. The Court thus considers that in the circumstances of the case it has not been established with sufficient certainty that the remedy advanced by the Government would have been effective within the meaning of the Convention. The Court finds that the applicant was not obliged to pursue that remedy, and that this limb of the Government's preliminary objection should therefore be dismissed.

102. In the light of the foregoing, and with regard to the inferences drawn from the respondent Government's submission of evidence, the Court further concludes that the authorities failed to carry out a thorough and effective investigation into the circumstances surrounding the death of Aslanbek Kukayev. It accordingly holds that there has been a violation of Article 2 of the Convention on that account.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

103. The applicant complained of mental suffering in breach of Article 3 of the Convention, which he had endured as a result of his son's

disappearance and death and the State's failure to investigate those events properly. This Article reads as follows:

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

104. The applicant maintained that he had suffered severe mental distress and anguish falling within the scope of Article 3 of the Convention on account of the fact that for several months he had had no information about his son and that his attempts to find Aslanbek Kukayev and later to have his death investigated had been paid scant attention by the State authorities.

105. The Government argued that the investigation had not established that the applicant had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention. In the Government's view, the investigation had not breached the requirements of that provision. They also claimed that "the perception of events is a very personal matter depending on emotional and other specific features of an individual's personality and relates in fact to the field of psychology", and that therefore "it is impossible to assess the degree of the applicant's mental suffering from the views of the investigating officers", the latter being responsible only for investigating criminal offences.

106. 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*, judgment of 25 May 1998, *Reports* 1998-III, § 130-134), 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. 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, and *Luluyev and Others v. Russia*, no. 69480/01, § 114, ECHR 2006-... (extracts)).

107. In the present case, the applicant's son remained missing from 26 November 2000 until 22 April 2001, that is, for almost five months. In the Court's opinion, this period, during which the applicant 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 applicant's distress during that period is attested by his numerous efforts to prompt the authorities to act, as well as by his own attempts to search for his son. The Court has to ascertain therefore whether the authorities' conduct in this period amounted to a violation of Article 3 in respect of the applicant.

108. The Court refers in this connection to its above findings regarding the shortcomings in the investigation. In particular, the Court considers that

the authorities' failure to grant the applicant the status of victim at any time during the period under consideration, the absence of access to the case file and the sparse information he received about the investigation throughout the proceedings are elements contributing to the applicant's suffering. It follows that the applicant's uncertainty about his son's fate was aggravated by his exclusion from monitoring the progress of the investigation.

109. The Court therefore finds that the applicant suffered distress and anguish as a result of his son's disappearance and of his inability to find out what had happened to his son or to receive up-to-date and exhaustive information on the investigation. The manner in which the applicant's complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3 of the Convention.

110. In the light of the foregoing, the Court finds that there has been a violation of Article 3 of the Convention on that account.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

111. The applicant complained that he had been deprived of effective remedies in respect of the violations alleged under Articles 2 and 3, contrary to Article 13 of the Convention, which provides 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."

112. The applicant argued that the domestic remedies usually available had proved ineffective in his case, given that the investigation had been pending for several years without any progress and that he had never been properly informed of any developments in the investigation. With regard to the copies of the court decisions produced by the Government in support of their assertion as to the existence of effective remedies in Russia, the applicant contended that the decisions given in civil cases were irrelevant, as, according to the Court's well-established practice, alleged violations of Article 2 and 3 of the Convention could not be remedied merely by an award of damages to the relatives of victims in civil proceedings. In so far as the Government relied on judgments given in criminal cases, the applicant submitted that these were just a few exceptions and that, in reality, there existed an administrative practice consisting in the authorities' continuing failure to conduct adequate investigations into offences committed by representatives of the federal forces in Chechnya.

113. In the Government's submission, the applicant had had effective remedies at his disposal as required by Article 13 of the Convention and the authorities had not prevented him from using them. In particular, the applicant had received reasoned replies to all his complaints lodged in the context of the criminal proceedings. Besides, the applicant had had the

opportunity to challenge the actions or omissions of the investigating authorities before military prosecutors at various levels or before the Prosecutor General's Office, and also before the different levels of military courts and the Supreme Court of Russia. The Government corroborated their submissions regarding the existence of effective domestic remedies in Russia with copies of domestic court decisions (see paragraph 66 above).

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

115. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 117; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Orhan*, cited above, § 384).

