GRAND CHAMBER

**CASE OF NAGMETOV v. RUSSIA**

*(Application no. 35589/08)*

JUDGMENT

STRASBOURG

30 March 2017

*This judgment is final but it may be subject to editorial revision.*

In the case of Nagmetov v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,* Luis López Guerra, Angelika Nußberger, Ledi Bianku, Helen Keller, Paul Lemmens, Valeriu Griţco, Faris Vehabović, Ksenija Turković, Dmitry Dedov, Branko Lubarda, Yonko Grozev, Síofra O’Leary, Carlo Ranzoni, Armen Harutyunyan, Stéphanie Mourou-Vikström, Pauliine Koskelo, *judges,*  
and Françoise Elens-Passos, *Deputy Registrar,*

Having deliberated in private on 1 September 2016 and 23 January 2017,

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

PROCEDURE

1.  The case originated in an application (no. 35589/08) 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 Yarmet Uzerovich Nagmetov (“the applicant”), on 11 July 2008.

2.  The applicant was represented by Ms K. Moskalenko and Ms K. Kostromina, lawyers practising in Moscow and Strasbourg, assisted by Ms A. Maralyan. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3.  The applicant alleged under Article 2 of the Convention that his son had died following the use of a lethal weapon against him, and that there had been no effective investigation in this respect.

4.  The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 January 2012 the application was communicated to the Government.

5.  On 5 November 2015 a Chamber of the First Section, composed of András Sajó, president, Mirjana Lazarova Trajkovska, Julia Laffranque, Paulo Pinto de Albuquerque, Linos-Alexandre Sicilianos, Erik Møse and Dmitry Dedov, judges, and André Wampach, Deputy Section Registrar, gave judgment. They unanimously declared admissible the applicant’s complaints under Article 2 of the Convention and held that there had been violations of this Article under its substantive and procedural limbs. While noting that no claim for just satisfaction had been made, the Chamber unanimously decided to make a just-satisfaction award in respect of the non‑pecuniary damage sustained by the applicant. The concurring opinion of Judge Sajó was annexed to the judgment.

6.  On 4 February 2016 the Russian Government requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, with regard to the just-satisfaction award made in the Chamber judgment. The panel of the Grand Chamber granted the request on 14 March 2016.

7.  The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. Having consulted with the parties, the President of the Grand Chamber decided to dispense with a public hearing in the present case (Rule 59 § 3 and Rule 71 § 2). On 23 January 2017 Helen Keller, substitute judge, replaced judge Işıl Karakaş, who was prevented from sitting (Rule 24 § 3).

8.  The applicant and the Government each filed written observations (Rule 59 § 1 and Rule 71 § 1).

THE FACTS

I.  THE CIRCUMSTANCES OF THE CASE

9.  The applicant was born in 1949 and lives in Makhachkala, Republic of Dagestan, Russia.

10.  On 25 April 2006 the applicant’s son, Murad Nagmetov, participated in a public gathering in the village of Miskindzha, in the Dokuzparinskiy district of Dagestan. Several hundred people took part, alleging corruption by local public officials. At around 3 p.m. officers from the special mobile unit encircled the participants and fired several warning shots into the air.

11.  Thereafter the gathering was dispersed by the authorities with the use of firearms (see also *Primov and Others v. Russia*, no. 17391/06, §§ 15‑18, 12 June 2014). Murad Nagmetov was wounded by a tear-gas grenade and died from his wounds. Five other people were seriously wounded; a large number of people sustained injuries and were arrested.

12.  On the same day the prosecutor of the Republic of Dagestan initiated criminal proceedings on charges of murder and illegally handling firearms (Articles 105 and 222 of the Criminal Code) and assigned the case to an investigator.

13.  A forensic expert examined the deceased’s body and extracted the objects that had killed him.

14.  On the same day, the investigator commissioned a ballistics report from the Forensic Expert Centre of the Dagestan Ministry of the Interior to determine the type of the grenade, the type of rifle used to fire it and whether the grenade had striae that could be used to identify that rifle.

15.  On 11 May 2006 the ballistics expert issued a report and concluded as follows:

“1. The forensic expert was given the following two objects for examination: a grenade with a special charge; and an obturator with a special charge (a 23 mm cartridge used with a carbine type KS-23 (KS-23M)). It has not been possible to determine the exact make of the tear-gas grenade.

2.  ... It would not be possible to use the obturator on the body of the grenade to identify the specific weapon used. It would however be possible to use the separate obturator to identify the weapon used, if the weapon were provided for examination.”

16.  On 26 June 2006 the investigating authority commissioned another ballistics report to identify the rifle used to fire the grenade extracted from the body of the applicant’s son. On 6 July 2006 the Forensic Expert Centre of the Dagestan Ministry of the Interior declined to carry out an examination, referring to the absence of “facilities or equipment for test-shooting 23 mm canisters with special gases”.

17.  On an unspecified date, a number of carbines used by officers of the special mobile unit on 25 April 2006 were seized.

18.  In July and August 2006 the investigating authority commissioned ballistics reports from the Forensic Expert Centre of the Dagestan Ministry of the Interior and another local expert institution. However, the reports were not produced, apparently, on account of lack of sufficient technical facilities.

19.  On 6 September 2006 the Federal Office of Forensic Examination of the Federal Ministry of Justice was asked to prepare a ballistics report in order to determine which rifle had been fired at the victim. The investigating authority submitted the objects extracted from the victim’s body, as well as thirteen carbines.

20.  On 19 October 2006 the authorities took the decision to open another criminal case concerning the charge of abuse of power by a public official causing death (Article 286 of the Criminal Code). It appears from the decision that it concerned persons other than the applicant’s son. The decision read as follows:

“It was established that police officers had had recourse to firearms ... Officers from the special mobile unit fired gunshots, using 23 mm cartridges, and teargas grenades, acting in violation of a directive dated 5 November 1996 and in excess of their powers... It is prohibited to fire these tear-gas canisters at a person. As a result, Mr N. and Mr A. sustained injuries.”

21.  The above-mentioned cases were subsequently joined.

22.  On 8 November 2006 the Federal Office of Forensic Examination issued a report, the relevant parts of which read:

“ ... As the relevant 23 mm cartridges had not been submitted for test shots, a request for 23 mm *Volna* cartridges was made to the relevant department of the Ministry of the Interior of the Russian Federation ... [Footnote: *Volna* cartridges are used for training purposes relating to the use of KS-23 and KS-23M carbines. These cartridges are similar to those normally used with these carbines. The only difference is that they do not contain the irritating chemical substance.] ...

The research part

**...**

2.  ... I note that the tear-gas grenade has no striae left by the carbine used to fire it. This may be explained by the fact that the grenade could not have had contact with the interior of the carbine as it had been loaded into it with the aid of two obturators ...

5.  Test shots have been carried out in respect of the KS-23 and KS23M carbines that were submitted for the examination. The purpose of the test shots was to observe the striae left on the obturators of the grenades fired from these carbines, and to compare the striae with the striae left on the obturator of the grenade used against the victim. I have used 23 mm *Volna* cartridges for the test shots. These cartridges are similar to those that were submitted for the examination ...

6.  ... In view of the variance of the results of the test shots, it was impracticable to identify the relevant carbine on the basis of the striae left on the obturators ... in particular, on account of the elasticity and low thermo-resistance of the material used in the obturators ...”

23.  On 15 November 2006 another ballistics report was requested from the Forensic Science Institute of the Federal Security Service (“the Institute”). The Institute was likewise provided with thirteen carbines and the objects extracted from the victim’s body.

24.  On 26 February 2007 the expert from the Institute issued a report stating that it was not practicable to determine which of the examined carbines had been used to shoot the cartridge. The forensic expert explained that she had been provided with *Volna* cartridges for the purpose of her research and for test shots, whereas the elements extracted from the victim’s body were parts of a grenade. The forensic expert specified that *Volna*cartridges and tear-gas grenades had “different geometric parameters and are made of materials with different characteristics”.

25.  On 26 February 2007 the investigating authority suspended the investigation.

26.  On 30 August 2007 the applicant’s other son, Mr Rafik Nagmetov, brought court proceedings challenging the alleged inaction of the investigating authority. In a judgment of 8 October 2007 the Sovetskiy District Court of Makhachkala dismissed the complaint. The court held as follows:

“Over seventy people were interviewed in the course of the investigation. The necessary (medical, ballistics, criminological) examinations were carried out ... All carbines which had been used by the officers were seized ... All relevant officers were identified ... The logbooks concerning distribution of weapons and ammunition were examined ... On three occasions three different expert institutions were asked to submit ballistics reports. The requests were not complied with on account of the absence of the necessary equipment ... Attempts were made to identify the relevant rifle in other expert institutions ... Those were not equipped for this kind of forensic examination ... In consequence, the Federal Office of Forensic Examination was not able to identify the weapon ... Another request is pending before the Forensic Science Institute of the Federal Security Service ... Thus, the investigating authority has carried out all the investigative measures that were possible in the absence of an identified suspect.”

27.  On 14 January 2008 the Supreme Court of the Republic of Dagestan upheld the judgment.

28.  The applicant’s son, Mr Rafik Nagmetov, also sought judicial review of the suspension decision of 26 February 2007. On 25 July 2008 the District Court held that the suspension of the investigation was justified. However, on 8 September 2008 the appeal court quashed the judgment and ordered a re-examination of the complaint. In a judgment of 6 October 2008 the District Court granted the complaint, considering that by failing to submit appropriate comparative material to the forensic expert, the investigating authority failed to take “exhaustive measures aimed at identifying the perpetrator”.

29.  On an unspecified date, the applicant became aware that the evidence extracted from the body of his son had been lost.

30.  In November 2009 the applicant requested that the authorities commission an additional ballistics report and complained about the loss of the evidence.

31.  On 16 December 2009 the investigation was resumed. It appears that the investigating authority took some measures to clarify what had happened to the evidence. In particular, armourers from the special mobile unit were interviewed. The investigator also made an enquiry with the Institute referring to his difficulties in interpreting the report of 26 February 2007. It remains unclear what reply was received to this enquiry.

32.  According to the Government, the enquiry about the loss of evidence yielded no specific results, in particular on account of the death of the investigator in the case and the redeployment of the investigation unit.

33.  On 16 January 2010 the investigator again suspended the investigation.

34.  On 21 February 2011 the acting prosecutor of the Republic of Dagestan determined that this decision was unlawful and ordered a resumption of the investigation. The decision reads as follows:

“Having examined the file, I conclude that the investigation did not exhaust the measures aimed at establishing the circumstances of the crime, at collecting the evidence and identifying the rifle used to cause the victim’s death ... In particular, the request for a ballistics report to the Institute was submitted with *Volna* cartridges instead of the type of cartridges used for causing the victim’s death. The different geometric parameters of these cartridges prevented the experts from identifying the carbine used against the victim ...

Following the resumption of the investigation in December 2009 the investigator merely made an enquiry instead of actually submitting grenades for comparative research ...

It does not follow from the expert report of 26 February 2007 that it would have been impossible to identify the rifle, provided that cartridges of the relevant type were provided.

The evidence extracted from the victim’s body was examined for the purposes of the above expert report. Thus, the current unavailability of this evidence is not an obstacle to seeking a new ballistics report from the same institution.”

35.  Following the resumption of the investigation the investigator made enquiries with the Institute about the possibility of carrying out a ballistics examination in the absence of the evidence extracted from the victim’s body. While it remains unclear what reply was received from the Institute, it does not appear that any new ballistics examination was carried out.

36.  On 17 April 2011 the investigating authority issued a decision suspending the investigation. This decision reads as follows:

“It follows from the evidence in the case file that on 25 April 2006 inhabitants of nearby villages and other people blocked the road with stones and logs ... In reply to lawful orders from the police requiring them to disperse, unidentified people threw stones at the police, causing various physical injuries to eleven officers. The police officers used firearms to retaliate...

Officers of the special mobile unit fired shots with their pump-action shotguns towards the crowd, using 23 mm cartridges, and a tear-gas grenade. In so doing they violated a directive dated 5 November 1996 ... and acted in excess of their powers. As a result, [the applicant’s son] and others sustained shotgun wounds ... causing [him] to die on the spot.

...

It is impossible to commission another ballistics report in the absence of the cartridge. It has not been possible to identify the person who shot [the applicant’s son].”

37.  The applicant did not challenge this decision.

II.  PROCEDURAL HISTORY OF THE CASE BEFORE THE COURT

38.  On 11 July 2008 the applicant lodged an application before the Court. Relying on Article 2 of the Convention, the applicant argued that his son had died because of an unlawful and excessive use of lethal force. The investigations into his son’s death were ineffective. In his application form the applicant sought “compensation for the related violations of the Convention” albeit without specifying the type of damage and the amount.

39.  Following communication of the case, on 24 May 2012 Ms K. Kostromina, the applicant’s representative, was invited to submit observations and claims for just satisfaction on behalf of the applicant. The relevant standard letter read as follows in this respect:

“The President of the Section has instructed me to invite you to submit by 26 July 2012 ... any claims for just satisfaction. ...

With regard to just satisfaction claims, I would draw your attention to Rule 60 and would remind you that failure to submit within the time allowed quantified claims, together with the required supporting documents, entails the consequence that the Chamber will either make no award of just satisfaction or else reject the claim in part. This applies even if the applicants have indicated their wishes concerning just satisfaction at an earlier stage of the proceedings.

The criteria established by the Court’s case-law when it rules on the question of just satisfaction (Article 41 of the Convention) are: (1) pecuniary damage, that is to say losses actually sustained as a direct consequence of the alleged violation; (2) non‑pecuniary damage, meaning compensation for suffering and distress occasioned by the violation; and (3) the costs and expenses incurred in order to prevent or obtain redress for the alleged violation of the Convention, both within the domestic legal system and through the Strasbourg proceedings. These costs must be itemised, and it must be established that they are reasonable and have been actually and necessarily incurred.

