ORMER FIFTH SECTION

DECISION

Application no. 38263/08
by GEORGIA
against RUSSIA

The European Court of Human Rights (Fifth Section), sitting on 13 December 2011 as a Chamber composed of:

Peer Lorenzen, *President,*
Karel Jungwiert,
Anatoly Kovler,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 22 September and 13 December 2011

Decided, on the last-mentioned date, as follows:

PROCEDURE

1. Following the outbreak of the armed conflict between Georgia and the Russian Federation in August 2008, the Minister for Foreign Affairs of Georgia informed the Secretary General of the Council of Europe on 10 August 2008 that on 9 August 2008 the President of Georgia had used his powers under Articles 73(1) and 46(1) of the Constitution and declared a state of war in the whole territory of Georgia for fifteen days. He stated that no provision for derogation from the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") had been made at that stage.

2. On 11 August 2008 Georgia requested the application of Rule 39 of the Rules of Court (interim measures) against the Russian Federation. That request was made in the context of an application (no. 38263/08) against the Russian Federation lodged with the Court by Georgia under Article 33 of the Convention.

3. The Georgian Government ("the applicant Government") were represented by their Agent, Mr Levan Meskhoradze, having formerly been represented by Mr David Tomadze.

4. The Russian Government ("the respondent Government") were represented by their representative, Mr Georgy Matyushkin.

5. On 12 August 2008 the President of the Court, acting as President of Chamber, decided to apply Rule 39 of the Rules, calling upon both the High Contracting Parties concerned to honour their commitments under the Convention, particularly in respect of Articles 2 and 3 of the Convention. In accordance with Rule 39 § 3, he further requested both Governments concerned to inform the Court of the measures taken to ensure that the Convention was fully complied with.

6. The applicant Government replied by letter of 21 August 2008 and the respondent Government by letter of 22 August 2008.

7. On 26 August, 16 September, 6 October and 25 November 2008 the President of the Chamber decided to extend the measure indicated under Rule 39 and to request additional information from the parties.

8. The respondent Government replied by letters of 5 and 25 September 2008 and the applicant Government by letters of 8 and 26 September 2008.

9. On 6 February 2009 the Agent of the applicant Government lodged the formal application and annexes with the Registrar of the Court.

10. The applicant Government alleged that the Russian Federation had allowed or caused an administrative practice to develop in violation of Articles 2, 3, 5, 8 and 13 of the Convention, and of Articles 1 and 2 of Protocol No. 1 and of Article 2 of Protocol No. 4 through indiscriminate and disproportionate attacks against civilians and their property in the two autonomous regions of Georgia – Abkhazia and South Ossetia – by the Russian army and/or the separatist forces placed under their control. They alleged, further, that despite the indication of interim measures the Russian

Federation continued to violate their obligations under the Convention and, in particular, were in continuous breach of Articles 2 and 3 of the Convention.

11. On 27 March 2009 the President of the Chamber decided to communicate the application to the respondent Government, inviting them to submit observations on the admissibility of the complaints. After the time-limit for doing so had been extended, the respondent Government filed their observations on 7 October 2009.

12. On 9 October 2009 the applicant Government were invited to submit their observations in reply. After the time-limit for doing so had been extended, they filed their observations on 10 March 2010. The annexes were received on 22 March 2010.

13. On 6 September 2010 the President of the Chamber invited the respondent Government to indicate to the Court whether they wished to submit observations in reply. On 12 November 2010 the respondent Government replied that they wished to reserve the possibility of submitting observations at a later date if this were to become necessary in the interests of international justice.

14. The Court considered the state of the procedure on 25 January 2011 and decided to obtain the oral observations of the parties on the admissibility of the application. It set the date of the hearing for 16 June 2011 and also invited the parties to reply in writing to a list of questions before the date of the hearing.

15. At the request of the applicant Government, the Court decided on 3 May 2011 to adjourn the date of the hearing on admissibility and that of the submission by the parties of their written observations regarding the questions put by the Court.

16. On 13 and 15 June 2011 the parties filed their observations.

17. A hearing was held in public in the Human Rights Building, Strasbourg, on 22 September 2011 (Rule 51 § 5).

There appeared before the Court:

– *for the applicant Government*
Ms T. BURJALIANI, First Deputy Minister of Justice,
Mr L. MESKHORADZE, *Agent,*
Mr B. EMMERSON QC, *Counsel,*
Mr A. CLAPHAM,
Ms N. TSERETELI, *Advisers*;

– *for the respondent Government*
M. G. MATYUSHKIN, Deputy Minister for Justice, *Representative,*
Mr M. SWAINSTON QC,
Mr M. MENDELSON QC,
Mr K. IVANYAN, *Counsel,*
Mr P. WRIGHT,

Mr S. MIDWINTER,
Ms M. LESTER,
Mr M. CHAMBERLAIN,
Mr E. HARRISON
mr V. TORKANOVSKIY
Ms M. ANDREASYAN,
Mr N. MIKHAYLOV,
Mr M. KULAKHMETOV,
Mr P. SMIRNOV,
Mr A. DRYMANOV,
Mr O. MIKHAYLOV,
Ms V. UTKINA,
Mr S. LAGUTKIN, *Advisers.*

The Court heard addresses by Mr Matyushkin and Mr Swainston and by Ms Burjaliani and Mr Emmerson.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The general context

18. The present application was lodged in the context of the armed conflict that occurred between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents that opposed the two countries.

19. In its report of September 2009 the Independent International Fact-Finding Mission on the Conflict in Georgia[1] (hereafter "the International Fact-Finding Mission"), established by a decision of 2 December 2008 of the Council of the European Union, summarised the events in question as follows:

> "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 ... Then another theatre of hostility opened on the western flank, where Abkhaz forces supported by Russian forces took the upper Kodori Valley, meeting with little Georgian resistance. After five days of fighting, a ceasefire agreement was negotiated on 12 August 2008 between Russian President Dmitry Medvedev, Georgian President Mikheil Saakashvili and French President Nicolas Sarkozy, the latter acting on behalf of the European Union[2]."

20. By a decree of 26 August 2008 the Russian President, Dmitry Medvedev, recognised South Ossetia and Abkhazia as independent

States following an unanimous vote of the Russian Federal Assembly to that end. That recognition was not followed by the international community.

