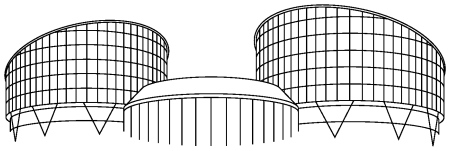

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HUSEYNOVA v. AZERBAIJAN

(Application no. 10653/10)

JUDGMENT

STRASBOURG

13 April 2017

FINAL

13/07/2017

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

In the case of Huseynova v. Azerbaijan,

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

Angelika Nußberger, *President,*
Erik Møse,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 7 March 2017,

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

PROCEDURE

1. The case originated in an application (no. 10653/10) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Ms Rushaniya Saidovna Huseynova (*Ruşaniyə Saidovna Hüseynova* – "the applicant"), on 17 February 2010. The applicant acquired Norwegian citizenship on 7 November 2014.

2. The applicant was represented by Mr K. Rognlien, a lawyer practising in Oslo. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged that her husband had been murdered by State agents and that the domestic authorities had failed to conduct an effective investigation. She further alleged that the killing of her husband had constituted a breach of the right to freedom of expression, as he had been targeted on account of his journalistic activity.

4. On 29 June 2015 the application was communicated to the Government.

5. On 15 December 2016 the Norwegian Government informed the Court that they would not exercise their right to intervene in the proceedings as a third party (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1978 and lives in Norway.

A. Journalistic activity of the applicant's husband

7. Mr Elmar Huseynov, the applicant's husband, was a prominent independent journalist in Azerbaijan. At the time of the events he worked as the editor-in-chief of the weekly magazine *Monitor*, which was strongly critical of the Government as well as the opposition. He had also been the owner of the magazine since 1996 and wrote analytical and investigative articles for each edition under his own name.

8. Various civil and criminal proceedings had been brought against Mr Huseynov since the beginning of his journalistic activity for the publication of critical articles about the President of Azerbaijan and members of his family, and about members of the parliament, Government and other State officials. In total, thirty-four proceedings were instituted against him by various public officials. Moreover, copies of the magazine had been confiscated on several occasions and the domestic authorities sometimes prevented its publication.

9. According to the applicant, her husband regularly received threats because of his critical articles. In particular, in January 2004 a police officer had threatened him with death and told him to stop writing about the President and his family.

B. Murder of the applicant's husband and public reaction

10. At around 9 p.m. on 2 March 2005, Mr Huseynov was shot dead on the third floor of his apartment building as he returned home from work.

11. Mr Huseynov's murder received wide local and international media coverage and was unanimously condemned by various politicians, international organisations, and local and international NGOs.

C. Criminal investigation into the murder

12. On 2 March 2005 criminal proceedings were instituted under Articles 120.2.4 (murder) and 228.1 (illegal possession of weapons) of the Criminal Code by the Serious Crimes Department ("the SCD") of the Prosecutor General's Office.

13. On the same day a record relating to the inspection of the scene of the crime and the examination of the body (*hadisə yerinə və meyitə baxış*

keçirilməsi haqqında protokol) was drawn up. It appears from the record that one bullet and seven cartridges were found at the crime scene and that two bullets were removed from the body.

14. On 3 March 2005 the investigator in charge of the case ordered a post-mortem examination of the body, which was carried out on the same day. Report no. 27 dated 10 March 2005 showed that death had resulted from bleeding caused by gunshot wounds. The expert also found that death was likely to have occurred a few minutes after the injuries had been sustained.

15. On 3 March 2005 a pistol with a silencer and a knitted hat were found near the crime scene. On the same day the investigator ordered forensic medical, ballistic and chemical trace examinations of the pistol and silencer, the bullets, the cartridges, the victim's hair and nails, and the clothes that he had been wearing on 2 March 2005. Report no. 2074/2108/2109, dated 7 March 2005, concluded that the pistol in question was a Baikal pistol that had been produced in 2003 in Russia and that it had been used in the murder.

16. Still on 3 March 2005 the investigator asked a telecommunications company to provide details on any mobile telephones that had been used near the scene of the crime between 8.30 p.m. and 9 p.m. on 2 March 2005.

17. On 4 March 2003 the Prosecutor General's Office, the Ministry of Internal Affairs ("the MIA") and the Ministry of National Security ("the MNS") issued a joint statement officially informing the public of the institution of criminal proceedings in connection with the murder of the applicant's husband.

18. On 5 March 2005 the crime scene was again inspected by the investigator.

19. On the same day the investigator questioned the applicant as a witness in connection with her husband's murder. She stated that she had not seen the killer, but that from February 2005 a person, who had introduced himself as Vusal, had come to their flat on several occasions and asked for a meeting with her husband. He had always arrived when her husband had been absent and had asked various questions about his whereabouts and working hours. The applicant further stated that she could not say who had murdered her husband, but she was sure that he had been murdered because of his journalistic activity.

20. On 7 March 2005 a photofit picture of the person who had introduced himself as Vusal was compiled on the basis of the applicant's statements.

21. On 8 March 2005 the investigator arranged an identity parade in the presence of the applicant. However, she could not identify the man who had called himself Vusal among the people who took part in the identity parade.

22. On 19 March 2005 the applicant was granted victim status.

23. Further to various requests sent in March 2005 to the Russian authorities concerning the pistol found at the crime scene, the Russian authorities confirmed that the pistol in question had been produced in Russia as a gas pistol and had then been exported to Bulgaria on the basis of a contract with a Bulgarian company. It further appears from a letter, dated 23 March 2005 and signed by the Bulgarian Deputy Minister of Internal Affairs, that there was no record on the buyer of the pistol after its import to Bulgaria because Bulgarian legislation did not provide for such records for the buying and selling of gas pistols.

24. In the meantime, the prosecuting authorities identified two mobile telephone numbers which had allegedly been used by the perpetrators of the murder. On 26 March 2005 T.B., an Azerbaijani national, was charged under Article 320.1 of the Criminal Code (use of false documents) as he had purchased the mobile telephone numbers in a mobile telephone shop in Baku by giving false information about his identity. During questioning, T.B. stated that on 27 February 2005 he had bought the numbers at the request of T.X. and T.A., who had asked him to obtain a telephone number registered in someone else's name. He further stated that he knew the men from Georgia where he was born and they had told him that they were in Baku on business. It appears from the documents in the case file that in July 2005 the Nizami District Court found T.B. guilty under Article 320.1 of the Criminal Code and sentenced him to two years' imprisonment.

25. On 6 April 2005 the Prosecutor General reclassified the criminal case under Articles 277 (acts of terror) and 228.1 (illegal possession of weapons) of the Criminal Code and decided to hand the investigation over to the MNS.

