

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

SECOND SECTION

DECISION

Application no. 39611/18
GEORGIA
against Russia

The European Court of Human Rights (Second Section), sitting on 28 March 2023 as a Chamber composed of:

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Egidijus Kūris,
Pauliine Koskelo,
Lado Chanturia,
Lorraine Schembri Orland,
Davor Derenčinović*, judges*,

and Hasan Bakırcı, *Section Registrar,*

Having regard to the above application lodged on 22 August 2018,

Having regard to the observations submitted by the parties,

Having deliberated, decides as follows:

PROCEDURE

1. The application was communicated to the Russian Government ("the respondent Government") on 18 June 2019.

2. On 10 September 2019, at the request of the respondent Government, the Chamber decided to adjourn the case until the adoption of a judgment on the merits in the case *Georgia v. Russia (II)* (no. 38263/08). After the delivery of the judgment on the merits in that case on 21 January 2021, the proceedings in the present case were resumed on 25 May 2021.

3. The parties submitted their observations on 15 December 2021 and on 25 February 2022.

4. The Georgian Government ("the applicant Government"), were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

5. The respondent Government were represented by Mr M. Vinogradov, Representative of the Russian Federation to the European Court of Human Rights.

6. On 16 March 2022 the Committee of Ministers of the Council of Europe, in the context of a procedure launched under Article 8 of the Statute of the Council of Europe, adopted Resolution CM/Res(2022)2, by which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022.

7. On 22 March 2022 the Court, sitting in plenary session in accordance with Rule 20 § 1, adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights". It stated that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

8. On 5 September 2022 the Plenary Court took formal notice of the fact that the office of judge with respect of the Russian Federation would cease to exist after 16 September 2022. This, as a consequence, entailed that there was no longer a valid list of *ad hoc* judges who would be eligible to take part in the consideration of cases where the Russian Federation was the respondent State.

9. By a letter of 8 November 2022, the Russian Government were informed, *inter alia*, that the Court intended to appoint one of the sitting judges of the Court to act as an *ad hoc* judge for the examination of applications against that State that the Court remained competent to deal with (applying by analogy Rule 29 § 2 of the Rules of Court). The Russian Government were invited to comment on that arrangement by 22 November 2022, but they did not submit any comments.

10. Accordingly, in the present case the President of the Chamber decided to appoint an *ad hoc* judge from among the members of the composition, applying by analogy Rule 29 § 2 (b).

THE FACTS

11. In the context of an armed conflict that occurred between Georgia and Russia in August 2008, the Russian armed forces invaded all of Abkhazia and South Ossetia[1] (for more details about that conflict, see *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 32-44, 21 January 2021). Russia recognised those two

[1] "Abkhazia" and "South Ossetia" refer to regions of Georgia which are currently outside the *de facto* control of the Georgian Government. Abkhazia has about 200,000 inhabitants, including about 50,000 ethnic Georgians concentrated in the Gali district; South Ossetia has about 30,000 inhabitants, including a small number of ethnic Georgians concentrated in the Akhalgori district (see International Crisis Group report "Abkhazia and South Ossetia: Time to Talk Trade", 2018, p. 1).

Georgian regions as independent States on 26 August 2008. That recognition was not followed by the international community[2]. On the basis of "friendship and cooperation" agreements with Abkhazia and South Ossetia, Russia then established military bases and stationed up to 3,800 Russian soldiers in each of those two regions. Subsequent agreements set up a joint military command between Russia and Abkhazia and incorporated the South Ossetian "military" into the Russian armed forces[3].

12. Furthermore, pursuant to agreements on "joint efforts in protecting the border"[4], Russian border guards (under the Federal Security Service of the Russian Federation) secure the administrative boundary line ("ABL") between those breakaway regions and the territory controlled by the Georgian government. It has been reported that there are around 900 Russian border guards in South Ossetia and around 1,500 in Abkhazia[5]. Since 2009, physical barriers and other measures have gradually been established to block people from crossing the ABL freely. As described by the European Union Monitoring Mission (EUMM) in Georgia[6], this process – often called "borderisation" – includes three main elements: (1) the establishment of physical infrastructure, such as fencing, barbed wire, guard towers, signs informing people that they are approaching the "borders" and advanced surveillance equipment, to force commuters, vehicles and goods to use controlled crossing points established at the ABL; (2) surveillance and patrolling by either Russian border guards or security actors from the breakaway regions who monitor the situation and detain people if they are in violation of established rules; and (3) a crossing regime requiring commuters to have specific documents and only use "official" crossing points[7].

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[2] Only Russia, Nicaragua, Venezuela, Nauru and, most recently, Syria have recognised Abkhazia and South Ossetia as independent States.

[3] As regards Abkhazia, see the "Agreement between the Russian Federation and the Republic of Abkhazia of Alliance and Strategic Partnership" of 2014 and "Human Rights in Abkhazia Today", a report by Thomas Hammarberg and Magdalena Grono, July 2017, pp. 69-70; as regards South Ossetia, see the "Agreement between the Russian Federation and the Republic of South Ossetia on Alliance and Integration" of 2015.

[4] See the "Agreement between the Russian Federation and the Republic of Abkhazia on Joint Efforts in Protecting the State Border of the Republic of Abkhazia" and "Agreement between the Russian Federation and the Republic of South Ossetia on Joint Efforts in Protecting the State Border of the Republic of South Ossetia", both of 2009.

[5] See International Crisis Group report "South Ossetia: The Burden of Recognition", 2010, p. 8, and International Crisis Group report "Abkhazia: The Long Road to Reconciliation", 2013, p. 3. The numbers provided by the applicant Government were slightly higher: around 1,100 Russian border guards in South Ossetia and around 2,000 in Abkhazia.

[6] EUMM was deployed in September 2008 as an unarmed civilian monitoring mission. While its mandate is valid throughout all of Georgia, the *de facto* authorities of Abkhazia and South Ossetia have so far denied access to the territories under their control.

[7] See *EUMM Monitor*, Issue 7, October 2018, p. 3.

Reportedly, this process intensified in 2013[8]. Uncontrolled crossings have been a frequent occurrence, with people taking backdoor paths across the conflict divide to bypass the controlled crossing points. Many of those who cross outside controlled crossing points have no crossing documents. Others cross *via* uncontrolled paths because travel to the crossing points is too inconvenient[9]. Another reason is that it is not always clear where the ABL lies (only parts of the ABL have been marked so far)[10].

13. Georgia and the overwhelming majority of the international community consider the process of "borderisation" illegal under international law. The Georgian authorities refer to the ABL as the occupation line. In contrast, the Russian and the *de facto* Abkhaz and South Ossetian authorities treat the ABL as an international border on the grounds that Russia has recognised the two breakaway entities as independent States.

RELEVANT LEGAL FRAMEWORK

14. The applicant Government submitted the following materials stemming from international organisations and independent international human rights protection associations, in support of their claims: consolidated reports of the Secretary General of the Council of Europe on the conflict in Georgia dated 11 April 2017 (SG/Inf(2017)18) and 11 April 2018 (SG/Inf(2018)15); Amnesty International Report 2017/18 on the state of the world's human rights during 2017; the decision of the Committee of Ministers of the Council of Europe on the conflict in Georgia, adopted at the 1315th meeting of the Ministers' Deputies on 2 May 2018 (CM/Del/Dec(2018)1315/2.1); the Resolution of the European Parliament of 14 June 2018 on Georgian occupied territories 10 years after the Russian invasion (P8_TA(2018)0266); and the Resolution on Ten Years After the August 2008 War in Georgia, adopted by the Organization for Security and Co-operation in Europe (OSCE) Parliamentary Assembly at its twenty-seventh annual session in Berlin from 7 to 11 July 2018.

15. The relevant part of the 2017 consolidated report of the Secretary General of the Council of Europe on the conflict in Georgia (cited above) reads:

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[8] See the report of the Special Rapporteur on the human rights of internally displaced persons, A/HRC/26/33/Add.1, 4 June 2014, § 45, and Amnesty International report "Behind barbed wire: Human rights toll of 'borderisation' in Georgia", 2018, pp. 20 and 24.

