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

SECOND SECTION

DECISION

Application no. 48347/08
Elza Alikhanovna BEKOYEVA against Georgia
and 3 other applications
(see list appended)

The European Court of Human Rights (Second Section), sitting on 5 October 2021 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Aleš Pejchal,
Egidijus Kūris,
Branko Lubarda,
Pauliine Koskelo,
Lado Chanturia,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar*,

Having regard to:

the above applications lodged on the various dates indicated in the appended table,

the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

the comments submitted by the Government of the Russian Federation,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants, who are all Russian nationals, is set out in the appendix. The first and third applicants were represented by Mr V. Torkanovskiy, a lawyer practising in Moscow. The second and fourth applicants were represented, respectively, by lawyers from Russian Justice Initiative, a non-profit legal aid organisation based in Moscow, and Mr K. Krakovskiy, a lawyer practising in the same city.

2. The Georgian Government ("the Government") were successively represented by their Agents, Mr L. Meskhoradze and Mr B. Dzamashvili, of the Ministry of Justice.

A. The circumstances of the cases

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background

4. The four applications listed in the appendix were lodged in the context of the armed conflict that occurred between Georgia and the Russian Federation in August 2008. The chronology of the conflict was described by the Court in its judgment in the inter-State case of *Georgia v. Russia (II)* ([GC] (merits), no. 38263/08, §§ 32-44, 21 January 2021).

5. In sum, during the night of 7 to 8 August 2008, after an extended period of mounting tensions and incidents, heavy fighting erupted in and around Tskhinvali, the administrative capital of South Ossetia[1]. On 8 August 2008 Russian ground forces penetrated into Georgia by crossing through Abkhazia and South Ossetia before entering the neighbouring regions in undisputed Georgian territory. They were assisted by the Russian air force and the Black Sea fleet. Armed fighting between the enemy forces took place essentially in South Ossetia, as well as in the area of Gori, situated in the "buffer zone" in undisputed Georgian territory, to the south of South Ossetia. From 10 August 2008 Georgian armed forces withdrew first from Tskhinvali and then from the Gori area, while Russian armed forces progressively invaded all of Abkhazia and South Ossetia as well as the "buffer zone". A ceasefire agreement between the Russian Federation and Georgia was concluded on 12 August 2008. Part of the invaded areas of Georgia, notably the "buffer zone", was vacated by Russian troops by 10 October 2008 (see *Georgia v. Russia (II)*, cited above, §§ 32-44).

2. The applicants' individual situations

6. According to the applicants' individual accounts, their family members – the first applicant's daughter, the second applicant's mother and aunt, the third applicant's husband and the fourth applicant's son – were killed either on 8 or 9 August 2008 as a result of the Georgian armed forces' offensive on the town of Tskhinvali and its surrounding areas, which, in their words, consisted of air raids, artillery shelling and gunfire by ground forces.

[1] The terms "Abkhazia" and "South Ossetia" refer to the regions of Georgia which are currently outside the *de facto* control of the Georgian Government.

7. The fourth applicant's son had been military personnel, a contract serviceman of the Russian Federation's armed forces attached to a Russian peacekeeping corps stationed in Tskhinvali, prior to the outbreak of the war. The remaining applicants' late relatives were part of the civilian population residing in Tskhinvali.

8. While the second and fourth applicants were not personally present in the conflict area at any time during the hostilities, the first and third applicants were awakened in their homes in Tskhinvali during the night of 7 to 8 August 2008 by the eruption of intense shelling and bombing and immediately went down to the basements of the blocks of flats where they were living to find shelter. As a result of that night-long shelling, the third applicant's three-room flat was allegedly damaged by either an air strike or a missile.

9. On 9 August 2008 the Chief Prosecutor's Office ("the CPO") of Georgia opened a general criminal investigation into war crimes committed against the civilian population and other possible breaches of international humanitarian law during the active phase of the international armed conflict between Georgia and the Russian Federation and its immediate aftermath. Within the framework of that investigation, the CPO carried out numerous investigative actions by interviewing several thousand witnesses – Georgian military personnel who had taken part in the armed clashes and the civilian population from the zone affected by the conflict – and collecting telephone intercepts and public statements made by the South Ossetian *de facto* authorities as well as various intelligence and military reports, satellite images and other information available from media and other open sources.

10. By letters dated 19 March and 11 May 2009, a non-governmental organisation registered under Georgian law and located in Tbilisi ("the NGO"), acting in its own name, enquired with the CPO about whether a criminal case had been opened into the killing of the second applicant's mother and aunt on 9 August 2009. In the affirmative, the NGO requested to be served with a copy of the materials in the criminal case file. The NGO did not submit an authority form authorising it to represent the second applicant's interests. Nor did it submit identity documents of either the second applicant or of his late relatives, or death certificates.