26. On 3 May 2005 the investigator in the case showed the applicant four photographs in order to try to identify the person who had introduced himself as Vusal. The applicant identified the individual in photograph no. 2 as that person.

27. On the same day the investigator charged T.X., a Georgian national, under the aforementioned Articles 277 and 228.1 and issued a warrant for his arrest. It appears from the investigator's decision that T.X. was suspected of being involved in the murder and had been identified as the person calling himself Vusal.

28. On 4 May 2005 the Prosecutor General's Office, the MIA and the MNS issued a joint statement that T.X. had been identified as the person involved in the murder. The statement also noted that T.X. had left the country immediately after the murder and that an arrest warrant had been issued. It also indicated that T.X. had been identified by the applicant as the person who had introduced himself as Vusal before the murder. Lastly, the statement pointed out that the investigation was being carried out in collaboration with the Federal Bureau of Investigation of the United States of America ("the FBI") and Turkey's Central Security Department.

29. It appears from the case file that on 5 May 2005 the investigator questioned T.X.'s sister and son, who resided in Azerbaijan.

30. In the meantime, on 4 May 2005 the investigator ordered a new ballistic and chemical examination of the pistol and silencer found at the scene of the crime. The investigator noted that although the examination of 7 March 2005 had concluded that the pistol was a Baikal firearm produced in 2003 in Russia, the material collected during the investigation had revealed that the pistol had not been produced as a regular firearm but as a gas pistol that had subsequently been modified. On 27 May 2005 a panel composed of three experts issued report no. 4351/4352/4358 on the new ballistic and chemical examination of the pistol and the silencer. The experts reiterated the findings of the 7 March 2005 report (see paragraph 15 above), concluding that the pistol had been produced as a firearm and had not been modified.

31. On 11 May 2005 the investigator questioned the applicant about a suspicious person that she had seen in their building in February 2005.

32. On 20 May 2005 the Prosecutor General's Office, the MIA and the MNS issued a new statement, informing the public that T.A., a Georgian national, had been identified as another suspect. The statement said that a warrant for his arrest had been issued.

33. It appears from a letter dated 27 May 2005, signed by the head of the Azerbaijani National Central Bureau of Interpol, that notices relating to T.X. and T.A. had gone out via Interpol.

34. The case file shows that in March and May 2005 the investigating authorities submitted hair samples to the FBI for a trace evidence examination. They were taken from the hat found near the scene of the crime and from pillowcases found in the flat that T.X. and T.A. had rented in Baku. The results of the examination revealed that some fibres found on the hat and pillowcases had the same microscopic characteristics and optical properties, consistent with them having come from the same source.

35. On 31 May 2005 the applicant wrote to the MNS asking for information concerning the progress of the investigation. In particular, she noted that although she had been recognised as a victim, the investigating authorities had failed to share any information on the investigation with her.

36. It can be seen in a document dated 8 June 2005, signed by the investigator, that he informed the applicant by telephone about the investigation. In particular, he informed her that various investigative actions had been conducted, that T.X. and T.A. had been identified as the perpetrators of the murder, that an international warrant for their arrest had been issued and that some forensic examinations had been carried out by the FBI.

37. On 2 June and 12 July 2005 the Prosecutor General's Office and the MNS issued joint statements on the forensic examinations carried out in the

United States of America. They stated that the results of the examinations had confirmed that T.X. and T.A. were directly involved in the murder.

38. In the meantime, on 16 and 30 May 2005 the Azerbaijani authorities asked the Georgian authorities to extradite T.X. and T.A.

39. By a letter of 1 July 2005, signed by the Deputy Prosecutor General of the Republic of Georgia, the Georgian authorities refused to extradite T.X. and T.A. on the grounds that as they were Georgian nationals they could not be extradited to a foreign country. However, relying on the CIS Convention on Legal Assistance and Legal relations in Civil, Family and Criminal Matters of 22 January 1993 and the Treaty between Azerbaijan and Georgia on Legal Assistance and Legal relations in Civil, Family and Criminal Matters of 8 March 1996 (see paragraphs 66-70 below), the Deputy Prosecutor General stated in the same letter that the Georgian authorities undertook to institute criminal proceedings against its two nationals at the request of the Azerbaijani authorities in case of the transfer of the criminal case to the Georgian authorities.

40. By two separate letters, dated 20 July 2005, the Prosecutor General of Azerbaijan again asked his Georgian counterpart for the arrest and extradition of T.X. and T.A. The Prosecutor General also asked the Georgian authorities to provide legal assistance to the Azerbaijani authorities by allowing two Azerbaijani investigators to conduct investigative actions on Georgian soil.

41. In July and August 2005 the Georgian authorities conducted various investigative actions at the request of their Azerbaijani counterparts. In particular, on 26 July 2005 two flats in Tbilisi were searched and various people were questioned in connection with the criminal proceedings instituted in Azerbaijan.

42. On 9 August 2005 the investigator showed various photographs to the applicant for identification. Although the applicant stated that she had seen two of the people on the photographs somewhere before, she could not remember more details about them.

43. On 15 August and 6 September 2005 the investigator questioned the applicant about her neighbours and the clothes worn by the man who called himself Vusal.

44. On 20 November 2005 the applicant again wrote to the MNS, asking for an effective investigation into the murder of her husband. She further asked the investigating authorities to provide her with information about the progress of the investigation.

45. On 30 November and 20 December 2005 the investigator ordered further ballistic and trace evidence examinations, in particular asking the experts to compare the pistol found at the scene of the crime with another pistol found in a different murder case. The experts' reports, dated 15 December 2005 and 19 January 2006, concluded that the pistol found at

the scene of the murder of the applicant's husband had not been used in the commission of the other murder.

46. According to the applicant, she was threatened after her husband's murder because she said that the domestic authorities had been involved. On an unspecified date in 2006 the applicant left Azerbaijan for Norway, where she was granted asylum.

47. On 4 May 2006 the investigator questioned a cousin of T.X. who resided in Azerbaijan.

48. On 14 November 2006 the investigator again questioned the sister of T.X. who resided in Azerbaijan.

49. On 30 November 2006 the investigator carried out a reconstruction of the murder. In particular, the investigator retraced the path the applicant's husband had taken from his workplace to where he had been murdered.

