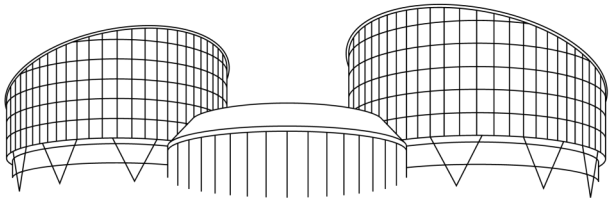

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PANKOV v. BULGARIA

(Application no. 12773/03)

JUDGMENT

STRASBOURG

7 October 2010

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

In the case of Pankov v. Bulgaria,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 31 August 2010,

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

PROCEDURE

1. The case originated in an application (no. 12773/03) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Ivaylo Yavorov Pankov ("the applicant"), on 28 March 2003.

2. The applicant was represented by Mr Y. Grozev, a lawyer practising in Sofia and by Mr B. Boev, formerly a lawyer practising in Sofia, who on 7 October 2008 was granted leave under Rule 36 § 4 (a) *in fine* of the Rules of Court to continue representing the applicant. The Bulgarian Government ("the Government") were represented by their Agents, Ms N. Nikolova and Ms S. Atanasova, of the Ministry of Justice.

3. The applicant alleged that his life-threatening injury sustained during military shooting practice was due to the use of deadly force by another serviceman, that the authorities failed to take the necessary precautions to prevent that from happening, and that the ensuing investigation was not effective.

4. On 4 December 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Pleven.

A. The incident of 22 July 1999

6. In April 1999 the applicant was conscripted into the Bulgarian Army to perform his mandatory military service. He was serving in a regiment in the town of Gorna Banya. In mid-July 1999 the regiment doctor relieved him from physical exercise and daily duty because of illness. Nevertheless, on the night of 21 July 1999 he was assigned to night duty.

7. After finishing his duty, in the morning of 22 July 1999 the applicant was sent, together with other soldiers from his regiment, to shooting practice at a military shooting range near the town of Slivnitsa. During the practice soldiers from the applicant's regiment and another regiment were present on the range. The applicant performed his task, which consisted of firing twelve rounds. After that he handed back all spent cartridge cases and was sent to a watchtower to guard against outsiders penetrating into the range. The tower was a square concrete construction 9.3 metres long and 7 metres wide. In the middle it had a three-metre-high chimney.

8. At about 11.10 a.m., minutes after climbing up the tower, the applicant was shot in the abdomen. According to the findings of the ensuing investigation, the shot was fired at close range from his own automatic rifle, whose breechblock he was trying to fix without following the applicable safety procedures. The applicant disputes those findings and asserts that the shot was in all probability fired by another soldier from afar.

9. After the shot the applicant fell down on the roof of the tower, screaming and moaning. Chief Lieutenant P.P., who was sitting with a few soldiers from his regiment at the foot of the tower, rushed up the stairs. He brought the applicant down with the help of soldier T. and medical officer N.G., who were also at the foot of the tower and climbed up after the shot.

10. After that the applicant was put into an ambulance and transported, accompanied by medical officer N.G., to the Military Medical Academy in Sofia, where he underwent life-saving surgical operations on 23, 26 and 27 July 1999. On 28 July 1999 his condition was found to be serious but stable. He was discharged from hospital on 9 September 1999, and later received a medical discharge from the army.

B. The investigation

11. On the day of the incident a military investigator, notified by the military police, opened a preliminary investigation whose aim was to "determine the causes and the circumstances in which [the applicant] shot himself".

12. At 2.30 p.m. the investigator inspected the scene of the incident. He found that it had not been preserved intact. He described in detail everything he found. He also identified, on the basis of the statement of Chief Lieutenant P.P., the likely positions of the applicant's body and of his rifle "after the shot". He impounded the rifle, a half-scrubbed and oxygenated cartridge case, some pieces of dark reddish matter, dactyloscopic traces from the rifle, and traces from the surface of the tower.

13. Later that day the hospital where the applicant had been operated upon sent the investigator the piece of skin surrounding his entry wound and acetone smears from his palms. The applicant's commander handed over to the investigator the shirt he had been wearing during the shooting and some of his personal items.

14. The next day, 23 July 1999, the investigator interviewed Chief Lieutenant P.P., a sergeant responsible for counting the targets at the shooting range, the applicant's mother, and Captain Y.P., the officer in charge of the shooting practice. He also ordered a complex ballistic, microbiological and physicochemical report and a medical expert report.

15. Chief Lieutenant P.P. said that while he was sitting at the foot of the watchtower he heard a single shot from above, much louder than those coming from the firing range, and then heard screaming from the top of the tower. He climbed up the stairs and saw the applicant lying on the ground, moaning and tossing his upper body up and down. He noticed that the applicant's shirt was unbuttoned and that he had a wound on the left side of his abdomen. The wound did not have a clear shape and looked more like a star than a hole. It was surrounded by a round black patch with a diameter of five to seven centimetres and consisting of many black spots close together. The lieutenant saw another wound on the applicant's back, with a clear round shape, one centimetre in diameter, with a little blood on it. He also saw the applicant's rifle, which did not have a round in its chamber, had its safety lever down and was in semi-automatic mode.