[9] See "Human Rights in Abkhazia Today", a report by Thomas Hammarberg and Magdalena Grono, July 2017, p. 67.

[10] See Amnesty International report "Behind barbed wire: Human rights toll of 'borderisation' in Georgia", 2018, pp. 21-23. According to the information provided by the Georgian authorities to Amnesty International in March 2018, the total length of the barbed wire and other fencing along the ABL with South Ossetia was at that time more than 52 out of 350 kilometres, and along the ABL with Abkhazia around 49 out of 145 kilometres.

"*III.1 Reports on Abkhazia*

III.1.i Security

36. According to the assessments by the [Geneva International Discussions (GID)] participants, the security situation has remained relatively stable and calm. However, in meetings with the delegation, the Georgian authorities identified detentions related to ABL crossings as a critical security concern for the local population.

37. Since its resumption in May 2016, the Incident Prevention and Response Mechanism (IPRM) in Gali facilitated by the UN Geneva co-chair has continued to function as the only format on the ground to alleviate security tensions and address incidents. All interlocutors positively assessed the process and the commitment of the participants. A regular and enhanced activation of the hotline is reported in connection to the IPRM resumption.

38. It is understood that lack of progress regarding the investigation conducted by *de facto* authorities into the murder of an ethnic Georgian in the vicinity of the ABL, in May 2016[11], represents a challenge for joint efforts to sustain security and build trust between the sides. A large part of the Gali IPRM agenda is consecrated to this issue. The Georgian authorities stressed the need to bring the perpetrator to justice and informed the delegation that they had transmitted the necessary information to the Abkhaz side. However, no agreement on the matter was reached as of the time of the delegation's visit. It was also reported to the delegation that a general insecurity feeling persists among the local population in Khurcha in the aftermath of the incident.

39. Meanwhile, the identified suspect was tried *in absentia* on murder charges by a Georgian court, which sentenced him to 12 years' imprisonment in December last year. On 10 March, the court of appeal reportedly increased the sentence to 14 years. On 17 March, Interpol issued a red notice warrant on the suspect.

III.1.ii Freedom of movement

40. The main critical development over the reporting period concerns the closure of two additional crossing points on the ABL, namely Khurcha/Nabakevi and Meore-Otobaia/Orsantia, pursuant to a decision of the *de facto* authorities adopted on 28 December [2016], which became effective on 5 March 2017.

41. Although anticipated, the decision prompted severe negative reactions both at the national level and internationally. The UN, the OSCE and the EU advised against such unilateral steps while warning about the detrimental effect on the freedom of movement, cross-ABL trade, access to healthcare and education as well as other aspects of daily lives of the local population, and more broadly on the security situation in the region. In this context, they called upon all actors to engage constructively in the Geneva International Discussions. On 10 March, the *de facto* authorities in Abkhazia reiterated that the decision was not subject to revision and that 'it met the security needs of all its citizens'. In meetings with the delegation, all international interlocutors converged on the important humanitarian impact of the closures also in view of the fact that approximately 600 crossings per day reportedly take place in each location. The Georgian central government and international interlocutors expressed very strong concerns about the consequences of the decision.

42. While the road linking villages adjacent to the ABL with the main crossing point over the Inguri bridge has been repaired and a shuttle service is in place, these measures are deemed to be insufficient to cope with the needs of the local population. It would

[11] The person in question is Giga Otkhozoria – see paragraph 58 below.

appear that the new rules will have a particularly worrying effect on schoolchildren and humanitarian crossings. Crossing itinerary in some cases is extended to over 50 km. Moreover, the purported closure of yet another crossing point has been announced in the future, leaving only the Inguri road bridge where over 1,500 crossings are reported on a daily basis. The local residents in the Gali district peacefully protested against these measures, on 25 January.

43. Freedom of movement continues also to be very negatively affected by the ongoing so-called 'borderisation' process, which according to information provided by the Georgian central government, has resulted in a 48 km stretch of fencing along the ABL. It was reported to the delegation that the so-called 'border zone' with a specific regime adjacent to the ABL inside the territory of Abkhazia had been expanded since November 2016.

44. It is anticipated that the reduction in the number of crossing points will inevitably lead to an increased number of detentions, which continue to occur regularly in case of crossings in 'unauthorised' points and/or due to lack of valid documents. According to the Georgian Security Service, 190 detention cases were reported in the course of 2016 across the ABL with Abkhazia. While as a rule those apprehended are released after being shortly detained and paying a 'fine', the delegation continued to receive reports about instances of ill-treatment. A drastic increase in 'fines' – up to ten times higher – for recurrent 'violations' is reported to be recently enforced.

III.1.iii Identity documents

45. It was reported to the delegation that in December 2016, the *de facto* Parliament of Abkhazia adopted changes to the *de facto* law on the status of foreign citizens that regulates, among other things, the status and rights of the ethnic Georgian population in the Gali district. At the time of the delegation's visit to Tbilisi and as reported to the delegation by international interlocutors, the distribution of the new residence permits had not yet started.

46. The new changes reportedly foresee that the majority of Gali district residents who have Georgian citizenship will be granted 'permanent residency' rights, however, it is understood that these changes do not address all outstanding issues. While it is anticipated that one improvement might purportedly concern crossings along the ABL, lack of clarity persists with respect to other rights attached to the permanent resident status, such as property rights. In discussions with the delegation, representatives of the Georgian central government expressed concern that restrictions for receiving the temporary and permanent 'residence permits' remain unchanged.

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III.2 Reports on South Ossetia

51. Following the so-called 'borderisation' phase that resulted in installation of fences and barbed wire stretching over 52 km along the ABL, ploughing of furrows and deep ditches along the ABL were pursued during the period under review. As a result, local residents continued to be unable to access their agricultural and grazing lands in particular during the harvesting period.

52. At the same time, the delegation was informed that the *de facto* authorities had eased some of the restrictions in terms of access to the so-called 'border zone' adjacent to the ABL, following several protests and criticism by South Ossetia residents who were unable to visit villages situated within the designated area. In particular, on 27 January 2017, the *de facto* government removed special permissions required to enter the so-called 'border zone'. Other restrictions including the requirement of a

permission to carry out livelihood activities within 100 m distance from the ABL reportedly remains in force.

53. The Georgian central government and the international community remain firm in their opposition to the so-called 'borderisation' activities and their impact on the local population, particularly as regards adverse effects on their freedom of movement, livelihood and security perceptions. The issue is regularly raised in the Geneva and IPRM formats.

54. International observers estimate that over 500 crossings per day take place along the ABL, out of which 400 at the Odzisi/Mosabruni main crossing point to Akhalgori; a region populated mainly by the ethnic Georgian population, a part of which continues to commute to and from government-controlled territories after being displaced as a result of the 2008 conflict. Notwithstanding the stable crossing rates, some interlocutors maintained that the crossing point is regarded as 'temporary' by the *de facto* authorities and continues to operate in view of the still complicated transport connection between Akhalgori and Tskhinvali. Reportedly, the previous weight restriction on merchandise (50 kg) allowed through the ABL was lifted during the period under review.

55. Alleged violations of the 'border' regime by the local population keep resulting in short-term detentions by the *de facto* authorities who keep imposing 'fines' on the persons concerned. It was reported to the delegation that at least 10 cases of detentions per month could be ascertained by observers on the ground, although similar to Abkhazia, admittedly the number could be higher.

56. In discussions with the delegation, representatives of the Georgian central government expressed fears that the practice of longer-term detentions could be reinstated. In this respect they once again drew the delegation's attention to the case of a Georgian IDP from the Gori district that was detained in June 2016 for 'illegal border crossing', and sentenced to over 20 years of imprisonment on 3 February 2017 allegedly on crimes relating to 'illegal possession of weapons' during the August 2008 conflict. The delegation was also informed that another person had been recently released after a relatively long detention period in Tskhinvali.

57. As far as identity documents are concerned, the delegation was informed that new 'permissions' valid for three years were being distributed to the ethnic Georgian population in Akhalgori as replacement for long expired documents. While this measure is thought to improve the situation with freedom of movement and the conduct of daily activities, the Georgian authorities have reported cases when 'permissions' were issued with a much shorter validity period of three months. Separation of family members appears to remain a pressing concern for the local population in Akhalgori, in particular as not everybody has been able to obtain the new ID documentation.