50. In September and October 2005, in February, September and November 2006 and in July 2007 the Georgian authorities conducted various investigative actions at the request of their Azerbaijani counterparts. In particular, by a letter of 3 October 2006 the Office of the Prosecutor General of Georgia informed the Azerbaijani authorities that the Georgian prosecuting authorities had questioned T.A., who had used his right to remain silent. In that connection, it appears from the record of the questioning, which took place on 11 September 2006, that T.A. invoked his right to remain silent, stated that he did not consider himself guilty and that he had no confidence in the investigation conducted by the Azerbaijani authorities. The Georgian prosecuting authorities also informed their Azerbaijani counterparts by the same letter that they could not conduct any investigative actions in respect of T.X. as it had not been possible to establish his whereabouts.

51. By a letter of 11 February 2008 the applicant's Azerbaijani lawyer asked the MNS to provide the applicant with information about the progress of the investigation. In particular, the lawyer pointed out that although three years had elapsed since the institution of criminal proceedings, the applicant had still not been informed about the progress of the investigation or the decisions that had been taken. He further asked the investigating authorities to allow the applicant to familiarise herself with the criminal case file and to provide her with copies of the relevant documents.

52. By a letter of 12 March 2008, signed by the head of the investigation department of the MNS, the MNS informed the lawyer that the applicant had been informed orally about the progress of the investigation. It was further stated that in accordance with Articles 87 and 102 of the Code of Criminal Procedure (see paragraph 61 below) the applicant had the right to familiarise herself with the case file and obtain copies of documents only when the preliminary investigation was over. The letter also said that the Azerbaijani authorities had asked the Georgian authorities to extradite the murderers and were continuing to take the necessary steps to achieve that

goal. Lastly, it was noted that members of the investigative group had been sent to Georgia several times and that the investigation was ongoing.

53. On 13 May 2008 the investigator questioned T.B. (see paragraph 24 above) about the whereabouts of T.X. and T.A. It appears from the record of the questioning that T.B. stated that he had not seen them since his release from detention on 19 March 2007 and that he had no information about their whereabouts.

54. By a letter dated 14 June 2008 the National Central Bureau of Interpol informed the head of the investigation department of the MNS that T.X. and T.A. were not registered as being in Russia.

55. On 4 July 2008 the applicant's Norwegian lawyer and the Norwegian Helsinki Committee wrote to the Prosecutor General's Office and the MNS asking for the documents relating to the criminal investigation of the murder of the applicant's husband.

56. By a letter of 18 July 2008 the MNS informed the applicant's Norwegian lawyer that as he was not a member of the Azerbaijani Bar Association and had failed to submit a notarised power of attorney, he could not obtain copies of the documents. Relying on Articles 87 and 102 of the Code of Criminal Procedure, the letter also stated that a victim or his or her representative could only have access to a case file and the relevant documents following the termination of the preliminary investigation. The letter also informed the applicant's lawyer that the criminal investigation was still ongoing.

57. On 30 January 2009 the applicant herself wrote to the MNS, reiterating her previous requests. In particular, she asked the investigating authorities to provide her with the documents relating to the investigation, to inform her of the progress of the investigation and of the date when the investigation would end.

58. By a letter dated 17 March 2009 the MNS informed the applicant that her request for access to the case file had been examined. However, in accordance with Articles 87 and 102 of the Code of Criminal Procedure a victim or her representative could only have access to the case file and the relevant documents after the termination of the preliminary investigation. The letter, which was twelve pages long, contained a detailed summary of the investigative steps conducted from the institution of criminal proceedings until March 2009. It stated that the investigation had identified T.X. and T.A. as the perpetrators of the murder and that any information received relating to the possible involvement of various people in the crime had been examined. In that connection, the letter referred to allegations submitted to the investigating authority in August 2006 and August 2007 by people arrested in connection with other criminal cases, as well as information revealed by various journalists and NGO activists in November 2006 and March 2009 about the identity of T.X. and T.A. However, the investigation had not substantiated any of those allegations. The letter also

stated that the preliminary investigation was still ongoing and had been extended until 2 September 2009.

59. By a letter of 17 March 2009 the National Central Bureau of Interpol in Azerbaijan informed the head of the investigation department of the MNS that T.A. was living in Tbilisi in Georgia. However, his extradition had been refused by the Georgian authorities on the grounds that he was a Georgian national. The information was based on a letter dated 6 March 2009 from the Georgian National Central Bureau of Interpol to the Azerbaijani National Central Bureau of Interpol.

60. At the time of the most recent communication with the parties on 3 February 2016, when the last observations were filed by the Government, the criminal proceedings were still ongoing.

II. RELEVANT DOMESTIC LAW

61. Under Articles 87.6 and 102.6 of the Code of Criminal Procedure of Azerbaijan ("the CCrP"), a person recognised as a victim, or his or her representative, has various procedural rights within the framework of criminal proceedings. Articles 87.6.10 and 102.6.8 provide that a victim or his or her representative have the right to familiarise themselves with the criminal case file and to obtain copies of relevant documents following the termination of the preliminary investigation or the discontinuation of the criminal proceedings.

62. Chapter LII of the CCrP lays down the procedure by which parties to criminal proceedings may challenge the actions or decisions of prosecuting authorities before a court. In particular, Article 449.3.5 provides that a victim or counsel may challenge within the criminal proceedings the actions or decisions of prosecuting authorities concerning a refusal to institute criminal proceedings, or the suspension or termination of criminal proceedings. The judge examining the lawfulness of the prosecuting authorities' actions or decisions may quash them if he or she finds them to be unlawful (Article 451). The judge's decision may be challenged in an appellate court, in accordance with the procedure set out in Articles 452 and 453 of the CCrP.

III. RELEVANT INTERNATIONAL DOCUMENTS

A. The European Convention on Extradition

63. The European Convention on Extradition was signed on 13 December 1957 in Paris, and both Azerbaijan and Georgia are parties. It entered into force in respect of Azerbaijan on 26 September 2002 and in respect of Georgia on 13 September 2001.

64. Article 1 provides that the Contracting Parties, subject to the provisions and conditions laid down in the Convention, undertake to surrender to each other all persons against whom the competent authorities of the requesting Party have begun proceedings for an offence or who are wanted by the said authorities for the execution of a sentence or detention order.

65. In accordance with Article 6 § 1, a Contracting Party has the right to refuse to extradite its nationals. However, if the requested Party does not extradite its nationals, it must, at the request of the requesting Party, submit the case to its competent authorities so that proceedings may be taken if they are considered appropriate (Article 6 § 2).

B. The 1993 CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters ("the 1993 Minsk Convention")

66. The 1993 Minsk Convention was signed on 22 January 1993 in Minsk, and Azerbaijan and Georgia are both parties. It entered into force in respect of both countries on 11 July 1996.