16. Captain Y.P. handed over to the investigator the order and the plan for the shooting practice, and described the safety briefing given to all soldiers before the start of the shooting practice. He said that after the briefing a chief lieutenant checked the weapons of all soldiers taking part in the practice, and ordered two soldiers to step aside and clean their weapons. Then the captain announced to the soldiers the manner in which the practice would be conducted and the safety measures. They were to fire solely upon his command, and stop firing immediately if he so ordered, or if they

received a visual signal from the watchtower, or if they noticed people, animals or machines near the targets. The firing range was delimited by markers at both ends. It was strictly forbidden, under any circumstances, to point a firearm outside the firing range. If a firearm jammed, the soldier had to report it immediately, remain still, put the safety catch down and not touch the firearm. The soldiers fired in groups of four, with those waiting their turn having unloaded weapons. The soldiers first went to the starting point, received magazines containing twelve rounds, and put them in their bags, while keeping their rifles on their backs. When they received the order to fire, they had to run to the firing position with their rifles pointing towards the firing range. Then, on a further order, they had to take the magazines out of the bags, put them onto the rifles, load a round, lift the safety catch and report that they were ready to fire. When ordered to fire, after the captain had made sure that each of them had loaded his weapon and was ready to fire, they put the safety catch in automatic firing mode and started firing. After finishing firing, they had to report, remove the magazine, and, when ordered, fire a control shot towards the firing range and put the safety catch on. After that they had to stand up, have their rifles checked by the captain with the magazine removed, fire a second control shot, and hand back the spent cartridges. At the time of the incident a group of soldiers was firing, with the captain standing about two metres behind them. Immediately after hearing the applicant's screams the captain ordered the soldiers to stop firing and empty their weapons, and then checked the weapons.

17. The order for the shooting practice, issued by the head of the regiment, designed a commanding officer, an officer, a sergeant and a soldier ensuring the sealing off of the area, a technician, an emergency medical officer, a stand-by ambulance, two guards, one of whom was the applicant, and a head of the ammunition supply point. It directed the commanding officer to ensure compliance with the safety measures in line with the applicable instructions. An annex to that order shows that all the soldiers confirmed that they had been briefed about the safety measures.

18. On 27 July 1999 the investigator interviewed medical officer N.G., Sergeant-Major G.I., the person in charge of ammunition safety during the shooting practice, and soldier R.V. of the applicant's regiment.

19. N.G. said that, while sitting at the foot of the watchtower, she heard a loud whizzing sound and then screaming. She climbed up the tower and saw a wound on the applicant's abdomen. It was a small hole with a round dark-brown patch around it. Later, the officer was with the applicant in the ambulance, she noticed another wound, with a diameter of one centimetre, on the left side of his lower back. In the ambulance, she repeatedly asked the applicant how he had sustained the injury, but he kept silent. At one point, he said "I wanted to fix it". She pressed him for more, but he said

"Oh, leave me, leave me" and asked whether they had already reached the hospital.

20. G.I. said that following the incident, when he had been counting the cartridge cases spent during the shooting practice, somebody, probably Lieutenant M., threw a cartridge case on to the pile, and it got mixed up with the others. When G.I. enquired about the case's origin, lieutenant M. had replied that it had come from the scene of the incident. Later, with a view to identifying the case, the officer in charge of the practice ordered G.I. to divide the cases up into lots. He found only one with a diverging serial number, and handed it over to the investigator. G.I. also said that he was certain that the applicant had earlier returned to him all twelve cases of the cartridges allotted to him for the shooting practice.

21. R.V. said that the applicant had been in a good mood on the day of the incident, that both of them had had their rifles checked and returned their spent cartridge cases after the shooting practice, and that, prior to climbing up the watchtower, the applicant did not have a magazine on his rifle.

22. On 29 July 1999 the investigator interviewed the applicant, who was still in the intensive care unit of the emergency surgical department of the Military Medical Academy in Sofia (see paragraph 10 above). According to the record of this interview, the applicant said that while he was on the watchtower he tried to fix his rifle's sling. He knelt down on his right knee and laid the rifle on the ground with the muzzle pointing towards him. He noticed that the safety catch was in automatic firing position and the breechblock was not in position. With his right hand he pushed the breechblock forward. It jammed and he used force to push it, with the rifle's barrel lying on his left hand and the magazine holder pointing upwards. When the breechblock moved into position, he heard a shot. He became short of breath and started crying for help.

23. The applicant strongly disputes the accuracy of this record and maintains that, being in a very serious medical condition, he could not remember how this interview unfolded or the statements he made during it. He submits that the only reliable statements were those which he made during a subsequent interview on 13 September 1999, four days after his discharge from hospital. At that interview he said that before going to the tower he fired all twelve cartridges at the shooting range and then returned the spent cases to Sergeant-Major G.I. When going up the tower, he noticed two sergeants there, talked to them for a while and then remained alone. When standing with his left side toward the shooting range and his rifle slung over his shoulder, he suddenly felt powerless, weak in the knees and short of breath, but did not hear a shot close by. He started shouting for help and ten seconds later someone came up to him.

24. On 11 and 17 November 1999 the investigator interviewed Captain V.P., a staff doctor from the applicant's regiment, and two soldiers serving

with the applicant. All of them said that they had not seen any signs of depression in the applicant prior to the incident.