58. Meanwhile, according to media reports, the *de facto* authorities have also started to re-issue 'passports' to the local Georgian population for the first time since 2014, in a move that appears to be related with *de facto* presidential elections scheduled for 9 April. On 1 March 2017, *de facto* President of South Ossetia Tibilov declared that ethnic Georgians could be hired to serve in local administration posts.

59. During the period under review, the participants from the Georgian central government and South Ossetia continued to meet regularly in the presence of the European Union Monitoring Mission (EUMM) and the OSCE Geneva Co-Chair in the framework of the IPRM in Ergneti to address security concerns and incidents. The continued readiness of the participants to address jointly security concerns by effectively using the hotline to manage incidents on the ground has been valued by the international co-facilitators."

16. The relevant part of the 2018 consolidated report of the Secretary General of the Council of Europe on the conflict in Georgia (cited above) reads:

"*III.1 Reports on Abkhazia*

III.1.i Security

35. Though the security situation on the ground remained relatively stable as reported by various relevant interlocutors involved in the monitoring of the situation, it was reported to the delegation that the general crime situation had worsened in Abkhazia during the period under review.

36. During the period under review, the IPRM under the auspices of the UN co-chair of the GID continued to convene regularly in Gali, with the most recent, the 53rd round taking place on 27 February. All participants recognise the value of the mechanism, and the associated hotline managed by the EU Monitoring Mission (EUMM), in ensuring exchange of information, increasing confidence and predictability and addressing humanitarian concerns on the ground.

37. Regrettably, no progress was made in delivering justice in the case of the murder of Georgian civilian, Mr Giga Otkhozoria, on 19 May 2016, in the vicinity of the village of Khurcha, on the ABL with Abkhazia (see previous consolidated reports). Representatives of the Georgian central government underlined to the delegation that they remained gravely concerned by the impunity for this criminal act and continued to raise the issue at the GID and IPRM. The media reported that in January 2018, the Georgian Young Lawyers Association, a prominent Georgian NGO, lodged an ECtHR application on behalf of the victim's relatives[12].

III.1.ii Freedom of movement

38. Freedom of movement continued to be severely affected by the so-called 'borderisation' process. The delegation's interlocutors noted that the period under review was marked by gradual reinforcement of so-called 'borderisation' activities, displayed in new earth berms, ditches and new surveillance equipment including in and around 'crossing points' that were closed down last year. The Georgian authorities continue to resolutely protest against the so-called 'borderisation' process and condemn it in strong terms.

39. An average of 3,000 ABL crossings per day are reported on the main bridge over the Inguri River, marking an increase in comparison to previous periods, presumably as a result of the closure of other points. Whilst some interlocutors noted that the situation with crossings had relatively stabilised due to certain steps taken by the *de facto* authorities and international humanitarian agencies, other argued that these measures were insufficient and that the most vulnerable groups of the population such as elderly and disabled people, schoolchildren and patients in emergency medical evacuations were affected the most. Though a second crossing point remains in place, preparations to close it are reported as ongoing.

40. As regards crossing documentation, the delegation was informed that the *de facto* authorities in Abkhazia had temporarily extended the validity of use of the so-called

[12] Application no. 3963/18 (*Matkava and Others v. Russia*) is pending before the Court. It was lodged on 11 January 2018 and notice was given to the respondent Government on 8 November 2018.

'Form Nr. 9'[13], arguably in view of the low number of so-called 'residence permits' issued so far (cf. also part *III.1.iii*).

41. The so-called 'borderisation' and other freedom of movement restrictions along with the reported lack of crossing documents continue to complicate access to livelihoods, healthcare and education as well as family links. Several interlocutors met in Tbilisi, including from civil society, raising concerns that the humanitarian and economic situation in the Gali district is primarily and particularly affected even though restrictions appear to affect not only the ethnic Georgian population but also members of other communities.

42. Concerns persist also in relation to the detention of persons who are accused of 'violating' crossing rules. On a more positive note, the delegation was informed that two Georgian citizens who were earlier detained for 'illegal crossing' and subsequently sentenced on other charges (cf. 16th consolidated report) had been recently released.

III.1.iii Identity documents

43. As of the time of the visit, it was reported that the *de facto* authorities had issued 1,500 new so-called 'residence permits' to ethnic Georgians in the Gali district under the so-called 'Law on the legal status of foreigners'. The delegation was informed that some 5,000 applications were filed compared to over 20,000 persons who had their *de facto* 'passports' removed or invalidated in 2013. According to some interlocutors, the applications take excessive time to process in part due to security checks.

44. In addition, the local *de facto* authorities in Gali have indicated that some 4,000 individuals would not be entitled to a so-called 'foreign residence permit'. The decision purportedly affects people who have moved to reside in adjacent areas under the control of the Georgian central government but periodically cross to Abkhazia to access their land and agricultural livelihoods.

45. As previously reported, the scope of the rights and entitlements attached to this new 'legal status' is marked by ambiguity, giving rise to concerns about the rights of the local population. Effective implementation of property rights during property transfer transactions seems to be particularly problematic. The delegation was informed that the *de facto* authorities have undertaken to amend the *de facto* legislation in the near future. However, little information seems to be available in this respect creating further uncertainty.

46. It is recalled that the UN has sought assurances with regard to returnees' rights relating to permanent residence, freedom of movement, birth registration and property ownership and more generally has called for access to political rights, equal protection before the law, social security, health care, work and employment, education, freedom of thought, conscience and expression, and cultural life.

III.1.iv Access to education, including teaching of/in the native language

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50. It was reiterated to the delegation that the freedom of movement of schoolchildren who attend schools in central government-controlled territory remained problematic in the aftermath of the closure of two 'crossing points' in 2017, even though no detentions

[13] In the Soviet Union, "Form No. 9" was an administrative form widely used to replace lost or missing identity documents. In the wake of the conflict, when people were left without documents, and later as old Soviet passports expired, "Form No. 9" was used to provide a replacement identity document (see "Human Rights in Abkhazia Today", a report by Thomas Hammarberg and Magdalena Grono, July 2017, p. 60).

seem to have recently occurred. Currently, only 16 children are reported to be crossing, which appears to be a considerably lower number in comparison to previous years.

III.2 Reports on South Ossetia

51. The general security situation along the ABL during the reporting period was assessed by observers on the ground as relatively calm. Security incidents continue to be discussed in the IPRM in Ergneti and are effectively dealt with through the activation of the associated Hotline. It was reported that in this framework the EUMM has proposed to enlarge the list of activities conducted by military/security services near the ABL that could be pre-announced *via* the Hotline. At the same time, representatives of the Georgian central government underlined the necessity of creating international security arrangements to address security challenges on the ground.

52. The period under review was regrettably marked by a continuation of so-called 'borderisation' activities. In addition to the 60 km which have been fenced off, ploughed lines continue to be used, apparently in an effort to 'demarcate' the ABL, according to the interlocutors met by the delegation. The human rights and humanitarian dimensions of the so-called 'borderisation' were unfortunately reflected in the inability of the local population to move freely, access livelihoods or collect firewood during the winter season remain of serious concern.

53. As previously reported, approximately 500 people are estimated to cross daily through the Mosabruni/Odzisi 'crossing point' to the Akhalgori district inhabited by ethnic Georgians. It was reported that since January 2018 a *de facto* customs office has been functioning at this crossing point. According to the *de facto* authorities, who have justified this measure with the need to control the flow of agricultural goods to South Ossetia, Akhalgori residents would be allowed to transport goods (except meat and dairy products) of up to 50 kilograms monthly for personal use. Goods beyond that limit are declared and a fee is levied. Georgia's Ministry of Foreign Affairs condemned the opening of the post as another 'illegal step' by the Russian Federation and warned about the aggravation of the humanitarian situation of the local people.

54. It was reported to the delegation that the number of detentions related to 'unauthorised' crossings seemed to be lower than in previous periods, although no comprehensive statistical data exists in this regard. The Georgian authorities and the EUMM possess information only about detentions of ethnic Georgians who are subsequently handed back to the Georgian side, whilst it is understood that the community in Tskhinvali is also affected. It was also reported that a case involving a Georgian long-term detainee in Tskhinvali, referred to in the previous consolidated report, had been positively resolved in November, leading to his 'pardon' and release. At the same time, in the meeting with the delegation, the Georgian Public Defender expressed concerns about the allegations of ill-treatment in Tskhinvali detention facilities.