67. Article 56 provides that the Contracting Parties undertake, subject to the conditions set out in the Convention and at the request of one of the Parties, to hand over to each other any persons found in their territory for the purpose of criminal prosecution or the enforcement of a judgment delivered against them. The extradition is not performed if the person to be extradited is a citizen of the requested Contracting Party (Article 57 § 1).

68. Article 72 provides that each Contracting Party is obliged, by the commission of another Contracting Party, to institute criminal proceedings against its own citizens suspected of committing a criminal offence on the territory of the requesting Contracting Party. If the requesting Contracting party transfers a criminal case which has already been instituted to the requested Contracting Party, the latter must continue the investigation in accordance with its own legislation (Article 73).

C. The Treaty on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters between Azerbaijan and Georgia

69. The Treaty on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters was signed on 8 March 1996 in Tbilisi between Azerbaijan and Georgia and the instruments of ratification were exchanged between the parties on 20 January 1997.

70. Article 48 establishes an obligation for the Contracting Parties to extradite to each other people found on their territory in the context of criminal proceedings. Although Article 50 excludes the extradition of nationals of the requested Contracting Party to the requesting Contracting

Party, Article 63 provides that each Contracting Party undertakes to institute criminal proceedings, at the request of the other Contracting Party, against any of its own nationals suspected of committing a criminal offence on the territory of the requesting Contracting Party.

D. Council of Europe documents

71. In its Resolution 1456(2005) the Parliamentary Assembly of the Council of Europe strongly condemned the murder of Mr Elmar Huseynov, noting that it had spread a climate of fear amongst the opposition press.

72. The following is an extract from Recommendation CM/Rec(2016)4 of the Committee of Ministers of the Council of Europe to member States on the protection of journalism and safety of journalists and other media actors:

> "19. Investigations must be effective in the sense that they are capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible. The authorities must take every reasonable step to collect all the evidence concerning the incident. The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate. State authorities are also obliged to investigate the existence of a possible link between racist attitudes and an act of violence. The relevance of gender-related issues should also be investigated."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

73. Relying on Articles 2 and 13 of the Convention, the applicant complained that her husband had been murdered by State agents and that the domestic authorities had failed to conduct an effective investigation. The Court considers that the present complaint falls to be examined solely under Article 2 of the Convention, which reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life ..."

A. Admissibility

1. The parties' submissions

74. According to the Government, the applicant had failed to exhaust domestic remedies because she had failed to bring the complaints made to

the Court before the domestic authorities. In particular, they submitted that the applicant had had the right to mount a challenge in the domestic courts to the procedural actions or decisions of the investigating authorities, in accordance with Article 449 of the CCrP.

75. The Government also argued that the applicant had failed to comply with the six-month rule. The MNS had given a comprehensive reply to the applicant's request for information by a letter dated 17 March 2009, but the applicant had not lodged her application with the Court until 17 February 2010. In the Government's view, if she had considered that the MNS's answer of 17 March 2009 had violated her rights, she should have lodged her application with the Court earlier than 17 February 2010.

76. The applicant disagreed with the Government's submissions, arguing that there had been no effective domestic remedies for the complaints she had raised before the Court. She submitted that the Government's reliance on Article 449 of the CCrP could not be considered relevant in the present case as those provisions governed exclusively the possibility to challenge investigating authorities' decisions relating to the suspension or discontinuation of criminal proceedings. However, as specified in the MNS's letter of 17 March 2009 and the Government's observations, the criminal investigation into the murder of her husband was still ongoing.

77. The applicant also contested the Government's objection as regards compliance with the six-month rule. She submitted that the six-month period had not yet started running because the criminal investigation was still ongoing.

2. The Court's assessment

(a) Exhaustion of domestic remedies

78. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should be made first to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, although there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports of Judgments and Decisions* 1996-IV; *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports* 1996-VI; and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 71-73, 25 March 2014).

79. As regards the distribution of the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time, that is to say that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Akdivar and Others*, cited above, § 68, and *Muradova v. Azerbaijan*, no. 22684/05, § 84, 2 April 2009).

80. Turning to the circumstances of the present case, the Court observes that the Government submitted that the applicant had failed to exhaust domestic remedies because she had not challenged the actions or decisions of the investigating authorities before the domestic courts, in accordance with Article 449 of the CCrP (see paragraph 62 above). The Court notes that the provisions of the CCrP to which the Government referred allow to challenge the prosecuting authorities' actions or decisions to suspend or terminate criminal proceedings, or to refuse to institute them. However, in the present case the criminal proceedings instituted by the prosecuting authorities were still ongoing at the time of the most recent communication with the parties. Therefore, there has been no decision by the investigating authorities to suspend or terminate them.

81. In those circumstances, the Court does not see which decision or action by the prosecuting authorities the applicant should have challenged before the domestic courts before lodging her application with the Court. Moreover, in another case against Azerbaijan examined by the Court, the domestic courts refused to examine a complaint by applicants who had used Article 449 of the CCrP to challenge a prosecution decision to extend the time-limit for an ongoing investigation into the murder of their son. The courts in that case found that Article 449 clearly established the extent of the actions and decisions of prosecuting authorities which could be challenged in court (see *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, §§ 36-38, 31 July 2014).

82. The Court also cannot overlook the fact that the applicant, having no access to the material in the case file during the course of the criminal proceedings, despite repeated requests, could not have effectively challenged the investigating authorities' decisions or actions in court (compare *Estamirova v. Russia*, no. 27365/07, § 94, 17 April 2012).

83. For the above reasons, the Court finds that the complaint cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection in this respect must be dismissed.

(b) Compliance with the six-month rule

84. The Court notes at the outset that it cannot accept the Government's objection relating to compliance with the six-month rule, inasmuch as that objection could be understood to mean that the six-month period started to run on 17 March 2009, namely the date of the MNS's letter to the applicant (see paragraph 58 above). The letter in question was not a decision and has no bearing on the issue of compliance with the six-month rule. It simply informed the applicant of the progress of the investigation, indicating that various investigative actions had been taken and that she could not have access to the case file at that stage of the investigation. The Court also notes that the applicant did not complain to the Court that the letter had violated her rights; rather, she complained that her husband had been murdered by State agents and that the investigation into the murder had not been effective. However, it remains for the Court to examine whether the applicant can be criticised for having waited for almost five years after the start of the investigation into the murder of her husband before lodging her application with the Court.