25. The medical expert report ordered by the investigator was drawn up on 28 July 1999 by Dr G.D., deputy chief of the Forensic Medicine Centre of the Bulgarian Army. He had not examined the applicant but based his report on the existing medical documentation. The report read as follows:

> "... The entry wound is situated on the front left side of the abdomen, slightly above the navel and on the midclavicular line, with burns on the surrounding skin. The exit wound is on the left side of the back, under the corner of the scapula.
>
> If the body was in an upright position the channel of the wound would go slightly upward from the front to the back.
>
> The entry wound's description in the medical documents shows that it was the result of a shot from a very close range. To determine precisely the distance of the shot it is necessary to carry out a ballistic testing of the clothes worn by [the applicant] at the time when the shot was fired.
>
> When passing through the body the projectile (the bullet), in addition to damaging the soft tissues, broke the twelfth rib on the left, ruptured the front and the back walls of the stomach, the transverse colon, the splenic flexure (in two places), and the spleen. As a result, there was a flow of faeces and a massive haemorrhage in the abdominal cavity, causing a temporarily life-threatening medical condition.
>
> The above necessitated an emergency life-saving surgery, consisting of a full midline laparotomy, with a drainage of the blood and the faeces from the abdominal cavity and a resection of the omentum, a wedge-shaped resection and stitching of the stomach, partial resection of the transversal colon and of the splenic flexure, with a removal of a bitruncular colostoma, surgical removal of the spleen, treatment of the fractured rib, lavage and drainage of the abdominal cavity, and laparostoma.
>
> After that surgical intervention the bleeding was stopped and the risk to [the applicant's] life was averted, i.e. the case concerns loss of the spleen.
>
> It should be borne in mind that without a timely and highly-qualified medical intervention death would have occurred very rapidly.
>
> After the surgical intervention [the applicant] was placed in an intensive care unit. Following X-ray data about a haemorrhage in the left pleural cavity on 23 July 1999, a left-side thoracentesis (drainage of the pleural fluid) was carried out. On 26 July 1999 a surgical bandage was made, and on 27 July 1999 – a second laparotomy with a revision of the laparostoma and of the abdominal cavity was carried out, a local aesthetic was applied on the mesentery, ileostomy and debrissage of the small intestine through it were performed, and a new laparostoma was placed. After the surgical intervention the [applicant] was again placed in an intensive care unit. On 28 July 1999 his condition was assessed as being stable but serious."

26. On 10 September 1999 a biology expert drew up a report saying that the blood-red dry matter taken from the scene of the incident was indeed human blood. However, as a result of the depletion of the sample, it was

impossible to determine its type or to tell whether it was identical with the applicant's blood. The applicant's shirt had blood on it.

27. In a report of 14 September 1999 three experts stated that the applicant's rifle was in good working order and able to produce a shot. The force needed to be applied to the trigger in order to fire was within the acceptable limits. They further found that the rifle had been fired since it had last been cleaned, and that the cartridge case handed over by Sergeant-Major G.I. to the investigator did not come from that rifle.

28. In a physicochemical report of 4 October 1999 two experts said that they had been unable to conclude whether the gunpowder from the rifle's barrel was identical to that taken from the applicant's shirt. They also said that the smears from the applicant's palms and wrist-bands did not contain traces of a shot.

C. The discontinuance of the investigation and the applicant's appeals

29. On 22 November 1999 the investigator proposed discontinuing the investigation. He found that the applicant had shot himself at close range. There was no evidence pointing to breaches of the regulations on conducting shooting exercises or the applicable safety rules. Nor was there any indication that the applicant had had psychological problems or depression which could push him to commit suicide, or that he had tried to damage his health with a view to evading military service. The evidence thus led to the conclusion that his injury was the result of an accidental shot fired because of his improper handling of his firearm.

30. On 30 November 1999 the Sofia Military Regional Prosecutor's Office decided to discontinue the investigation, repeating the reasons given by the investigator verbatim.

31. On 9 April 2001 the applicant appealed to the Military Appellate Prosecutor's Office. He argued, among other things, that the authorities had explored solely the version that he had shot himself. No expert report had been drawn up on the identity of the firearm which had produced the shot. It was absurd to think that this was the rifle he had been carrying while on the watchtower, because it had not been loaded and had its safety catch down. His clothes had not been examined by an expert and it was therefore impossible to conclude whether or nor the shot had been fired at close range. The medical expert report was not based on primary medical documents and had thus come to the erroneous conclusion that the bullet had left his body, producing a second wound on his back. There were indications, such as the noise of the shot, noted by the witnesses, that he had been wounded by a ricochet and that the bullet had shattered.

32. On 18 June 2002 the Military Appellate Prosecutor's Office dismissed the appeal. It noted that during his interview on 29 July 1999 the

applicant had stated that he had shot himself. Moreover, the medical expert had found that he had both an entry and an exit wound. The medical documents showed that the wound was from a shot fired at close range. No-one else was around the applicant at the time of the shot. The lower prosecutor's findings were thus correct.

33. On 9 July 2002 the applicant appealed to the Chief Prosecutor. He asserted that his statement of 29 July 1999 was far from reliable. At that time he had been in hospital, in a very bad condition following several life-saving operations. It was therefore surprising to see that the official record of this statement seemed so detailed and logical. No expert report had been drawn up on the identity of the firearm which had produced the shot, whereas the evidence showing that it had been fired by his rifle was unreliable and was called into doubt by other evidence. There was no evidence showing that the shot had been fired at close range. Lastly, no consideration had been given to the fact that he had been ordered to take part in the shooting exercises after night duty and while he was ill.