B. The present application

21. The applicant Government submitted that, in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to leave Abkhazia and South Ossetia.[3] In their submission, those consequences and the subsequent lack of any investigation engaged the Russian Federation's responsibility under Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1 to the Convention and Article 2 of Protocol No. 4 to the Convention.

22. The respondent Government denied the applicant Government's allegations, which they considered to be baseless, unjustified and unconfirmed by any admissible evidence. They maintained that the applicant Government had deliberately distorted the facts when they referred to indiscriminate and disproportionate attacks by Russian forces and/or the separatist forces under their control. In actual fact, they argued, the armed forces of the Russian Federation had not launched an attack, but, on the contrary, had defended the civilian population of South Ossetia against Georgian attacks.

C. Particulars submitted by the applicant Government

23. In their application, the applicant Government provided the following particulars regarding how the events in question had unfolded, supported by, among other things, the reports by non-governmental organisations and international organisations appended in the annex. These particulars may be summarised as follows.

1. Extent of the control exercised by the Russian Federation over the territories of South Ossetia and Abkhazia

24. In the applicant Government's submission, there was no doubt that the Russian Federation exercised authority and/or effective control over the territories of South Ossetia and Abkhazia at the time when they committed the acts complained of in the present application. The size of the region subject to the authority and/or effective control of the Russian Federation had increased further when the Russian forces occupied major parts of Georgia, including areas situated beyond the territories mentioned above and including the "buffer zone". At the time when they lodged their application, after the withdrawal of the Russian forces on 8 October 2008, the Russian Federation were still in occupation, exercising authority and/or effective control over the autonomous regions of Abkhazia and South Ossetia and over territories which formed part of Georgia proper, namely, Upper Abkhazia, the Akhalgori District and the village of Perevi (Sachkhere District). It continued to exercise that authority and/or effective control both directly, through its armed forces,

and indirectly, through control of its agents, namely, the *de facto* authorities and the South Ossetian and Abkhaz separatist armed forces.

25. The applicant Government alleged that the Abkhaz and South Ossetian military formations had not independently controlled, directed or implemented the military operations during either the armed conflict or the occupation periods. Rather, those military formations had acted as agents or *de facto* organs of the Russian Federation and as such constituted a simple continuation of the Russian armed forces. Acts perpetrated by the Abkhaz and South Ossetian illegal military formations had been either directed and controlled by the Russian armed forces, or facilitated by essential support from the Russian Federation, or legitimised through a policy of tacit acquiescence on the latter's part. The entire scheme, strategy and policy pursuant to which the military operations had been conducted had derived from the Russian Federation as architect, controller, instructor and executor of the military operations.

2. Alleged violations of the Convention

(a) Under Article 2 of the Convention

26. The applicant Government submitted that the respondent Government had failed to comply with their substantive obligations under Article 2 during the armed conflict and subsequent occupation and also with their procedural obligations. They indicated that a total of 228 civilians had been killed and 547 wounded[4].

27. Firstly, during the attacks carried out by the Russian forces and/or South Ossetian or Abkhaz militias acting under their orders, no distinction had been made between combatants and civilians; by indiscriminately bombing and shelling areas which were not legitimate military targets, and by using means of warfare such as landmines and cluster bombs, the respondent Government had failed to take sufficient precautions to protect the lives of the civilian population. The applicant Government referred to examples of indiscriminate and disproportionate aerial bomb attacks and rocket and tank attacks on civilian convoys and/or Georgian villages during which many civilians had died[5]. They also cited cases of cluster bombs being dropped by the Russian forces on Georgian villages[6].

Similarly, during the period of occupation, the respondent Government had been under a duty to prevent arbitrary executions and ensure the well-being of civilians in the areas under their control. There had, however, been at least 67 cases of arbitrary executions carried out by the Russian forces and/or the separatists acting under their control[7]. Furthermore, there had been many lethal attacks against civilians carried out by Ossetian militias and armed criminals in areas under Russian control during that period[8].

Lastly, the respondent Government had not carried out an adequate and effective investigation into the attacks against civilians[9].

(b) Under Article 3 of the Convention

28. According to the applicant Government, the respondent Government had also failed to comply with their substantive and procedural obligations under Article 3.

29. Thus, many Georgian civilians had been ill-treated and tortured by the South Ossetian militias during the armed conflict and subsequent occupation[10]. At least fifty incidents of torture had been reported[11]. They alleged, further, that members of the Russian armed forces or separatist forces acting under their control had raped civilians[12]. Lastly, about 160 civilians, most of whom were elderly, had been held in detention by the *de facto* South Ossetian authorities before being transferred to the Georgian authorities between 19 and 27 August 2008. They had frequently been verbally abused and had been given neither bedding nor blankets nor any basic nutrition. The youngest among them had been beaten and forced to clear debris from the streets of Tskhinvali for no payment whatsoever. Many civilians had also been held in the basement of the Ossetian Ministry of the Interior building in Tskhinvali in degrading conditions[13]: overcrowding, insufficient food and water, no electricity, verbal abuse, forced labour without compensation, beatings of detainees and inadequate toilet facilities.

Besides that, ill-treatment had also been meted out to Georgian soldiers who were no longer taking an active part in the hostilities: some thirty soldiers had been beaten with rifles, burnt with cigarettes and cigarette lighters, and subjected to electric shocks[14], and at least thirteen soldiers had suffered injuries from severe beatings and acts of torture during their detention by Ossetian military and police forces between 8 and 19 August 2008[15]. Many former soldiers continued to suffer severe trauma as a result of their ordeal.

The respondent Government had failed to carry out an adequate and effective investigation into the ill-treatment inflicted during the conflict and subsequent occupation[16].

(c) Under Article 5 of the Convention

30. The applicant Government submitted that approximately 160 civilians, including 40 women, had been illegally captured by the Russian armed forces and/or separatist militia under their control and held for up to fifteen days in some cases (see paragraph 29 above). They also submitted witness accounts of their conditions of arrest and detention. The Russian soldiers had directly participated in the interrogation and supervision of detainees at the Tskhinvali detention centre[17]. Those detentions were clearly illegal in so far as the detainees, who were mainly old people and women, had posed no security threat whatsoever[18].