85. In that connection, the Court observes that in a number of cases concerning ongoing investigations into the death of applicants' relatives it has examined the period of time from which the applicant could or should start doubting the effectiveness of a remedy and its bearing on the six-month time-limit provided for in Article 35 § 1 of the Convention (see *Narin v. Turkey*, no. 18907/02, §§ 40-51, with further references, 15 December 2009; *Deari and Others v. the Former Yugoslav Republic of Macedonia* (dec.), no. 54415/09, §§ 41-50, 6 March 2012; and *Bogdanović v. Croatia* (dec.), no. 72254/11, §§ 31-45, 18 March 2014). The Court has found that in cases concerning instances of violent death, the ineffectiveness of the investigation will generally be more readily apparent than in cases of missing persons; the requirement of expedition may require an applicant to bring such a case to Strasbourg within a matter of months or at most, depending on the circumstances, just a few years after the events (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., § 158, ECHR 2009). Stricter expectations would apply in cases where there was a complete absence of any investigation or progress in an investigation, or meaningful contact with the authorities. Where there is an investigation of sorts, even if plagued by problems, or where a criminal prosecution is being pursued, even by the relatives themselves, the Court accepts that applicants may reasonably wait longer for developments which could potentially resolve crucial factual or legal issues. It is in the interests of not only the applicant but also the efficacy of the Convention system that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention (see *Mučibabić v. Serbia*, no. 34661/07, § 108, 12 July 2016).

86. As can be seen from the case-law referred to above, the Court has refrained from indicating a specific period beyond which an investigation is deemed to have become ineffective for the purposes of assessing the date from which the six-month period starts to run (see *Bogdanović*, cited above, §§ 36 and 43). The determination of whether the applicant in a given case has complied with the admissibility criteria will depend on the circumstances of the case and other factors such as the diligence and interest displayed by the applicant, as well as the adequacy of the investigation in question (see *Narin*, cited above, § 43, and *Cindrić and Bešlić v. Croatia*, no. 72152/13, § 58, 6 September 2016).

87. In particular, the Court has rejected applications as submitted out of time where there had been an excessive or unexplained delay on the part of applicants once they had, or ought to have, become aware that no investigation had been instigated or that the investigation had lapsed into inaction or become ineffective and, in any of those eventualities, there was no immediate, realistic prospect of an effective investigation being provided in the future (see, *inter alia*, *Narin*, cited above, § 51; *Aydinlar and Others v. Turkey* (dec.), no. 3575/05, 9 March 2010; and *Frandes v. Romania* (dec.), no. 35802/05, 17 May 2011). In other words, the Court has considered it indispensable that persons who wish to bring a complaint about the ineffectiveness or lack of such an investigation before the Court do not delay unduly in lodging their application. Where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a time when the relatives must realise that no effective investigation has been, or will be, provided (see *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 268, ECHR 2014 (extracts)).

88. Turning to the circumstances of the present case, the Court observes that the investigation into the murder of the applicant's husband commenced on 2 March 2005 and that the applicant lodged her application with the Court on 17 February 2010 (see paragraphs 12 and 1 above). The investigation was still ongoing at the time of the most recent communication with the parties. In that connection, the Court notes that it appears from the Government's observations that they did not submit all the documents relating to the criminal investigation to the Court, only the case file material that they considered relevant to the Court's questions. In any event, it can be seen in the documents submitted by the Government that although the main investigative steps were carried out in the first few months after the murder in 2005, it could not be said that the investigation subsequently became passive and that no further steps were taken. In particular, it appears from those documents that from 2006 to 2009 numerous investigative actions were conducted in Azerbaijan and Georgia at the request of the Azerbaijani authorities. Moreover, in March 2009, when the Azerbaijani authorities replied to the applicant's last request about the progress of the investigation,

they were still corresponding with the Georgian authorities with a view to establishing the whereabouts of one of the suspects and having him extradited to Azerbaijan (see paragraph 59 above).

89. The Court further observes that the applicant displayed a constant interest in the progress of the investigation and maintained contact with the investigating authorities (see paragraphs 19, 21, 26, 31, 35, 42, 43 and 44 above). Also after her departure from Azerbaijan, she continued to enquire about the investigation through her lawyers and tried to obtain information about its progress (see paragraphs 51, 55 and 57 above). The investigation authorities' replies to her requests were not limited to just providing a mere summary of the activities that had been undertaken, without indicating any possibility of progress in the investigation. Each time they clearly indicated that the investigation was ongoing and that further investigative steps would be taken. In particular, the MNS's last reply to the applicant clearly stated that the investigation had been extended to 2 September 2009 and that further investigative and operational search measures would be taken by the investigation (see paragraph 58 above).

90. In the light of the foregoing, the Court considers that there were no periods of total inactivity in the criminal proceedings before March 2009 so as to allow the Court to establish a date on which the applicant was or could have been aware that domestic remedies had become ineffective. The applicant could thus still realistically expect that an effective investigation would be carried out when she received the investigating authorities' letter of 17 March 2009. She therefore acted reasonably by waiting until 2 September 2009 for further developments in the criminal proceedings and the six-month period could not have started to run before that date. Accordingly, the applicant has complied with the six-month time-limit and the Government's objection must be rejected.

(c) Conclusion as to admissibility

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

B. Merits

1. As to the murder of the applicant's husband

(a) The parties' submissions

92. The applicant submitted that her husband had been murdered by State agents because of his journalistic activity. She also argued that the State had failed to protect her husband's right to life because the State knew or ought to have known about a risk to his life. Her husband had been

regularly threatened and targeted by numerous legal proceedings, and before his murder he had written in *Monitor* about a risk to his life.

93. The Government contested the applicant's submissions. They submitted that there was no evidence of any involvement by the State or its agents in the murder of the applicant's husband. The applicant's husband had never applied to the domestic authorities or informed them of any danger or threat to his life.

(b) The Court's assessment

94. The Court observes that it was not disputed by the parties that Elmar Huseynov died as a result of gunshot wounds. The questions to decide in the present case are, firstly, whether the State authorities were involved in one way or another in the murder of the applicant's husband, as the applicant alleged, and, secondly, whether the domestic authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's husband and failed to protect his right to life.

95. As regards the first question, the Court is conscious of the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, with further references, ECHR 2011 (extracts)). Nevertheless, since Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted, the Court must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 131, ECHR 2014). However, for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of "beyond reasonable doubt", and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161; *Adalı v. Turkey*, no. 38187/97, § 216, 31 March 2005; and *Giuliani and Gaggio*, cited above, § 181).

96. Bearing in mind the above principles, the Court observes that the applicant made allegations about the involvement of State agents or the State in general in the murder of her husband. In her submissions to the Court and in the statement which she made to the domestic authorities, she stated that her husband had been murdered because of his journalistic activity.