34. On 11 October 2002 the Supreme Cassation Prosecutor's Office dismissed the appeal. It observed that the testing of the piece of skin surrounding the applicant's entry wound showed that the shot had been fired at close range. This was consistent with the applicant's statement of 29 July 1999 and the statement of medical officer N.G. It was impossible to examine the bullet, because it had not been found. It was established that the spent cartridge case handed over to the investigator by Sergeant-Major G.I. did not come from the applicant's rifle. However, it could not be ruled out that G.I. had mistakenly identified it as the one thrown on to the pile by lieutenant M., given that the pile contained in total more than nine hundred spent cartridge cases. Even if all of them were to be tested, which was impossible in view of the time elapsed since the events, that would not have led to a definite conclusion about the firearm's identity. The lower prosecutors had thus correctly found that the applicant had injured himself by handling his rifle improperly. There was no indication that other soldiers had shot him or that he had injured himself deliberately.

D. The private expert opinion obtained by the applicant in June 2003

35. On 11 June 2003 the applicant's representative before the Court wrote to Dr P.L., the head of the forensic department of the Pleven Medical University. He sent him the relevant medical documents and asked for his opinion on (a) whether the description of the applicant's wound was comprehensive; (b) whether it was possible to determine, on the basis of that description, the distance from which the shot had been fired; (c) what could be the exact basis for such determination; (d) what could be the possibility for error; and (e) what type of data would allow a more precise determination of the distance from which the shot had been fired.

36. Dr P.L.'s opinion, drawn up on 13 June 2003, read as follows:

"The questions you pose in your letter ... may be answered like this:

1. The description, which says 'visible entry wound in the abdominal area, at the midclavicular line, slightly above the navel, with burns', is not detailed – the shape of the wound, the condition of the edges, the size of the wound (diameter or diameters), the size of the 'burn' and its position relative to the edges of the wound – concentric or eccentric – are lacking.

2. On the basis of that description, one could make the very general conclusion that the wound was the result of a shot from a close distance. Indeed, the shot could have been even a contact one, if it was fired through several layers of clothing, or thicker, or damp clothing.

In forensic medicine, shot distances are categorised in three ways: contact shots (complete or incomplete), close-distance shots (within the range of action of the shot's additional effects), and long-distance shots (outside the range of action of the shot's additional effects), without this being linked with a concrete distance in centimetres or meters.

3. The basis for the conclusion in point 2 is the fact that the wound was surrounded by a ring, described as a 'burn'.

4. In the case of close-distance shots (and sometimes in the case of contact shots), one can see traces of unburned powder, metal particles, grease, etc. around the wound (the so-called 'stain ring' or 'blackened ring'). The range at which those can make an impact (in the case of a shot with a Kalashnikov rifle) is twenty-five to thirty centimetres. With the increase in the distance, the intensity of those additional effects of the shot diminishes.

There is no burning around an entry firearm wound because the action of the flame and the hot gases is short-term. Sometimes one can find traces of the high temperature – slight burning of thin or more tender hairs or of artificial tissues.

The 'stain ring' around the wound is a result of the mechanical action of the blacks and of the other particles and their ramming into the skin, as well as of the chemical action of the powder gases and the other residues from the shot.

It is also possible that the so-called 'burn' was in fact a 'muzzle mark' – a bruise around the entry wound resulting from the impact of the muzzle in the case of a full contact shot. Such marks are characteristic for shots in the head or in areas having a solid surface (bone) underneath, but can sometimes occur in cases of shots in the abdominal area. The available description does not allow a more specific conclusion to be drawn.

The possibility for error when concluding that a shot has been fired from a close distance on the basis of a 'stain ring' is minimal. The medical literature refers to the so-called 'phenomenon of Vinogradov', in which such a ring appears after a shot from a distance of even several hundred meters. However, such occurrences are rare and do not correspond to the description of the wound in the present case. The description of the wound allows one to conclude that the shot was fired either from a close distance or that it was a contact shot. A long-distance shot is to be excluded.

5. It would be possible to make a more specific assessment of the distance from which the shot has been fired on the basis of:

– a more detailed medical description (as mentioned in point 1);

– more information about the conditions in which the shot was fired (clothes, type of bullet, etc.);

– a special analysis determining the composition of the stain around the wound or on the clothes;

– experimental shots with the same weapon and in the same conditions as the shot under consideration."

II. RELEVANT DOMESTIC LAW

37. Article 192 of the 1974 Code of Criminal Procedure, as in force at the material time, provided that proceedings concerning publicly prosecutable offences could be initiated only by a prosecutor or an investigator. When military courts had jurisdiction to hear a case, as for example when it concerned soldiers or army officers (Article 388 § 1(1) of the Code), the responsibility for conducting the preliminary investigation lay with military investigators and prosecutors.

38. Under Article 237 § 1 (1) of the Code, as in force at the relevant time, prosecutors were to discontinue an investigation if they found that the matters alleged did not amount to a criminal offence. Until 31 December 1999 their decisions to do so could be appealed against before the superior prosecutor (paragraph 6 of that Article, as in force until 31 December 1999).