11. On 5 June 2009 the CPO replied to the NGO, stating that the second applicant had neither lodged a criminal complaint nor otherwise informed it of the killing of his mother and aunt. Expressing its readiness to cooperate with the second applicant by conducting all the necessary investigative steps and granting him, if appropriate, victim status, the authority informed the NGO that he needed to file a complaint and to testify in person about the circumstances surrounding his relatives' alleged death. The authority also informed the NGO that the general criminal case had been opened on 9 August 2008 into war crimes and other breaches of international

humanitarian law possibly committed during the Russo-Georgian hostilities in August 2008 (see paragraph 9 above).

12. In disregard of the suggestion made in the CPO's letter of 5 June 2009, the second applicant never contacted either the prosecution or any other domestic law-enforcement authority. Between December 2009 and January 2011, the CPO served several summonses on the second applicant's home address, inviting him to cooperate with the investigation by testifying either in person or via a video-link. If the second applicant were to choose to travel to Georgia, the CPO offered to reimburse him all his travel expenses (airfare, hotel accommodation costs and daily expenses). However, all those summonses, despite having been duly served on the addressee, went unanswered.

13. During the same period, the CPO addressed to its Russian counterpart, the General Prosecutor's Office of the Russian Federation, repeated requests to assist it in interviewing the second applicant for the purposes of obtaining additional information about the alleged killing of his mother and aunt during the conflict. The Russian prosecution authority replied by a letter of 28 January 2011, stating that it was unable to cooperate with the Georgian authorities on the matter. On 16 March 2011 the CPO addressed another legal assistance request to its Russian counterpart, but the request went unanswered.

14. On an unspecified date in early March 2015, the CPO finally discontinued the criminal investigation into the events that had taken place in and around South Ossetia between 8 and 12 August 2008 during the armed clashes between Georgia and Russia (see paragraph 9 above). The decision was based, *inter alia*, on the domestic authorities' inability to access any part of the South Ossetian region, including its administrative capital Tskhinvali, for the purposes of carrying out on-site investigations. On 17 March 2015 the CPO issued a public notification about the discontinuation of the investigation (see *Georgia v. Russia (II)*, cited above, § 322) and, according to the submissions filed with the Court by the first and third applicants on 25 November 2019 and 25 June 2020 (see paragraph 24 below), they both took due note of that public notification.

B. Relevant international material

1. The European Union

15. The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (Volume I) established in December 2008 by the Council of the European Union, stated, *inter alia* (p. 10):

> "On the night of 7 to 8 August 2008, a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not

take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another. Such a combination of conflicts going on at different levels is particularly prone to violations of International Humanitarian Law and Human Rights Law. This is indeed what happened, and many of these instances were due to the action of irregular armed groups on the South Ossetian side that would not or could not be adequately controlled by regular Russian armed forces."

2. Human Rights Watch

16. On 22 January 2009 Human Rights Watch issued a fact-finding report on the events that unfolded during the five-day war between Georgia and the Russian Federation. The report was based on the collection of findings reported by a team of researchers who had conducted several research missions from August to November 2008 in South Ossetia and in undisputed parts of Georgia.

17. An excerpt from the report describing the difficulties in establishing the exact provenance of artillery strikes in South Ossetia read as follows (p. 38):

"... In a number of cases, ... there were no direct witnesses and no reliable information regarding the circumstances of the attack. Also, since Georgian and Russian forces use some identical Soviet-era weapons systems including main battle tanks, Grad multiple-launch rockets, BMP infantry fighting vehicles, and tube artillery, Human Rights Watch could not always conclusively attribute specific battle damage to a particular belligerent, especially for the attacks that happened on and after the evening hours of August 8 when both Russian and Georgian troops were present in Tskhinvali. ..."

18. A chapter from the report describing the treatment of the civilian population of Tskhinvali by Georgian ground forces on 8 and 9 August 2008 read as follows (pp. 61-63):

The Conduct of Georgian Troops during the Ground Offensive

"The majority of witnesses interviewed by Human Rights Watch did not complain about other types of violations against them by the Georgian forces. Judging by their statements, in most cases the troops entering the villages did not deliberately cause physical harm to civilians.

Several Ossetian interviewees said that Georgian soldiers told them they were under orders to look for and pursue Ossetian militias, but to spare women, children and elderly during the ground offensive.

Zareta Z., from the village of Sarabuki, said that when Georgian soldiers entered the basement where she was hiding with her husband, they told them:

‘Now you’ll live with us, with Georgians, and we’ll live in peace. Misha [Saakashvili] told us not to touch women and children. We’re instructed to kill the young guys [fighters] only. And that’s what we’ll do. You are not to worry.’

Another woman from the same village, ‘Svetlana S.,’ also said that the Georgian soldiers were telling the residents ‘We have not killed any residents and we are not going to! Everyone is safe!’