55. In a grave development, on 23 February, Mr Archil Tatunashvili, a Georgian citizen residing in the Akhalgori district was detained and later died in custody in South Ossetia. This tragic incident led to a wide outcry in Georgia and to broad international condemnation. Moreover, the *de facto* authorities' decision to delay the transfer of the victim's body to the Georgian central government and the family, for almost one month, until 20 March, on the grounds of conducting forensic procedures gave rise to additional concerns. Meanwhile, two other persons who were detained with the victim were released only 11 March. The Co-chairs of the GID have called for a thorough investigation into the case, as well as for co-operation among relevant actors, including in the IPRM framework. Other international actors have made similar calls."

17. The relevant part of the Amnesty International Report 2017/08 on the state of the world's human rights during 2017 (pp. 172-73) reads as follows:

> "Russian forces and *de facto* authorities in the breakaway regions of Abkhazia and South Ossetia continued to restrict movement across the *de facto* border, briefly detaining and fining dozens of people for 'illegal' border crossing. The increased fencing along the administrative boundary lines continued to adversely affect the rights of local residents, including the rights to work, food and an adequate standard of living, owing to the loss of access to their orchards, pasture and farm land."

18. The decision of the Committee of Ministers of the Council of Europe of 2 May 2018 on the conflict in Georgia (cited above) reads as follows:

> "The Deputies
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> 1. recalled their decisions on 'The Council of Europe and the conflict in Georgia' of 29 and 30 April and 2 May 2014 (1198th meeting), 12 May 2015 (1227th meeting), 4 May 2016 (1255th meeting) and 3 May 2017 (1285th meeting); reiterated the unequivocal support of the Council of Europe member States for the sovereignty and territorial integrity of Georgia within its internationally recognised borders;
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> 2. stated that the conclusion and implementation of so-called treaties on alliance and strategic partnership/integration between the Russian Federation and Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia and the recent ratification by the Russian State Duma of a so-called agreement on the incorporation of military units of the Tskhinvali region of Georgia into the armed forces of the Russian Federation, as well as the recent opening of so-called customs points in the Georgian regions of Abkhazia and Tskhinvali region/South Ossetia aimed at the integration of these regions respectively into the customs sphere of the Russian Federation, impede the peaceful conflict resolution, undermine the ongoing efforts to strengthen security and stability in the region, constitute repeated violations of the sovereignty and territorial integrity of Georgia and have no legal validity; reiterated that any illegal act aimed at changing the status of the Georgian regions will have no legal effect; reiterated that any illegal act by the Russian Federation aimed at changing the status of the Georgian regions, including through issuing passports and establishing a so-called status of foreign residents, have no legal effect and further complicate the situation on the ground; called upon the Russian Federation to stop and reverse this process and to comply with its international law obligations and commitments, including under the EU mediated 12 August 2008 Ceasefire Agreement, in particular with regard to the withdrawal of military forces and allow the establishment of international security mechanisms on the ground;
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> 3. stated that Georgia, as the only sovereign State under international law over its regions of Abkhazia and Tskhinvali region/South Ossetia, is still prevented from exercising legitimate jurisdiction over these regions due to the continuous impediments put by the Russian Federation, including its continuing military presence therein;
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> 4. deeply regretted that despite the constant calls upon the Russian Federation to reverse this process, it continues installing razor and barbed wire fences and other artificial obstacles along the administrative boundary lines (ABLs) dividing families and communities, violating human rights and fundamental freedoms, complicating the settlement of the conflict involving two member States; expressed their concern that the closure of 'crossing points' across the ABL of the Georgian region of Abkhazia is detrimental for freedom of movement and livelihood of the local residents and further deteriorates the humanitarian situation on the ground;

5. underlined the efforts of Georgia to reach out to the residents of its regions of Abkhazia and Tskhinvali region/South Ossetia by enhancing humanitarian activities; expressed appreciation for the various initiatives taken by Georgia in this respect, *inter alia*, through providing education opportunities and free medical service to the residents of these regions; welcomed the new peace initiative of the Government of Georgia entitled 'A step to a better future', as a vivid sign of Georgia's firm commitment to promote confidence and interaction between the societies split by the dividing lines;

6. expressed profound concern that the human rights situation in the Georgian regions of Abkhazia and Tskhinvali region/South Ossetia has been further deteriorating, including with regard to the right to education in native language, the right to freedom of movement, the right to property, and the right to liberty and security; expressed serious concern at the discrimination based on ethnic grounds; expressed concern that IDPs and refugees continue to be deprived of the right to return to their places of origin in a safe and dignified manner;

7. expressed grave concern over the detention of three Georgian citizens Mr Archil Tatunashvili, Mr Levan Kutashvili and Mr Ioseb Pavliashvili in Tskhinvali region/South Ossetia and the subsequent death of Mr Archil Tatunashvili in custody; condemned the fact that handing over his body became a topic for negotiations, which lasted almost one month; expressed concern over obstacles to the freedom of movement of Mr Levan Kutashvili and Mr Ioseb Pavliashvili, who were allowed to cross into Tbilisi Administered Territory after considerable delay;

8. expressed grave concern over impunity around the killing of an unarmed Georgian civilian on 19 May 2016 in the village of Khurcha[14];

9. expressed concern at the razing of intentionally damaged houses belonging to IDPs in Eredvi village, Tskhinvali region/South Ossetia, in violation of property rights;

10. bearing in mind that human rights and fundamental freedoms shall be protected by all relevant States Parties to the European Convention on Human Rights in the Georgian regions of Abkhazia and Tskhinvali region/South Ossetia, called on the authorities exercising effective control:

- to create conditions allowing for the voluntary, safe and dignified return of IDPs and refugees, and to protect their property rights;

- to guarantee and implement the right to education in schools and preschools, including education in the native language in Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia;

- to remove any impediment, restriction or limitation to the right to freedom of movement across the ABLs, including for medical and education purposes; to cease arbitrary detention of persons, including in the context of so-called 'illegal border crossing' and to re-open 'crossing points';

- to ensure that residents of the Georgian regions concerned are not subject to discrimination on any including ethnic ground and are prevented from holding Georgian passports;

- to investigate allegations of human rights violation and ensure appropriate follow-up in accordance with the European standards on human rights;

[14] The person in question is Giga Otkhozoria – see paragraph 58 below.

- to prevent further deterioration of monuments belonging to the cultural heritage throughout Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia;

11. deeply regretted that neither the Commissioner for Human Rights, the monitoring bodies, nor the Secretariat delegation preparing the Secretary General's consolidated reports have been granted access to the Georgian regions concerned; invited the Secretary General to engage in a dialogue with the Russian Federation and Georgia to this end; called on the Russian Federation to secure immediate and unrestricted access to the territories beyond the control of the Government of Georgia to the Council of Europe bodies;

12. encouraged the Secretary General to continue the submission of his biannual consolidated reports on the conflict in Georgia to the Committee of Ministers."

19. The Resolution of the European Parliament of 14 June 2018 on Georgian occupied territories 10 years after the Russian invasion and the OSCE Resolution on Ten Years After the August 2008 War in Georgia (cited in paragraph 14 above) are along the same lines as the decision of the Committee of Ministers of the Council of Europe of 2 May 2018 on the conflict in Georgia, reproduced in paragraph 18 above. Since they are available on the Internet, they have not been reproduced here.