(d) Under Article 8 of the Convention and Article 1 of Protocol No. 1

31. The applicant Government submitted that the Russian armed forces and/or separatist forces operating under their control had systematically looted

and burnt property in entire civilian villages, expelling the inhabitants and refusing to this day to allow them to return home[19].

32. They listed the villages in which the systematic looting and burning had occurred[20]. The practice had continued on a large scale for several weeks after the formal cessation of hostilities, with the Russian authorities failing in their duty to prevent human rights abuses being carried out by South Ossetian forces and militia units. Residents had described the looting as occurring on some occasions just after the bombing ceased and on other occasions after the ceasefire of 12 August 2008. Usually Russian tanks had arrived in the village and armed South Ossetian militias, together with Ossetian civilians, had entered houses and shops threatening villagers in the event of protest, stealing furniture and livestock, and then setting fire to the houses. The Russian forces had either just let them do so or joined in with the South Ossetian militias, sharing the plunder from houses and burning what they could not take away[21].

33. The applicant Government estimated that the damage caused by the deliberate burning of property and by the indiscriminate bombing and shelling in the areas invaded and occupied by the Russian armed forces was considerable. Between 300 and 500 houses had been deliberately burnt in the "buffer zone" proclaimed by the Russian Federation and 2,000 houses had been otherwise damaged during the conflict[22].

(e) Under Article 2 of Protocol No. 1

34. The applicant Government pointed out that since Russia's military invasion of Georgia in August 2008 education in schools located in the occupied territories of Abkhazia and South Ossetia had been severely disrupted. Acts of violence by Russian troops and separatist forces, such as the destruction and looting of schools and libraries, and threats to school staff and pupils, had led to children of school age being partially or fully impeded from continuing their education in those territories.

35. Thus, of the thirty-five schools registered in South Ossetia that provided schooling, twenty-nine could no longer operate. Of the nine schools operating in Abkhazia, none could continue functioning. Furthermore, instruction in Georgian was forbidden[23].

(f) Under Article 2 of Protocol No. 4

36. The applicant Government alleged that the Russian Federation, together with the separatist forces acting under their control, had imposed illegal restrictions on civilians' freedom of movement and right to choose their residence during the recent armed conflict and subsequent occupation.

37. The Russian Federation had instituted a widespread practice of restricting civilians' freedom of movement in the vicinity of the Abkhaz and South Ossetian borders. Thus, over 23,000 civilians had been displaced and prevented from returning home[24]. Furthermore, since the armed conflict of 2008, the Russian forces had been arbitrarily opening and closing the administrative border between the Gali district in Abkhazia and the rest of

Georgia, thus isolating entire villages. Accordingly, some 42,000 civilians had been prevented from moving freely between the Gali district and Zugdidi in order to obtain food and basic supplies.

(g) Under Article 13 of the Convention

38. The applicant Government submitted that the Russian Federation had not paid any reparations to the victims of the 2008 armed conflict. Nor had they conducted an investigation into the circumstances surrounding the events giving rise to the allegations referred to above. This was so despite widespread media and non-governmental reports of human rights abuses at the hands of Russian forces and separatist forces under their control suffered by civilians and soldiers no longer taking part in the hostilities[25]. Nor was there any evidence that the Russian Federation had established a system for dealing with complaints about the conduct of their armed forces or the separatist militias.

D. Position of the respondent Government

39. In reply, the respondent Government gave their version of the facts regarding the events in question, referring, *inter alia*, to the same reports by international organisations as the applicant Government. The particulars submitted by the respondent Government may be summarised as follows.

1. The course of the conflict

40. The respondent Government submitted that the conflict and ethnic antagonism on which Georgia based the present allegations were a direct consequence of Georgia's armed attack on Tskhinvali and the civilians living there during the night of 7 to 8 August 2008.

41. In their submission, during the period prior to the conflict and, in particular, during the armed conflict itself in August 2008 the Georgian authorities had treated inhabitants of the Republic of South Ossetia who did not have Georgian nationality as enemies and, accordingly, a threat to the State. These people had had to take steps to protect themselves from the Georgian State. Russian soldiers from the peacekeeping force, who were legally – and with Georgia's consent – inside the conflict zone, had also been the subject of surprise attacks by Georgia. Faced with those illegal attacks, the Russian Federation had been compelled to use force in full compliance with the principles and rules of international law governing the State's right to legitimate self-defence. The military operation had been strictly proportionate to the aim pursued, namely, putting an end to the attack by Georgia and ensuring that the latter did not resume military operations. It had lasted a very short time (from 8 to 20 August 2008) and had ended as soon as that objective had been attained.

42. Moreover, Georgia's attack on Russian soldiers from the peacekeeping force and the peaceful South Ossetian population, and the triggering of hostilities by Georgia, had been confirmed by the International Fact-Finding

Mission[26]. The latter had also stressed the unlawfulness of the use of force by the Georgian army.

2. Situation in the territories of South Ossetia and Abkhazia

43. The respondent Government observed that the independence movements and governments in Abkhazia and South Ossetia were in no way recent or artificial. Nor could they be dismissed as instruments of the Russian Federation. They were long-standing movements representing the genuine, historic and democratically expressed wills of their peoples. The applicant Government had not submitted any convincing argument to the contrary effect.

44. They stated that during the conflict the Russian army had not occupied the territories on which they had circulated in South Ossetia, Abkhazia or Georgia. It had confined its actions to responding to the Georgian threat and had predominantly been at the front line, or in transit to and from the front line, or securing supply lines. Moreover, during the period of active conflict and afterwards, the forces of South Ossetia and Abkhazia had not constituted part of the Russian military or peacekeeping forces. They had acted independently without authorisation or assistance from the Russian military command, which had been focused entirely on achieving its military mission using its own forces. The applicant Government's allegations that the actions by the Russian armed forces and the separatist militia had been "coordinated and coherent" were either unsubstantiated or contradicted by the reports by Human Rights Watch, Amnesty International and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE.

45. According to the respondent Government, one of the major causes of the Georgian attack on Tskhinvali, and its earlier provocations, was the lack of any possibility of peaceful coexistence between Georgian and Ossetian peoples in the region. The attack had further exacerbated those tensions by causing massive civil unrest during which Ossetians had attacked villages and Georgian homes. Given the terrain, and the fact that Georgian and Ossetian villages were often next to one another, and that people from both groups occupied some mixed villages, such attacks, which could come at any time, were impossible to prevent.