Madina M. from Khetagurovo said that she was terrified when Georgian troops entered the village, but to her surprise they were ‘polite’ and did not harm her. She said:

‘They were going from yard to yard and looking for young guys. They did not know our guys weren’t around anymore. I was so frightened ... I thought they’d be doing cruel things to women and to the elderly, like during the first war, back in 1992. But they were ... polite, really. They kept saying that they had an order not to touch women, children, and old people, and we had nothing to fear from them. They were so young – seemed to be 19 or 20, no more than that. Those who came into our basement even told us, “We don’t want to die either.”‘

Several women from five mountain villages in Akhalgori district populated mainly by Ossetians also confirmed that the Georgian forces did not harm civilians when they entered the villages on the night of August 7-8. A woman from Tsinagari told Human Rights Watch:

‘They told us not to be afraid and said that if our men wouldn’t shoot, they wouldn’t shoot either. They shot in the air – probably trying to frighten us. They entered the houses, checked identification documents, even some of our neighbours’ passports. They also looked for young guys and for the men. But all our men were already gone by then – they joined the militia and hid in the woods. The Georgians were also looking for firearms, but our men had taken their weapons with them, so there was nothing much to find.’

A small number of witnesses from different villages complained, however, that the Georgian forces ransacked their houses as they were looking for Ossetian fighters, and in a few cases took money, valuables, Russian identification documents, or other things from the residents. ...”

COMPLAINTS

A. Complaints made in the initial applications forms, lodged on the various dates listed in the appendix

19. All four applicants complained mainly under the substantive limb of Article 2 of the Convention of the deaths of their various family members which had allegedly occurred as a result of the disproportionate use of military force by the Georgian armed units on either 8 or 9 August 2008.

20. The second applicant additionally complained that the respondent State had breached its procedural obligations under Article 2 of the Convention by not investigating the death of his mother and aunt which had allegedly been caused by the explosion of either a bomb or a missile fired from the Georgian armed forces’ position.

21. Relying on Article 3 of the Convention, the first and third applicants complained that the military offensive of the Georgian armed forces had caused them serious mental suffering and that they had been obliged to find shelter in the basements of the blocks of flats where they had lived in Tskhinvali. The third applicant further complained, under Article 8 of the Convention and Article 1 of Protocol No. 1, about the destruction of her flat during the hostilities.

22. Relying on Articles 13 and 14 in conjunction with each of the above-mentioned substantive provisions of the Convention, the first and third applicants complained that the respondent State had discriminated against them on the basis of their ethnic origin and, as an additional corollary to that discriminatory motive, that they had not had effective domestic remedies at their disposal.

23. The second and fourth applicants also complained under Article 13 about the absence of effective domestic remedies, which in their view had been as a result of the post-conflict political tensions between the respondent State and the Russian Federation.

B. Additional complaints lodged on 25 November 2019 and 25 June 2020

24. On 25 November 2019 and 25 June 2020, relying on various provisions of the Convention, the third and first applicants, respectively, complained for the first time, in their additional submissions on the admissibility and merits of the case, that the respondent State had lacked candour in its attempts to investigate the war crimes allegedly committed by its armed forces against the ethnic Ossetian inhabitants of South Ossetia during the armed conflict between 8 and 12 August 2008.

THE LAW

A. Joinder of the applications

25. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

B. The complaints lodged in the original application forms

26. All four applicants made a number of complaints in relation to the events that occurred between 8 and 9 August 2008, that is during the active phase of the international armed conflict between Georgia and the Russian Federation, under Articles 2, 3, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 19 and 21-23 above). The relevant parts of these provisions read as follows:

Article 2 § 1

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

Article 3

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

Article 8 § 1

"Everyone has the right to respect for his private and family life [and] his home ..."

Article 13

"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."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... association with a national minority..."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. ..."

1. As regards the events that allegedly took place between 8 and 9 August 2008

(a) The Government's submissions

27. The Government submitted that the applications were inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention. That is, the applicants had lodged their complaints with the Court without trying to obtain redress at the national level first, either by lodging criminal complaints or suing the respondent State's Ministry of Defence for the wrongs allegedly inflicted on them in the course of the military clashes. They argued that there were no circumstances absolving the applicants from the obligation to put their grievances to the domestic authorities, and that the applicants' personal opinion of the effectiveness of the domestic remedies could not be decisive. Alternatively, the Government submitted that the applications should be declared inadmissible for being manifestly ill-founded or constituting an abuse of the right of individual petition because the applicants had not provided any evidence in support of their claims. In actual fact, the four applications in issue were part of a politically orchestrated attempt to overload the Court with hundreds of unsubstantiated applications, represented by a small group of lawyers

practising in the Russian Federation, for post-war propaganda purposes – to create a false image of the respondent State being a malicious violator of the Convention and/or of international humanitarian law. Such political purposes had nothing to do with the essence of the right of individual petition, as it was to be understood under Article 34 the Convention.