COMPLAINTS

20. The applicant Government outlined their case as follows:

"Georgia alleges before the Court two separate but related administrative practices, each of which involves a pattern of repeated and linked violations of multiple Convention rights. Both concern the recent sharp deterioration in the human rights situation in the occupied territories that has been recognised in various international fora:

a. The first administrative practice is the ongoing practice of the Russian authorities, and the 'authorities' of Russia's subordinate local administrations (*de facto* organs of Russian Federation in the occupied Georgian territories), of harassing, unlawfully arresting and detaining ethnic Georgian civilians attempting to cross the ABLs, or living adjacent to them, of restricting their freedom of movement, detaining them against their will, and of subjecting them to physical ill-treatment (sometimes amounting to torture or leading to death). The purpose or effect of the administrative practice is to intimidate the ethnic Georgian population living close to the ABL, to cut those who are resident in the occupied territories off from the facilities, opportunities and people located in Georgian-controlled territory, to further isolate ethnic Georgians resident in the occupied territories, and to consolidate and complete the process of 'cleansing' the occupied territories of their ethnic Georgian civilian population.

i. This administrative practice involves a systematic pattern of action which violates the Convention rights of the ethnic Georgian civilian population living close to the ABLs (on both sides of each line), in particular by action that violates the right to freedom of movement (Article 2 of Protocol 4); the right to be protected against arbitrary deprivation of liberty (Article 5(1)); the protection from torture and inhuman or degrading treatment or punishment (Article 3); the right to life (Article 2); the right to respect for one's home, and one's private and family life - lack of access to home and the graves of relatives (Article 8); the right to education (Article 2 of Protocol 1); the right to property (Article 1 of Protocol 1). This pattern of violations of the

Convention is well-established, entrenched, officially tolerated (indeed encouraged) and ongoing.

ii. The applicant Government also invokes, in this connection, Article 14 (the prohibition on discrimination) and Article 18 (limitation on the use of restrictions on Convention rights) in conjunction with the pattern of violations of Articles 1 and 2 of Protocol 1 and Article 2 of Protocol 4 and Article 5 of the Convention.

b. The second administrative practice is the policy of the Russian authorities, and the 'authorities' of the subordinate local administrations, to shield perpetrators from justice for serious crimes of violence (including fatal violence) committed by 'border guards' or 'officials' for whose actions the Russian Federation is accountable under the Convention. This amounts to a practice of impunity or *de facto* immunity for public officials and others committing those crimes. This administrative practice violates the investigative obligation inherent in Articles 2, 3 and 8 of the Convention, (the duty to conduct a prompt, independent and impartial investigation capable of leading to the identification, accountability and punishment of the perpetrator); and Article 13 (the right to an effective remedy).

Lastly, the applicant Government asks the Court to consider the three individual cases arising out of the abduction and murder of Davit Basharuli, Giga Otkhozoria and Archil Tatunashvili:

a. The Court is first asked to consider these three cases as compelling and detailed illustrations of the two administrative practices alleged (i.e. as 'case studies' of the practices).

b. However, the Court is also asked to consider these three cases as individual violations that call for a specific finding and an award of just satisfaction.

i. In all three cases, the violation of the relevant investigative obligations amount to continuing breaches of Articles 2 and 3 and Article 13 of the Convention, and the Court is asked so to find.

ii. In the case of Archil Tatunashvili the Court is additionally asked to reach a finding on the substantive violations of Articles 2, 3, 5, and 8 of the Convention and Article 2 of Protocol 4."

THE LAW

I. PRELIMINARY ISSUES

21. The applicant Government asked the Court to consider the cases of Davit Basharuli, Giga Otkhozoria and Archil Tatunashvili not only as illustrations of the administrative practices alleged, but also as individual violations of the Convention. The Court notes that those cases are also the subject of three pending individual applications (*N.G. and N.B. v. Russia*, no. 44677/21; *Matkava and Others v. Russia*, no. 3963/18; and *Tatunashvili v. Russia*, no. 41776/18). Notice of one of them has already been given to the respondent Government and the applicant Government have intervened as a third party under Article 36 § 1 of the Convention (*Matkava and Others*, cited above). Accordingly, in this inter-State case, the Court will only examine the allegations of administrative practices and will consider the three individual

cases as alleged illustrations of such practices (see *Georgia v. Russia (I)* [GC], no. 13255/07, § 128, ECHR 2014 (extracts)).

22. As to the temporal scope of the case, the Court notes that the applicant Government complained, in essence, about various human rights consequences of the process of "borderisation" outlined in paragraph 12 above. That process started in 2009. The Court therefore agrees with the respondent Government that no events which occurred before 2009 should be taken into consideration as illustrations of the administrative practices alleged.

23. Lastly, in view of the fact that the Russian Federation ceased to be a Party to the Convention on 16 September 2022 (see paragraph 7 above), the Court decides that it has jurisdiction to deal with the applicant Government's complaints in so far as they relate to facts that took place before that date (see *Fedotova and Others v Russia* [GC], nos. 40792/10 and 2 others, §§ 68-73, 17 January 2023, and *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, 25 January 2023).

II. ALLEGED LACK OF A GENUINE APPLICATION

A. The parties' submissions

24. The respondent Government objected that the purpose of the applicant Government was not genuinely to raise issues related to the protection of human rights under the Convention. Rather, the application had been brought to seek a decision on issues of general international law. They submitted that putting such questions before the Court demonstrated a lack of good faith on the part of the applicant Government and amounted to an abuse of process.

25. The applicant Government disagreed, without going into any details.

B. The Court's assessment

26. In relation to individual applications, Article 35 § 3 (a) allows the Court to declare inadmissible an application lodged under Article 34 on the ground that it constitutes an abuse of the right of individual application. There is no such provision in respect of inter-State applications lodged under Article 33 of the Convention. No general, and in the absence of an express provision, necessarily implied, good faith requirement for the admissibility of inter-State applications has been identified under the Convention or under general public international law beyond the existing criterion already set out in the Court's case-law that such application must not be "lacking the requirements of a genuine allegation" (see, for instance, *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 269, 16 December 2020, and *Ukraine and the Netherlands v. Russia*, cited above, § 492). The

Court does not consider there to be any basis for now introducing such a requirement.

27. In the present case, the Court is asked to rule on various consequences of the process of "borderisation" for the rights and freedoms defined in the Convention and the Protocols thereto of ethnic Georgians attempting to cross the ABLs, or living adjacent to them on both sides, and whether the victims of any such violations fell within the jurisdiction of the respondent State for the purposes of Article 1 of the Convention. The Court considers that those issues are indeed legal ones and raise genuine questions under the Convention.

28. The Court is aware that those issues inevitably have political aspects. However, that fact alone does not suffice to deprive them of their character as legal issues. Indeed, the Court has never refused to decide a case brought before it merely because it had political implications. Any such implications in the present case cannot deprive the Court of the competence expressly conferred on it under Article 19 of the Convention. Judicial adjudication on those issues is entirely consonant with its competence under that Article to ensure the observance of the engagements undertaken by the respondent State in the Convention and the Protocols thereto (see *Ukraine v. Russia (re Crimea)*, cited above, §§ 272-74, and the authorities cited therein).

29. Accordingly, the Court considers that there is no basis on which the present application can be rejected as lacking the requirements of a genuine application under Article 33 of the Convention and dismisses the respondent Government's objection under this head.

III. JURISDICTION OF THE RESPONDENT STATE REGARDING THE EVENTS COMPLAINED OF BY THE APPLICANT GOVERNMENT

30. Article 1 of the Convention provides:

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

31. In order for an alleged violation to fall within the Court's Article 19 jurisdiction to "ensure the observance of the engagements undertaken by the High Contracting Parties", it must first be shown to fall under the Article 1 jurisdiction of a High Contracting Party. It is for this reason that the Court has described Article 1 jurisdiction as a threshold criterion (see *Ilaşcu and Others*, cited above, § 311; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; and, most recently, *Georgia v. Russia (II)*, cited above, § 129). In its recent decision in *Ukraine v. Russia (*re *Crimea*) (cited above, § 264), it explained that the question whether the case fell within the jurisdiction of the respondent State was a preliminary issue to be determined before any assessment of the merits of the substantive allegations could take place (see also *Ukraine and the Netherlands v. Russia*, cited above, § 506). Establishing the existence of Article 1 jurisdiction is not necessarily

determined by the merits of the case, and it is not therefore necessarily to be left to be determined at the merits stage of the proceedings. There is nothing to prevent the Court from establishing already at this preliminary (admissibility) stage whether the matters complained of by the applicant Government fall within the jurisdiction of the respondent Government (ibid., § 507).