46. In the respondent Government's submission, the Russian forces had in fact been caught in a stranglehold in the ethnic conflicts. They had, however, sometimes attempted to intervene when they had witnessed such attacks and were in a position to do so in accordance with the military purposes behind their presence in the region. Indeed, the evidence produced by the applicant Government purportedly in support of their application contained many references to protective steps taken by Russian soldiers to assist Georgian people. The respondent Government also referred in that connection to the reports by Human Rights Watch, Amnesty International and the ODIHR[27] in which there appeared numerous examples of Russian soldiers attempting to

protect civilians against Ossetian militia members or criminals. Those factors clearly contradicted allegations of participation by Russian soldiers in any orchestrated "ethnic cleansing" campaign against Georgian civilians.

3. Consequences

47. The respondent Government submitted that the Georgian attack on South Ossetia had resulted in 64 deaths on the Russian side, including 12 members of the peacekeeping forces and at least 323 wounded. The death toll among civilians had reached about 1,500. Many thousands of South Ossetians had lost their homes and been deprived of water and food. Over four days 35,000 refugees had crossed the Russian border.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Russian law (as cited by the respondent Government in their observations)

48. Under Article 140 of the Code of Criminal Procedure of the Russian Federation (hereafter "the CCP of the Russian Federation"), a complaint that an offence has been committed constitutes a ground for instituting criminal proceedings. The requirements for reporting an offence are set forth in Article 141 of the CCP of the Russian Federation (reporting of an offence), which provides:

> "1. An offence may be reported orally or in writing.
>
> 2. Any written statement relating to an offence shall be signed by the person making the statement.
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> 3. Any oral statement relating to an offence shall be noted down in an official record, which shall be signed by the person making the statement and the person receiving it. The official record shall contain details of the person making the statement and of the identity documents submitted.
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> 4. Where an offence is reported orally during an investigation or judicial proceedings, the statement shall be entered in the record of investigation or record of trial accordingly.
>
> 5. Where the person making the statement cannot be present when the record is drawn up, it shall be officialised in accordance with the procedure provided for in Article 143 of the present Code.
>
> 6. The person making the statement shall be warned that, in accordance with Article 306 of the Criminal Code of the Russian Federation, he or she will be held criminally responsible for knowingly making an untrue statement. A note to that effect, certified by the signature of the person making the statement, shall be attached to the file.
>
> 7. Criminal proceedings shall not be instituted where an offence is reported anonymously."

49. In addition to that, Article 144 of the CCP of the Russian Federation sets out the procedure for verifying a statement relating to an offence. It contains the following provisions in particular:

> "1. A petty-crimes investigator (*дознаватель*), petty-crimes investigating body, serious-crimes investigator (*следователь*) or head of a serious-crimes investigating body shall accept and verify any statement relating to an offence that has been committed or is about to be committed and take a decision regarding any statement that falls within the scope of their powers, as defined in the present Code, at the latest three days after receipt of the statement. When verifying a statement relating to an offence the petty-crimes investigating body, petty-crimes investigator, serious-crimes investigator or

head of the serious-crimes investigating body may request the communication and verification of documents and call on the services of specialists.

2. Any statement relating to an offence reported by the media shall be verified by a petty-crimes investigating body at the request of the prosecutor, or by a serious-crimes investigator at the request of the head of a serious-crimes investigating body. At the request of a prosecutor or a serious-crimes investigator or investigating body, the journalists and editor of the news medium concerned must communicate documents and other evidence in their possession confirming the statement relating to the offence and information about the person making the statement, save where the person in question has requested that the sources remain secret.

3. The head of a serious-crimes investigating body or petty-crimes investigating body may, at the official request of a serious-crimes or petty-crimes investigator, extend up to ten days the time-limit stipulated in paragraph 1 of this Article, and where it is necessary to request the communication or verification of documents, the head of a serious-crimes investigating body, at the official request of a serious-crimes investigator, and the prosecutor, at the official request of a petty-crimes investigator, may extend the time-limit up to thirty days.

4. The person making the statement shall be issued with a document confirming acceptance thereof and containing the name of the officer accepting it and the date and time of acceptance.

5. A refusal to accept a statement relating to an offence may be appealed to a prosecutor or court, in accordance with the procedure set forth in Articles 124 and 125 of the present Code.

6. A statement made by a victim or his or her legal representative in the context of a private prosecution instituted before a court shall be examined by a judge in accordance with Article 318 of the present Code. In the cases envisaged under Article 147 (paragraph 4) of the present Code, such statements shall be verified in accordance with the rules set forth in the present Article (paragraph 6, as amended by Federal Law no. 47-FZ of 12 April 2007).

50. Article 145 of the CCP of the Russian Federation provides:

"1. After a statement relating to an offence has been verified, the petty-crimes investigating body or investigator or the serious-crimes investigator or head of the serious-crimes investigating body shall take one of the following decisions:

1) to institute criminal proceedings under Article 146 of the present Code;

2) to refuse to institute criminal proceedings;

3) to refer the statement to the proper investigating body under Article 151 of the present Code and, in the event of a private prosecution, to the proper court under Article 20 (paragraph 2) of the present Code.

2. The person making the statement shall be notified of the decision taken. He or she shall be informed of his or her right to challenge the decision and the procedure for doing so.

3. Where a decision is taken under sub-paragraph 3 of paragraph 1 above, the investigating department, petty-crimes or serious-crimes investigator or head of the serious-crimes investigating body shall take measures to preserve the traces of the offence."

51. Article 42 § 1 of the CCP of the Russian Federation provides that any physical person who has suffered bodily injury or pecuniary or non-pecuniary damage arising out of an offence and any legal person whose property and goodwill has been damaged as a result of an offence shall be regarded as a victim of the offence in question. The status of victim is officially recognised by decision of the investigator, the prosecutor or a court. Under sub-paragraph 8 of paragraph 1 of this Article, the victim is entitled to representation. An application for recognition of victim status must be made to an investigator giving details of the damage sustained.

52. In accordance with the Constitutional Court of the Russian Federation's interpretation of the provisions of Article 42 of the CCP

(see, *inter alia*, decision no. 131-O of 18 January 2005), in order to confer victim status on a person the investigator must establish that damage has been incurred as a result of an offence, which is possible only in the context of an investigation opened under Article 144 of the CCP of the Russian Federation in accordance with the procedure determined in Article 140 of the CCP of the Russian Federation.