39. Paragraphs 3 and 4 of Article 237 of the Code, as in force between 1 January 2000 and 30 April 2001, provided that after the discontinuance the prosecutor had to send the case file and his decision to the superior prosecutor's office, which could confirm, modify or quash it. If it confirmed the decision, it had to send the case file to the appropriate court, which had to rule in private as to whether the discontinuation was or was not warranted (Article 237 §§ 5, 6 and 7 of the Code, as in force at that time). Paragraph 9 of that Article provided that no appeal lay against the court's decision. No provision was made for the victim of the offence to be notified of the discontinuance.

40. Article 237 of the Code was completely changed with effect from 1 May 2001 and from that point on provided that the prosecutor's decision to discontinue the proceedings was to be served on the accused and on the victim of the offence. Either of them could then seek judicial review.

41. Under the 2005 Code of Criminal Procedure, which superseded the 1974 Code on 29 April 2006, a prosecutor's decision to discontinue an investigation is served on the accused and the victim of the offence and is

subject to judicial review by the relevant first-instance court. An appeal lies against the court's decision to the higher court, whose decision is final (Article 243 §§ 3-7 of that Code).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

42. The applicant complained that that an unidentified serviceman had used deadly force against him, that the authorities had failed to take the necessary precautions to prevent that from happening, and had later failed to conduct an effective investigation into the matter. He relied on Articles 2 and 3 of the Convention, which provide, in so far as relevant:

Article 2 (right to life) § 1

"Everyone's right to life shall be protected by law. ..."

Article 3 (prohibition of torture)

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

A. The parties' submissions

43. The Government submitted that the applicant had shot himself by accident, as evident from his statement of 29 July 1999. This was confirmed by Dr. G.D.'s expert report, which concluded that the applicant had been shot at very close range. The prosecuting authorities' finding on that point was therefore correct. Moreover, the incident took place during planned shooting exercises, in which the risk to the applicant's life and health was minimal. Those exercises were conducted at a special firing ground, under the supervision and command of professional military instructors. They complied strictly with the applicable rules, and were conducted in broad daylight and in good weather conditions. The authorities thus had no reason to expect risks that would be higher than the usual ones inherent in such activities. The firearm assigned to the applicant was checked beforehand and the applicant was apprised of the applicable safety measures. When the incident happened he was given immediate first aid and taken to hospital. He had not been behaving unusually prior to the incident. The apparent reason for the shooting was his failure to follow the instructions on how to handle the firearm assigned to him.

44. The Government further submitted that the investigation conducted after the incident was effective. It started immediately and the authorities worked diligently on it. They inspected the scene, took pictures, interviewed a number of witnesses and ordered expert reports. In addition, under the applicable law the applicant could claim compensation for his injury.

45. The applicant submitted that the authorities failed to provide a plausible explanation of how he was injured. Their version of the events was not supported by reliable evidence. First, their unconditional reliance on his statement of 29 July 1999 was wrong, chiefly because that statement was made at a time when he was still in the intensive care unit of the hospital and not fully conscious, a matter he repeatedly brought to the attention of the authorities. Secondly, Dr G.D.'s conclusion about the range at which the shot had been fired could also not be trusted because it was based solely on medical documents and not on a personal examination of the applicant. Moreover, Dr G.D. had himself stated that this matter could be clarified solely through an expert examination of the applicant's clothes. Thirdly, the authorities did not try to elucidate the discrepancies between the statements of Chief Lieutenant P.P. and medical officer N.G. about the noise they had heard while standing under the watchtower. The applicant further asserted that he did not shoot himself. He did not have bullets in his weapon, as evident from the statement of Sergeant-Major G.I. His weapon was in good working order and no extra force was needed to push the breechblock forward, which was the apparent cause of the shot. This was established by both Captain P.P., who checked the firearm after the incident, and by the ballistics experts. Lastly, no spent cartridge case was found near the applicant, and the tests showed that he did not have gunpowder residue on his palms or wristbands.

46. The applicant further submitted that the Government did not adduce any evidence as to the planning and monitoring of the shooting exercises. Their vague submissions on that point failed to address several key questions, such as which soldiers were firing on the range during the incident, whether the exercises of those particular soldiers were adequately planned, and whether those soldiers were properly instructed.

47. The applicant also submitted that the investigation was not effective, for several reasons. First, the authorities gathered evidence only in support of the version that he had shot himself. They failed to find the spent cartridge case, relied on an incomplete description of his injury, and based the expert assessment of that injury solely on medical documentation and not on a personal assessment. They did not try to identify the soldiers who were shooting during the incident or determine their position *vis-à-vis* the watchtower. They did not ask the experts appropriate questions and failed to elucidate the discrepancies between the statements of Chief Lieutenant P.P. and medical officer N.G. They interviewed neither soldier T. and other persons standing near the watchtower nor Lieutenant M. Lastly, they relied

heavily on a statement given by the applicant at a time when he was not fully conscious and was incapable of answering questions.

B. The Court's assessment

48. The Court considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

1. Applicability of Article 2 of the Convention

49. The Court observes at the outset that the applicant fortuitously – and as a result of a timely and competent medical intervention (see paragraphs 10 and 25 above) – did not die. However, the fact that he suffered a life-threatening injury resulting from the use of a potentially lethal firearm is sufficient to attract the applicability of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, § 100, *Reports of Judgments and Decisions* 1998-VI; *Makaratzis v. Greece* [GC], no. 50385/99, §§ 49-55, ECHR 2004-XI; *Goncharuk v. Russia*, no. 58643/00, § 74, 4 October 2007; and *Alkın v. Turkey*, no. 75588/01, § 29, 13 October 2009). The Court will therefore examine his complaint solely by reference to that provision.