28. Even assuming that the acts complained of by the applicants had occurred within the specified time frame of 8 to 9 August 2008, the Government submitted that they could not be held imputable to the respondent State because it could not be established beyond reasonable doubt that they had been caused by the Georgian armed forces. To that end, the Government submitted that the respondent State had not been the only military force present in the conflict area at the material time; they submitted a copy of internal combat reports and other evidence to show that the South Ossetian militia had, as early as 7 August, started heavy shelling of numerous villages in the zone, as well as checkpoints of the Georgian peacekeeping troops, while the Russian armed forces had launched a large-scale military offensive in the early morning of the following day. The Government submitted statements by Russian military servicemen who had participated in the armed clashes, according to which the Russian army had shelled Tskhinvali and its suburbs on 8 and 9 August with the Russian-produced rocket-launching system Grad for the purpose of putting Georgian forces, who had at that time been in full control of Tskhinvali, at a military disadvantage and preparing the zone for an offensive by their ground forces. The Government also submitted documents concerning the artillery and other rocket-launching systems that the Georgian armed forces had been using before and during the August war. According to those documents, the Georgian army had not been equipped with the Russian-produced Grad artillery systems but had been using the DANA, self-propelled artillery pieces which had been procured from the Czech Republic. As regards the treatment of the civilian residents of Tskhinvali by Georgian soldiers, the Government, referring to the relevant excerpts of a fact-finding report issued by Human Rights Watch (see paragraph 18 above), argued that there existed no credible reports of ill-treatment of civilians by military personnel of the respondent State.

(b) The applicants' submissions

29. The applicants submitted that there existed special circumstances absolving them from the obligation to exhaust domestic remedies and that, in any event, the domestic remedies advanced by the Government – lodging criminal complaints and suing the respondent State for the disproportionate use of military force against the civilian residents of Tskhinvali – were ineffective. They submitted that they had been afraid to travel to Tbilisi or otherwise get in direct contact with the central authorities for fear of persecution on the basis of either their Russian nationality or their Ossetian

ethnic origins. They further added that they had not been able to lodge their complaints by mail either, as the postal services between Georgia and Russia had been suspended for several months in the immediate aftermath of the August war. As regards the ineffectiveness of the suggested criminal remedy, the applicants stated, among other arguments, that the respondent State's investigative authorities should not have remained passive and waited to receive their criminal complaints but, on the contrary, should have opened criminal cases in respect of the killing of their relatives of their own motion. As to the civil remedy suggested by the Government, the applicants submitted that they did not need to exhaust that remedy because they did not wish to obtain damages but rather to have the military servicemen in question criminally prosecuted and punished for the crimes they had committed.

30. The applicants argued that the Georgian armed forces' offensive on Tskhinvali in the night of 7 to 8 August 2008 had mostly consisted of shelling the city with multiple Grad rocket launchers, and that during the daytime of 8 August 2008, after the Georgian ground forces had taken control of Tskhinvali, they had intentionally used lethal force against the city's civilian population. The applicants submitted that, before conducting an attack on the city, the Georgian forces should have warned the civilian population and allowed them to leave Tskhinvali by means of a humanitarian corridor. The applicants further submitted that it could be established beyond reasonable doubt that the military actions that had entailed a breach of their various rights under the Convention were attributable to the Georgian armed forces. They claimed, without submitting any evidence, that on 8 and 9 August 2008 the Georgian armed forces had been the only military power in control of Tskhinvali and its surrounding areas, that the Russian armed forces had been stationed at least ten kilometres further to the north, and the South Ossetian militia could hardly be accused of having shot at their own fellow residents of Tskhinvali. Referring to the Court's relevant case-law, the applicants submitted that an indiscriminate shelling and aerial bombing of civilians could not be acceptable in a democratic society or reconcilable with any of the grounds regulating the use of force set out in Article 2 § 2 of the Convention or under the customary rules of international humanitarian law (see *Benzer and Others v. Turkey* (revision), no. 23502/06, § 184, 13 January 2015).

(c) The third party's submissions

31. The Government of the Russian Federation submitted that the respondent State had initiated the international armed conflict by attacking the civilian population of Tskhinvali and the largely unarmed Russian peacekeepers stationed in the city's surrounding areas. As regards the exhaustion of domestic remedies, the third party stated that the applicants should be absolved from the obligation to pursue them given the special

circumstances of the cases at hand. The Russian Government further argued that the Georgian Government had failed to prove that the criminal and civil remedies put forward were effective. As to the question of whether or not the acts constitutive of the alleged violations of the applicants' various rights under the Convention had been caused by acts of the Georgian armed forces, the Russian Government stated that the burden of proof rested on the Georgian Government, and that, in the absence of any evidence to the contrary, the Court should make negative inferences as to the responsibility of the respondent State for the acts in question.