53. Furthermore, Article 46 of the Constitution of the Russian Federation guarantees judicial protection to everyone. The decisions and acts (or omissions) of State bodies and civil servants are subject to appeal to a court. Article 125 of the CCP of the Russian Federation enshrines the relevant constitutional provision in the criminal law by providing for an appeal against the acts and decisions of the investigating authorities.

B. The decision of the International Court of Justice

54. By an Order of 15 October 2008 the International Court of Justice (ICJ), reminding the Parties [Georgia and the Russian Federation] of their duty to comply with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD), indicated the following provisional measures (by eight votes to seven): Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall refrain from any act of racial discrimination and abstain from sponsoring, defending or supporting such acts; refrain from placing any impediment to humanitarian assistance; and refrain from any action which might prejudice the rights of the other Party or which might aggravate or extend the dispute.

55. In a judgment of 1 April 2011 the ICJ upheld, by ten votes to six, the preliminary objection raised by the Russian Federation according to which Georgia could not have recourse to the ICJ because it had failed to meet two procedural preconditions provided for in Article 22 of CERD, namely, negotiations and referral to procedures expressly provided for in the Convention. Accordingly, the ICJ concluded that it did not have jurisdiction to entertain the application lodged by Georgia on 12 August 2008.

REQUESTS BY THE PARTIES

56. In their application and observations in reply the applicant Government asked the Court to hold

> "A. Admissibility
>
> a. That the Court has jurisdiction in this case as the complaints fall within the proper scope of Article 1 of the Convention;
>
> b. That the Applicant [State's] complaints are admissible as the rule regarding exhaustion of domestic remedies does not apply in these proceedings. This is because the alleged violations are part of a repetitive

pattern of acts incompatible with the Convention which have been the subject of official tolerance by the Russian authorities;

c. Alternatively, that the Applicant [State's] complaints are admissible as the injured parties have exhausted domestic remedies to the extent that it is possible to do so;

d. That the claim has been submitted within the six-month time-limit.

B. Merits

That Russia has violated Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol 1 to the Convention and Article 2 of Protocol 4 to the Convention and has failed to carry out investigations into the incidents forming the basis of these violations;

C. Remedy

That the Applicant State is entitled to just satisfaction for these violations requiring the institution of Convention-compliant investigations, remedial measures and compensation to the injured party."

57. The applicant Government also pointed out "that specific complaints regarding the targeting of these attacks against civilians of ethnic Georgian origin could also have been properly advanced on the facts of this case pursuant to articles 8 and 14 of the Convention, articles 1 and 2 of Protocol 1 to the Convention and Article 2 of Protocol 4 to the Convention. The Applicant State has not invited the Court to consider such complaints at this juncture as the approach which has been adopted is not to include matters in this application which are properly ventilated in the concurrent proceedings before the International Court of Justice relating to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Should it become necessary to do so, the Applicant State reserves the right to seek permission to amend this Application to include those matters at a later stage."

58. In their latest observations in response to the questions put by the Court, the respondent Government submitted that the application lodged by the applicant Government was inadmissible and unfounded for the following reasons:

1. "As a matter of law, the application falls outside the Court's jurisdiction under the European Convention on Human Rights ("the Convention") and relates to matters which are not properly the subject of the Convention, or of determination by the Court.

2. The allegations made by the Government of Georgia, and the evidence provided in support, could not begin to establish the necessary elements of jurisdiction on the part of the Russian Federation under Article 1 of the Convention.

3. Even if jurisdiction were capable of being established, the allegations and evidence put forward by the Government of Georgia do not reach the threshold level required to sustain admissibility, because

a) The materials relied upon, taken as a whole, do not support the case put forward by Georgia;

b) The allegations and materials do not cover, or sufficiently support, what would be necessary elements of the Georgian case, in particular concerning alleged responsibility of the Russian Federation for any breaches of the Convention.

c) It follows that the application is wholly unsubstantiated."

THE LAW

59. In their written and oral observations, the respondent Government raised a number of grounds of inadmissibility of the application. The Court will examine these below.

I. JURISDICTION AND RESPONSIBILITY OF THE RESPONDENT GOVERNMENT REGARDING THE ACTS COMPLAINED OF BY THE APPLICANT GOVERNMENT

60. 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."

A. The parties' submissions

1. The respondent Government

61. The respondent Government argued, as their principal submission, that the alleged violations of the Convention did not fall within the jurisdiction of the Russian Federation on a correct interpretation of Article 1 of the Convention. In their view, the jurisdiction of a State within the meaning of that Article was based on the principle of territoriality. It did not extend beyond the national territory of a State Party unless this had been voluntarily extended by that State Party under Article 56.

In the alternative, the extension of jurisdiction within the meaning of Article 1 beyond the national territory of a State Party, where the latter has taken no decision to that effect, could be effective only in exceptional cases in which the relevant State exercised "effective control" over the area in question, which was not the case here.

In the further alternative, such jurisdiction could not be extended to a short-term situation of military operations abroad during and in the immediate aftermath of an international armed conflict such as had occurred here, or to a situation in which the territory was controlled by a *de facto* government

supported by a State Party but which was not an organ or instrument of that State Party.

The allegations that the Russian Federation supported the separatist governments in Abkhazia and South Ossetia were therefore insufficient to establish jurisdiction within the meaning of Article 1. In that connection the respondent Government distinguished the present case from the cases of *Loizidou v. Turkey* ((preliminary objections) [GC], 23 March 1995, Series A no. 310) and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV), in which there had been long-term annexation and occupation of a territory and from the case of *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, 7 July 2011 ECHR 2011-...), in which the United Kingdom had exercised some of the public powers, in particular in south-east Iraq. In the present case the Russian Federation had, on the contrary, not occupied or administered South Ossetia or Abkhazia, but carried out a military operation that had been fully justified under public international law and limited in time (from 8 to 20 August 2008), for the purposes of protecting Russian soldiers of the peacekeeping force and civilians.

The respondent Government also invited the Court to return to the more traditional approach followed in the case of *Banković and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), rather than the approach followed in the cases of *Issa and Others v. Turkey* (no. 31821/96, 16 November 2004) and *Al-Skeini*, cited above, in which the Court had interpreted the Convention as if it had received a "blank cheque" from the Contracting States.