A. The parties' submissions

1. The respondent Government

32. The respondent Government submitted that, as a matter of principle, the jurisdiction of a State within the meaning of Article 1 of the Convention was based on the principle of territoriality and did not extend beyond the national territory of a State Party unless it was voluntarily extended by that State Party under Article 56 of the Convention. In that respect, they disagreed with the *Al-Skeini* line of case-law adopted by the Court, which according to them disregarded the sovereign entitlement of Contracting States to decide whether and how to apply the Convention beyond their metropolitan jurisdiction.

33. They further maintained that the Russian Federation could not be held responsible for the conduct of the Abkhazian and South Ossetian authorities. In this connection, they submitted an argument based on the case-law of the International Court of Justice (ICJ), namely *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*[15] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[16], the latter referring to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[17], in particular Article 8 thereof concerning the attribution of conduct of persons or groups of persons directed or controlled by a State.

34. For those reasons, the respondent Government asserted that the Court had no jurisdiction *ratione loci* to examine the present case.

2. The applicant Government

35. The applicant Government referred to the Court's finding in *Georgia v. Russia (II)* (cited above) that the Russian Federation had "effective control" over Abkhazia and South Ossetia until at least 23 May 2018 (§§ 298-99). No material change in circumstances having taken place since then, they claimed that the Russian Federation still had "effective control" over Abkhazia and

[15] Judgment of 27 June 1986, *ICJ Reports* 1986, p. 14.
[16] Judgment of 26 February 2007, *ICJ Reports* 2007, p. 43.
[17] See UN General Assembly Resolution 56/83, 28 January 2002, UN Doc. A/RES/56/83.

South Ossetia and that the victims of the alleged violations of the Convention in the present case fell within the jurisdiction of the respondent State.

36. The applicant Government also invoked the "State agent authority and control" ground as a basis for "jurisdiction" within the meaning of Article 1 of the Convention, alongside the "effective control" ground, without going into much detail.

B. The Court's assessment

1. General principles

37. The general principles relevant to jurisdiction under Article 1 of the Convention were summarised in *Al-Skeini and Others* (cited above, §§ 130-142) and reproduced in *Georgia v. Russia (II)* (cited above, § 81).

2. Application to the present case

38. The respondent Government's arguments concerning jurisdiction are essentially the same as those which the respondent Government advanced, *inter alia*, in *Georgia v. Russia (II)* ((dec.), no. 38263/08, § 61, 13 December 2011), as well as those which the Netherlands Government raised in *Jaloud v. the Netherlands* ([GC], no. 47708/08, ECHR 2014).

39. In *Al-Skeini and Others* (cited above, § 140) the Court held, in the context of the "effective control" basis for extraterritorial jurisdiction under Article 1 of the Convention, as follows:

> "140. The 'effective control' principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, 'with due regard ... to local requirements', to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term 'jurisdiction' in Article 1. The situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible. ..."

40. In reply to arguments based on the ICJ's case-law concerning a respondent State's responsibility under public international law for the acts complained of, the Court stated the following in *Jaloud* (cited above, § 154):

> "... the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law."

41. The Court has also laid down that principle in *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 and 2 others, § 115, ECHR 2012 (extracts)) and reiterated it in *Mozer v. the Republic of Moldova and Russia* ([GC], no. 11138/10, § 102, 23 February 2016):

> "The Russian Government submitted an argument based on the ICJ *Bosnian Genocide* case, as they had done in *Catan and Others* (cited above, § 96), and the case of *Nicaragua v. the United States of America* ..., which was part of the case-law taken into account by the Court in *Catan and Others* (cited above, § 76). In these cases the ICJ was concerned with determining when the conduct of a group of persons could be attributed to a State, with the result that the State could be held responsible under international law for that conduct. In the instant case, however, the Court reiterates that it is concerned with a different issue, namely whether the facts complained of by the applicant fall within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the Court has already found, the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law (see ... *Catan and Others*, cited above, § 115)."

42. The Court added in *Georgia v. Russia (II)* (cited above, § 162) that the question whether the facts complained of by the applicant Government fall within the jurisdiction of the respondent State and whether they are attributable to that State and engage its responsibility are separate matters, the latter two having to be determined on an examination on the merits.

43. The Court finds no reason in the present case to depart from the case-law described in paragraphs 39-42 above.

44. In respect of Abkhazia and South Ossetia, in particular, the Court held in *Georgia v. Russia (II)* (cited above) that the strong Russian presence and the dependency of the *de facto* Abkhazian and South Ossetian authorities on the Russian Federation, on whom their survival depended, indicated that there had been continued "effective control" over those two breakaway regions at least until 23 May 2018 (ibid., §§ 162-75 and 299). Given the absence of any relevant new information to the contrary, the Court considers that this conclusion continues to be valid.

45. It follows that the victims of the alleged violations of the Convention in the present case fall within the jurisdiction of the Russian Federation. The objection raised by the respondent Government in that regard must therefore be dismissed.

IV. EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

1. The respondent Government

46. The respondent Government maintained that the victims of the alleged administrative practices should have exhausted the available legal remedies in Abkhazia and South Ossetia. In this connection, they referred to the finding

of the Court, in *Demopoulos and Others v. Turkey* ((dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010), that there was no direct, or automatic, correlation of the issue of recognition of the legitimacy of a "State" by the international community and the application of Article 35 § 1 of the Convention. In this connection, the respondent Government provided an overview of the legal system of those two breakaway regions.

47. The respondent Government added that, if the applicant Government considered that any breaches of the Convention had actually been committed by the Russian authorities, it was necessary to use the remedies under Russian law; however, the authorities of the Russian Federation had not received any official complaints or requests for mutual legal assistance from the Georgian authorities. Instead, the respondent Government maintained, "representatives of the Georgian authorities made loud statements at the Geneva International Discussions and [Incident Prevention and Response Mechanisms] meetings on the topic of 'Russian occupation', which [was] not exhaustion of effective remedies".

2. The applicant Government

48. The applicant Government maintained that the rule on exhaustion of domestic remedies did not apply to allegations, such as those made in the present case, of an administrative practice of violations of the Convention. In any event, even if the rule on exhaustion of domestic remedies were to apply, the respondent Government had failed to demonstrate that there had been practical and effective remedies available in relation to the alleged violations.

B. The Court's assessment

49. The Court reiterates that the rule of exhaustion of domestic remedies as embodied in Article 35 § 1 of the Convention applies to State applications (Article 33), in the same way as it does to "individual" applications (Article 34), when the applicant State does no more than denounce a violation or violations allegedly suffered by "individuals" whose place, as it were, is taken by the State. On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice (see *Georgia v. Russia (I)* (dec.), no. 13255/07, § 40, 30 June 2009; *Ireland v. the United Kingdom*, 18 January 1978, § 159, Series A no. 25; and *Denmark v. Turkey* (dec.), no. 34382/97, 8 June 1999). The Court has ruled that it will examine in the present case the allegations of administrative practices only (see paragraph 21 above). The present case thus falls under the latter type of inter-State cases.

50. In view of the above, the Court finds that the exhaustion rule does not apply in the circumstances of the present case, and it dismisses the respondent Government's objection of non-exhaustion of domestic remedies.