(d) The Court's assessment

32. The Court notes at the outset that the cases raise an issue under Article 1 of the Convention concerning the respondent State's jurisdiction in the circumstances of the international armed conflict at the origin of the matters complained of.

33. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

34. The Court reiterates that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean, *inter alia*, that jurisdiction is presumed to be exercised normally throughout the State's territory. However, this presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory, which may be as a result of (i) military occupation by the armed forces of another State which effectively controls the territory concerned, (ii) acts of war or rebellion, or (iii) the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned (compare *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 311-12, ECHR 2004-VII, with further references). The above-mentioned limitation of the "normal" exercise of jurisdiction means in practice that when a State is prevented from exercising authority over a territory due to exceptional circumstances, it does not lose the jurisdictional link within the meaning of Article 1 of the Convention altogether but rather has its responsibility under the Convention significantly reduced to discharging a number of positive obligations, such as, for instance, taking diplomatic, economic, judicial or other measures (see *Ilaşcu and Others*, cited above, 333 and 335, and also *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 130 and 131, ECHR 2015).

35. The Court observes that the acts allegedly constitutive of violations of the applicants' various Convention rights took place in and around Tskhinvali, the administrative capital of South Ossetia, on 8 and 9 August 2008. These two days fall within the five-day international armed conflict that took place between the military forces of Georgia and the Russian Federation mostly in South Ossetia, but also in Abkhazia, as well as in undisputed Georgian territory, between 8 and 12 August 2008 (see *Georgia v. Russia (II)*, ([GC] (merits), no. 38263/08, §§ 35-40, 51, 109-11 and 113, 21 January 2021). Consequently, whilst these regions clearly fall within the respondent State's internationally recognised borders and thus are covered by the notion of its territorial jurisdiction under Article 1 of the Convention (compare, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 108-09, 134, 139 and 141, ECHR 2004-II), the Court must answer the question of whether or not there existed a valid limitation of the normal exercise of that jurisdiction. This major question must be addressed against the reality of the "acts of war" that took place in South Ossetia on the above-mentioned days in August 2008.

36. In this respect, the Court observes that it has already comprehensively examined the active phase of the hostilities (from 8 to 12 August 2008) between Georgia and the Russian Federation in the case of *Georgia v. Russia (II)* (cited above, §§ 105-44). As was emphasised in that judgment, that inter-State case was the first time since the decision in *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) that the Court had been required to examine the question of jurisdiction in relation to military operations in the context of an international armed conflict. Having noted that the notion of "jurisdiction" contained in Article 1 was a threshold criterion for the question of attributability of alleged violations to a Contracting State, the Court went on to conclude that "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no 'effective control over [the] area ..., but also excludes any form of 'State agent authority and control' over individuals" (ibid., §§ 129 and 137). With respect to the latter, the Court underscored that "State agent authority and control" can hardly materialise during an international armed conflict which consists of massive bombing, shelling and ground attacks effected by the opposing sides' armed forces for the purpose of putting each other *hors de combat*, because such a large-scale war cannot be equated with isolated and specific military actions involving an "element of proximity" (ibid., §§ 127-38).

37. The Court considers that the same considerations, which exclude an "element of proximity" between military actions and the alleged violations of individual victims' various rights under the Convention, apply equally to the presumption of the "normal exercise" by the respondent State of its territorial jurisdiction over Tskhinvali and other conflict-stricken areas of

South Ossetia (see paragraph 34 above for the general case-law principle concerning the possibility of limitation of territorial jurisdiction by "acts of war or rebellion"). Indeed, having regard to the exceptionally large-scale nature of the international armed conflict which took place between the armed forces of the two Contracting States between 8 and 12 August 2008 over, *inter alia*, the establishment of control of the South Ossetian region, and the fact that both sides, the Russian and Georgian armed forces, resorted to massive bombing and shelling of the territories within the same period of time, it would be impossible to track either direct and immediate cause or even sufficiently close proximity between the actions of the Georgian army proper and the effects produced on the applicants (contrast *Solomou and Others v. Turkey*, no. 36832/97, § 25, 24 June 2008, and *Andreou v. Turkey*, no. 45653/99, §§ 48-50, 27 October 2009). In this connection, and as an additional illustration of the level of disarray unavoidably reigning during such large-scale international armed conflicts, it cannot go unnoticed that while the applicants claim that they and their relatives were victims of shelling by the Russian-produced artillery system Grad, the respondent Government submitted evidence, which was not disputed by the applicants, suggesting that the Russian armed forces might also have used the same artillery system to shell Tskhinvali for the purpose of stopping the Georgian ground forces' advance in Tskhinvali on 8 and 9 August (see paragraphs 17 and 28 above, and compare, *mutatis mutandis*, *Şirin Yılmaz v. Turkey*, no. 35875/97, §§ 71-76, 29 July 2004, where the Court, faced with a complaint about a killing by artillery shells during a non-international armed conflict, was unable to conclude that the killing was, beyond reasonable doubt, imputable to the security forces of the respondent State). Then again, while the applicants assert that the civilian population of Tskhinvali had been singled out by Georgian soldiers (see paragraphs 22 and 30 above), such allegations seem to be unsupported by the available fact-finding materials (see paragraph 18 above). The Court considers that these and other possible contradictions and inconsistencies between the military actions which actually occurred in the conflict zone and the effects of those actions on individual victims can be explained by such complexities as the exceptionally large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention, notably international humanitarian law and/or the law of armed conflict (compare *Georgia v. Russia (II)*, cited above, § 141).