You must attach to your claims the necessary vouchers, such as bills of costs. The Government will then be invited to submit their comments on the matter.

These time-limits will not normally be extended.”

40.  No such observations or claims were submitted by 26 July 2012. In a subsequent letter Ms Kostromina explained that, despite an informal agreement between them, her former legal office had not forwarded the mail to her new address (of which the Court had not been informed). On 11 October 2012 the President of the Section, on an exceptional basis, granted the lawyer leave to submit observations and claims, despite the expiry of the time-limit on 26 July 2012. The new time-limit was 22 November 2012. However, none were submitted by that date. The Government was informed that while no observations had been submitted within the time-limit, it transpired that the applicant wished to maintain his application before the Court and that the Court would therefore examine the case on the basis of the file as it stood at the time.

III.  RULES OF COURT AND PRACTICE DIRECTION ON JUST SATISFACTION CLAIMS

41.  The Rules of Court (adopted by the Plenary Court pursuant to Article 25 of the Convention) read in the relevant parts as follows at the relevant time:

“Rule 36 – Representation of applicants

...

2.  Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise. ...

4.  (a) The representative acting on behalf of the applicant pursuant to paragraphs 2and 3 of this Rule shall be an advocate ..., or any other person approved by the President of the Chamber.

(b)  In exceptional circumstances and at any stage of the procedure, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed under the preceding sub-paragraph so warrant, direct that the latter may no longer represent or assist the applicant and that the applicant should seek alternative representation. ...

Rule 60 – Claims for just satisfaction

1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.

2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise.

3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.

4. The applicant’s claims shall be transmitted to the respondent Contracting Party for comment.

...

Rule 75 – Ruling on just satisfaction

1.  Where the Chamber or the Committee finds that there has been a violation of the Convention or the Protocols thereto, it shall give in the same judgment a ruling on the application of Article 41 of the Convention if a specific claim has been submitted in accordance with Rule 60 and the question is ready for decision; if the question is not ready for decision, the Chamber or the Committee shall reserve it in whole or in part and shall fix the further procedure ...”

42.  The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007) read in the relevant parts as follows at the relevant time:

“4. Claimants are warned that compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition for the award of just satisfaction.

II. Submitting claims for just satisfaction: formal requirements

5. Time-limits and other formal requirements for submitting claims for just satisfaction are laid down in Rule 60 of the Rules of Court ... Thus, the Court requires specific claims supported by appropriate documentary evidence, failing which it may make no award. The Court will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time.

III. Submitting claims for just satisfaction: substantive requirements

...

13.  The Court’s award in respect of non-pecuniary damage is intended to provide financial compensation for non-material harm, for example mental or physical suffering.

14.  It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law.

15.  Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation.

...

23.  The Court’s awards, if any, will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention).”

THE LAW

I.  ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

43.  The applicant complained under Article 2 of the Convention that his son Murad had died in circumstances disclosing an unlawful and excessive use of lethal force. The applicant also contended that no effective investigation had been carried out.

44.  Article 2 of the Convention 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 Chamber’s judgment

45.  In its judgment of 5 November 2015 the Chamber held that there had been violations of Article 2 of the Convention under its substantive and procedural aspects. The Chamber’s judgment contained the following findings in relation to the complaint under Article 2 of the Convention:

“(a)  Material aspect

40.  The Court notes that the Government have acknowledged that Murad Nagmetov was deprived of his life, in contravention of the requirements of Article 2 of the Convention. In particular, the Government stated, together with the domestic authorities, that it was against Russian law to fire the tear-gas grenade in question directly at a person.

41.  The Court finds no reasons to disagree with the above submission (see also *Abdullah Yaşa and Others v. Turkey*, no. 44827/08, § 48, 16 July 2013). Thus, there has been a violation of Article 2 of the Convention.

(b)  Procedural aspect

...

46.  First of all, the Court notes that following the death of the applicant’s son a criminal investigation was opened, and it was done without delay (see, by contrast, *Lyapin v. Russia*, no. 46956/09, §§ 128-133, 24 July 2014).

47.  Second, the Court considers that the applicant’s argument concerning, in substance, the alleged partiality of the investigating authority or the experts in the case is unspecific and unsubstantiated. In the present case, the Court has no reasons to conclude that there was any hierarchical or institutional connection between the persons responsible for and those carrying out the investigation and those implicated in the events (see, by way of comparison, *A.A. v. Russia*, no. 49097/08, § 94, 17 January 2012, and *Davitidze v. Russia*, no. 8810/05, § 107, 30 May 2013).

48.  Third, as to the thoroughness of the authorities’ efforts to identify the person who caused the victim’s death, the Court reiterates that in investigations into killings crucial evidence is usually available to the investigating authorities at the beginning of the investigation. The body of the victim, the crime scene, eyewitness evidence and the material used in the commission of the offence, such as bullets and spent cartridges, are of benefit to investigators and provide them with pointers in the earliest stages of their enquiries (see *Er and Others v. Turkey*, no. 23016/04, § 54, 31 July 2012). The Court’s task in the present case is to determine, with due regard to the specific allegations and arguments from the parties, whether some deficiency in the investigation undermined its ability to identify the person responsible for the victim’s injuries and death.

49.  It follows from the available material that over seventy people were interviewed in the course of the investigation; the relevant officers were identified; and the logbooks concerning distribution of weapons and ammunition were examined ... The applicant raised no arguments relating to these investigative measures. At the same time, the Court observes that in his application before it the applicant referred mostly to the allegedly unsatisfactory quality of the expert reports.

50.  It appears from the available material that the domestic authorities proceeded on the assumption that the victim’s death resulted from the use of a weapon by an officer of the special mobile unit and that this use was in breach of the domestic regulations because it was not appropriate to fire a tear-gas grenade directly at a person. In the circumstances of the case, the authorities considered it pertinent to check for a possible match between the evidence extracted from the victim’s body and the carbines held by the officers during the public gathering on 25 April 2006.

51.  As to the pace and thoroughness of the measures concerning this aspect of the investigation, it remains unclear when the relevant carbines were seized. At least, it is noted that the first ballistics expert stated in May 2006 that it would be possible to identify the specific weapon using a separate obturator, if such a weapon were provided for examination ... More than a month later, the investigating authority decided to commission another ballistics report from the same expert institution. However, at this point it could not be done because of the absence of “facilities or equipment for test-shooting 23 mm canisters with special gases” ... As a result, this test was only performed after August 2006 when the investigating authority provided the forensic experts with a number of carbines ... It is uncontested that these carbines were the ones that had been used by the officers of the special mobile unit on 25 April 2006. However, it is regrettable that it took nearly eight months to make proper arrangements for a comparative forensic examination in late 2006 and then three more months to receive a reply from the Forensic Science Institute of the Federal Security Service in February 2007 ...

52.  The Court considers that, in addition to the above unjustified delays, the domestic authorities failed to take reasonable measures to preserve the key evidence in the case. The Court reiterates in this connection that to be effective an investigation should be “capable of leading to” the identification and punishment of those responsible. Otherwise, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Labita v. Italy* [GC], no. [26772/95](http://hudoc.echr.coe.int/eng#{"appno":["26772/95"]}), § 131, ECHR 2000‑IV). Therefore, the loss of the evidence extracted from the victim’s body ... required a prompt and thorough enquiry. In the circumstances relating to the use of weapons by an agent of the State it was important to confirm or dispel any doubts as to the absence of any bad faith in handling evidence on the part of any public officials. Nevertheless, the available decisions contain no presentation or assessment of any evidence as to the circumstances of the loss of the key piece of evidence ... The Court has not been provided with convincing evidence that the Russian authorities took sufficient steps to secure the evidence concerning the incident and to investigate the loss of the key piece of evidence.

53.  The respondent Government has argued that the effectiveness of the domestic investigation was not undermined by the loss of the evidence because it happened after the investigators had already exhausted all reasonable measures, including the comparative forensic examination. The investigation could not be completed on account of the objective impossibility to identify the relevant rifle.

54.  The Court agrees with the Government that the ballistics report of 8 November 2006 did contain an assessment of the relevant evidence, including that extracted from the victim’s body. The expert test shot the carbines and made an attempt to compare the results with the striae left on the evidence extracted from the victim’s body. This measure was intended to establish whether any of the carbines had been used to fatally wound the applicant’s son. The expert concluded that it was technically impossible to establish, to a reasonable degree of certainty, whether or not any of the tested carbines had been used to shoot the victim.

55.  However, it appears that the investigating authority and the prosecutor’s office were not satisfied with the ballistics report of 8 November 2006 ..., and thus the Forensic Science Institute was asked to reassess the matter. It replied in February 2007 that it was not practicable to determine which of the carbines had been used to shoot the cartridge. It remains unclear why the new forensic expert was provided with *Volna* cartridges rather than the relevant type of grenades for comparative research and why those could not have been obtained by her *proprio motu*. The respondent Government have not substantiated their statement before the Court that the Institute had insufficient technical facilities to carry out a forensic examination.

56.  For its part, the Court is not ready to rely on the report of 8 November 2006 as regards its conclusion of the impossibility of identifying the relevant carbine. It can be reasonably inferred from the expert’s explanation in February 2007 that *Volna* cartridges were not appropriate for comparative testing because they and the elements of the grenade, which had been extracted from the victim’s body, had different geometric parameters and were made of materials with different characteristics ...

57.  The investigating authority failed to act on the information received from the Institute and suspended the investigation in February 2007, without any valid reason. While the domestic court eventually acknowledged in October 2008 that the investigating authority had wrongly suspended the investigation and had not taken “the exhaustive measures aimed at identifying the perpetrator” ..., it was only in December 2009 that the authorities resumed the investigation.

58.  By that time, the key evidence had already been lost ... However, the prosecutors considered that a new forensic examination was still necessary and possible ... Despite the prosecutors’ orders, the investigating authority failed to submit the materials for a new forensic examination. Instead, they limited their work to making enquiries with the Institute which, apparently, yielded no replies ...

59.  The Court has not been provided with any evidence which would refute the domestic authorities’ conclusion that the new comparative ballistics assessment remained necessary and possible, despite the loss of the evidence. The report of 26 February 2007 may be perceived as disclosing an important disagreement with the methodology of the report of 8 November 2006, that is, whether it was appropriate to use *Volna* cartridges for the comparative test-shooting, as it was done in the latter forensic examination. By implication, it could be argued that there remained a possibility that a proper comparative assessment might lead to the identification of the relevant rifle.

60.  In addition, the Court cannot but note that the available official decisions, including the most recent one in 2011, concern the suspension of the investigation. They do not contain any presentation or analysis of the available evidence such as statements regarding the incident on 25 April 2006. Thus, the applicant has not been provided with any official conclusions relating to his son’s death.

61.  Lastly, it does not transpire from the available material that there was any adequate disciplinary or criminal inquiry carried out in respect of the superior officers who had the task of training and supervising the officers who had been involved in the events on 25 April 2006.

62.  Taken together, the foregoing considerations have led the Court to conclude that the authorities did not exhaust all reasonable and practicable measures, which would be capable of providing assistance in identifying the shooter and in establishing the other relevant circumstances of the case.

63.  There has therefore been a violation of Article 2 of the Convention under its procedural limb.”

B.  The Court’s assessment

46.  Before the Grand Chamber the applicant maintained his complaint under Article 2 of the Convention, and the Government made no submissions on it.

47.  The Court endorses the Chamber’s findings and holds that there has been a violation of Article 2 of the Convention under its substantive and procedural limbs.

II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

48.  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.  Non-pecuniary damage

1.  The Chamber’s findings

49.  In its judgment of 5 November 2015 the Chamber took note of the fact that the applicant had not submitted a claim for just satisfaction within the prescribed time-limit, and stated that no award would normally be made. However, referring to the powers conferred on it by Article 41 of the Convention and previous cases in which the Court had exceptionally found it equitable to award compensation in respect of non-pecuniary damage, even where no such claim had been made, the Chamber decided to make an award. In reaching this conclusion, the Chamber referred to the particular gravity of the violation of the Convention, the absence of any domestic compensation and the uncertain prospects of success in obtaining adequate compensation in a speedy manner after the Court’s judgment. Having regard to the above considerations, the Court found it appropriate and necessary in the particular circumstances of the case to award the applicant, on an equitable basis, a sum of 50,000 euros (EUR), in respect of non-pecuniary damage, plus any tax that might be chargeable to him.

2.  The parties’ submissions before the Grand Chamber

(a)  The applicant

50.  The applicant submitted that he had made a just satisfaction claim in the application form (see paragraph 38 above) and acknowledged that he had subsequently failed to comply with the formal requirements at the communication stage of the proceedings. The applicant argued, however, that nothing in the letter or spirit of the Convention or even the Rules of Court prevented the Court from making an award in the absence of a formal claim from an applicant. On the contrary, Article 41 of the Convention set out the basis for an award that the Court “shall” make “if necessary”. Rule 60 § 3 of the Rules of Court provided that the Court “may” dismiss the claim in whole or in part where an applicant had not properly complied with the procedural requirements. The above consideration meant that the Court was not prohibited from making an award where a requirement to submit a claim at the appropriate stage had not been complied with. Such a decision would not run counter to the principle of subsidiarity, since the decision remained within the Court’s purview.

51.  As was clearly stated in the application form, the applicant’s application to the Court pursued the aim of obtaining a declaration of a violation of the Convention as well as the aim of obtaining compensation. Thus, it should be accepted that a claim had been made but was not quantified.