116. In view of the Court's findings above with regard to Article 2, the applicant's complaint was clearly "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The applicant should accordingly have been able to avail himself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation for the purposes of Article 13.

117. It follows that in circumstances where, as in the present case, the criminal investigation into the death was ineffective (see paragraph 102 above) and the effectiveness of any other remedy that may have existed, including the civil remedies, was consequently undermined, the State has failed in its obligation under Article 13 of the Convention (see, among other

authorities, *Imakayeva v. Russia*, no. 7615/02, § 195, ECHR 2006-... (extracts)).

118. Consequently, there has been a violation of Article 13 of the Convention in connection with Article 2 of the Convention.

119. As regards the applicants' reference to Article 13 in conjunction with Article 3 of the Convention, the Court notes that it has found above that the applicant endured severe mental suffering on account of, *inter alia*, the authorities' inadequate investigation into his son's disappearance (see paragraphs 108-110 above) and that it has also found a violation of Article 13 of the Convention in connection with Article 2 of the Convention on account of lack of effective remedies in a situation, such as the applicant's one, where the investigation was ineffective (see paragraph 117 above). Having regard to these findings, the Court is of the opinion that the applicant's complaint under Article 13 in conjunction with Article 3 is subsumed by those under Article 13 in conjunction with Article 2 of the Convention. It therefore does not consider it necessary to examine the complaint under Article 13 in connection with Article 3 of the Convention.

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

120. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government's part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI). In a case where the application raises issues of the effectiveness of the investigation, the documents of the criminal investigation are fundamental to the establishment of facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility stage and at the merits stage (see *Tanrıkulu*, cited above, § 70).

121. The Court observes that it has on several occasions requested the Government to submit a copy of the file on the investigation opened into the abduction and murder of the applicant's son. The evidence contained in that file was regarded by the Court as crucial to the establishment of the facts in

the present case. In reply, the Government produced only copies of procedural decisions instituting, suspending and reopening criminal proceedings, copies of investigators' decisions taking up the criminal case and some letters informing the applicant of the suspension and reopening of the criminal proceedings in the case. They refused to submit any other documents, such as transcripts of witness interviews, reports on investigative actions, or even the report on the results of the forensic examination of Aslanbek Kukayev's dead body or the decision granting the applicant the status of a victim, with reference to Article 161 of the Russian Code of Criminal Procedure.

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

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. 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

125. The applicant sought 34,978.70 pounds sterling (GBP) in respect of the lost earnings of his son. He submitted that Aslanbek Kukayev, who had been 25 years old at the time of his death, had earned 250 United States dollars per month and had provided financial support for the applicant and his wife. The applicant claimed that he and his wife could have counted on that support until his son had reached the age of 60 years old, which was the age of retirement for a male in Russia, and given that the average life expectancy for a male in Russia was 60 years. The applicant based his calculation on the Ogden Actuarial Tables used to calculate personal injury and fatal accidents in the United Kingdom, with reference to the absence of any equivalent methods of calculation in Russia.

126. The Government contended that the applicant's claims under this head were excessive and unsubstantiated. In their opinion, it was impossible to establish the amount which Aslanbek Kukayev could have earned had he not been killed, and that therefore any calculations of his future earnings were approximate and unreliable.

127. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention, and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Çakıcı,* cited above, § 127). The Court has found that it may be taken as established that Aslanbek Kukayev died after being apprehended by the federal forces and that the State's responsibility is engaged under Article 2 of the Convention (see paragraphs 88 and 90 above). In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his parents of the financial support which he provided for them. The Court, however, is not convinced that the amount claimed is reasonable, given in particular that the applicant seems only to have taken into account the average life expectancy for the deceased and not for the dependants. Moreover, the applicant did not indicate the proportion of his son's income on which he could have counted (see, by contrast, *Imakayeva* cited above, § 210). Nor

did he take into account the compensation received at domestic level for loss of his son as his breadwinner. Having regard to these considerations, the Court considers it appropriate to award the applicant EUR 7,000 in respect of pecuniary damage, plus any tax that may be chargeable on this amount.

2. Non-pecuniary damage

128. The applicant claimed EUR 100,000 in respect of non-pecuniary damage for the fear, anguish and distress which he had suffered as a result of the loss of his son.