38. The Court thus concludes that the events that unfolded in South Ossetia and other areas of Georgia, including in the so-called "buffer zone", where the massive fighting between the armed forces of the Russian Federation and the respondent State took place between 8 and 12 August 2008, were "acts of war", in a context of chaos, effectively preventing the

respondent State from exercising its authority over the areas in question for the duration of the armed conflict. In the same way as those "acts of war" or, borrowing the language of the inter-State judgment, the "active phase of the hostilities" did not fall within the extra-territorial jurisdiction of the Russian Federation, one side of the international armed conflict, the same events cannot be considered, for the same reasons as indicated in that judgment (*Georgia v. Russia (II)*, cited above, §§ 133-44), as attracting the normal exercise of the territorial jurisdiction of Georgia, the other side of the conflict, merely because the territory in which the hostilities took place was formally Georgian. Any other conclusion would, in the eyes of the Court, go against the spirit of the Grand Chamber's ruling in the above-mentioned inter-State case, where the international armed conflict between the two Contracting States, as well as the repercussions of this conflict for the overall jurisdictional test contained in Article 1 of the Convention, were already comprehensively examined.

39. Following the logic of the above-mentioned *Ilaşcu* approach, Georgia's inability to exercise State authority over the relevant territories during the active phase of the hostilities is to be understood as a limitation of the normal exercise of the respondent State's territorial jurisdiction over the war-stricken territories (see *Ilaşcu and Others*, cited above, § 312). Thus, as matter of principle, the respondent State was still expected under the Convention to take diplomatic, economic, judicial or other measures (see paragraph 34 *in fine* above and also paragraph 47 below). However, the Court considers that it would be unrealistic to expect the respondent State to have taken any such measures during the active phase of the hostilities, in a context of chaos and confusion. Given the ongoing massive armed conflict, such positive measures of a public order nature were, on the one hand, impossible to implement and, on the other, of no real value, as they could not have meaningfully contributed to the protection of the applicants' rights in times of war.

40. It follows that the applicants' various complaints under Articles 2, 3, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1, which stem from the acts of war that took place on the territory of Georgia between 8 and 9 August 2008, must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. As regards the alleged lack of effective investigation into the death of the second applicant's relatives

(a) The parties' submissions

41. The Government submitted that the second applicant's complaint concerning the lack of an effective investigation into the circumstances surrounding his relatives' deaths (see paragraph 20 above) was premature because he had not cooperated with the domestic authorities. He had also

never lodged a criminal complaint. It was only after his application had been lodged with the Court that the NGO had informed the prosecution authority about the death of the second applicant's relatives for the first time. However, even that notification had been flawed because the NGO had not informed the prosecution authority that it was representing the applicant's interests and had failed to submit any proof in support of the claims made. Nevertheless, the prosecution authority had duly expressed its readiness to assist the second applicant by inviting him to lodge a criminal complaint and to testify in person, which, however, he had never done. The second applicant had thus failed to display due diligence in his dealings with the national investigative authorities either before or after introducing his application with the Court. The Government also submitted that the domestic investigative authorities had been heavily impeded by the fact of the occupation of the whole of South Ossetia, including Tskhinvali, by Russian forces, a fact which had made it impossible for the investigators to access and examine the scenes of the military clashes of August 2008 (see paragraph 14 above).

42. The second applicant replied that the domestic investigative authorities had been sufficiently informed about the death of his relatives by the NGO's letters of 19 March and 11 May 2009. That being so, the authorities had been under an obligation to launch a criminal investigation on their own motion without waiting for any additional complaints or documents from him. Acknowledging the fact that the Georgian investigative authorities had not been able to access the South Ossetian territory for the purposes of conducting various forensic examinations on the sites of shelling and aerial bombings, the second applicant insisted that the respondent State should still have tried to conduct an effective investigation by attempting to obtain legal assistance from the Russian authorities. Furthermore, the respondent State's investigative authorities could have conducted a number of investigative actions which did not necessarily require having physical access to South Ossetia, such as, for instance, questioning Georgian military servicemen who had taken part in the armed conflict between Georgia and Russia.