The respondent Government stated that if, contrary to their submissions, Georgia's allegations were in principle sufficient to establish jurisdiction, they disputed those allegations and would contest them on the facts when the case was examined on the merits.

2. The applicant Government

62. The applicant Government argued, as their principal submission, that the respondent Government's jurisdiction under Article 1 of the Convention extended to the regions in which the alleged violations had been committed because they exercised "effective control" over those regions directly, through their forces, and through a subordinate local administration which survived as a result of the respondent Government's political, economic and military support. In the present case the incursion of Russian troops into Georgian territory, their participation in the hostilities of August 2008 and the progressive occupation of South Ossetia and Abkhazia after the cessation of hostilities and the withdrawal of Georgian troops had been evidenced by numerous reports by independent international organisations[28]. Furthermore, given the degree of subordination of the separatist authorities in South Ossetia and Abkhazia to the Russian Federation those *de facto* regimes could properly be regarded as subordinate local administrations. Accordingly, by virtue of the

principle of responsibility for acts committed by a subordinate local administration, the respondent Government were responsible for the crimes committed by the forces of those regimes.

In the alternative, the alleged violations fell within the jurisdiction of the respondent Government according to the principle of "State agent authority" in so far as the acts or omissions of the latter had unlawfully interfered with the rights of persons or with property situated in the regions in question, as was also substantiated by numerous reports by international organisations and by eyewitnesses.

The position of the applicant Government was endorsed by well-established case-law of the Court regarding the extra-territorial application of the Convention (*Loizidou v. Turkey* (merits) [GC], 18 December 1996, §§ 52 and 56, *Reports of Judgments and Decisions* 1996-VI; *Cyprus v. Turkey* [GC], cited above, § 77; *Issa and Others*, decision cited above, § 74; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 383-85, ECHR 2004-VII; and *Al-Skeini*, cited above, § 138).

B. The Court's assessment

63. The Court considers that the question as to the respondent Government's "jurisdiction" in South Ossetia, Abkhazia and in the neighbouring regions referred to by the applicant Government in their application and that of their responsibility for the acts complained of are in principle to be determined at the merits stage of the proceedings (see *Loizidou* (preliminary objections), cited above, § 61, *Cyprus v. Turkey*, no. 25781/94,Commission decision of 28 June 1996, Decisions and Reports (DR) 86-A, p. 130, and *Al-Skeini*, cited above, § 102).

64. Article 35 § 3 of the Convention, which permits the Court to dismiss applications *inter alia* on the ground that they are incompatible with the provisions of the Convention, does not apply in respect of applications submitted under Article 33 of the Convention and accordingly cannot be applied either in such applications where the respondent Government raise the objection that particular complaints are incompatible with the Convention *ratione loci* or *ratione personae*. However, this cannot prevent the Court from establishing already at this preliminary stage, under general principles governing the exercise of jurisdiction by international tribunals, whether it has any competence at all to deal with the matter laid before it (see *Cyprus v. Turkey*, Commission decision cited above, *ibid.*).

65. The Court will limit its examination at this stage to the question whether its competence to examine the applicant Government's complaints is excluded on the grounds that they concern matters which cannot fall within the "jurisdiction" of the respondent Government. The Court must therefore examine whether the matters complained of by the applicant Government are capable of falling within the "jurisdiction" of the respondent Government even though they occur outside her national territory (see *Loizidou* (preliminary objections), cited above, §§ 60-61; *Cyprus v. Turkey*, Commission decision

cited above, pp. 130-31; and *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001).

66. The Court reiterates in this connection that although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. For example, the responsibility of Contracting Parties can be involved because of acts of their authorities which produce effects outside their own territory (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 91, Series A no. 240). Furthermore, bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62, and *Ilaşcu and Others*, decision cited above). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration (see *Al-Skeini*, cited above, § 138, and for a comprehensive summary of the applicable principles regarding "jurisdiction" within the meaning of Article 1, *Al-Skeini*, cited above, §§ 130-42).

67. The Court considers that, as the evidence stands, it does not have sufficient elements enabling it to decide these questions. Moreover, as it has stated above, these matters are so closely connected to the merits of the case that they should not be decided at the present stage of the procedure.

68. Accordingly, it decides to join to the merits of the case the objection raised by the respondent Government of incompatibility *ratione loci* of the application with the provisions of the Convention.

II. APPLICABILITY OF THE PROVISIONS OF THE CONVENTION AND THE RULES OF INTERNATIONAL HUMANITARIAN LAW

A. The parties' submissions

1. The respondent Government

69. The respondent Government submitted that as the conflict between Georgia and the Russian Federation was an international one, the events relating to it and the acts allegedly committed during it should be examined under the rules of international humanitarian law and not the provisions of the Convention.

In their submission, international human rights law was of extremely limited application in periods of armed conflict and of no application at all in a situation of international armed conflict. Accordingly, the Convention was of limited application to cases of internal disturbances amounting to less than

armed conflict, as could be inferred from Article 2 which permitted the use of force for the purpose of quelling a riot or insurrection. Where internal disturbances reached the level of non-international armed conflict, a State Party could be permitted to derogate from its obligation to extend Convention rights throughout its territory under Article 15, but only in so far as was strictly necessary. Lastly, the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances the conduct of the State Party's forces was governed exclusively by international humanitarian law.

Referring to decisions and advisory opinions of the ICJ[29] and to the report of the International Fact-Finding Mission[30], the respondent Government submitted that international humanitarian law was in the present case the *lex specialis* in relation to the provisions of the Convention, and that the *lex specialis derogat generali* rule had to apply. That was particularly true in respect of the events described by the applicant Government relating to infringements of the right to life, the proportionality of attacks perpetrated by the parties to the conflict and to the internment of prisoners of war and civilians in periods of international armed conflict. Lastly, the alleged unlawful interference with State property did not come within the scope of application of Article 1 of Protocol No. 1.

The respondent Government concluded that as the application mainly fell outside the provisions of the Convention, it had to be considered incompatible *ratione materiae* with those provisions.