V. ALLEGED EXISTENCE OF ADMINISTRATIVE PRACTICES INCOMPATIBLE WITH THE CONVENTION

A. The parties' submissions

1. The applicant Government

51. The applicant Government maintained that at the admissibility stage of an inter-State case in which an administrative practice was alleged, it was necessary only to provide prima facie evidence of the alleged administrative practice. In support of their allegations, the applicant Government referred to various pieces of evidence, notably an official document of the State Security Service of Georgia recording thousands of incidents and, insofar as possible, the name of the victims, the place and date of their detention, the date of their release and their date of birth. Among the incidents recorded in that document were: (a) the disappearance and death of Davit Basharuli (an ethnic Georgian resident of South Ossetia who was arrested by the *de facto* police authorities of South Ossetia on 4 June 2014 on suspicion of having committed a burglary and was not seen again until 4 January 2015 when his body was found hanging from a tree in a forest in South Ossetia; according to an expert report submitted by the applicant Government, his body bore signs of beating); (b) the death of Giga Otkhozoria (an ethnic Georgian who was refused entry into Abkhazia and was then chased and killed by a "border guard" of the *de facto* authorities of Abkhazia in territory controlled by the Georgian government on 19 May 2016); (c) the death of Archil Tatunashvili (an ethnic Georgian who was arrested by "law enforcement officers" of the *de facto* authorities of South Ossetia while trying to enter that breakaway region, interrogated about his involvement in the 2008 conflict and, according to an expert report submitted by the applicant Government, tortured to death); (d) alleged murder of three other ethnic Georgians in Abkhazia and a death of an ethnic Georgian resident of South Ossetia from a heart attack (allegedly, the life of that person could have been saved, had he been allowed to undergo treatment in territory controlled by the Georgian government); (e) fifty-two cases of alleged ill-treatment in Abkhazia and seven cases of alleged ill-treatment in South Ossetia since the onset of the process of "borderisation" (more precisely, in 2009, one case in South Ossetia; in 2010, two cases in Abkhazia; in 2011, four cases in Abkhazia; in 2012, six cases in Abkhazia; in 2013, thirteen cases in Abkhazia; in 2014, eight cases in Abkhazia; in 2015, eleven cases in Abkhazia; in 2016, two cases in Abkhazia and three cases in South Ossetia; in 2017, three cases in Abkhazia and one case in South Ossetia; in 2018, one case in Abkhazia; in 2019, one case in Abkhazia and

two cases in South Ossetia; in 2020, no cases reported; and in 2021, one case in Abkhazia); and (f) many cases of detention of ethnic Georgians by the Russian or *de facto* authorities of the breakaway regions for "illegally crossing" the ABL (more than a thousand such cases in each of the regions since the onset of the process of "borderisation"). The applicant Government also referred to international materials mentioned in paragraph 14 above and to news reports. The applicant Government emphasised that they were ready to submit additional evidence in respect of the incidents recorded in the above-mentioned document of the State Security Service of Georgia and that official information regarding those incidents could also be obtained from the EUMM. As to the illustrative cases of Davit Basharuli, Giga Otkhozoria and Archil Tatunashvili, they provided witness statements, CCTV footage and forensic medical reports. According to the Government, the key features which bound these incidents together as a pattern amounting to an administrative practice were: (a) the consistency of methods used and the surrounding circumstances: (b) the convergence of location and context; (c) the common motive or purpose; (d) the evidence of official tolerance of the crimes; and (e) the culture of impunity.

52. Lastly, the applicant Government submitted that it was not open to the Russian Government to prevent the authorities of the territorial State from gaining access to the relevant territory while simultaneously submitting that their failure to provide direct evidence rendered an application inadmissible.

2. The respondent Government

53. The respondent Government argued that the applicant Government's allegations of administrative practices were vague and unclear, as the alleged victims, perpetrators and dates of the alleged events had not always been clearly identified. Moreover, they had not been supported by proper primary evidence from the alleged victims. For that reason, they submitted that the application failed to make out a prima facie case on attribution of alleged breaches of the Convention to Russia. They denied that there was prima facie evidence regarding the "repetition of acts" or "official tolerance" and invited the Court either to declare the application inadmissible or to carry out a thorough examination of each incident and to individualise the inter-State complaints.

54. As regards the case of Davit Basharuli, the respondent Government submitted that the *de facto* authorities of South Ossetia had investigated and had concluded that he had not been murdered. Similarly, they asserted that the *de facto* authorities of Abkhazia had not been able to conduct an effective investigation into the case of Giga Otkhozoria since they had not had access to the crime scene and the Georgian authorities had failed to make available to them a certified copy of their criminal file. In any event, the respondent Government argued that, in accordance with *Ukraine v. Russia (re Crimea)* (cited above, § 399), the illustrative cases to which the applicant Government

referred were not sufficiently numerous to amount to an "administrative practice".

55. As to documents and statements emanating from Georgian authorities, such as the Public Defender of Georgia, the Prime Minister of Georgia or the Ministry of Foreign Affairs of Georgia, the respondent Government asserted that they were incomplete and partial. The respondent Government also opposed the admission in evidence of information gleaned from the media (at least as sole evidence). Lastly, they criticised written material published by non-governmental organisations (NGOs) as being vague. In this connection, the respondent Government stated:

> "What these non-governmental organisations have in common: significant funding of these organisations by sources with a clear anti-Russia orientation in the information sphere; a wave of anti-Russia rhetoric among supposedly independent voices trying to exploit the fact that the repletion of the information by an obvious majority of sources makes it easy to give credit to this information; general hostile conclusions based on vague unspecified allegations of human rights violations, without specifying who collected such data, what special evidences are, where they were collected, when and who provided them."

B. The Court's assessment

1. General principles

56. In the light of the legal and evidential complexities of the present case, the Court considers it important at the outset to set out the approach it will take to the questions of proof (both the burden and the standard of proof) in relation to the issues to be decided at this stage of the proceedings. This is of particular importance in an inter-State case concerning, as the present case does, allegations of an "administrative practice", because the Court is almost inevitably confronted with the same difficulties regarding the establishment and assessment of the evidence as is any first-instance court. The relevant principles concerning the burden of proof were summarised in *Ukraine v. Russia (re Crimea)* (cited above, §§ 255-57) as follows:

> "255.The Court notes that as a general principle of law the initial burden of proof in relation to an allegation is borne by the party which makes the allegation in question (*affirmanti incumbit probatio*; see, for example, *Nolan and K. v. Russia*, no. 2512/04, § 69, 12 February 2009, and *Makhmudov v. Russia*, no. 35082/04, § 68, 26 July 2007).
>
> 256. That said, the Court has also recognised that a strict application of this principle is not always appropriate. This is particularly so where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities of the respondent State (see *Baka v. Hungary* [GC], no. 20261/12, § 143 *in fine*, 23 June 2016, and the examples cited therein, in relation to various substantive Articles of the Convention when only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations). In such circumstances, the Court has held that the burden of proof may be regarded as falling on the respondent Government to provide a satisfactory and convincing explanation. In the absence of such explanation, the Court can draw inferences that may be unfavourable for the

respondent Government. The burden of proof will only shift in this way where there are already concordant inferences supporting the applicant's allegations (see, *mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 152-53, ECHR 2012; *Hassan v. the United Kingdom* [GC], no. 29750/09, § 49, ECHR 2014; and *Al Nashiri v. Romania*, no. 33234/12, § 493, 31 May 2018). In the context of, in particular, inter-State cases, the Court has long held that the conduct of the parties when evidence is being obtained may be taken into account (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25).

257. This approach relies on the premise that in the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts, the parties' submissions and, if necessary, material obtained *proprio motu*. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 317, 28 November 2017; *Georgia v. Russia (I)* [GC], no. 13255/07, § 94, ECHR 2014; *El-Masri*, cited above, §§ 151 and 213; and *Creangă v. Romania* [GC], no. 29226/03, § 88, 23 February 2012, and the cases cited therein)."

57. The meaning of the concept of "administrative practice" was outlined in *Georgia v. Russia (I)* (cited above, §§ 122-24) as follows:

"122. ... an administrative practice comprises two elements: the 'repetition of acts' and 'official tolerance' (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, § 19, DR 35, and *Cyprus v. Turkey* [[GC], no. 25781/94], § 99[, ECHR 2001-IV]).

123. As to 'repetition of acts', the Court describes these as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system' (see *Ireland v. the United Kingdom*, [18 January 1978], § 159[, Series A no. 25], and *Cyprus v. Turkey*, cited above, § 115).

124. By 'official tolerance' is meant that 'illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'. To this latter element the Commission added that 'any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system' (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, cited above, ibid.). In that connection the Court has observed that 'it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on

> subordinates and cannot shelter behind their inability to ensure that it is respected' (see *Ireland v. the United Kingdom*, cited above, § 159)."