2. Alleged inadequacy of the investigation

50. The Court will first examine the applicant's complaint concerning the effectiveness of the investigation. It finds that a procedural obligation arose to investigate the circumstances in which the applicant sustained his life-threatening injury, for four reasons. First, he was a conscript soldier under the care and responsibility of the military authorities (see *Abdullah Yilmaz v. Turkey*, no. 21899/02, § 58, 17 June 2008; and also *Ataman v. Turkey*, no. 46252/99, § 64, 27 April 2006; *Salgın v. Turkey*, no. 46748/99, § 86, 20 February 2007; and *Ömer Aydın v. Turkey*, no. 34813/02, § 61, 25 November 2008). Secondly, he suffered his injury in a military firing range, which was an area under the exclusive control of the State's armed forces (see, *mutatis mutandis*, *Beker v. Turkey*, no. 27866/03, § 42, 24 March 2009). Thirdly, the obligation to investigate is not confined to situations where it has been established that a deadly attack was caused by an agent of the State (see *Yaşa*, cited above, § 100, and *Ergi v. Turkey*, 28 July 1998, § 82, *Reports* 1998-IV). Lastly, the circumstances in which the applicant sustained his injury, which undoubtedly resulted from the use of a deadly firearm, were suspicious and called for an explanation (see, *mutatis mutandis*, *Salman v. Turkey* [GC], no. 21986/93, § 105, ECHR 2000-VII, and *Slimani v. France*, no. 57671/00, §§ 30 and 47, ECHR 2004-IX (extracts)). Indeed, this need for scrutiny was

acknowledged by the national authorities, which opened an investigation the very day of the incident (see paragraph 11 above).

51. Such investigation must comply with certain minimum requirements which have recently been restated, with reference to lethal incidents in the armed forces, in paragraph 47 of the Court's judgment in the case of *Esat Bayram v. Turkey* (no. 75535/01, 26 May 2009). The Court would add that the nature and degree of scrutiny which satisfy the minimum threshold of effectiveness depend on the circumstances of each particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see, among other authorities, *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI). To be effective, an investigation must be objective and thorough; its effectiveness cannot be gauged simply on the basis of the number of reports made, witnesses questioned or other investigative measures taken (see *Anguelova v. Bulgaria*, no. 38361/97, § 144, ECHR 2002-IV).

52. In the instant case, the authorities took a number of investigatory steps. The investigator inspected the scene of the shooting several hours after the incident and gathered various pieces of physical evidence (see paragraph 12 above). He conducted interviews with a number of eyewitnesses in the following few days (see paragraphs 14 and 18 above), and interviewed the applicant twice, the first time while he was in hospital and the second time shortly after he was discharged from hospital (see paragraphs 22 and 23 above). In the following months he conducted further interviews in order to gather information about the applicant's state of mind before the incident (see paragraph 24 above). He commissioned and obtained a medical expert report just a few days after the incident (see paragraphs 14 and 25 above), and later obtained a biological, a ballistics and a physiochemical experts reports (see paragraphs 26, 27 and 28 above). The medical expert, whose professional competence and impartiality have not been called into question, was able to determine that the shot which had wounded the applicant had been fired from a close distance. Indeed, that fact was later confirmed by the private expert approached by the applicant's representative before the Court (see paragraph 36 above).

53. The evidence gathered through those steps – which clearly showed that at the time of the shot the applicant had been alone on the top of the watchtower and that the bullet which wounded him had been fired from a close distance – was sufficient to allow the investigator to exclude the hypothesis of a possible ricochet and conclude that the applicant had shot himself at close range. The duty to investigate requires thoroughness and effectiveness in deploying all possible and reasonable means leading to the proper and uncontroversial identification of the circumstances and of those individuals possibly responsible. In cases where the mechanism of the injury is established and where any causal link between that injury and possible omissions on part of the authorities is excluded in an

uncontroversial manner, it would be unreasonable and unnecessary to require investigative scrutiny over further circumstances, like the origin of the cartridge or the organisation of the shooting exercise in the instant case.

54. The applicant did not question the finding that he was alone on the roof or contest the medical expert report which confirmed the short range of the shot. He has not argued that there was any other individual nearby capable of producing a shot from a close range, nor indicated any other hypothesis for the origin of his injury. Whether the shot was produced at a very close range or was a direct contact one appears to be irrelevant for the clarification of the circumstances. It is regrettable that, not least due to the actions of Lieutenant M. (see paragraph 20 above), the authorities were not able positively to identify the firearm from which the shot had originated (see paragraphs 27 and 34 above), that they did not clarify how the applicant's rifle could have produced a shot when apparently not loaded (see paragraphs 16, 20 and 21 above), that they did not try to identify and question the soldiers who were shooting on the range at the time when the applicant was wounded, and that they were not able to establish whether the blood taken from the scene of the incident belonged to the applicant (see paragraph 26 above). However, in the circumstances those omissions were not crucial because the available evidence was sufficient to support the conclusion reached by the investigator (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 77 *in fine*, ECHR 2002-II). It can thus hardly be said that the authorities were ignoring reasonable lines of inquiry, or failed to take indispensable and obvious investigative steps (contrast *Velikova*, cited above, §§ 79 *in fine* and 83).