(b) The third party's submissions

43. The Government of the Russian Federation endorsed the second applicant's arguments relating to the respondent State's alleged failure to conduct an effective investigation into his relatives' killing (see the preceding paragraph).

(c) The Court's assessment

44. The Court notes that, following the termination of the hostilities between the Georgian and Russian armed forces, that is from 12 August

2008 onwards, the Russian Federation established full extraterritorial jurisdiction over South Ossetia by ensuring the direct presence of its own armed forces there and providing further economic, military and political support to the local *de facto* authorities aimed at exercising "effective control" over the territory (see *Georgia v. Russia (II)*, cited above, §§ 161-75). Reiterating that occupation of a territory of a sovereign State by a foreign State, either by means of direct military presence or through the provision of military, economic and political support to local separatist authorities, limits the "normal" exercise of the territorial jurisdiction by the former State over the thus occupied territory (see, among other authorities, *Ilaşcu and Others*, cited above, § 312), the Court considers that, for the purposes of Article 1 of the Convention, the respondent State is no longer able to fully exercise its normal territorial jurisdiction over South Ossetia as a result of the outcome of the international armed conflict with the Russian Federation.

45. Indeed, it was on the basis of the limitation of the jurisdictional link between the respondent State and the South Ossetian region that the Grand Chamber explicitly stated in its judgment in the relevant inter-State case that the Georgian authorities could not be expected to conduct an effective investigation under Article 2 of the Convention where potential suspects were located in South Ossetia, a territory remaining under the effective control of the Russian Federation (see *Georgia v. Russia (II)*, cited above, § 331 *in fine*). In the same vein as the Grand Chamber's reasoning, the Court considers that even before potential suspects of the allegedly disproportionate use of military force during a large-scale international armed conflict can be identified, in circumstances where even the provenance of the military strikes, as well as the causality and the proximity between the strikes and the alleged loss of life, is heavily disputed between the parties, the very first and decisive investigative steps would consist of examining the sites of the shelling and bombing, as well as fragments of the exploded missiles, conducting the autopsies of dead bodies, identifying and hearing direct witnesses to the military strikes and so on. However, having regard to the already established fact that the respondent State could not exercise its authority over South Ossetia in the immediate aftermath of the international conflict owing to the occupation of this region by a foreign power, its investigative authorities could obviously not access Tskhinvali and its surrounding areas for the purposes of conducting any of the above-mentioned on-site investigations.

46. The Court considers that it would be unrealistic to expect the domestic authorities to investigate such allegations without first giving them the possibility of conducting various technical forensic investigations on the sites of the military battles. It further observes that even in the context of non-international armed conflicts, it has often acknowledged in the past, on the one hand, the importance of prompt examination and collection of

evidence on the site of the use of lethal force and, on the other, the fact that unstable security conditions in conflict-stricken areas posed serious obstacles to the proper conduct of investigations (see, *mutatis mutandis*, *Isayeva v. Russia*, no. 57950/00, §§ 215-24, 24 February 2005, and *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports of Judgments and Decisions* 1998-I). Indeed, challenges and constraints for the investigation authorities stemming from the fact that the deaths occurred during active hostilities in an (extraterritorial) armed conflict continue to influence the feasibility of the investigative measures that could be undertaken throughout the investigation process (see *Hanan v. Germany* [GC], no. 4871/16, § 200, 16 February 2021, with further references).

47. The above findings should not, however, be understood as absolving the respondent State from its procedural obligations under Article 2 of the Convention altogether, but rather as delimiting these obligations. Thus, the Court reiterates that whenever a Contracting State is prevented from exercising its authority over part of its territory, the State still has "a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention" (see *Ilaşcu and Others*, cited above, §§ 330-31; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 100, 23 February 2016; and *Sargsyan*, cited above, § 131). Applying this general principle in the context of the procedural limb of Article 2, the Court finds that, in the particular circumstances of the present cases, the respondent State's obligation to investigate can be understood to be limited to the need to cooperate with the Russian Federation, the latter exercising extraterritorial jurisdiction over South Ossetia, for the purposes of attempting to secure evidence located in the region in question (compare, *mutatis mutandis*, *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 245-47, ECHR 2010 (extracts), and *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 235-36, 29 January 2019). However, for this particular positive obligation to be triggered, the Court considers that the next-of-kin of an individual killed during the armed clashes would also be expected to display a certain degree of diligence in their dealings with the investigative authorities (compare, *mutatis mutandis*, *Finozhenok v. Russia* (dec.), no. 3025/06, 31 May 2011, and *Aydin and Others v. Turkey* (dec.), no. 46231/99, 26 May 2005) by, *inter alia*, taking the initiative and lodging a criminal complaint capable of substantiating the allegations with *prima facie* evidence (namely, death certificates and/or detailed descriptions of the relevant incidents).