52.  The applicant’s representatives invited the Grand Chamber to “affirm the judgment” made by the Chamber but submitted no further claim for just satisfaction either as regards costs and expenses incurred before it or with respect to pecuniary or non‑pecuniary damage. The applicant also made a written statement confirming his interest in pecuniary compensation for the violation of Article 2 of the Convention, in the following terms:

“My representative has informed me that the Russian Government challenged the Court’s judgment awarding me compensation in relation to my son’s death ... In my application to the Court I asked for compensation. I did not specify the amount because I could not at the time and cannot now ‘put a price’ on my son’s life, since it is without price ...

The Russian State did not investigate the murder of my son and now, moreover, it has refused to pay the money that the European Court considered to be just satisfaction ... I insist that the Court should confirm that the judgment [issued by the Chamber] is correct.”

53.  Alternatively, the applicant invited the Court to make an exception in the present case while acknowledging the Court’s prevailing practice not to make an award in the absence of a formal claim. When making an award, the Chamber had correctly taken into consideration the absolute nature of the protected Convention right whose violation had given rise to the matter of just satisfaction.

(b)  The Government

54.  The Government argued that the Chamber’s award ran counter to the principle of subsidiarity and the Court’s primary role of setting human‑rights standards across Europe rather than allocating monetary compensation. Article 46 of the Convention set out the basis for the Court to order individual measures such as an award of compensation for the damage and loss suffered by an applicant on account of a violation of the Convention. However, such compensation was not intended to punish the respondent State. Nor was it vindictive or exemplary in character, for the purpose of deterring any future blameworthy conduct. The compensation should not exceed the loss actually sustained by the injured party. The above consideration found its application in the *ne ultra petitum* rule established in Rule 60 of the Rules of Court and was thus binding on the Court.

55.  Along with a finding of a violation of the State’s obligations under an international treaty, the claim for compensation (duly submitted and reasoned by the injured party) was a condition *sine qua non* for reaching a decision on the matter of compensation. An injured party could choose to resort to international justice for the sole purpose of obtaining a finding of a violation which, for that party, might constitute just satisfaction. In the absence of a clearly sought and formulated claim, an award would be arbitrary, since the adjudicating authority would not dispel doubts as to whether damage had actually been incurred.

3.  The Court’s position

56.  The Court will examine in turn whether there is a just satisfaction “claim” within the meaning of the Rules of Court in the present case, whether it has competence to make a just-satisfaction award and whether it is appropriate to make such an award in the circumstances of the present case.

(a)  Whether there is a just satisfaction “claim”

(i)  General principles and established practice

57.  The Court reiterates that Article 41 of the Convention (cited above) empowers it to afford the injured party such satisfaction as appears to it to be appropriate (see *Karácsony and Others v. Hungary* [GC], no. 42461/13, § 179, ECHR 2016 (extracts)).

58.  Article 41 does not impose on applicants or their representatives before the Court any procedural requirements (non-)compliance with which would, at the same time, circumscribe the Court’s decision on the matter of just satisfaction. However, certain requirements are contained in the Rules of Court and a Practice Direction (quoted in paragraphs 41 and 42 above), both of which are intended to establish a procedural framework for organising the Court’s activity and assisting it in the exercise of its judicial function.

59.  On the basis of the above provisions, it is the Court’s prevailing practice that the applicants’ indications of wishes for reparation mentioned in the application form in respect of the alleged violations cannot palliate the ensuing failure to articulate a “claim” for just satisfaction during the communication stage of the proceedings. Thus, the Court normally refused to take such statements into account for the purpose of Article 41 of the Convention (see *Mancini v. Italy*, no. 44955/98, §§ 28-29, ECHR 2001‑IX; *Fadıl Yılmaz v. Turkey*, no. 28171/02, §§ 26-27, 21 July 2005; *Miltayev and Meltayeva v. Russia*, no. 8455/06, § 62, 15 January 2013; *Anđelković v. Serbia*, no. 1401/08, § 33, 9 April 2013; compare *Burdov v. Russia*, no. 59498/00, §§ 44-47, ECHR 2002‑III; *Gorodnitchev v. Russia*, no. 52058/99, §§ 142-43, 24 May 2007; *Čalovskis v. Latvia*, no. 22205/13, §§ 233-37, 24 July 2014; *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, §§ 302-03, 27 January 2015; and *Blesa Rodríguez* *v. Spain*, no. 61131/12, §§ 47-48, 1 December 2015).

(ii)  Application of the principles and established practice in the present case

60.  As a starting point, the Court finds it appropriate to ascertain whether a “claim” for just satisfaction has ever been made before the Court in the present case and, if yes, whether this claim complied with the applicable formal/procedural requirements.

61.  The Court notes that the applicant stated in the application form his wish to obtain monetary compensation (albeit without specifying the type of damage and the amount) in relation to the violations of the Convention, including its Article 2. It was clearly pointed out in the Court’s letter to the applicant’s representative during the communication stage of the proceedings (see paragraph 39 above) that an indication, at an earlier stage of proceedings, of the applicant’s wishes concerning just satisfaction did not redress the failure to articulate a “claim” for just satisfaction in the observations. In the light of the Court’s general principles and the established practice mentioned above, the applicant’s indication of a wish for eventual monetary compensation as expressed at the initial non‑contentious stage of the procedure before the Court, dating back to 2008, does not amount to a “claim” within the meaning of Rule 60 of the Rules of Court, read together with its Rule 71 § 1 in the context of the present case.

62.  Furthermore, it is uncontested that no “claim” for just satisfaction was made during the communication procedure in the proceedings before the Chamber in 2012.

63.  Lastly, the Court notes that, acting on behalf of the applicant, his representatives submitted a memorial before the Grand Chamber inviting it to “affirm the judgment” delivered by the Chamber (see paragraph 52 above). The Court does not need to determine whether these submissions should be interpreted as properly articulating a “claim” for just satisfaction on account of non‑pecuniary damage. Neither Article 41 of the Convention nor the Rules of Court specify whether it is permissible to make a just satisfaction claim in respect of non-pecuniary damage for the first time in the proceedings before the Grand Chamber. However, the practice in cases referred under Article 43 of the Convention has been generally that the just satisfaction claim remains the same as that originally submitted before the Chamber, an applicant only being allowed at this stage to submit claims for costs and expenses incurred in relation to the proceedings before the Grand Chamber (see, as recent authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 176, 29 November 2016, and *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 167-70, ECHR 2015; see also *Khan v. Germany* [GC], no. 38030/12, § 45, 21 September 2016).

(b)  Whether the Court has competence to make a just-satisfaction award in the absence of a properly made “claim” and whether it is appropriate to make such an award in the present case

(i)  Overview of the guiding principles, rules and approaches relating to just satisfaction

64.  The Court reiterates at the outset that it has a double role in respect of applications lodged under Article 34 of the Convention: (i) to render justice in individual cases by way of recognising violations of an injured party’s rights and freedoms under the Convention and Protocols thereto and, if necessary, by way of affording just satisfaction and (ii) to elucidate, safeguard and develop the rules instituted in the Convention, thereby contributing in those ways to the observance by the States of the engagements undertaken by them as Contracting Parties (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003‑IX, and *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016). The awarding of sums of money to applicants by way of just satisfaction is not one of the Court’s main duties but is incidental to its task under Article 19 of the Convention of ensuring the observance by States of their obligations under the Convention (see *Salah v. the Netherlands*, no. 8196/02, § 70, ECHR 2006‑IX (extracts)).

65.  The Court also reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows for *restitutio in integrum*, it is for the respondent State to effect it (see *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001‑I, and *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, §§ 32-33, ECHR 2000‑XI; see also *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330‑B, and *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009).

66.  The Court is empowered to afford the injured party such satisfaction as appears to it to be appropriate, as follows from Article 41 of the Convention, if national law does not allow – or allows only partial – reparation to be made. At the same time, the rule on exhaustion of domestic remedies under Article 35 § 1 of the Convention does not apply to just satisfaction claims submitted to the Court under Article 41 of the Convention (see *Salah*, cited above, § 67; see also *Jalloh v. Germany* [GC], no. 54810/00, § 129, ECHR 2006‑IX).

67.  It is not specified in Article 41 of the Convention (and was not specified in the former Article 50 of the Convention) that the existence of a “claim” is/was a prerequisite for the Court to exercise its discretion. At the relevant period (that is, in 2012 in the present case) the Rules of Court contained requirements relating to just satisfaction, including the requirement to make a “claim” within the prescribed time period during the communication stage of the proceedings before the Chamber. These requirements are addressed to applicants and their representatives, who are required to file a “claim” for any such just satisfaction as they wish to obtain. It follows from Rule 60 § 3 that the Court “may” take an adverse decision where an applicant (or his or her representative) has not complied with the requirements.

68.  It has been the Court’s prevailing practice that it normally looks only to the items actually claimed and will not of its own motion consider whether the applicant has been otherwise prejudiced (see *The Sunday Times v. the United Kingdom (no. 1)* (Article 50), 6 November 1980, § 14, Series A no. 38; see also, among many others, *Kaya and Others v. Turkey*, no. 4451/02, §§ 56-57, 24 October 2006; and *Al-Dulimi and Montana Management Inc.* *v. Switzerland* [GC], no. 5809/08, §§ 159-60, ECHR 2016).

69.  The Court previously found it necessary, in rare cases, to make a monetary award in respect of non-pecuniary damage, even where no such claim had been made or where the claim was belated, taking into account the exceptional circumstances of the cases, for instance the absolute or fundamental character of the right or freedom violated (see, in relation to a violation of Article 2 of the Convention, *Kats and Others v. Ukraine*, no. 29971/04, § 149, 18 December 2008; in relation to a violation of Article 3 of the Convention on account of ill-treatment and lack of an effective investigation or appalling conditions of detention, *Bursuc v. Romania*, no. 42066/98, § 124, 12 October 2004; *Mayzit v. Russia*, no. [63378/00](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2263378/00%22]%7D), § 88, 20 January 2005; *Davtyan v. Georgia*, no. [73241/01](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2273241/01%22]%7D), § 71, 27 July 2006; *Babushkin v. Russia*, no. [67253/01](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2267253/01%22]%7D), § 62, 18 October 2007; *Igor Ivanov v. Russia*, no. [34000/02](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2234000/02%22]%7D), §§ 50-51, 7 June 2007; *Nadrosov v. Russia*, no. 9297/02, § 54, 31 July 2008; *Chember v. Russia*, no. [7188/03](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%227188/03%22]%7D), § 77, ECHR 2008; *Chudun v. Russia*, no. [20641/04](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2220641/04%22]%7D), § 129, 21 June 2011; and *Borodin v. Russia*, no. [41867/04](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2241867/04%22]%7D), § 166, 6 November 2012; see also, in relation to a violation of Article 5 of the Convention, *Rusu v. Austria*, no. [34082/02](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2234082/02%22]%7D), § 62, 2 October 2008, and *Crabtree v. the Czech Republic*, no. [41116/04](http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2241116/04%22]%7D), § 60, 25 February 2010). Furthermore, in a case concerning Article 8 of the Convention, the Court ordered under Rule 39 of the Rules of Court that the respondent State was to appoint a representative to the applicant, who was entirely divested of the capacity to act and was not capable under domestic law of choosing her own legal representative. When it later transpired that the representative so appointed had omitted to claim just satisfaction, the Court made a non-pecuniary award, having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of her daughter (see *X v. Croatia*, no. 11223/04, §§ 61-63, 17 July 2008).

70.  By comparison, in some other cases the Court considered that a finding of a violation constituted sufficient just satisfaction and thus dismissed related claims (see, for instance in relation to violations of Articles 3, 5 or 6 of the Convention, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 315, 13 September 2016; *Murray v. the Netherlands* [GC], no. 10511/10, § 131, ECHR 2016; *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 136, ECHR 2013 (extracts); and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 76, ECHR 1999‑II).

71.  The principle of *ne ultra petitum* (“not beyond the request” or “not beyond the scope of the dispute”), referred to by the respondent Government, finds its primary application in the situation where a claim for just satisfaction is lower than the amount that would normally be awarded by the Court in comparable circumstances (see, for instance, *Mateescu v. Romania*, no. 1944/10, § 39, 14 January 2014; *Rummi v. Estonia*, no. 63362/09, § 139, 15 January 2015; *Neshkov and Others*, cited above, § 301; and *Yevdokimov and Others v. Russia*, nos. 27236/05 and 10 others, § 58, 16 February 2016).

72.  On the other hand, neither the above principle nor Rules 60 and 75 have invariably prevented the Court from applying a degree of flexibility, essentially in respect of non-pecuniary damage, and, for instance, agreeing to examine claims for which applicants did not quantify the amount, “leaving it to the Court’s discretion” (see, among many other examples, *Guzzardi v. Italy*, 6 November 1980, §§ 112-14, Series A no. 39; *Blesa Rodríguez*, cited above, §§ 47-48; *Frumkin v. Russia*, no. 74568/12, §§ 180‑82, 5 January 2016; *Svetlana Vasilyeva* *v. Russia*, no. 10775/09, §§ 43-45, 5 April 2016; *Sürer v. Turkey*, no. 20184/06, §§ 49-51, 31 May 2016; compare *Mihu v. Romania*, no. 36903/13, §§ 82-84, 1 March 2016). As the Court has previously stated, it is in the nature of non-pecuniary damage that it does not lend itself to a process of calculation or precise quantification (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 224, ECHR 2009).

73.  The Court emphasises in this connection that, in particular as regards just satisfaction on account of non-pecuniary damage, the Court’s guiding principle is equity, which involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred (see *Varnava and Others*, cited above, § 224; and *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 114, ECHR 2011). The Court’s awards in respect of non-pecuniary damage serve to give recognition to the fact that non-material damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (ibid.).