97. However, the Court considers that the above-mentioned allegations, in the absence of any evidence, do not enable it to find beyond reasonable doubt that the applicant's husband was murdered by State agents or that the State was behind his murder. In particular, although he published numerous articles criticising various State officials, there is no direct or indirect evidence proving that the State or any of its agents was involved in any way in the murder. In the light of the above, the Court cannot conclude beyond all reasonable doubt that the applicant's husband was murdered by a State agent or that the State was behind the murder (compare *Adalı*, cited above, §§ 217-220).

98. As regards the second question, the Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; *Branko Tomašić and Others v. Croatia*, no. 46598/06, §§ 49-50, 15 January 2009; and *Opuz v. Turkey*, no. 33401/02, § 128, ECHR 2009).

99. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of a particular individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII; *Gongadze v. Ukraine*, no. 34056/02, §§ 164-171, ECHR 2005-XI; and *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, §§ 64-75, 14 September 2010).

100. Turning to the circumstances of the present case, the Court observes that although the applicant submitted that her husband had been regularly threatened because of his articles (see paragraph 92 above), she

did not dispute the Government's submission that he had never applied to the domestic authorities or informed them of any danger or threat to his life (compare *Gongadze*, cited above, §§ 167-168).

101. The Court further observes that there was no material in the case file indicating that at any time before the murder of the applicant's husband the law-enforcement authorities had been aware of any danger to his life or had held any information which might give rise to such a possibility (compare *Dink*, cited above, §§ 66-70).

102. For those reasons, the Court considers that it has no evidence indicating that the domestic authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's husband, which is the requirement according to its case-law (see paragraph 99 above), and failed to protect his right to life. Accordingly, there has been no violation of the substantive limb of Article 2 of the Convention.

2. Alleged failure to carry out an effective investigation

(a) The parties' submissions

103. The applicant maintained that the criminal investigation had been ineffective. In particular, she submitted that the domestic authorities had failed to take all the measures available to them in order to bring the perpetrators of the murder to justice.

104. The Government submitted that the investigation had been effective and had complied with the procedural guarantees provided for by Article 2 of the Convention.

(b) The Court's assessment

105. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 103, ECHR 1999-IV; *Branko Tomašić and Others*, cited above, § 62; and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 230, ECHR 2016). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II, and *Mezhiyeva v. Russia*, no. 44297/06, § 72, 16 April 2015).

106. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur*

v. Turkey [GC], no. 21594/93, § 88, ECHR 1999-III). This is an obligation not of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or people responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention (see, for example, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 173-74, 14 April 2015). Moreover, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice. In all cases, the next of kin of the victim must be involved in the procedure to such an extent as is necessary to safeguard his or her legitimate interests (see *Aliyeva and Aliyev*, cited above, § 70).

107. A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Mikayil Mammadov v. Azerbaijan*, no. 4762/05, § 105, 17 December 2009, and *Armani Da Silva*, cited above, § 237).

108. Turning to the circumstances of the present case, the Court observes that although criminal proceedings were instituted immediately after the murder of the applicant's husband and numerous investigative actions were taken, the criminal proceedings were still ongoing at the time of the most recent communication with the parties and the perpetrators of the crime have not yet been prosecuted.

109. In that connection, the Court observes a number of shortcomings in the criminal investigation carried out by the domestic authorities.

110. Firstly, the Court notes that although in May 2005 two people, T.X. and T.A., were identified as suspects by the investigation, the domestic authorities failed to take all the measures available to them in order to obtain their prosecution. The Court considers it necessary to reiterate that the State's obligation under Article 2 of the Convention to carry out an effective investigation capable of leading to the identification and punishment of those responsible is not an obligation of result, but of means. In that connection, the Court accepts that in some situations, such as in the present case, where the suspects were on the territory of another State which refused to extradite them, there may be particular obstacles which can hinder the progress of a criminal investigation, and Azerbaijan cannot be held liable for another State's decision not to extradite its nationals (compare *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 65, 15 February 2011, and *Nježić and Štimac v. Croatia*, no. 29823/13, § 68, 9 April 2015).

111. However, the refusal of the Georgian authorities to extradite the suspects did not prevent the Azerbaijani authorities from examining the feasibility of transferring the criminal case to the Georgian authorities in order for the murder charge to be prosecuted there, and the prospects of success if the case were so transferred. The Court notes that various international legal instruments, such as the European Convention on Extradition, the 1993 Minsk Convention and the Treaty on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 8 March 1996, to which both States were parties, clearly provided for such a possibility (see paragraphs 65, 68 and 70 above). Moreover, the Georgian authorities expressly referred to that possibility in their reply to the extradition request from the Azerbaijani authorities, indicating that they undertook to prosecute the suspects at the request of the Azerbaijani authorities if the criminal case was transferred to the Georgian authorities (see paragraph 39 above). However, there is no evidence that the Azerbaijani authorities examined the possibility of prosecuting the alleged perpetrators of the murder in Georgia by transferring the criminal case there. No explanation was provided by the Government in this respect.

112. The Court further notes that the present case should be distinguished from the cases relating to serious violations of international humanitarian law in the former Yugoslavia, where the applicants could have reported their case themselves to the relevant prosecutor of the State refusing to extradite its nationals, who had jurisdiction over serious violations of international humanitarian law committed anywhere in the former Yugoslavia (see *Palić*, cited above, § 65, and *Nježić and Štimac*, cited above, § 68). In the present case the applicant did not have the possibility to apply directly to the Georgian authorities and the alleged perpetrators of the murder could be prosecuted in Georgia only at the request of the Azerbaijani authorities following a transfer of the criminal case.

113. Secondly, the Court notes that even though the applicant was granted victim status in the investigation, the investigating authorities constantly denied her access to the case file during the investigation and she only obtained copies of some documents from the case file for the first time when the Government submitted their observations to the Court. In that connection, the Court cannot accept the investigating authorities' reliance on the domestic law for justifying that situation and finds it unacceptable that under the relevant domestic law the applicant had no access whatsoever to the relevant case materials during the investigation (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 250, 26 April 2011). That situation deprived the applicant of the opportunity to safeguard her legitimate interests and prevented any scrutiny of the investigation by the public (see *Slimani v. France*, no. 57671/00, §§ 44-48, ECHR 2004-IX (extracts), and *Beker v. Turkey*, no. 27866/03, § 49, 24 March 2009).

114. Thirdly, the Court considers that the criminal investigation was not carried out promptly, taking into account its overall length of over twelve years.