58. The evidentiary threshold to be satisfied at the admissibility stage in relation to the alleged existence of an administrative practice in inter-State cases was set out by the Commission in *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (cited above, §§ 21-22) and maintained by the Court in *Georgia v. Russia (II)* ((dec.), cited above, § 86). It is as follows:

> "... in accordance with the Commission's case-law on admissibility, it is not sufficient that the existence of an administrative practice is merely alleged. It is also necessary, in order to exclude the application of the rule requiring the exhaustion of domestic remedies, that the existence of the alleged practice is shown by means of substantial evidence ...
>
> ... It observes that the term 'substantial evidence', used in the *First Greek Case*, cannot be understood as meaning full proof. The question whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility prima facie evidence, while required, must also be considered as sufficient ... There is prima facie evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of both the applicant and the respondent Party. It is in this sense that the term 'substantial evidence' is to be understood."

59. The same test was applied in *Ukraine and the Netherlands v. Russia*, cited above. The relevant part of that decision reads as follows:

> "As set out above (...), in order to show the existence of an administrative practice the applicant Ukrainian Government must present sufficiently substantiated prima facie evidence of the repetition of the acts in question and official tolerance."

60. The Court finds no grounds to hold otherwise in the present case. The same standard of proof, notably whether there is sufficiently substantiated prima facie evidence, is thus to be satisfied at this admissibility stage of the proceedings in respect of the applicant Government's substantive allegations of an administrative practice of human rights violations. This standard is to apply to each of the two component elements of the alleged "administrative practice", namely the "repetition of acts" and the "official tolerance". In the absence of such evidence, the complaint of an administrative practice cannot be viewed as admissible and warranting an examination by the Court on the merits.

2. Application to the present case

61. At the outset, the Court reiterates that it is entitled "to rely on evidence of every kind, including, in so far as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials" (see *Ireland v. the United Kingdom*, cited above, § 209). However, "statements given by government ministers or other high officials" are to be "treat[ed] with caution ... since they would tend to be

in favour of the government that they represent or represented" (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 163, ECHR 2012). Applying these principles, the mere fact that such evidence emanates from Georgian officials does not therefore in itself render it inadmissible.

62. The Court likewise does not consider that evidence obtained from media reporting is *per se* inadmissible. However, it accepts that such evidence is to be treated with a degree of caution. Media reports are not themselves evidence for judicial purposes, but public knowledge of a fact may be established by means of these sources of information and the Court may attach a certain amount of weight to such public knowledge (see *Ukraine and the Netherlands v. Russia*, cited above, § 444).

63. Furthermore, in the light of the principles summarised in *Ukraine v. Russia (re Crimea)* (cited above, § 257; see paragraph 56 above), the Court rejects the respondent Government's argument that in order to be regarded as admissible, an allegation of administrative practice must be supported by direct evidence emanating from the alleged victims. The Court has often attached importance to material originating from international organisations, independent international human rights protection associations and any other reliable and objective sources (see *Saadi v. Italy* [GC], no. 37201/06, § 131, ECHR 2008; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 118, ECHR 2012; *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008; and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 255, ECHR 2011). In assessing their probative value, the Court is conscious of the need to show a degree of caution since widespread reports of a fact may prove on closer examination to derive from a single source (see *Ukraine and the Netherlands v. Russia*, cited above, § 443).

64. In *J.K. and Others v. Sweden* ([GC], no. 59166/12, §§ 88-89, 23 August 2016) the Court outlined the methodology to be applied when assessing the probative value of such reports:

> "88. In assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations ...
>
> 89. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question ... The Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on."

65. In *Sufi and Elmi v. the United Kingdom* (nos. 8319/07 and 11449/07, § 232, 28 June 2011) the Court added that it would not disregard a report

simply on account of the fact that its author had not visited the area in question and had instead relied on information provided by sources.

66. In the present case, the reliability of the reports in question, as well as the relative probative value of all available evidence, will be considered not only on the basis of whether they corroborate each other, but also in the light of the fact that human rights monitoring bodies have not had unhindered access to the breakaway regions in question since August 2008 (see, for example, the consolidated reports of the Secretary General of the Council of Europe on the conflict in Georgia dated 11 April 2017 (SG/Inf(2017)18, § 5) and 3 November 2022 (SG/Inf(2022)38, § 5); the OSCE Resolution on Ten Years After the August 2008 War in Georgia (cited above, §§ 5, 8, 15 and 17); *EUMM Monitor*, Issue 7, October 2018, p. 3; the report of the UN Secretary-General of 9 May 2022 (UN Doc. A/76/828, § 51); and the report of the Office of the UN High Commissioner for Human Rights (OHCHR) of 12 July 2022 on cooperation with Georgia (UN Doc. A/HRC/51/64, §§ 31-34)).

67. The Court considers it legitimate to draw a parallel between a situation where a State restricts the access of independent human rights monitoring bodies to an area in which it exercises "jurisdiction" within the meaning of Article 1 of the Convention and a situation where there is non-disclosure by a government of crucial documents in their exclusive possession which prevents or hinders the Court establishing the facts. After all, in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities of the respondent State. The Court may draw relevant inferences from the respondent Government's conduct in this respect, as it has done previously in inter-State cases (see *Ukraine v. Russia (re Crimea)*, cited above, § 390).

68. In the light of the criteria defined above, the Court will assess the evidence available to it in order to determine whether or not the applicant Government's allegations of administrative practices incompatible with the Convention during the period under consideration, namely between 2009 and 16 September 2022 (see paragraphs 22-23 above), are substantiated to the prima facie standard of proof required at the admissibility stage of the proceedings.

69. The Court notes that the applicant Government submitted, in support of their complaints, a detailed list of the alleged victims set up by the State Security Service of Georgia which refers to many incidents (see paragraph 51 above). Except for the three illustrative cases also mentioned in paragraph 51 above, they did not provide the statements of the alleged victims or witnesses, on the basis of which the list was presumably created. Neither did they submit forensic or any other evidence. That being said, it appears from the materials originating from international organisations and independent international human rights protection associations submitted by the applicant Government (see paragraphs 14-19 above) and those obtained by the Court *proprio motu*

(see, for instance, the report by Thomas Hammarberg and Magdalena Grono "Human Rights in Abkhazia Today", July 2017, and the report by Amnesty International "Behind barbed wire: Human rights toll of 'borderisation' in Georgia", 2018) that many human rights incidents have indeed taken place since the onset of the process of "borderisation" in 2009. By way of example, the hotline set up by EUMM in Georgia was activated 2,741 times in respect of detentions for ABL crossings in the period from 2011 to September 2018 (see *EUMM Monitor*, Issue 7, October 2018, p. 4). Therefore, the Court finds that the available material is sufficient to amount to prima facie evidence of the "repetition of acts" during the period under consideration which are sufficiently numerous and interconnected to amount to a "pattern or system" in breach of Articles 2 (substantive and procedural limbs), 3 (substantive and procedural limbs), 5 § 1, 8, 13, 14 and 18 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4. It will be for the Court at the merits stage to decide whether the material provided by the applicant Government is sufficient to overcome the threshold of "beyond reasonable doubt" when confronted with any evidence supplied by the respondent State.

70. As to the "official tolerance" element of the administrative practice, the Court notes that pursuant to agreements on "joint efforts in protecting the border", Russian border guards (under the Federal Security Service of the Russian Federation) secure the ABL between the territory controlled by the Georgian government and the breakaway regions (see paragraph 12 above). The Court further notes the regulatory nature of some of the measures at issue (notably, restrictions on freedom of movement into and out of Abkhazia and South Ossetia resulting from the *de facto* transformation of the ABL into State borders) and their general application to all people concerned. The reality of those measures was not denied by the respondent Government and is furthermore confirmed by the international materials submitted by the applicant Government and those obtained by the Court *proprio motu*. At this stage of the proceedings, the available evidence is sufficient to satisfy the Court that the "official tolerance" element at the level of direct supervisors of the aforementioned regions is established to the appropriate standard.

71. Accordingly, the respondent Government's objection that there is no prima facie evidence of the alleged administrative practices is dismissed. The Court further notes that the case is not inadmissible on any other grounds listed in Article 35 §§ 1 and 4 of the Convention. It must therefore be declared admissible.

For these reasons, the Court, unanimously,

Holds that it has jurisdiction to deal with the applicant Government's complaints in so far as they relate to facts that took place before 16 September 2022;

Declares the application admissible, without prejudging the merits of the case.

Done in English and notified in writing on 20 April 2023.

Hasan Bakırcı Section Registrar	Arnfinn Bårdsen President