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

130. The Court observes that it has found a violation of Articles 2, 3 and 13 of the Convention on account of the disappearance and death of the applicant's son, the mental suffering endured by the applicant and the absence of effective remedies to secure domestic redress for the aforementioned violations. The Court has also found a violation of Article 38 § 1 (a) of the Convention on account of the Government's failure to submit the materials requested by the Court. The applicant must have suffered anguish and distress as a result of all these circumstances, which cannot be compensated by a mere finding of a violation. Having regard to these considerations, the Court awards the applicant, on an equitable basis, EUR 35,000 for non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. The applicant's request for an investigation

131. 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 his son's disappearance". He relied in this connection on the cases of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-203, ECHR 2004-II) and *Tahsin Acar v. Turkey* ((preliminary objection) [GC], no. 26307/95, § 84, ECHR 2003-VI).

132. The Government argued that the investigation into the murder of the applicant's son was still in progress and that there was therefore no need for the Court to indicate any special measures in this regard.

133. 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), judgment of 1 April 1998, *Reports* 1998-II, pp. 723-24, § 47; and *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). 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), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

134. In the Court's opinion, the present case is distinguishable from the ones referred to by the applicant. In particular, the *Assanidze* judgment ordered the respondent State to secure the applicant's release so as to put an end to the violations of Article 5 § 1 and Article 6 § 1, whereas in the *Tahsin Acar* judgment the effective investigation was mentioned in the context of the Court's examination of the respondent Government's request for the application to be struck out on the basis of their unilateral declaration. 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 paragraphs 97 and 101 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 and the Government's argument that the investigation is currently under way, 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.

C. Costs and expenses

135. The applicant claimed EUR 8,750 and GBP 2,973.20 for the fees and costs he had incurred in the domestic proceedings and before the Court. These amounts included EUR 5,150 for the lawyers of the Memorial Human Rights Centre, EUR 3,600 for the work done by the field staff of the Memorial Human Rights Centre office in the Northern Caucasus, GBP 1,316.70 for the lawyers of the European Human Rights Advocacy Centre, GBP 1,446.50 for translation of the documents and GBP 210 in respect of administrative costs, such as postal expenses, photocopying, faxing and other expenses.

136. The Government did not dispute the details of the calculations submitted by the applicant, but contested the applicant's claims in their entirety as excessive, with reference to the established rates of legal fees in Russia. They relied on to the Court's case-law to the effect that costs and expenses should be awarded only in so far as they were actually incurred, were necessary and were reasonable as to their amount. The Government also insisted that the applicant's claims were not supported by any relevant documents.

137. 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 were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

138. The Court notes firstly that the applicant did not submit any documents in support of his claim for administrative costs. It therefore dismisses this claim. The Court further observes that in April 2002 and April 2005 the applicant gave authority to the lawyers of the Memorial Human Rights Centre and the European Human Rights Advocacy Centre to represent his interests in the proceedings before the European Court of Human Rights and that these lawyers acted as the applicant's representative throughout the procedure. The applicant also produced invoices from the translators for the total amount of GBP 1,446.50 (EUR 2,142.94). The Court is therefore satisfied that the applicant's claims in this part were substantiated.

139. The Court further notes that this case was rather complex, and required a certain amount of research work. On the other hand, it did not involve any large amount of documents, especially once the preparation of the initial submissions was done, and therefore the Court doubts whether at later stages it required the amount of research and preparation claimed by the applicant's representatives.

140. In these circumstances, having regard to the details of the claims submitted by the applicant, the Court awards him a reduced amount of EUR 8,000, less EUR 850 received by way of legal aid from the Council of Europe, together with any tax that may be chargeable.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 2 of the Convention as regards the disappearance and death of Aslanbek Kukayev;

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

4. *Holds* that there has been a violation of Article 3 of the Convention on account of the mental suffering endured by the applicant because of his son's disappearance and the lack of an effective investigation into the matter;

5. *Holds* that there has been a violation of Article 13 of the Convention in respect of the alleged violations of Article 2 of the Convention;

6. *Holds* that no separate issue arises under Article 13 of the Convention in respect of the alleged violation of Article 3 of the Convention;

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

8. *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 7,000 (seven thousand euros) in respect of pecuniary damage;

(ii) EUR 35,000 (thirty-five thousand euros) in respect of non-pecuniary damage;

(iii) EUR 7,150 (seven thousand one hundred and fifty euros) in respect of costs and expenses;

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

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

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

Done in English, and notified in writing on 15 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK Registrar	Peer LORENZEN President