115. Fourthly, having regard to the overall factual context of the case, the Court considers that the applicant's allegations that the killing of her husband was related to his activities as a journalist were not at all implausible. The magazine that he had operated independently had a reputation of being strongly critical of the Government and the opposition; its publication or dissemination had been interfered with by the authorities; and over thirty civil and criminal proceedings had been brought against him (see paragraphs 7 and 8 above). It was apparent that his murder could have a "chilling effect" on the work of other journalists in the country. In such circumstances, there was every reason for the investigating authorities to explore with particular diligence whether the murder, which appears to have been carefully planned, could be linked to Mr Huseynov's journalistic activities, or to come up with another plausible explanation for the motives behind the murder. However, having regard to the material in the case file, it does not appear that adequate steps were taken during the investigation to inquire sufficiently into the motives behind the killing of Mr Huseynov and to investigate the possibility that the attack could have been linked to his work as a journalist (compare *Adalı*, cited above, § 231, and *Uzeyir Jafarov v. Azerbaijan*, no. 54204/08, § 52, 29 January 2015).

116. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the killing of the applicant's husband. It accordingly holds that there has been a violation of Article 2 under its procedural limb.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

117. The applicant complained that there had been a violation of the right to freedom of expression since her husband had been killed because of his journalistic activity. Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

118. The Government contested that argument.

119. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

120. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest which the public is, moreover, entitled to receive (see, for example, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 131, ECHR 2012). The Court also reiterates that the key importance of freedom of expression as one of the preconditions for a functioning democracy is such that the genuine, effective exercise of this freedom is not dependent merely on the State's duty not to interfere, but may call for positive measures of protection, even in the sphere of relations between individuals (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 59, with further references, ECHR 2011). In particular, the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear (see *Dink*, cited above, § 137).

121. Turning to the circumstances of the present case, the Court observes that the present application should be distinguished from cases in which it found a violation of Articles 2 or 3 of the Convention under their substantive limb because the State had failed to protect the right to life of a journalist (compare *Dink*, cited above, § 137) or a journalist was subjected to the use of force by a State agent (compare *Najafli v. Azerbaijan*, no. 2594/07, § 67, 2 October 2012). In the present case, although the Court has found a violation of Article 2 of the Convention under its procedural limb, it could not establish that the applicant's husband was murdered by a State agent, that the State was behind the killing or that the State failed to protect his right to life in accordance with its positive obligations (see, *mutatis mutandis*, *Uzeyir Jafarov*, cited above, § 69).

122. The Court considers that the present case should also be distinguished from the case of *Özgür Gündem* where the domestic authorities – which were aware of a series of violent actions against a newspaper and people associated with it – did not take any action to protect the newspaper and its journalists (see *Özgür Gündem v. Turkey*, no. 23144/93, § 44, ECHR 2000-III). In the present case, in contrast, at the time of the events in question, neither the applicant's husband nor *Monitor* magazine had been subjected to acts of violence. Moreover, as the Court has already found, it does not appear from the documents in the case file that the applicant's husband lodged any application or request for protection with the domestic authorities before his murder (see paragraph 100 above).

123. In those circumstances, the Court observes that the only issue remaining under Article 10 of the Convention is that of establishing whether or not the right to freedom of expression was violated on account of the domestic authorities' failure to conduct an effective investigation into the killing of the applicant's husband. However, the Court notes that the applicant's allegations in this respect arise out of the same facts as those already examined under Article 2 and that it has already found a violation of that provision under its procedural limb because of the ineffectiveness of the investigation into the killing of the applicant's husband (see paragraph 116 above).

124. Having regard to those findings (including its observations in paragraph 115 above), the Court considers that it is not necessary to examine the complaint under Article 10 of the Convention separately (see *Adalı*, cited above, § 260, and *Uzeyir Jafarov*, cited above, §§ 71-72).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

126. The applicant claimed 384,000 euros (EUR) in respect of pecuniary damage for the loss of income caused by the death of her husband.

127. The Government contested the claim, noting that it was unsubstantiated and that there was no causal link between the alleged violation and the pecuniary damage allegedly sustained.

128. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

2. Non-pecuniary damage

129. The applicant claimed EUR 25,000 in respect of non-pecuniary damage. She also claimed EUR 25,000 in respect of non-pecuniary damage in respect of her son.

130. The Government contested the claim, submitting that the application had been lodged only on behalf of the applicant and that therefore she could not claim any compensation in respect of her son. The Government also submitted that the amount claimed was excessive.

131. The Court notes that it cannot accept the applicant's claim in respect of her son as the present application was lodged with the Court only by her on behalf of the applicant. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation, and that compensation should thus be awarded. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 20,000 under this head, plus any tax that may be chargeable on this amount (see *Mikayil Mammadov*, cited above, § 150).

B. Costs and expenses

132. The applicant claimed EUR 17,469 for costs and expenses incurred before the Court. In support of her claim, she submitted an invoice detailing the number of hours spent by the lawyer on the case and the lawyer's hourly rates (131 hours at the rate of NOK 1,000).

133. The Government considered that the claim was unsubstantiated and lacked documentary evidence. In particular, they argued that the applicant had failed to submit a power of attorney to the Court or a copy of the contract concluded with her representative. They also submitted that the amount claimed was excessive and that EUR 2,000 would constitute reasonable compensation for costs and expenses.

134. The Court notes that the applicant submitted a valid authority form to the Court with her application, which was sent to the Government when the application was communicated.

135. The Court further reiterates that according to its established case-law costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are reasonable as to quantum. Moreover, legal costs are only recoverable in so far as they relate to the violation found (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 176, ECHR 2008, and *Farhad Aliyev v. Azerbaijan*, no. 37138/06, §§ 245-46, 9 November 2010).

136. In that connection, the Court observes that in the present case it is undisputed that the representative provided relevant documentation and observations, as requested by the Court. However, the Court notes that it has found a violation of Article 2 of the Convention only under its procedural limb. In those circumstances, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been no violation of Article 2 of the Convention under its substantive limb;

3. *Holds*, unanimously, that there has been a violation of Article 2 of the Convention under its procedural limb;

4. *Holds*, by five votes to two, that there is no need to examine the complaint under Article 10 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President

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

A.N.
M.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES NUSSBERGER AND VEHABOVIĆ

I. Killing of journalists – a fundamental threat to Convention values

1. Nothing can have a more chilling effect on freedom of expression than the murder of a courageous and well-known journalist when the perpetrators of the crime are not identified. We cannot agree with the majority that in such a case it is "not necessary" to analyse Article 10 of the Convention.[1] It is more than necessary.

2. In the context of the present case it is worthwhile recalling the reaction of the Parliamentary Assembly of the Council of Europe:

> "8. The Assembly strongly condemns the murder of Elmar Huseynov, editor of the weekly magazine Monitor, and the climate of fear that this murder has spread amongst the opposition press. It deplores the legal and administrative harassment to which opposition newspapers continue to be subjected and the difficulties in setting up and operating independent and critical television channels."