(ii)  The Court’s approach in the absence of a properly made “claim”

74.  Article 41 of the Convention confers on the Court the competence to afford just satisfaction (“shall ... afford” in the English text; “*accorde*” in the French text) and allows the Court discretion in deciding on this matter (“if necessary” in the English text; “*s’il y a lieu*” in the French text) (see *Guzzardi*, cited above, § 114). The exercise of such discretion encompasses such decisions as to refuse monetary compensation or to reduce the amount that it awards. Naturally, it includes a decision to award compensation.

75.  Making a global assessment of the principles and approaches summarised above, the Court reaffirms that an applicant and his or her representative designated under Rule 36 of the Rules of Court must observe formal and substantive requirements contained in these Rules on the matter of just satisfaction, at a risk of incurring adverse consequences for the applicant. A representative acts on behalf of the applicant who appointed him or her, which means, *inter alia*, that pursuant to Rule 37 communications or notifications addressed to that representative are deemed to have been addressed to the applicant. The representative is deemed to act in the applicant’s interest; the representative’s actions are normally deemed to be based on the applicant’s instructions and wishes, and require co-operation between them in the course of the proceedings before the Court (see, *mutatis mutandis*, *V.M.* *and Others v. Belgium* [GC], no. 60125/11, §§ 35 and 37, 17 November 2016), for instance, as regards the choice to seek just satisfaction before the Court for the alleged violation of the Convention. This usually entails, in particular, that an applicant has to bear the adverse consequences arising from his or her representative’s conduct of a case before the Court. Consequently, a representative’s failure to submit a “claim” for just satisfaction would, as a rule, entail that the Court would make no award.

76.  At the same time, Article 41 of the Convention being the primary legal provision on just satisfaction, the norm of a higher hierarchical value (see, *mutatis mutandis*, *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 42, ECHR 2014) and the norm which is applicable in the context of the system for the protection of human rights agreed by the Contracting Parties, the Court holds that while it would normally not consider of its own motion the question of just satisfaction, neither the Convention nor the Protocols thereto preclude the Court from exercising its discretion under Article 41 of the Convention. The Court therefore remains empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a “claim” has not been properly made in compliance with the Rules of Court.

77.  The exercise of such discretion should always take due account of the basic requirement of adversarial procedure. Where the Court might exceptionally envisage a possibility of a just-satisfaction award on account of non-pecuniary damage in the absence of a properly made “claim”, it should be appropriate to seek the parties’ submissions, for instance, by way of reserving the Article 41 matter under Rule 75 § 1 of the Rules of Court (see, *mutatis mutandis*, *Cyprus v. Turkey* (just satisfaction), cited above, § 4).

78.  Bearing in mind the above considerations, the Court finds it appropriate to adopt the following approach to be applied in exceptional situations. It is first necessary to ascertain that a number of prerequisites have been met, before weighing the compelling considerations in favour of making an award, in the absence of a properly made “claim” for just satisfaction.

(α)  Prerequisites

79.  The Court finds it conceivable that an applicant may choose to limit (*ab initio* or at a later stage) his or her application before the Court to a recognition that the rights under the Convention or the Protocols thereto were violated by the respondent State, while seeking no monetary reparation before the Court (see, for instance, *Mihu*, cited above, §§ 82-84) or preferring to subsequently seek it at domestic level, for instance where effective remedies become clearly available in view of the Court’s judgment. Therefore, the Court would attach particular importance to indications unequivocally showing that an applicant expressed a wish to obtain monetary compensation in addition to the recognition of the violation of the Convention, and that his or her interest in obtaining compensation is expressed in relation to the same facts as those that underlie the Court’s findings about a violation of the Convention in his or her case. It is further necessary to ascertain that there is a causal link between the violation and the non-material harm arising from the violation of the Convention.

(β)  Compelling considerations

80.  On the basis of its conclusions concerning the prerequisites mentioned above, the Court would then examine whether there are compelling considerations in favour of making an award, despite the applicant’s non-compliance with the requirements arising under Rule 60 of the Rules of Court, namely that a claim for non-pecuniary damage must be made, and made in due time, during the contentious procedure.

‑  Particular gravity and impact of the violation, and overall context of the case

81.  Where the Court envisages of its own motion a just-satisfaction award on account of non-pecuniary damage, it is appropriate to take into account the particular gravity and the particular impact of the violation of the Convention (for instance, on account of its nature or degree), which, for example, significantly harmed the moral well-being of the applicant, otherwise seriously affected his or her life or livelihood or caused another particularly significant disadvantage (see, *mutatis mutandis*, *Varnava and Others*, cited above, § 224), and, as it may be pertinent in the particular circumstances of a given case, the overall context in which the breach occurred.

‑  Unavailability or partial availability of adequate reparation at domestic level

82.  As a further element to be taken into consideration for making a just-satisfaction award in the absence of a properly made “claim”, the Court needs to ascertain whether there are reasonable prospects of obtaining adequate “reparation”, in terms of Article 41 of the Convention, at the national level after the Court’s judgment.

(iii)  Application in the present case

(α)  Prerequisites

83.  The Court considers, and it is also common ground between the parties, that the applicant sustained non-material harm arising from the violation of Article 2 of the Convention and that there is a causal link between the violation and the harm. The non-pecuniary damage existed in the present case on account of the moral suffering and distress sustained by the applicant due to the unlawful and unjustified lethal use of firearms against his son and the incomplete investigation into the matter.

84.  The Court attaches importance to the unequivocal indication that the applicant wished and continues to wish to obtain monetary compensation in addition to the recognition of the violation of the Convention. His interest in obtaining compensation was expressed in relation to specific facts disclosing a violation under Article 2 of the Convention on account of the death of his son (see paragraphs 38 and 52 above).

(β)  Compelling considerations on the facts of the present case

85.  The conduct of a case before the Court being essentially a matter between an applicant and his or her representative, the Court notes, however, that the applicant’s representative in the present case submitted no “claim” for just satisfaction in the procedure before the Chamber, despite, as it transpires from the documents in the file, the applicant’s explicit wish to obtain such just satisfaction. Thus, the Court is not inclined to conclude in the particular circumstances of the present case that the applicant should, *ipso facto*, bear the unfavourable consequence of such an omission, and will give weight to the considerations presented below.

86.  With due regard to the considerations in paragraphs 75 and 76 above, the Court’s concern in the present case is whether any compelling considerations make it necessary (*s’il y a lieu*) to afford just satisfaction to the applicant.

‑  Particular gravity and impact of the violation, and overall context of the case

87.  Endorsing the Chamber’s assessment, the Grand Chamber has concluded above that the present case disclosed particularly serious violations of the Convention; the findings relate both to the substantive and procedural limbs of Article 2 of the Convention. The respondent Government itself acknowledged before the Chamber a violation of the substantive limb and did not plead otherwise before the Grand Chamber. The Court considers that the finding of a violation of the Convention in the present case would not constitute in itself sufficient just satisfaction and that the particular gravity and impact of the violations and the overall context in which the breach occurred, in particular the lengthy and defective investigation of a death inflicted by an agent of the State, plead in favour of a just-satisfaction award (compare *X v. Croatia*, cited above, §§ 61-63).

‑  Unavailability or partial availability of adequate reparation at domestic level

88.  The Court notes that there is no possibility of *restitutio in integrum* in the present case. Without prejudice to eventual general or individual measures that may be adopted in the domestic legal order in compliance with Article 46 of the Convention, the material before the Court leads it to conclude, within its assessment under Article 41 of the Convention, that no reasonable prospect of success has been shown for obtaining adequate “reparation” at domestic level, especially if such a request were to be made years after the violations of the Convention and the suspension of the domestic investigation in the present case.

89.  In the context of the complaints under Articles 2 and 3 of the Convention, redress that is commensurate with the nature of the violation would normally require a proper investigation capable of leading to the punishment of those responsible and monetary compensation (see, essentially in the context of the Court’s assessment of a possible loss of victim status on account of favourable domestic measures following death or ill-treatment inflicted intentionally, *Gäfgen v. Germany* [GC], no. 22978/05, §§ 121-30, ECHR 2010; *Mustafa Tunç and Fecire Tunç* *v. Turkey* [GC], no. 24014/05, §§ 130-35, 14 April 2015; and *Jeronovičs*, cited above, §§ 103-08; see also *Kopylov v. Russia*, no. 3933/04, §§ 127‑31, 29 July 2010, and *Razzakov v. Russia*, no. 57519/09, § 50, 5 February 2015). It is noted that the applicant has not received any redress, such as a monetary compensation, in relation to the facts underlying the violations under Article 2 of the Convention (see, *mutatis mutandis*, *Tomasi v. France*, 27 August 1992, § 130, Series A no. 241‑A, and *Trévalec v. Belgium* (just satisfaction), no. 30812/07, §§ 26-27, 25 June 2013).

90.  The Government have not suggested that the applicant has available to him domestic remedies that offer reasonable prospects of “reparation” in relation to the Convention violations (see, *mutatis mutandis*, *Clooth v. Belgium*, 12 December 1991, § 52, Series A no. 225, and *Clooth v. Belgium* (Article 50), 5 March 1998, §§ 14-16, *Reports of Judgments and Decisions* 1998‑I), in particular remedies that may be based on the Court’s judgment finding a violation of the Convention, for claiming monetary compensation. It follows from the available information that the criminal investigation has remained suspended since 2011, so that no definitive domestic decision has been taken as to the merits of the applicant’s criminal complaint and as regards the legality of the use of weapons in the present case. In any event, while it appears that, following the Court’s judgment, the application of the Code of Criminal Procedure might open a possibility of having the criminal investigation resumed, the Court notes that more than nine years have passed since the relevant events, which may adversely affect any eventual measure of “reparation”.

91.  Against this background, and in so far as monetary compensation is relevant in the context of the present discussion on just satisfaction, the Court finds no indication, and the respondent Government have not argued otherwise, that the domestic law allows adequate “reparation” to be sought and obtained within a reasonable time in respect of the Court’s findings concerning the death inflicted on the applicant’s son and the defects in the investigation (see, *mutatis mutandis*, *Tarariyeva v. Russia*, no. 4353/03, §§ 96-101, ECHR 2006‑XV (extracts); *Menesheva v. Russia*, no. 59261/00, §§ 76-77, ECHR 2006‑III; *Dedovskiy and Others v. Russia*, no. 7178/03, §§ 98-102, ECHR 2008 (extracts); *Denis Vasilyev v. Russia*, no. 32704/04, § 136, 17 December 2009, and *Islamova v. Russia*, no. 5713/11, § 73, 30 April 2015, in the context of Article 13 of the Convention).

(iv)  Conclusion

92.  Having examined the parties’ submissions, in view of the foregoing considerations taken as a whole, the Grand Chamber is satisfied that the present case discloses exceptional circumstances which call for a just- satisfaction award in respect of non-pecuniary damage, notwithstanding the absence of a properly made “claim” (see, by contrast, *Schatschaschwili*, cited above, §§ 167-70, in the context of Article 6 of the Convention). Making its assessment on an equitable basis, the Court accordingly awards the applicant 50,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable. It 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.

B.  Other types of damage

93.  The Court notes that no claim in respect of pecuniary damage or costs and expenses was made. Thus, it makes no award (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 134, ECHR 2014 (extracts), and *Perdigão v. Portugal* [GC], no. 24768/06, § 87, 16 November 2010).

FOR THESE REASONS, THE COURT

1.  *Holds*, unanimously, that there have been violation of Article 2 of the Convention under its substantive and procedural limbs;

2.  *Holds*, by fourteen votes to three,

(a)  that the respondent State is to pay the applicant, within three months, the following amount, to be converted into the currency of the respondent State:

EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

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

Done in English and French, and notified in writing on 30 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Guido Raimondi  
 Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a)  joint concurring opinion of Judges Nußberger and Lemmens;

(b)  joint dissenting opinion of Judges Raimondi, O’Leary and Ranzoni.

G.R.  
F.E.P.

JOINT CONCURRING OPINION OF JUDGES NUSSBERGER AND LEMMENS

1.  We voted with the majority to award the applicant an amount of 50,000 euros in respect of non-pecuniary damage.

2.  However, to our regret, we are unable to subscribe to the reasons contained in the judgment. In fact, we share to a very large extent the criticism made by Judges Raimondi, O’Leary and Ranzoni in their joint dissenting opinion. Nevertheless, we believe that a claim for just satisfaction for non-pecuniary damage has been validly made in the present case and that the Grand Chamber can naturally act upon it.

The issue at stake: the consistent application of the Rules of Court

3.  The Rules of Court are made to be observed. They are clear and have been applied over decades. Whoever seeks an award in respect of non‑pecuniary damage has to make a claim to that effect[[1]](#footnote-1) so that the Government may comment on it and the Court can decide after having heard both parties.

4.  It is true that the text of the Convention itself does not set out either the procedure for claiming just satisfaction or the specific prerequisites. Nevertheless, there is no contradiction between Article 41 of the Convention and the Rules of Court. It is one thing to regulate the formal requirements for exercising a certain competence, and another to grant discretion as to the substance of the decision to be taken. It follows from Article 41 of the Convention that the Court has a certain discretion to award or not to award compensation. But this discretion does not include the possibility of observing or not observing the procedural rules.

Awarding just satisfaction for human-rights violations: an acceptable rather than a good solution

5.  Before turning to the question of interpretation of the relevant rules, we would like to acknowledge that it may generally be questionable whether human-rights violations can be cured by money. The applicant rightly states that he would not be able to express in monetary terms the pain of having lost his son.[[2]](#footnote-2)

6.  Nevertheless, having no better option, the drafters of the Convention chose to provide for the option of awarding money as one of the means of bringing about justice, despite the danger of commercialising human rights.

Discretion and equal treatment

7.  While it is true that the Court has a discretion to award just satisfaction for non-pecuniary damage, there is still the question of equality requiring it to treat those in the same situation in the same way. In many cases the Court has not awarded just satisfaction because it has considered that the necessary claim had not been made in the correct way.[[3]](#footnote-3) We share the dissenters’ view that the Court should follow its own rules and case-law and not “invent” exceptions to fit a given case.