55. Lastly, the Court observes that the authorities gave reasons why they decided to discontinue the investigation. It is true that in their decisions they could have addressed in more detail certain discrepancies, such as those between the statements made by the applicant during his first and second interviews (see paragraphs 22, 23, 29, 30, 32 and 34 above). However, the Court does not consider that this, otherwise regrettable, omission had a substantial effect on the effectiveness of the investigation as a whole (contrast *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 123 and 124, ECHR 2001-III (extracts)).

56. There has therefore been no violation of Article 2 of the Convention.

3. Alleged violation of the right to life

57. The origin of the shot which wounded the applicant is vigorously disputed between the parties. The Court must therefore first determine whether the respondent State is under an obligation to account for the applicant's injury (see *Beker*, cited above, § 41).

58. According to the Court's settled case-law, the State bears the burden of providing a plausible explanation for injuries and deaths occurring to persons in custody (ibid., with further references). In several cases

concerning armed conflicts, the Court extended that obligation to situations where individuals were found injured or dead in areas under the exclusive control of the authorities and there was prima facie evidence that State agents could be involved (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts); *Yasin Ateş v. Turkey*, no. 30949/96, § 94, 31 May 2005, concerning the situation in south-east Turkey in the 1990s; *Goygova v. Russia*, no. 74240/01, § 94, 4 October 2007; *Makhauri v. Russia*, no. 58701/00, § 123, 4 October 2007; *Goncharuk*, cited above, § 80; *Zubayrayev v. Russia*, no. 67797/01, § 73, 10 January 2008; and *Gandaloyeva v. Russia*, no. 14800/04, § 89, 4 December 2008, concerning the situation in Chechnya in 2000 and 2003; and *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, § 184, ECHR 2009-..., concerning the situation on the island of Cyprus in 1974).

59. In a recent case concerning a situation not coloured by the existence of an armed conflict the Court also found it fitting to shift the burden of proof in a similar situation (see *Beker*, cited above, § 43). However, it does not find it appropriate to adopt the same approach in the present case, for three reasons. First, unlike Mr Beker, the applicant in the present case did not die. Secondly, in contrast to the case of Mr Beker (ibid., § 49), the applicant and his family were not fully excluded from the ensuing investigation. Indeed, the applicant was twice able to challenge the investigation's conclusions before the higher prosecutor's offices, which gave reasoned decisions (see paragraphs 31-34 above). Thirdly, as pointed out above, in spite of certain regrettable omissions, the investigation was effective and did provide a plausible explanation for the origin of the applicant's injury. Therefore, the Court does not consider that the burden of proof in the present can be shifted to the Government. It reiterates in this connection that the distribution of that burden is intrinsically linked to, among other things, the specificity of the facts of the case (see *Nachova and Others*, cited above, § 147).

60. The Court must subject deprivations of life to the most careful scrutiny. However, the required standard of proof for the purposes of the Convention is that of "beyond reasonable doubt", although such which may proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among other authorities, *Ataman*, cited above, §§ 44 and 46). In the circumstances of the present case, the applicant's allegation that he was shot by another serviceman cannot be discarded as prima facie untenable. However, he has not put forward sufficient evidence to enable the Court to find, beyond reasonable doubt, that his injury was indeed caused in that manner. The investigation, which the Court already found effective, rejected his version about the origin of his injury. There has therefore been no violation of Article 2 of the Convention in that respect.

61. That said, the Court observes 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. This duty extends, in appropriate circumstances, to a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, or from self-harm (see, among other authorities, *Ataman*, cited above, § 54). It applies also in the context of any activity in which the right to life may be at stake (see *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 130, ECHR 2008-... (extracts), citing *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, ECHR 2004-XII). However, bearing in mind, among other things, the unpredictability of human conduct, the scope of that obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see *Ataman*, § 55; *Salgın*, § 78; and *Ömer Aydın*, § 48, all cited above).

62. The Court must examine, in the light of the above principles, whether the authorities knew or should have known that there was a real and immediate risk to the life of the applicant, and whether they did all that could be reasonably expected of them to prevent it.

63. There is no indication, and it has not been alleged, that the present case concerns a suicide attempt. The Court will therefore not seek to determine whether the authorities sufficiently monitored the applicant's psychological state before the incident or took other measures in that connection.

64. By contrast, the Court must establish whether the authorities took sufficient precautions to avert the risk of accidental injury or death during the army shooting practice, which by its nature was an activity which could engender risks to the lives of those present in the vicinity. It notes that, as evident from the statement of the officer commanding the practice, Captain Y.P., and the order for and the plan of the practice, during the exercise of 22 July 1999, including at the time when the applicant was injured, the authorities took a number of safety measures designed to minimise the risk of shots being fired in the direction of any individual or of accidental shots, both during and after the actual practice (see paragraphs 16 and 17 above). The applicant has not pointed to any deficiencies in those measures, and has not identified failures to comply with the safety procedures governing the manner in which the soldiers carried out the firing practice. The fact that he was sent to shooting practice at a time when he had been relieved from physical exercise by the regiment doctor (see paragraph 6 above) does not seem to have had a causal connection with his injury, especially in view of his assertion that the bullet which wounded him did not originate from his rifle.