3. More generally, point 19 of Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors reads as follows:

> "19. Investigations must be effective in the sense that they are capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible. The authorities must take every reasonable step to collect all the evidence concerning the incident. The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate. State authorities are also obliged to investigate the existence of a possible link between racist attitudes and an act of violence. The relevance of gender-related issues should also be investigated."[2]

4. The Chamber has held that there was a procedural violation of Article 2 of the Convention in that the domestic authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the killing of Elmar Huseynov. We fully subscribe to this finding, but consider that this is not sufficient in order to capture adequately the human-rights violations in this case.

5. In recent years the Court has extensively developed its case-law on procedural violations of Article 2 of the Convention. This provision has been applied not only to deaths resulting from the intentional use of force by agents of the State, but has been expanded to include all situations where the

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[1] Paragraph 24 of the judgment, point 4 of the operative provisions.

[2] Resolution 1456(2005) of 22 June 2005 of the Parliamentary Assembly of the Council of Europe on the Functioning of democratic institutions in Azerbaijan.

responsibility for a death was not efficiently or speedily investigated, even in "everyday cases" such as road-traffic accidents[3] and medical malpractice.[4] Thus the finding of a procedural violation of Article 2 has to a certain degree lost its stigmatising effect. Taken alone, and not in combination with Article 10, it cannot by any means reflect the existential threat to human rights and democracy posed by murders of journalists that are not adequately investigated.

II. Case-law of the Court on the procedural limb of Article 10 of the *Convention*

6. It is true that the procedural aspect of Article 10 of the Convention has not yet been comprehensively developed in the Court's case-law, although several steps in this direction have been taken.

7. Thus, the Court has emphasized that public debate is possible only if opinions and ideas can be expressed without fear.[5] In this context it has confirmed that the protection of freedom of expression may call for positive measures, even in the sphere of relations between individuals.[6] Article 10 has thus been considered to be relevant in assessing the adequacy of protective measures necessary to prevent violence against journalists.

8. However, the Court has not to date found it necessary to specify the obligations arising under Article 10 with regard to investigations into the killing of journalists, i.e. the measures to be taken in order to punish those responsible. In 2005, in the case of *Adalı v. Turkey*[7], the Court was confronted with the inadequate investigation into the murder of a journalist in the "TRNC" who had received death threats on several occasions because of his articles and political opinions. Although the Court held that the widow's allegations that her husband's killing was related to his activities as a journalist were not implausible and that the authorities failed to inquire sufficiently into the motives behind the killing,[8] the Court came to the conclusion that "the applicant's allegations arise out of the same facts as those examined under Article 2 of the Convention".[9] It did not therefore consider it necessary to examine this complaint also under Article 10 of the

[3] See *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007; *Anna Todorova v. Bulgaria*, no. 23302/03, § 72, 24 May 2011; *Prynda v. Ukraine*, no. 10904/05, § 50, 31 July 2012.
[4] See, for example, *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII, and *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009.
[5] See *Dink v. Turkey*, nos. 2668/07 and 4 others, § 137, 14 September 2010.
[6] See *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000, § 43, ECHR 2000-III; *Dink v. Turkey*, cited above, § 106; and *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000.
[7] See *Adalı v. Turkey*, no. 38187/97, 31 March 2005.
[8] See *Adalı v. Turkey*, cited above, § 231.
[9] See *Adalı v. Turkey*, cited above, § 260.

Convention. This approach was upheld in the case of *Uzeyir Jafarov v. Azerbaijan*, which concerned not a death but a violent attack on a journalist.[10]

III. Shortcomings in the Court's approach to the lack of an investigation into the killing of journalists

9. The consequence of the approach the Court has adopted so far is that the motives behind the killing of a journalist are not given any prominence. In contrast to this approach, we consider that – seen from the human-rights perspective – the potential motives behind the killing of a journalist, namely, the wish to silence a critical voice in a country, differ substantially from the motives behind what might be called "ordinary crimes". To analyse the lack of an investigation in both cases in exactly the same way under Article 2 appears to us inadequate. Admittedly, the majority sought to take into account the "chilling effect" of the murder and confirmed the duty of the authorities "to explore with particular diligence whether the murder, which appears to have been carefully planned, could be linked to Mr Huseynov's journalistic activities".[11] But, in our view, this is a crucial aspect of the judgment which should have been taken up and elaborated further under Article 10 of the Convention.

10. The Court often resorts to the "not-necessary-formula" if it deems that the analysis of a case under one provision of the Convention sufficiently reflects all the human-rights violations at stake, so that any further analysis would have no added value.

11. But in cases such as the present one, an analysis under Article 10 does have an added value.

IV. Interpretation of procedural violations of Article 2 in the light of Article 10 of the Convention

12. It follows that it is necessary to interpret the lack of an investigation into the killing of a journalist in the context of the Convention as a whole. An analysis under the procedural limb of Article 2 taken together with Article 10 of the Convention could reveal the specific features of this fundamental human-rights violation.

13. Such an approach would be similar to the approach followed in cases of racial discrimination, where the Court has established that the finding of a violation of Article 2 of the Convention is not sufficient to adequately

[10] See *Uzeyir Jafarov v. Azerbaijan*, no. 54204/08, § 71, 29 January 2015.
[11] Paragraph 115 of the judgment.

reflect the wrong-doing and the intensity of the human-rights violation.[12] In such cases the Court has held: "Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights."[13] In our view, the same can be said for violence against journalists, although here the value at stake is not discrimination, but freedom of expression. But the destructive effect on human rights is the same. Therefore, the Court should not turn a blind eye to the fact that, as explained in a discussion paper issued by the Commissioner for Human Rights, murders of journalists are to be understood as "the most extreme form of censorship".[14]

14. In our opinion, this point is crucial in this particular case and in this particular political context. If it is omitted, the central question of the case, which is of utmost importance for democracy, political pluralism and human rights in general, has not been addressed adequately.

[12] See *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 146, 160-168 ECHR 2005-VII; *Šečić v. Croatia*, no. 40116/02, § 70, 31 May 2007; *Angelova and Iliev v. Bulgaria*, no. 55523/00, § 117, 26 July 2007.

[13] See *Nachova and Others v. Bulgaria*, cited above, § 160; *Balázs v. Hungary*, no. 15529/12, § 52, 20 October 2015.

[14] Commissioner for Human Rights, Protection of Journalists from Violence, Issue Discussion Paper, CommDH/(2011)44, p.8.