Formulation of the claim in the application form

8.  While Article 41 of the Convention does not specify a requirement to make a claim for just satisfaction, the general principle of law *ne ultra petitum* prohibits a court from awarding more than what has been claimed.[[4]](#footnote-4) This principle is confirmed in Rule 60 § 1 of the Rules of Court: “An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.”[[5]](#footnote-5) We note that there is no indication in Rule 60 § 1 of when the claim should be made.

9.  Rule 60 § 2 goes on to provide that “[t]he applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise”. We understand that this rule provides for the need to specify the claims already made in the application form (if this has indeed been done) and to produce relevant evidence of the damage incurred. It is interesting to note that Rule 60 § 2 does not provide that the claim as such can only be made during the communications stage, that is, within the time-limit fixed for the submission of the applicant’s observations.

10.  Rule 60 § 3 further provides that “[i]f the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part”. Why “may”, and not “shall”?[[6]](#footnote-6) In our opinion, this is so because there are cases where the Court can award just satisfaction without needing any particulars of claim or supporting documents. This is obviously, and in particular, the case with claims for just satisfaction for non-pecuniary damage. While it is clearly preferable to have an indication of what the applicant considers to be adequate, this cannot be seen as a condition *sine qua non* for awarding compensation. Rule 60 § 3 empowers the Court to reject a claim where, because of the absence of itemised particulars or supporting documents, it is not in a position to rule (easily) on the quantum of the damage.[[7]](#footnote-7) We further note that, according to the very wording of Rule 60 § 3 itself, that provision is based on the assumption that a claim has been made[[8]](#footnote-8); if no claim at all has been made, the principle *ne ultra petitum* is a sufficient basis for the Court not to make an award[[9]](#footnote-9), and there is no need to mention any other possible failure by the applicant.

11.  As is noted in paragraph 38 of the judgment, in the present case the applicant sought compensation, in the application form, for violations of Article 2 of the Convention. Our understanding of Rule 60 is that this should be sufficient to satisfy the requirement that a “specific claim” must be made, at least as far as non-pecuniary damage is concerned. Moreover, we see no reason why the Court cannot, even without further particulars of claim, award just satisfaction for non-pecuniary damage on the basis of the claim thus made.

12.  However, while such an interpretation of the Rules of the Court is in our view perfectly valid, we acknowledge that the Court’s practice has been different. This is clearly expressed in paragraph 5 of the Practice Direction on Just Satisfaction Claims where it is said that the Court “will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings ...” From the facts of the case it is evident that the applicant was informed about this practice (see paragraph 39 of the judgment).

Formulation of the claim in the applicant’s memorial before the Grand Chamber

13.  Even if Rule 60 should be read in the way that has been common practice for years and has been laid down in the Practice Direction, we still believe that there is a sufficient basis for enabling the Grand Chamber to make an award of just satisfaction.

14.  Indeed we base our view, alternatively, on the specific powers which the Grand Chamber has when deciding cases referred to it at the request of one of the parties (Article 43 of the Convention). A case referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment.[[10]](#footnote-10) The judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber.[[11]](#footnote-11) A reconsideration of an award in respect of non‑pecuniary damage is neither explicitly nor implicitly excluded by the Convention or the Rules of Court; nor is there, as claimed by the majority, a practice that “the just satisfaction claim remains the same as that originally submitted before the Chamber” (see paragraph 63 of the judgment).[[12]](#footnote-12)

15.  According to Rule 71 § 1 of the Rules of Court, “[a]ny provisions governing proceedings before the Chambers shall apply, *mutatis mutandis*, to proceedings before the Grand Chamber”. This means that the parties may be invited to submit further evidence and written observations before the Grand Chamber (see Rule 59 § 1). In his or her observations an applicant can then raise the question of non-pecuniary damage anew.

16.  In the present case we interpret the applicant’s invitation to the Court to “affirm the judgment” (see paragraph 52 of the judgment) as a new claim for non-pecuniary damage, this time specified in the amount of 50,000 euros. The Russian Government had ample opportunity to comment on this claim.

17.  In our opinion, an award by the Grand Chamber of just satisfaction for non-pecuniary damage in these circumstances is therefore compatible with the Rules of Court.

Judicial policy: the steps to be taken

18.  The conclusion which we arrive at is a solution for the specific case before us. In future, if it is deemed necessary to provide for exceptions to the principle *ne ultra petitum* we think that the matter can best be regulated by amending Rule 60 of the Rules of Court. We agree with the view expressed in the joint dissenting opinion that the definition of exceptions to procedural rules is an important question which should be discussed and decided by the plenary Court on the basis of Article 25 (d) of the Convention and not by seventeen judges of the Grand Chamber.[[13]](#footnote-13)

19.  It will then be for the plenary to define the circumstances in which the Court can make an award of just satisfaction despite the applicant’s failure to make a valid claim.

20.  We note that the majority’s reasoning is based on a set of “prerequisites” and “compelling considerations” which circumscribe the “exceptional situations” that allow for derogations from the principle *ne ultra petitum* (see paragraphs 78-82 of the judgment). With all due respect, we cannot consider these conditions to be workable. On this point, we fully agree with the views expressed in the joint dissenting opinion.[[14]](#footnote-14) The conditions are vague and imprecise. Moreover, the “compelling considerations” coincide almost entirely with the general conditions for making an award in respect of non-pecuniary damage.[[15]](#footnote-15)

21.  In our opinion, any exceptions should be formulated as briefly and clearly as possible, so that they can easily be applied by the Court in each individual case.

JOINT DISSENTING OPINION OF JUDGES RAIMONDI, O’LEARY AND RANZONI

I - Introduction

1.  In its judgment of 5 November 2015, the Chamber held unanimously that there had been a violation of Article 2 of the Convention under both its substantive and procedural limbs. These violations were the result of the unlawful killing of the applicant’s son by police during a demonstration about alleged corruption by public officials held in a town in Dagestan in 2006 and the ensuing ineffective investigation into his death.

2.  It is important to stress at the outset that today’s Grand Chamber judgment confirms, unanimously, this finding of a double violation of Article 2 of the Convention.[[16]](#footnote-16)

3.  The referral of the case to the Grand Chamber at the request of the respondent State and in accordance with Article 43 of the Convention concerned exclusively the award of just satisfaction pursuant to Article 41 of the Convention. It is trite, but perhaps necessary, to recall that a referral request such as this is only accepted by the Grand Chamber Panel if the case raises a serious question affecting the interpretation or application of the Convention or its Protocols or a serious issue of general importance. The question raised by the instant case – which by its nature falls under both branches of Article 43 – was whether the Court can award just satisfaction and, in particular, non-pecuniary damages, in the absence of a claim for just satisfaction duly submitted in accordance with the Convention and the Rules of Court?[[17]](#footnote-17)

4.  In determining whether the Court is competent to make an award, we would argue that the circumstances of the instant case and, in particular, the events surrounding and following the tragic death of the applicant’s son, are relevant but not determinative. The Court’s task under Article 19 of the Convention is to ensure the observance by States of their obligations under the Convention. The finding of a double violation of Article 2 of the Convention in the instant case corresponds to its primary function. As the majority judgment recognises, the awarding of sums of money to applicants by way of just satisfaction is not one of the Court’s main duties but is incidental to its task of ensuring the observance by States of their obligations under the Convention.[[18]](#footnote-18)

5.  What the Grand Chamber was being asked to do in the context of this referral was to resolve legal uncertainty as a result of the development of diverging case-law on the just satisfaction question outlined above (whereby some chambers award just satisfaction against some States in the absence of a claim while others, in cases concerning other States, do not). As such, the Grand Chamber was also being asked to answer a question of considerable importance regarding the nature and value of the procedural rules which govern the Court and its procedures and by which applicants and respondent States are meant to abide.

6.  We respectfully disagree with the majority that, in the absence of a claim for just satisfaction, the Court can and should award pecuniary and non-pecuniary damages as well as costs and expenses.[[19]](#footnote-19) As we explain below, the legal framework on just satisfaction, established in Article 41 of the Convention and Rule 60 of the Rules of Court (and explained, furthermore, in the relevant Practice Direction), do not support the finding of the majority. The fact that the Court has, in a limited line of cases relating almost exclusively to certain respondent States, deviated from the rule clearly elucidated in its Rules of Court and enunciated in its case-law is not a sound basis for the validation of this divergent case-law by the Grand Chamber. While it is true that the terms of Article 41, the Rules of Court and the Court’s own case-law on just satisfaction provide for a certain degree of judicial discretion, we would argue that this discretion comes into play only when certain formal and substantive requirements are met, only when necessary and only when it is first established, at the outset, that the internal law of the respondent State allows only partial reparation to be made.

7.  In holding as they do, the majority of the Grand Chamber risk driving a coach and four horses through the procedural rules governing just satisfaction and undermining, more generally, the Rules of Court, despite the importance and *raison d’être* of procedural rules. The Court itself, in its case-law on Article 6 of the Convention, has emphasized this. In order to determine when the newly confirmed exception will apply the majority judgment establishes certain criteria. However, the latter are both vague and porous and likely to give rise either to a considerable degree of legal uncertainty, or to differential treatment of different respondent States, or to both.

8.  We would submit that an alternative was open to the Court if indeed a review of the relevant case-law by the Grand Chamber indicated that refusing an award of just satisfaction in the absence of a duly submitted claim was problematic when viewed from the perspective of the Convention *system* for the protection of fundamental rights.[[20]](#footnote-20)

II – Detailed examination of the legal framework governing just satisfaction claims

9.  The relevant rules, in the Convention and the Rules of Court, on just satisfaction are outlined in the Grand Chamber judgment.[[21]](#footnote-21)

10.  Given that, we would argue, the majority are selective in their reliance on some rules to the pointed exclusion of others, it is necessary to analyse them in greater detail.

Article 41 of the Convention

11.  Article 41 must, as the majority insist, be our starting point. The Court “shall” afford just satisfaction to the injured party, but such an award presupposes:

- the finding of a violation;

- the finding that the internal law of the respondent State allows only partial reparation to be made;

- the existence of an injured party (normally the “victim” of the violation), and

- the necessity of an award to be made.[[22]](#footnote-22)

12.  Article 41 thus empowers the Court to make an award but it does not oblige it to do so.[[23]](#footnote-23)

13.  It is true, as the majority judgment indicates at § 67, that Article 41 does not specify that the existence of a claim, duly made, is a prerequisite for the Court to award just satisfaction. Nevertheless, is it not in the very nature of a document like the Convention – an international treaty signed in 1950 and subsequently ratified by 47 High Contracting Parties – that it is left to the Rules of Court to specify to which formal and substantive requirements an award by the Court of just satisfaction is subject?[[24]](#footnote-24) Like all procedural rules governing the organisation, procedure and proceedings in a court of law, whether national or international, the Rules of Court contain the details that the relevant Convention article lacks. They put flesh on the bones of those Convention provisions which concern procedure and the organisation and functioning of the Court.[[25]](#footnote-25) Neither, for example, does Article 41 specify that the satisfaction for which it provides covers pecuniary and non-pecuniary damages as well as costs and expenses. This only became clear over time, as the Court interpreted and applied first Article 50 and then Article 41 of the Convention, in conjunction with the relevant Rules of Court.[[26]](#footnote-26) Nor is mention made in Article 41 of the need for the establishment of a causal link. Should this lead us to call into question the requirements established in this regard in the Rules of Court, the Practice Direction and the Court’s own case-law? Finally, the reasoning of the majority in § 67 of the Grand Chamber judgment can so easily be turned on its head. Had the drafters intended the Court to have the power to make an award of just satisfaction of its own motion, they would have provided for this explicitly. An explicit possibility to grant reparation *proprio motu* in exceptional cases is provided for the International Criminal Court; the only international court which, to our knowledge, has this express power.[[27]](#footnote-27)

14.  The majority are also right in recognising the hierarchical superiority of Article 41 over Rule 60.[[28]](#footnote-28) Unfortunately, its reasoning sacrifices the nature, content and function of procedural rules on that normative altar. It also ignores the scope of the rule-making powers of the Court and its plenary, pursuant to Article 25(d) of the Convention.[[29]](#footnote-29)

Rule 60 and the Practice Direction on just satisfaction claims

15.  Rule 60 itself merits closer attention. Pursuant to Rule 60(1), an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights *must make a specific claim* to that effect. The terms of this rule could not be clearer but in case they are not clear enough, point 4 of the Practice Direction indicates: “Claimants are warned that *compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition* for the award of just satisfaction”. At point 5, it further states: “The Court will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time”. These conditions are spelled out to applicants and their legal representatives in correspondence from the Registry.

16.  The Court has, in the past, pointed to and relied on the clarity of these provisions. In *Andrea Corsi v. Italy* (Revision), following the Court’s refusal to grant just satisfaction in the absence of a claim, the applicant requested revision of the judgment because he was sure his representative had submitted such a claim, although he could not prove that this was the case. The Court held: “[I]t does not suffice to submit claims for just satisfaction; the Court must also receive them within the time-limits ... . *The provisions of the Rules of Court are clear in this respect as they mention the “filing” of these documents at the Registry*. Rule 38 § 2 [of the Rules of Court] specifies the means of verifying whether the parties have observed the time-limits”.[[30]](#footnote-30) Should there be any doubt as to the prevailing line established in the case-law on Article 41, previously Article 50, it is also worth revisiting *Sunday Times v. United Kingdom* (Article 50), where it is clearly stated: “In the context of Article 50, the Court normally looks only to items actually claimed [...] and, *since no question of public policy is involved, will not of its own motion consider whether the applicant has been otherwise prejudiced*”.[[31]](#footnote-31) This is not simply a dusty, historical, jurisprudential precedent, albeit one reflecting clearly the principle of *ne ultra petitum*. It is a judgment which reflects a principle respected and applied by the Court over many years, not least by the Grand Chamber in a recent case where it refused to award any just satisfaction in the absence of a claim duly made by the applicant.[[32]](#footnote-32)

17.  The submission of a claim as a prerequisite for an award is further emphasised, firstly, by Rule 60(2), which provides that applicants *must submit* itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise.