2. The applicant Government

70. The applicant Government replied that the respondent Government had misinterpreted the judgments of the ICJ on the relationship between international humanitarian law and international human rights law in situations of armed conflict. In their view, in the advisory opinions referred to by the respondent Government, and in a subsequent judgment[31], the ICJ had stated, on the contrary, that international human rights law continued to apply during an armed conflict. That had also been confirmed by the United Nations Human Rights Committee. In fact international humanitarian law and international human rights law applied in parallel.

The applicant Government added that whilst regard should be had to international humanitarian law principles because they provided guidelines for interpreting specific human rights standards that they alleged had been violated, the present application was based solely on the Convention. The Court should have regard to international humanitarian law principles only in connection with assessing the scope of the rights guaranteed by the Convention in the context of an armed conflict, as it had done in its judgment in the case of *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90,

§ 185, 18 September 2009). In any event, no international body had ever implied – and still less concluded – that international human rights law was overridden by international humanitarian law. On the contrary, all the international courts and committees that had dealt with these matters had always applied the human rights treaties to the armed forces of a State engaged in an armed conflict.

The respondent Government's arguments regarding the compatibility *ratione materiae* of the application with the provisions of the Convention were accordingly totally unfounded.

B. The Court's assessment

71. Like the question of the "jurisdiction" of the respondent Government, the Court considers that the question of the interplay of the provisions of the Convention with the rules of international humanitarian law in the context of an armed conflict belongs in principle to the merits stage of the procedure.

72. In that connection the Court refers to its previous case-law in which it has held that the procedural obligation under Article 2 of the Convention continued to apply even where the security conditions were difficult, including in the context of armed conflict (see, among other authorities, *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports of Judgments and Decisions* 1998-IV; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; and *Al-Skeini*, cited above, § 164). Furthermore, Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict[32] (see *Loizidou* (merits), cited above, § 43). In a zone of international conflict Contracting States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities (see *Varnava and Others*, cited above, § 185). Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI).

73. In the instant case the Court notes that neither Party requested a derogation under Article 15 of the Convention, which provides that in time of war or other public emergency a Contracting Party may take measures derogating from its obligations under the Convention "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

74. Moreover, as stated above, the question of the interplay between the provisions of the Convention and the rules of international humanitarian law, applied to the circumstances of the case, is to be decided when the case is examined on the merits.

75. Accordingly, the Court decides to join to the merits of the case the objection raised by the respondent Government on the ground of

incompatibility *ratione materiae* of the application with the provisions of the Convention.

III. SIMILARITY OF THE PRESENT APPLICATION WITH THE APPLICATION LODGED BY THE APPLICANT GOVERNMENT WITH THE INTERNATIONAL COURT OF JUSTICE

76. Article 35 § 2 of the Convention provides:

> "The Court shall not deal with any application submitted under Article 34 that
>
> (a) ...
>
> (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

A. The parties' submissions

1. The respondent Government

77. The respondent Government drew the Court's attention to the risk of a conflict of case-law between the Court and the ICJ if the former were to declare the present application admissible, which would jeopardise the legal foreseeability required under international law. The applicant Government themselves had conceded that the applications lodged with those two international courts concerned essentially the same dispute. The respondent Government specified that, in particular, the complaints lodged under Article 14 taken in conjunction with other provisions of the Convention – concerning alleged discriminatory attacks directed against civilians of Georgian origin – were outside the scope of the present application because they were not based on the Convention and were already the subject of examination by the ICJ. As the Court could not examine those issues, which were important for an understanding of the case as a whole, it should not examine the events related to them.

Following the judgment delivered by the ICJ on 1 April 2011, the respondent Government informed the Court that the procedure before the ICJ had come to an end and that the case brought before it by the applicant Government would not be examined on the merits. However, they reserved their position in the event that the applicant Government should seek to pursue the procedure before the ICJ by other means.

2. The applicant Government

78. The applicant Government submitted that Article 35 § 2 (b) did not apply to inter-State applications. Even if that were not so, the applications lodged with the Court and the ICJ concerned different issues: whilst the heart of the case before the ICJ concerned the discriminatory acts of which Georgian nationals were victims on account of their ethnic origin, attacks on civilians on the basis of their Georgian ethnic origin did not at this stage

appear among the violations alleged before the Court (paragraph 57 above). Similarly, the period in question was not the same one because the application before the Court essentially concerned violations perpetrated during the war of August 2008 and the immediate aftermath whereas the period concerned by the case before the ICJ had begun in 1999. Accordingly, each of the two international courts had jurisdiction to hear the dispute brought before it.

The applicant Government pointed out that since the judgment of the ICJ of 1 April 2011, negotiations were under way between the Parties regarding a possible intervention by the CERD regarding the dispute existing between them. That did not in any way invalidate the arguments set out above, however, particularly the fact that the subject of the two disputes was entirely different.

B. The Court's assessment

79. The Court observes that in a judgment of 1 April 2011 the ICJ held that it did not have jurisdiction to entertain the application lodged with it by Georgia on 12 August 2008 under the ICEFRD (see paragraph 55 above). It is undisputed between the parties that the procedure before that international court has accordingly come to an end. Besides that, it is clear from the explicit wording of Article 35 § 2 of the Convention that it applies only to individual applications.

80. It follows that the objection raised by the respondent Government in that regard must be dismissed.

IV. EXHAUSTION OF DOMESTIC REMEDIES AND COMPLIANCE WITH THE SIX-MONTH TIME-LIMIT

81. Article 35 § 1 of the Convention provides:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

A. Exhaustion of domestic remedies

1. The parties' submissions

(a) The respondent Government

82. The respondent Government drew the Court's attention to the existence in the applicable law of the Russian Federation of effective remedies for the violations of Convention provisions complained of by the applicant Government in their application (paragraphs 28-53 above). The latter had not submitted any evidence that the presumed Georgian victims had sought to use those domestic remedies by bringing an action before the appropriate authorities or reporting an offence. With regard to the complaints received from various human rights organisations, the investigative committee of the prosecution service of the Russian Federation ("the investigative committee")

had carried out the necessary investigations and concluded that the allegations were unfounded. The investigative committee had even sought the assistance of the General Prosecutor's Office of Georgia in respect of the allegations made by the applicant Government against Russian military officers; this had been met with a refusal by the General Prosecutor's Office.