48. Having regard to the circumstances of the application brought by the second applicant, the Court does not consider that he displayed a sufficient level of due diligence in his dealings with the domestic authorities: he himself never lodged a duly substantiated criminal complaint, and the Chief

Prosecutor's Office learned for the first time about the purported killing of his relatives in very brief letters sent by a local NGO (see paragraph 10 above). Leaving aside the fact that the NGO does not seem to have been authorised to represent the second applicant (no authority form was submitted), the organisation also does not seem to have provided the prosecution authority with either death certificates, a detailed description of the events that had allegedly led to the killings, or at least a copy of the identity documents of any of the people involved (see paragraph 10 above and contrast *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, §§ 49, 50 and 215, 24 February 2005). However, the Court considers that whenever massive armed clashes or other general and violent security incidents which have resulted in numerous and often unreported deaths are at stake (compare, *mutatis mutandis*, *Hanan*, cited above, § 218), it becomes of particular significance for the purported next-of-kin of the people who have been killed to provide the domestic authorities with *prima facie* evidence in support of their allegations under Article 2 of the Convention (compare, *mutatis mutandis*, *Nasirkhayeva v. Russia* (dec.), no. 1721/07, 31 May 2011, and *Umarov v. Russia* (dec.), no. 30788/02, 18 May 2006). Subsequently, when the Georgian prosecution authority repeatedly invited the second applicant to get involved and cooperate with the investigation within the framework of the criminal probe opened by the domestic authority of its own motion as early as 9 August 2008 (compare with *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 165, ECHR 2011), the latter did not respond to those requests (see paragraphs 9 and 11-12 above). The domestic prosecution authority even requested legal assistance from its Russian counterpart, a fact indicating that the respondent State fulfilled its duty of transnational cooperation in criminal matters, the latter constituting a component of the procedural obligation under Article 2 (see *Güzelyurtlu and Others*, cited above, §§ 221 and 237-8), but those official requests also went unanswered by the Russian side (see paragraph 13 above).

49. In the light of the foregoing considerations, and reiterating that the procedural duty under Article 2 must always be applied realistically in relation to deaths which occurred during active hostilities in an (extraterritorial) armed conflict (see, as a recent authority, *Hanan*, cited above, § 200, and also *Georgia v. Russia (II)*, cited above, § 327), the Court finds that the alleged lack of an effective investigation into the circumstances surrounding the death of the second applicant's relatives cannot be held imputable to the respondent State because of its inability to exercise its authority over the region where those deaths occurred (compare *Hanan*, cited above, § 224) and also owing to the applicant's own failure to display due diligence in his dealings with the authorities. It follows that his complaint under the procedural limb of the above-mentioned provision is

manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. The complaints introduced on 25 November 2019 and 25 June 2020

50. As regards the complaints introduced by the first and third applicants on 25 November 2019 and 25 June 2020 (see paragraph 24 above), the Government objected that those fresh complaints did not fall within the scope of the original applications which were lodged with the Court on 28 August and 27 September 2008, of which they had been notified pursuant to Rule 54 § 2 (b) of the Rules of Court on 6 January 2009 and 23 March 2010, and on which the parties had exchanged final observations. The first and third applicants did not provide any comments in reply to the Government's objection.

51. The Court reiterates that if, after the notification of an application to the respondent Government, the applicant introduces new grievances that cannot be considered as an elaboration of his or her original complaints and on which the parties have commented, the Court will not normally take these fresh matters into consideration (see, among many other authorities, *Kovach v. Ukraine*, no. 39424/02, § 38, ECHR 2008, and *Saghinadze and Others v. Georgia*, no. 18768/05, § 72, 27 May 2010). However, even assuming that the first and third applicants' complaints about the respondent State's unwillingness to shed light on the alleged war crimes committed in South Ossetia, which were introduced more than ten years after the Government had been notified of the original applications pursuant to Rule 54 § 2 (b), fall within the scope of these applications, these new complaints are in any event belated because the respondent State finally discontinued the relevant domestic investigation as early as March 2015 (see paragraph 14 above). Accordingly, these complaints have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 21 October 2021.

{signature_p_2}

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President

Appendix

No.	Application no.	Case name	Lodged on	Applicant Date of Birth
1.	48347/08	*Bekoyeva v. Georgia*	28/08/2008	**Ms Elza BEKOYEVA** ("the first applicant") 03/08/1967
2.	8336/09	*Sipols v. Georgia*	9/02/2009	**Mr Alan SIPOLS** ("the second applicant") 07/11/1970
3.	13508/09	*Tedeyeva v. Georgia*	27/09/2008	**Ms Tatyana TEDEYEVA** ("the third applicant") 04/07/1954
4.	34945/09	*Shmyganovskaya v. Georgia*	9/10/2008	**Ms Tatyana SHMYGANOVSKAYA** ("the fourth applicant") 25/10/1956