18.  It also follows, secondly, from Rule 60(4), which provides that *the applicant’s claims shall be transmitted to the respondent Contracting Party* for comment. The latter rule is essential to and characterises the adversarial nature of the proceedings before the Court. Under Rule 60(4), the respondent State is always offered an opportunity to comment on the applicant’s claim within a specified time-limit. The Registrar informs the parties as appropriate by letter. The President of the Section may agree to extend the time-limit if good reason is shown and if such an extension has been requested before the expiry of the established time-limit. If the response is submitted by a respondent State out of time it is not admitted to the file, unless the Court has exercised its discretion and extended the deadline. If it is duly submitted, it is transmitted to the applicant for information. The importance, for the parties, for the Court’s proceedings to be properly adversarial is plain to see. Any other organisation of procedure would undoubtedly fall foul of the Court’s own case-law under Article 6 of the Convention.[[33]](#footnote-33)

19.  As regards the submission of a claim, when and in what form, the applicant in the instant case had indicated a wish for compensation in his application form. His representative was invited, by letter of 24th May 2012, following communication of the case, to submit observations and claims for just satisfaction within a time-limit. With regard to the latter, the representative’s attention was drawn, in unequivocal terms, to the fact that failure to submit (quantified) claims within the time-limit together with the required supporting documents would mean the Chamber would make no award or reject the claims in part and this despite the fact that the applicant may have indicated a wish for compensation at an earlier stage in the proceedings.[[34]](#footnote-34) No observations or claims were submitted by the deadline of 26 July 2012. The applicant’s representative subsequently explained the lack of submissions as resulting from the failure of her former law firm to forward her correspondence. In the circumstances and, on an exceptional basis, by letter of 11th October 2012, the President of Section I granted her leave to submit observations and claims, extending the deadline to 22 November 2012 in the exercise of the discretion conferred by Rule 60(2). Nothing was submitted to the Court by the applicant or his representative by that date. The facts of the present case indicate that a clear procedural rule was applied with the requisite degree of flexibility, in accordance with the Rules of Court, with a view to protecting the applicant’s interests.

20.  Our examination of Rule 60 brings us to its third paragraph; the only potentially problematic one in terms of clarity and the one on which the majority prefer to dwell to the exclusion of the other three paragraphs outlined above. Rule 60(3) provides that “If the applicant fails to comply with *the requirements set out in the preceding paragraphs* the Chamber *may* reject the claims in whole or in part”. The reference to the preceding paragraphs (plural) and the use of “may” (facultative) are where potential problems lie.[[35]](#footnote-35) This rule could be read, in conjunction with the use of “shall” in Article 41, as proof of the Court’s (absolute) discretion when awarding just satisfaction. This is the preferred route of the majority.[[36]](#footnote-36) However, their choice is not borne out by the terms of Article 41, which contain conditions as explained above, by the clear terms of the remainder of Rule 60, by the terms of the Practice Direction or by the prevailing position of the Court in its case-law.[[37]](#footnote-37) All point to the fact that the Court *will* award just satisfaction but only in certain circumstances and where certain conditions, formal and substantive, are fulfilled. It would be strange for Rule 60 to establish the conditions for the processing and grant of an award only to nullify those conditions immediately thereafter. Furthermore, whatever one is to deduce from the reference to paragraph*s* and *may* in Rule 60(3), even that Rule, given its reference to “the claims”, presupposes that such claims have been made. That Article 41 requires the submission of a claim is also borne out by other Rules of Court. Rule 75(1), for example, provides that: “Where the Chamber or the Committee finds that there has been a violation of the Convention or the Protocols thereto, it shall give in the same judgment a ruling on the application of Article 41 of the Convention *if a specific claim has been submitted in accordance with Rule 60* and the question is ready for decision”.

Substantive requirements and the different heads of just satisfaction

21.  The Practice Direction provides details regarding what falls under each head of just satisfaction and further explains the formal and substantive conditions to be met in relation to each one.[[38]](#footnote-38)

22.  As regards pecuniary damage and costs and expenses, the applicant has to show that pecuniary damage has resulted from the violation[[39]](#footnote-39) and that costs and expenses were actually and necessarily incurred and reasonable as to quantum.[[40]](#footnote-40)

23.  Needless to say, fulfilling these substantive requirements is a condition for the award of just satisfaction under these heads. However, the very nature of what has to be proved, as demonstrated by the details in the Practice Direction and Rule 60, further underlines why the submission of actual claims is essential.

24.  As regards non-pecuniary damage, the head under which the majority of the Grand Chamber decided to exceptionally grant just satisfaction in the circumstances of the present case, the Practice Direction makes clear that the Court’s award is intended to provide financial compensation for non-material harm, for example mental or physical suffering. In addition, it indicates that, it is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. This difficulty explains, in our view, the wording of Rule 60(3) discussed above, namely the fact that the Court *may* reject the claims in whole or in part if the requirements in paragraphs 1 and 2 of Rule 60 are not complied with. The “may” reject the claims refers specifically to the preceding Rule 60(2) and, in particular, to situations where the applicant has not or cannot submit itemised particulars. As the applicant in the instant case rightly points out, and the Court has accepted in other circumstances, it is impossible to put a price on the life of a child or to quantify the moral damage caused by other violations.[[41]](#footnote-41)

25.  On the other hand, point 14 of the Practice Direction confirms the substantive requirement which must be fulfilled if non-pecuniary damages are to be awarded: “*If the existence of such damage is established, and if the Court considers that a monetary award is necessary*, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law”. How, one must ask, is this substantive requirement to be fulfilled, in the context of proceedings which must be adversarial, if no claims for just satisfaction are submitted?

III – Competence of the Court in the absence of a just satisfaction claim

26.  If Article 41, the Rules of Court, the Practice Direction and the vast majority of the Court’s decisions on just satisfaction all clearly point to the absence of such an award by the Court in the absence of a claim submitted in accordance with the prescribed formal and substantive requirements, on what basis do the majority of the Grand Chamber decide to both confirm this mandatory procedural rule[[42]](#footnote-42) and deviate from that rule in exceptional cases?

27.  The deviation is justified variously by the Court’s role under Article 34 of the Convention to render justice in individual cases,[[43]](#footnote-43) the legal obligation of States under Article 46 of the Convention to put an end to the breach and make reparation for its consequences,[[44]](#footnote-44) the Court’s power under Article 41 of the Convention to award such satisfaction as appears to it to be appropriate,[[45]](#footnote-45) the absence in that same provision of an indication as to formal conditions limiting the exercise of that discretion as well as the use of “may” in Rule 60(3) and “shall” in Article 41 itself,[[46]](#footnote-46) the fact that, in several cases, the Court has awarded just satisfaction of its own motion,[[47]](#footnote-47) the fact that, in some cases, it finds it appropriate to award no just satisfaction or to award it even if the applicant has not quantified the claim,[[48]](#footnote-48) the fact that the guiding principle when awarding non-pecuniary damages is the principle of equity[[49]](#footnote-49) and, finally, the fact that the primary application of the principle of *ne ultra petitum* in this field is to ensure that the Court itself does not raise the amount claimed by the applicant even if, in similar cases, it would normally award a higher amount.[[50]](#footnote-50)

28.  While we entirely agree with the majority that both equity and flexibility have guided the Court in determining, in accordance with Article 41, the appropriate award to be made in the circumstances of a particular case, we would respectfully disagree with the majority as to when and how the Court’s discretion in this regard kicks in and subject to what it must be exercised. As indicated in paragraph 12 above, there is no doubt that Article 41 empowers the Court to make awards of just satisfaction. However, its power to do so is dependent on the factors listed in paragraph 11 and further conditioned by the Rules of Court outlined above.[[51]](#footnote-51)

29.  In addition, it is important to examine more closely the authorities on which the majority rely in §§ 70 to 72. When the Court considered, in the cases cited in § 70, that the finding of a violation constituted sufficient just satisfaction, it was clearly exercising its discretion as per the terms “just” and “if necessary” in Article 41 of the Convention. Perhaps even more importantly, in all the cases listed in § 70, a claim for just satisfaction had been duly made such that Article 41 was engaged. When applying the principle of *ne ultra petitum* to limit the amount of the awards in the cases referred to in § 71 of the judgment, the Court was again examining just satisfaction claims which had been duly submitted. Similarly, as regards the cases cited in § 72, in all of them except one, *Blesa Rodríguez*, where the applicant had merely indicated his wish for compensation in the application form, the applicants in question had made duly submitted claims but had expressly left the amount to the discretion of the Court.

30.  As regards Article 41 of the Convention, first and foremost it must be established that the internal law of the respondent State only provides for partial reparation.[[52]](#footnote-52) It is striking that this *threshold* condition is examined at the end rather than at the beginning of the majority judgment.[[53]](#footnote-53) It features, in fact, as one of the two compelling considerations to determine whether the Court should make an award of just satisfaction in the absence of a duly made claim.[[54]](#footnote-54) This sequence is questionable for this issue is, according to the terms of Article 41, the first which should be tackled before the Court exercises whatever power Article 41 confers on it. It is not an issue which falls to be determined when the Court is considering, in exceptional cases, whether to grant an award in the absence of a claim; it is a question the answer to which triggers the Court’s engagement with Article 41 in the first place.

31.  This leads us to one of the main points of disagreement we have with the majority. In essence, the latter consider that Article 41 of the Convention confers on the Court a power which, in certain exceptional cases, the Court can and should exercise regardless of express provisions conditioning the exercise of that power and its discretion in the Rules of Court.[[55]](#footnote-55) While we entirely agree with the need for the Court to act flexibly and in accordance with the principle of equity, procedural rules are there to ensure that it will do so only where a claim for just satisfaction is duly made and subject to certain conditions. In other words, we agree with the existence of a discretion in the hands of the Court, we disagree regarding the moment when this discretion can be exercised and insist that it is circumscribed – as all discretions should be – by clear, coherent and accessible procedural (and substantive) rules.[[56]](#footnote-56) The clarity of the Rules of Court – with which applicants need no longer comply in exceptional circumstances – and the clarity of the Court’s own case-law are both sacrificed. Indeed, jurisprudence interpreting and applying the Rules of Court is reduced to mere judicial practice; to be deviated from or overthrown as an individual case requires.

32.  The specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law[[57]](#footnote-57) does not mean that the European Court of Human Rights is absolved, *qua* human rights court, from observing the principle of *ne ultra petitum*. That would be an extraordinary proposition but it is one which, implicitly, underpins the majority judgment.

IV – Examination of the exceptional circumstances in which an award can be made in the absence of a claim

33.  Having decided to deviate from the prevailing case-law and the Rules of Court, the majority judgment then seeks to ensure that the Court “remains empowered to afford, *in a reasonable and restrained manner*, just satisfaction on account of non-pecuniary damage arising *in the exceptional circumstances of a given case*, where a ‘claim’ has not been properly made in compliance with the Rules of Court”.[[58]](#footnote-58) It does so by trying to set out, on the one hand, the prerequisites for the exercise of this power and, on the other, the compelling considerations which must determine whether the Court actually makes an award in the absence of a duly made claim.

Prerequisites for applying the exception

(i)  Need for an express wish to receive compensation

34.  The first prerequisite relates to the fact that “the Court would attach particular importance to indications unequivocally showing that an applicant expressed a wish to obtain monetary compensation in addition to recognition of the violation of the Convention”.[[59]](#footnote-59) In other words, it is preferable that the applicant indicate, presumably in his application, like the applicant in the instant case, that they wish to receive monetary compensation. However, as phrased, § 79 does not indicate either where this wish should be expressed, at what stage in the procedure and, if such a wish is not expressed, whether this will preclude or dissuade the Court from awarding compensation. It may do so but, the nature and scope of the discretion that the majority confer on the Court in the field of just satisfaction mean that it may not.

(ii)  Need for the establishment of a causal link

35.  The next prerequisite is that it will be necessary in any event to establish a causal link between the violation and the non-material harm arising from the violation of the Convention.[[60]](#footnote-60) This not only makes sense; it also reflects the Rules and established case-law.[[61]](#footnote-61) However, as pointed out above, it is difficult to envisage, given circumvention of the procedural rules which seek to provide precisely for the establishment and verification of this crucial causal link, how this will be done.[[62]](#footnote-62)

(iii)  Need for an adversarial procedure

36.  This brings us to the next point, which is neither a prerequisite nor a compelling consideration – the need for an adversarial procedure and the difficulties which arise in this regard as a result of the absence of a duly made claim.[[63]](#footnote-63)

37.  In § 77 of the Grand Chamber judgment, the majority stipulate that the exercise of the Court’s discretion under Article 41 should always take due account of the basic requirement of adversarial procedure. Again, this is entirely correct; but again, respect for the requirements of an adversarial procedure is precisely what the provisions of Rule 60 seek to ensure – an express, itemised, claim, duly made by the applicant in accordance with the relevant procedural rules and within a fixed time-limit (albeit extendable), with the possibility for the respondent State to comment on the claims and the receipt by the applicant of those comments.[[64]](#footnote-64)

38.  By creating an exception to Rule 60 in exceptional cases, the Grand Chamber risks doing two things. On the one hand, the length of proceedings before the Court will grow ever longer, as will its workload. A judgment on the merits will have to be followed by a separate judgment addressing just satisfaction because the latter question will not, to use the terms of Rule 75(1), be ready for decision. An exchange of observations will have to take place to ensure that the procedure is adversarial and to avoid the non‑pecuniary award being, in the words of the respondent State in the instant case, arbitrary.[[65]](#footnote-65) On average, it takes an additional 12 to 18 months for a separate Article 41 judgment to be handed down. Given the Court’s docket and its limited budget, this will involve time and resources that it cannot afford. In the instant case, in the absence of a claim at Chamber and Grand Chamber level,[[66]](#footnote-66) it is difficult to contend that the procedure has been truly adversarial.