65. There has therefore been no violation of Article 2 of the Convention on that account either.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. The applicant complained under Article 13 of the Convention that he did not have effective remedies in respect of the breaches of Article 2.

67. Article 13 of the Convention provides:

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

68. The Government did not address this complaint in their observations.

69. The applicant submitted that victims of criminal offences in Bulgaria are unable to bring private prosecutions in cases where the authorities fail to investigate such offences effectively. Nor could they, at the relevant time, seek judicial review of the prosecutors' decisions to discontinue such investigations.

70. The Court finds that this complaint is linked to the ones examined above and must therefore likewise be declared admissible. Having analysed the various measures that were taken in the present case, the Court found that the investigation conducted by the authorities satisfied the procedural obligations arising from Article 2 (see paragraphs 52-55 above). It accordingly considers that the respondent State may be regarded as having conducted an effective criminal investigation, as required by Article 13 (see *Sabuktekin v. Turkey*, no. 27243/95, § 110, ECHR 2002-II (extracts)).

71. There has therefore been no violation of Article 13 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by four votes to three that there has been no violation of Article 2 of the Convention in respect of the respondent State's obligation to conduct an effective investigation into the incident in which the applicant suffered his life-threatening injury;

3. *Holds* unanimously that there has been no violation of Article 2 of the Convention in respect of the incident in which the applicant suffered his life-threatening injury;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 7 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
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 Jungwiert, Maruste and Villiger is annexed to this judgment.

P.L.
C.W.

PARTLY DISSENTING OPINION OF JUDGES JUNGWIERT, MARUSTE AND VILLIGER

1. While we agree that the Bulgarian State cannot be held liable under Article 2 of the Convention for the life-threatening injury suffered by the applicant, we regret that we cannot follow the views of the majority in respect of the investigation carried out into the circumstances in which the applicant sustained that injury. In our opinion, that investigation did not live up to the requirements of Article 2, for the following reasons.

2. It seems that, while they undertook a number of investigatory steps, the authorities from the very outset made the assumption that the applicant had shot himself (see paragraph 11 of the judgment). While this was certainly one of the possible explanations for the origin of his injury, even the most plausible one, it does not seem that during the course of the investigation the authorities explored any other versions. Their eventual findings, which confirmed that explanation for the applicant's injury, squared ill with uncontroverted evidence that cast doubt on the conclusion reached, and were based on evidence of questionable reliability.

3. For instance, the investigation did not try to explain how the applicant could have shot himself with his own rifle at a time when it was apparently not loaded. The authorities completely ignored three witness statements which strongly suggested that there was no cartridge in the applicant's rifle at the time when he went up the watchtower: (a) Sergeant-Major G.I.'s statement that the applicant had fired all twelve rounds that had been assigned to him and had handed back the spent cartridge cases (see paragraph 20 of the judgment), (b) Captain Y.P.'s statement that under the applicable safety procedure after the firing practice the soldiers had to fire two control shots and have their rifles checked by him (see paragraph 16 of the judgment), and (c) soldier R.V.'s statement that after firing his rounds the applicant did not have a magazine on his rifle (see paragraph 21 of the judgment).

4. The elucidation of the pivotal point of from which firearm the shot had originated was in addition seriously impeded by the actions of Lieutenant M., who shortly after the incident took a spent cartridge case from the scene and threw it onto a pile of about nine hundred other such cases (see paragraph 20 of the judgment), which made its subsequent identification next to impossible. Indeed, the experts later found that the case handed by Sergeant-Major G.I. to the investigator had not housed a cartridge from the applicant's rifle (see paragraph 27 of the judgment), and the prosecuting authorities found that it would be virtually impossible to test all spent cartridge cases in order to determine whether one of them originated from the applicant's rifle (see paragraph 34 of the judgment).

5. It is also striking that, notwithstanding the obvious contradiction between the statements given by the applicant in his interviews of 29 July

and 13 September 1999 (see paragraphs 22 and 23 of the judgment), in their decisions the authorities did not even mention the second interview and did not explain why they treated the statement made during the first one, which took place in a hospital intensive care unit, as fully credible in spite of the applicant's assertion that at that time he was in a serious medical condition and not fully conscious (see paragraphs 32-34 of the judgment).

5. Lastly, there is no indication that the authorities tried to establish, for instance by interviewing the soldiers who were shooting at the time of the incident (see paragraph 16 *in fine* of the judgment), whether the bullet which wounded the applicant could have been fired by one of them.

6. Those inconsistencies and deficiencies lead us to believe that the investigation lacked the requisite thoroughness and cannot be seen as effective within the meaning of the Court's case-law. A shooting exercise is not an ordinary military exercise but is subject to very strict rules and controls, which have to be implemented by the supervising officers responsible for the exercise. If the rules and controls had been followed in the present case, the accident would not have taken place: if the applicant still had bullets in his rifle when he was in the watchtower, at least some basic precautions were overlooked. The responsibility of those supervising the operation should have been considered, but was not.

7. Even if the investigation did come up with a plausible explanation for the origin of the applicant's injury, it failed to address important aspects of the underlying events and to shed sufficient light on the facts.

8. As we are of the view of that the investigation's effectiveness should be examined solely from the standpoint of Article 2, we consider that there has been no violation of Article 13 of the Convention, and voted accordingly.