39.  On the other hand, the “divergent” strand of cases on which the Chamber and Grand Chamber rely to justify an award in exceptional circumstances concern certain States only. Will this differentiated approach to exceptional awards continue after the Grand Chamber judgment in the instant case? If the *Nagmetov* precedent means what was divergent merely becomes exceptional but can be applied across the board, will it be applied consistently or will the undefined principles of equity, flexibility and necessity on which the Court’s discretion relies lead to differences in the quantum of the award depending on the respondent State?

Compelling considerations which govern the exception

(i)  Particular gravity and impact of the violation and overall context of the case

40.  The first compelling consideration which will determine if the Court makes an award in the absence of a duly made claim relates to the particular gravity and impact of the violation of the Convention and the overall context of the case. Did the violation, for example, significantly harm the moral well-being of the applicant, otherwise seriously affect his or her life or livelihood or cause another particularly significant disadvantage.[[67]](#footnote-67)

41.  This compelling consideration is interesting for a number of reasons. Firstly, the Grand Chamber provides for three cumulative conditions but attaches to these conditions not one, but two, illustrative lists of examples. The cumulative nature of the conditions is no doubt intended to restrict the circumstances in which the judicially-created exception applies. The use of “for example” and “for instance” is likely to have the opposite effect. Secondly, the terms of this compelling condition are quite loose and open-ended – violations of many different Convention articles in many different circumstances could come within these terms. Thirdly, it is noteworthy that the Grand Chamber did not accept the applicant’s invitation to pin the exception to the absolute nature of the right violated. This is both wise and worrying. It is wise because, as the majority themselves indicate, citing the violation of Article 8 of the Convention as a result of the proceedings leading to the adoption of the applicant’s daughter in *X. v. Croatia*,[[68]](#footnote-68) the violation of qualified rights may also have an enormous and tragic impact – such as the loss of one’s own child in adoption or child custody cases (a form of living death for some parents). In the small number of cases where the Court has granted an award in the absence of a duly made claim, it has, more often than not, justified its departure from the Rules of Court with reference to the absolute character of the article of the Convention violated[[69]](#footnote-69) or to the fundamental importance of the right at stake.[[70]](#footnote-70) However, in some other cases, no such justification for the award is provided, the latter being simply tied to the particular circumstances of the case.[[71]](#footnote-71) The breadth of the Grand Chamber’s language reveals the worrying aspect – namely, how difficult it will be for the Court to limit the parameters of its own judicially‑created exception. What will it do, for example, when faced with an Article 6 case resulting from child custody proceedings where what is at issue are due process rights with, however, in the background, the very real and tragic loss of access to children in a transnational custody dispute?[[72]](#footnote-72) It is not difficult to envisage the exception becoming so broad that it will further consume the rule from which it was intended to only exceptionally deviate.

42.  The majority judgment seeks, in §§ 79 to 82, to circumscribe the judicial exception created and it is to be applauded in this respect. Unfortunately, although it tries to do so by extracting a pattern from the divergent case-law, we would respectfully argue that it will be difficult to ensure clarity, transparency and coherence in the case-law when the exception is subsequently applied. Furthermore, some possible grounds for delimiting the scope of the exception are notable by their absence. Of relevance could be the fact that an applicant was not legally represented,[[73]](#footnote-73) was considered particularly vulnerable[[74]](#footnote-74) or was the victim of a double violation of an article having an absolute or fundamental character.[[75]](#footnote-75) While the vulnerability criterion might be an excessively fluid and subjective one, the other two are objective and easily verifiable.

(ii)  Provision of reparation under domestic law

43.  This compelling consideration was examined previously (see paragraph 30 above), where we questioned whether a consideration which determines whether Article 41 is triggered in the first place can also serve as a consideration delimiting when the judicially-created exception to the just satisfaction rule applies.

V – Consequences of and alternatives to the Grand Chamber’s decision

44.  The first consequence of the Grand Chamber’s judgment is likely to be, as indicated above, an increase in legal uncertainty. Even though the Court now confirms the divergent case-law which has allowed for the award of just satisfaction in exceptional cases in the absence of a specific claim, the terms delimiting the scope and application of this judicially-created exception may not be sufficiently clear and foreseeable for the reasons explained above. One might expect divergence as regards reliance on the exception, divergence as regards the quantum of damages which result from its application and even divergence as regards the respondent States with reference to which it is said to apply in the circumstances of each case. It is also striking that the majority judgment is framed in terms of the exceptional award by the Court of “just satisfaction” in the absence of a specific claim, but there is no discussion as regards whether this exception applies exclusively to non-pecuniary damage, the head at issue in the instant case. Paragraphs 69, 72-73, 79-80, 81, 83 and 92 of the majority judgment seem to limit the exception to the award of just satisfaction under that head but the reasoning of the majority in the remainder of the judgment refers to just satisfaction in general and, as such, to all three heads. While the applicant claimed neither moral damage nor costs and expenses, application of the requirements of the Rules of Court was suspended as regards the first omission but not as regards the second.[[76]](#footnote-76)

45.  The second consequence is even broader. It relates to compliance with the Rules of Court and the circumstances in which they – and the Practice Directions which clarify them – can be circumvented by the parties. A central tenet of the Court’s case-law on Article 6 of the Convention is that *domestic* rules governing the formal steps to be taken and the time-limits to be complied with in lodging court documents are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty. The Court has repeatedly signalled to litigants that they should expect those rules to be applied.[[77]](#footnote-77) Why would the Court, given this case-law, choose to undermine its own procedural rules in the manner outlined above? What the Court has found wanting under Article 6 are national rules which, in themselves, are excessively formalistic or which are applied by the authorities with excessive formalism.[[78]](#footnote-78) However, it can hardly be argued, in the instant case, that the Rules of Court were applied in an excessively formalistic manner. The applicant, who was legally represented, was informed that a wish for compensation expressed in his application form did not suffice and that a specific claim had to be submitted. The procedure for submitting a claim was explained and a deadline set. When this deadline was not respected, it was extended by the President of the Section but still not respected.

46.  It is also worth reflecting on the fact that the Grand Chamber, confronted as it was in this case with a large body of case-law against an award and a divergent, minority, strand of case-law in favour, had at its disposal an alternative. It could have upheld its prevailing case-law, confirming and clarifying for the future that the Rules of Court required the submission of a specific claim for an Article 41 award to be made, while highlighting why, in certain exceptional cases, the Rules as they stand at present fall short of what the Convention system requires. Since the Court, perhaps unique amongst international courts, possesses exclusive competence to adopt and amend the Rules of Court by virtue of Article 25(d) of the Convention, the plenary could have subsequently amended those rules and, specifically, the problematic Rule 60(3), if required. It is suggested that such a path, involving the drafting of procedural rules by a Court committee specialised in that field, their submission for observations to the High Contracting Parties and others and their approval by the plenary court and not a Grand Chamber formation representing a fraction of the Court, would have allowed for the establishment of clearer procedural rules while preserving the integrity of the Rules of Court more generally. A question of judicial and procedural policy would have been addressed in the appropriate forum and not with reference to the circumstances of an individual case.[[79]](#footnote-79)

47.  The circumstances of the present case are, unquestionably, tragic. The respondent State’s responsibility for the loss of life of a young man and its failure to investigate effectively the circumstances surrounding his death are the subject of a unanimous Chamber judgment, confirmed unanimously by the Grand Chamber. Nevertheless, it behoved the latter to introduce certainty where it presently lacks and to look beyond the individual circumstances of this case and this applicant. For the *legal* reasons outlined in detail above, we respectfully disagree with the Grand Chamber’s findings on just satisfaction, however *humane* an award of monetary compensation may appear to be in the tragic circumstances of a case like this.

1. .  See Rule 60 § 1: “… *must* make a specific claim to this effect.” [↑](#footnote-ref-1)
2. .  See paragraph 52 of the judgment: “I did not specify the amount because I could not at the time and cannot now ‘put a price’ on my son’s life, since it is without price.” [↑](#footnote-ref-2)
3. .  See the case-law cited in paragraph 59 of the judgment. As indicated below, we do not necessarily agree with the finding that no claim had been made in these cases; however, we do agree with the conclusion that, where no claim has been made, no award can be granted. [↑](#footnote-ref-3)
4. .  For applications of this principle in the case-law on Article 41 of the Convention, see, among other authorities, *Ilyushkin and Others v. Russia*, nos. 5734/08 and 28 other, § 76, 17 April 2012; *Pacifico and Others v. Italy*, nos. 34389/02, 34390/02, 34392/02 and 34458/02, § 44, 15 November 2012; *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 301, 27 January 2015; *Identoba and Others v. Georgia*, no. 73235/12, § 110, 12 May 2015; and *Kavaklıoğlu and Others v. Turkey*, no. 15397/02, § 301, 6 October 2015. [↑](#footnote-ref-4)
5. .  See also Rule 75 § 1: “Where the Chamber or the Committee finds that there has been a violation of the Convention or the Protocols thereto, it shall give in the same judgment a ruling on the application of Article 41 of the Convention *if a specific claim has been submitted in accordance with Rule 60* …” [↑](#footnote-ref-5)
6. .  See on this point also the joint dissenting opinion, § 20. [↑](#footnote-ref-6)
7. .  We note that this idea was clear in the original wording of Rule 60 § 2, adopted in 1998 and in force until the amendment of Rule 60 on 13 December 2004: “Itemised particulars of all claims made, together with the relevant supporting documents or vouchers, shall be submitted, failing which the Chamber may reject the claim in whole or in part.” [↑](#footnote-ref-7)
8. .  It is true that Rule 60 § 3 refers to the “preceding paragraphs”, including paragraph 1. This does not mean, in our opinion, that it also applies to the situation where no claim at all has been made. It can indeed apply to a situation where a claim has been made, but where this claim is, for instance, insufficiently “specific” (and where particulars of it have not subsequently been furnished). [↑](#footnote-ref-8)
9. .  See, among other authorities, *X v. Latvia* [GC], no. 27853/09, § 122, ECHR 2013, and *Nusret Kaya* *and Others v. Turkey*, nos. 43750/06, 43752/06, 32054/08, 37753/08 and 60915/08, § 91, ECHR 2014 (extracts). [↑](#footnote-ref-9)
10. .  See, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001‑VII; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004‑III; *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 194, 3 October 2008; and *Murray v. the Netherlands* [GC], no. 10511/10, § 88, ECHR 2016. [↑](#footnote-ref-10)
11. .  See *V.M. and Others v. Belgium* [GC], no. 60125/11, § 39, 17 November 2016. [↑](#footnote-ref-11)
12. .  The case-law cited by the majority does not prove the existence of such a practice. In *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, § 176, ECHR 2016 (extracts)) reference is made to a letter sent to the applicants telling them “that they were not *required*to amend the claims”. Obviously that does not mean that they were not *allowed* to amend the claims. In *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 167, ECHR 2015) it is only noted that the applicant “did not make any claims for just satisfaction in his observations.” In *Khan v. Germany* ([GC], no. 38030/12, § 45, 21 September 2016) it is noted that “the applicant was informed that her claims in respect of just satisfaction before the Chamber would be taken into account”. [↑](#footnote-ref-12)
13. .  See the joint dissenting opinion, § 46. [↑](#footnote-ref-13)
14. .  See the joint dissenting opinion, §§ 33-43. [↑](#footnote-ref-14)
15. .  The majority identify as “compelling considerations” the “particular gravity and impact of the violation, and [the] overall context of the case” and the “unavailability or partial availability of adequate reparation at domestic level”. It is these circumstances that, according to the majority, justify setting aside the otherwise obligatory rules. While the former criterion has to be taken into account in determining the amount to be awarded in respect of non-pecuniary damage, the latter is an essential precondition for an award as already explicitly stated in Article 41. [↑](#footnote-ref-15)
16. See § 47 and point 1 of the operative part of the Grand Chamber’s judgment. [↑](#footnote-ref-16)
17. A claim which has not been duly submitted refers to different circumstances – failure to submit a claim at all, failure to submit a claim despite having indicated in the application form that the applicant wished to receive compensation or failure to respect the deadlines established in the Rules of Court. [↑](#footnote-ref-17)
18. See, in this regard, *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 176, ECHR 2006; and *Salah v. Netherlands*, no. 8196/02, § 70, ECHR 2006-IX (extracts). [↑](#footnote-ref-18)
19. See, for a general discussion of Article 41, O. Ichim, *Just Satisfaction under the European Convention on Human Rights*, CUP, 2015, in particular, pp. 173-175; J. Laffranque, “Can’t Get Just Satisfaction” (2014) in A. Seibert-Fohr and M. E. Villiger (eds.): *Judgments of the European Court of Human Rights – Effects and Implementation*, Ashgate, p. 82; K. Reid, “A Practitioner’s Guide to the European Convention on Human Rights” (2nd edn. 2002) *Thomson, Sweet & Maxwell*, p. 546. [↑](#footnote-ref-19)
20. See below § 46 of this Opinion. [↑](#footnote-ref-20)
21. See §§ 41-42 of the majority judgment. [↑](#footnote-ref-21)
22. See, for the elucidation of these conditions, *De Wilde, Ooms and Versyp v. Belgium* (Article 50), judgment 10 March 1972, Series A no. 14, § 21. [↑](#footnote-ref-22)
23. Note also the use of “empowers” in § 57 of the majority judgment and in Grand Chamber judgments such as *Karácsonyi v. Hungary*, no. 37494/02, § 179, 18 April 2006 and *O'Keeffe v. Ireland* [GC], no. 35810/09, §199, 28 January 2014. See also point 1 of the Practice Direction on just satisfaction claims, issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007: “1. The award of just satisfaction is not an automatic consequence of a finding by the [ECtHR] that there has been a violation of a right guaranteed by the [ECHR] or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only “if necessary” (s’il y a lieu in the French text), makes this clear.” [↑](#footnote-ref-23)
24. Article 41 of the Convention was inspired by Article 10 of the German Swiss Treaty on Arbitration and Conciliation of 1921 and Article 32 of the Geneva General Act for the Pacific Settlement of International Disputes of 1928. Note that Articles 24(1) and 25(d) of the Convention indicate that the Court shall have a registry whose functions and organisation shall be laid down in the rules of the Court and that the plenary court is competent to adopt the latter (see *De Wilde, Ooms and Versyp*, cited above, § 16). On the exclusive competence of the Court to adopt, and amend, its own procedural rules and the alternative route this provided the Court to resolve a case such as this, see below paragraph 46. [↑](#footnote-ref-24)
25. Pursuant to Article 34 of the Convention, the Court may receive individual applications and, pursuant to Article 35 it shall not deal with certain types of applications or applications in certain circumstances. These bare rules are further clarified and conditioned by the Rules of Court – not least Rules 38 and 47 – and by the Practice Directions on the institution of proceedings and on written pleadings. These rules are applied rigidly and formalistically by the Court and failure to comply with them lead to thousands of complaints not being examined every year. [↑](#footnote-ref-25)
26. See further, for example, the analysis of the different heads in *Neumeister v. Austria* (Article 50), judgment of 7 May 1974, Series A no. 17, §§ 40-43; and, as regards Article 41, *Lechoisne and Others v. France*, no. 61173/00, § 28, 17 June 2003: “Under Rule 60 § 2 of the Rules of Court, the applicants *must submit itemised particulars of all claims* under Article 41 of the Convention, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part” (emphasis added). [↑](#footnote-ref-26)
27. See Article 75 of the Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90. [↑](#footnote-ref-27)
28. See also *Cyprus v. Turkey* (Just satisfaction), no. 25781/94, § 42, 12 May 2014. [↑](#footnote-ref-28)
29. See further § 46 below [↑](#footnote-ref-29)
30. *Andrea Corsi v. Italy* (Revision), no. 42210/98, § 12, 2 October 2003, emphasis added. See also *Sykora v. Slovakia*, no. 26077/03, §§ 31-32, 18 January 2011; *Fadil Yilmaz v. Turkey*, no. 28171/02, §§ 26-27, 21 July 2005; and *Chiorean v. Romania*, no. 20535/03, §§ 31-34, 21 October 2008. The need to respect deadlines is emphasised by Rule 38(1), Rule 60 and by the Practice Direction. [↑](#footnote-ref-30)
31. *Sunday Times v. United Kingdom* (Article 50), no. 6538/74, § 14, 6 November 1980. See also *Francesco Lombardo v. Italy*, judgment of 26 November 1992, Series A no. 249-B, § 25; or *Nasri v. France*, no. 19465/92, § 49, A 320-B, 1995. [↑](#footnote-ref-31)
32. *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 166-170, 15 December 2015. The applicant had specified the amount of compensation sought both in his application form and orally before the Grand Chamber. His failure to comply with the requirements of Rule 60 despite, as in the instant case, clear instructions from the Court’s registry and legal representation, led to the Court making no award. [↑](#footnote-ref-32)
33. For the requirement that a procedure be adversarial see, for example, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 27, § 67 and *Vermeulen v. Belgium*, judgment of 20 February 1996, Reports 1996-I, p. 234, § 33. [↑](#footnote-ref-33)
34. The letter received by the applicant’s representative in the instant case reflects the standard and established practice under the Rules of Court. See *Willekens v. Belgium*, no. 50859/99, § 27, 24 April 2003. Note also that, pursuant to Rule 37(1), communications or notifications addressed to the agents or advocates of the parties shall be deemed to have been addressed to the parties. [↑](#footnote-ref-34)
35. This equivocal language only reappears in one other place, point 5 of the Practice Direction: “Thus, the Court requires specific claims supported by appropriate documentary evidence, *failing which it may make no award”*. However, the same point continues: “The Court *will also reject* claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time.” The contrast between the two sentences may mean that the failure referred to in the first sentence is a failure to submit appropriate documentary evidence. In other words, the failure to itemise (possibly fatal) is distinguished from the failure to submit (fatal). [↑](#footnote-ref-35)
36. See §§ 67 (reliance on the use of “may” in Rule 60(3)), 74 (reliance on the use of “shall” in Article 41) and 76 of the majority judgment (reliance on the fact that Article 41 is a norm of a higher hierarchical value than the Rules of Court). [↑](#footnote-ref-36)
37. See also Ichim,cited above*,* pp. 52 and 77,who observes, respectively, that “Cases of a victim-oriented approach supported by *ultra petita* awards of reparation are relatively scant” and “the Court refrains not only from making *ex officio* awards, but also from ruling *ultra petita*”, albeit he proceeds, on p. 77, to detail some examples from the divergent strand of case-law on which the majority rely and which they today confirm. [↑](#footnote-ref-37)
38. See points 10-12 of the Practice Direction on pecuniary damage, points 13-15 on non‑pecuniary damage and points 16-21 on costs and expenses. [↑](#footnote-ref-38)
39. See, for example, for no award of pecuniary damage where the causal link could not be established, *inter alia*, *Saunders v. United Kingdom*, no. 19187/91, § 86, 17 December 1996; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII; and *Saadi v. Italy* [GC], no. 37201/06, §187, ECHR 2008-II. [↑](#footnote-ref-39)
40. See, for example, *Sunday Times v. United Kingdom* (Article 50), cited above, § 23 and *Jalloh v. Germany* [GC], no. 54810/00, §133, ECHR 2006-IX. [↑](#footnote-ref-40)
41. The Practice Direction recognises this – applicants who wish to be compensated for non-pecuniary damage are “invited” to specify a sum which in their view would be equitable – as does the Court’s case-law. The Court has made awards where the applicants have failed to quantify the amount, “leaving it to the Court’s discretion”. The case-law of the Court also recognises this. See, for example, the authorities cited at § 72 of the majority judgment. It is important to stress, however, that with the exception of the applicant in *Blesa Rodríguez v. Spain*, no. 61131/12, 1 December 2015, who had indicated a wish for compensation only in the application form, all other applicants listed had submitted a claim but had asked that the decision on quantum be at the discretion of the Court. [↑](#footnote-ref-41)
42. See §§ 59 and 75 of the majority judgment. [↑](#footnote-ref-42)
43. Ibid., § 64. [↑](#footnote-ref-43)
44. Ibid., § 65. [↑](#footnote-ref-44)
45. Ibid., § 66. [↑](#footnote-ref-45)
46. Ibid., §§ 67 and 74. [↑](#footnote-ref-46)
47. Ibid., § 69. [↑](#footnote-ref-47)
48. Ibid., §§ 70 and 72. [↑](#footnote-ref-48)
49. Ibid., § 73. [↑](#footnote-ref-49)
50. Ibid., § 71. [↑](#footnote-ref-50)
51. The Court has generally referred to the fact that it enjoys a “*certain* discretion in the *exercise* of the power conferred by Article 50 [Article 41]” a fact borne out by the expressions “just” and “if necessary” – see, for example, *Guzzardi v. Italy*, no. 7367/76, § 114, 6 November 1980 and *Perdigao v. Portugal* [GC], no. 24768/06, § 85, 16 November 2010. In addition, it has recognised that its jurisdiction under Article 41 of the Convention is limited: see variously *Velikova v. Bulgaria*, no. 41488/98 § 96, ECHR 2000-VI; *Philis v. Greece* (No. 1), judgment of 27 August 1991, Series A no. 209, p. 27, § 79; and *Allenet de Ribemont v. France*, judgment of 7 August 1996, Reports 1996-III, p. 910, §§ 18-19 (where it reminded the Commission not only of the bounds established by the Rules of Court but also of the limits to its own contentious jurisdiction under the Convention). [↑](#footnote-ref-51)
52. For an analysis of the origins of this threshold condition and some of the difficulties it raises see the partly concurring opinion of Judge Zupancic in *Lucà v. Italy*, no. 33354/96, ECHR 2001-II. [↑](#footnote-ref-52)
53. See §§ 88-91 of the majority judgment. [↑](#footnote-ref-53)
54. Ibid., § 82. [↑](#footnote-ref-54)
55. On the under-defined concept of necessity see *Ringeisen v. Austria* (Article 50), judgment of 22 June 1972, Series A no. 15, § 22, where the Court indicated that just satisfaction is necessary where the respondent Government has refused the applicant the reparation to which he considered himself entitled. [↑](#footnote-ref-55)
56. See, in support of our interpretation, point 14 of the Practice Direction. See also the joint concurring opinion of Judges Nussberger and Lemmens (§ 4) on this same point of fundamental divergence. [↑](#footnote-ref-56)
57. See *Cyprus v. Turkey* (Just Satisfaction), cited above, § 42. [↑](#footnote-ref-57)
58. See § 76 of the majority judgment, emphasis added. [↑](#footnote-ref-58)
59. Ibid., § 79. [↑](#footnote-ref-59)
60. Idem. [↑](#footnote-ref-60)
61. See *Andrejeva v. Latvia* [GC], no. 55707/00, § 111, 18 February 2009: “the indispensable condition for making an award in respect of pecuniary damage is the existence of a causal link […] and this is also true of non-pecuniary damage”. [↑](#footnote-ref-61)
62. See Rule 60(1), (2) and (4), as further clarified in the Practice Direction. [↑](#footnote-ref-62)
63. See above § 18 for the comments on Rule 60(4). [↑](#footnote-ref-63)
64. See the description of the provisions and operation of Rule 60 in §§ 15-20 above. [↑](#footnote-ref-64)
65. See § 55 of the majority judgment. [↑](#footnote-ref-65)
66. See §§ 60-63 of the majority judgment. Before the Grand Chamber, the applicant’s representative invited the latter simply to affirm the Chamber judgment but, as indicated in §  52 of the majority judgment, submitted no further claim for just satisfaction under any of the three heads. [↑](#footnote-ref-66)
67. See § 81 of the majority judgment. [↑](#footnote-ref-67)
68. See *X. v. Croatia* no. 11223/04, §§ 61-63, 17 July 2008. [↑](#footnote-ref-68)
69. See, for example, *Mayzit v. Russia*, no. 63378/00, § 88, 20 January 2005; *Igor Ivanov v. Russia*, no. 34000/02, § 50, 7 June 2007; *Babushkin v. Russia*, no. 67253/01, § 62, 18 October 2007; *Chember v. Russia*, no. 7188/03, § 77, 3 July 2008; *Chudun v. Russia*, no. 20641/04, § 129, 21 June 2011; and *Boordin v. Russia*, no. 41867/04, § 166, 6 November 2012, which all concerned violations of Article 3 of the Convention by the Russian Federation. [↑](#footnote-ref-69)
70. See, for example, *Rusu v. Austria*, no. 34082/02, § 62, 2 October 2008; and *Crabtree v. the Czech Republic*, no. 41116/04, § 60, 25 February 2010, which pointed to the fundamental importance of the Article 5 rights violated. See also *Kats v. Ukraine*, no. 29971/04, 18 December 2008, which concerned Article 2 and in which a claim had been submitted albeit out of time. The Court made an award for non-pecuniary damage due to the “fundamental character” of the right in Article 2. [↑](#footnote-ref-70)
71. See, for example, *Davtyan v. Georgia*, no. 73241/01, § 71, 27 July 2006. [↑](#footnote-ref-71)
72. See, for example, *Henrioud v. France*, no. 21444/11, 5 November 2011, where in a case involving loss of child custody and access to the applicant’s children, the Court merely found a violation of Article 6(1) of the Convention due to the excessive formalism of the French courts. See also, in the context of Article 8, *Yusopova v. Russia*, no. 66157/14, 20 December 2016. [↑](#footnote-ref-72)
73. See, for example, *Dorogaykin v. Russia*, no. 1066/05, §§ 48-49, 10 February 2011. [↑](#footnote-ref-73)
74. See, for example, *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 84, 27 January 2015. [↑](#footnote-ref-74)
75. See, for example, *Bursuc v. Romania*, no. 42066/98, 12 October 2004 and *Chember*, cited above, although the Court did not explicitly say this fact was relevant to its decision to award damages in the absence of a duly submitted claim. [↑](#footnote-ref-75)
76. In the absence of a claim for costs and expenses, the Court declares itself barred from awarding them – see § 93 of the majority judgment. [↑](#footnote-ref-76)
77. See, *inter alia*, *Miragall Escolano v. Spain*, nos. 38366/79 et seq., § 33, 25 January 2000; *Tricard v. France*, no. 40472/98, § 29, 10 July 2001; and *Marc Brauer v. Germany*, no. 24062/13, §§ 34 and 42, 1 September 2016. See also, the recent Grand Chamber decision in *V.M. and others v. Belgium* [GC] (Striking Out), no. 60125/11, § 35, 17 November 2016, which referred to the Rules of Court and the requirement, in the interests of the proper administration of justice, that applicants and their representatives stay in touch during the proceedings before the Court. [↑](#footnote-ref-77)
78. See, for example, *Marc Brauer*, cited above, § 43. [↑](#footnote-ref-78)
79. See also the joint concurring opinion of Judges Nussberger and Lemmens (§ 18). [↑](#footnote-ref-79)