There could not be deemed to have been an administrative practice in the present case, because the acts alleged against the Russian Federation were not sufficiently identical or analogous to amount to a pattern or system and, moreover, there was no proof that these acts were officially tolerated. Accordingly, there was no credible evidence that Russian troops had committed violations on a large scale or assisted or cooperated in those perpetrated by various groups of South Ossetians or others. On the contrary, the evidence relied on by Georgia itself showed that Russian troops had intervened in order to prevent attacks by members of the South-Ossetian militias on persons or property (paragraph 46 above). It was very difficult in such circumstances to suggest the existence of a "pattern" or "system" of violations officially authorised or tolerated by the Russian State.

Moreover, save perhaps for the complaints lodged under Article 2 of Protocol No. 1 and Article 2 of Protocol No. 4, the applicant Government were not seeking to prevent the continuation or the recurrence of an administrative practice. The subject of their complaint was rather events that had occurred in the past, namely, the conduct of the conflict and its consequences. Furthermore, the applicant Government, far from merely citing instances of violations of the Articles referred to as evidence or illustrations of the practice alleged, were seeking to obtain a decision on the complaints that could found an award of just satisfaction.

In any event, the allegations of an administrative practice did not meet the requirement of being supported by prima facie evidence. Thus, the application was wholly unsubstantiated and otherwise lacked the requirements of a genuine allegation within the meaning of Article 33 of the Convention; accordingly, the application could not be deemed to fall within the scope of application of the Convention. In particular, it contained the following flaws: the allegations were internally inconsistent and did not satisfy the conditions of a viable application, and were contradicted or unsupported by the evidence relied upon or that evidence was false or too vague to carry any weight.

The respondent Government concluded that if the Court did not accept their request, it should join this objection of inadmissibility to the merits of the case, taking account of the complaints formulated and the prosecution materials obtained from the prosecution authorities of the Russian Federation.

(b) The applicant Government

83. The applicant Government argued, as their main submission, that the rule on exhaustion of domestic remedies did not apply to State applications where the object, as in the instant case, was to determine the compatibility of

an administrative practice with the Convention. In the alternative, they submitted that domestic remedies should be deemed to have been exhausted.

As their main submission, the applicant Government argued that they had established the existence of an administrative practice consisting of a repetition of acts and official tolerance that had taken the following form: killing of civilians, inhuman treatment, unlawful deprivations of liberty, depriving thousands of civilians of their right to freedom of movement and the right to choose their place of residence through forced displacements and the refusal of the right to return home, and the destruction of property belonging to civilians by looting and burning. Contrary to the submission of the respondent Government, such incidents had occurred over a long period, and more specifically between 10-12 August and 8 October 2008. Furthermore, reports by human rights defence organisations (both local and international, governmental and non-governmental)[33] clearly showed that there had been a considerable number of "generalised and systematic" violations mainly occurring after the end of the hostilities in places controlled by the Russian forces and committed either with their direct participation or under their control. Lastly, it had been shown that the Russian authorities had tolerated acts contrary to the Convention at two levels: both at that of the direct superiors of the perpetrators and at the highest level, since the Russian Federation had clearly stated that it refused to investigate many allegations despite repeated appeals made by human rights organisations[34].

In the alternative, the applicant Government submitted that in the present case the victims had effectively been deprived of the possibility of exhausting domestic remedies. Russian law did not provide for any procedure allowing them to lodge a civil action for compensation against the respondent State, unless criminal proceedings in respect of a complaint had already been instituted (Articles 44, 140 and 144 of the CCP of the Russian Federation). To the applicant Government's knowledge, no such criminal proceedings had been instituted against Russian officials or against separatists in cases concerning attacks on civilians in the context of the armed conflict of 2008. Moreover, although many Georgian nationals and a number of human rights organisations had complained to the Russian investigating authorities, no effective investigation had followed. The Monitoring Committee of the Council of Europe[35] had pointed out the shortcomings of the respondent Government in that regard. The fact was that the Russian authorities had remained totally passive with regard to the alleged violations.

2. The Court's assessment

(a) Existence of an administrative practice

84. The Court reiterates at the outset that the rule on exhaustion of domestic remedies as embodied in Article 35 § 1 of the Convention applies to inter-State cases (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

85. 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 *Ireland v. the United Kingdom*, 18 January 1978, § 159, Series A no. 25; *Cyprus v. Turkey*, Commission decision cited above,*Denmark v. Turkey* (dec), no. 34382/97, 8 June 1999; and *Georgia v. Russia (no. I)* (dec.), no. 13255/07, § 40, 30 June 2009). An administrative practice involves two distinct elements: a repetition of acts and official tolerance (see *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, § 19, DR 35).

86. The Commission moreover set out the threshold required with regard to evidence in inter-State cases as follows (see *France, Norway, Denmark, Sweden, Netherlands v. Turkey,* Commission decision cited above, §§ 21-22):

> "However, 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. ...
>
> ... The Commission 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."

87. In the instant case, the Court notes that the applicant Government have submitted a number of documents – including reports by international organisations such as Human Rights Watch, Amnesty International, the OSCE and the Council of Europe – in support of their allegations as to the existence of an administrative practice involving a repetition of acts and official tolerance. For their part, the respondent Government have denied the existence of an administrative practice targeted against Georgian nationals and challenged the applicant Government's allegations regarding the role of the Russian military forces during the conflict. They have also submitted documents – including the same reports by international organisations and the report by the International Fact-Finding Mission – contesting the opposing party's claims. In their submission, the applicant Government had not submitted sufficient evidence to justify an examination of the application on the merits.

88. In determining the existence of prima facie evidence, the Court must ascertain – in the light of the criteria already applied by the Commission and the Court in inter-State cases – whether the applicant Government's allegations are wholly unsubstantiated ("*pas du tout étayées"*) or are lacking the requirements of a genuine allegation in the sense of Article 33 of the

Convention (“*feraient défaut les éléments constitutifs d’une véritable allégation au sens de l’article 33 de la Convention”*) (see *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, Commission decision cited above, § 12; *Denmark v. Turkey*, decision cited above; and*Georgia v. Russia (I)*, decision cited above, § 44).

89. In the instant case, having regard to the evidence submitted by the parties, it considers that the applicant Government’s allegations cannot be considered as being wholly unsubstantiated or lacking the requirements of a genuine allegation for the purposes of Article 33 of the Convention. In that connection it takes account *inter alia* of the report of 27 November 2008 of the ODIHR of the OSCE and of September 2009 by the Independent International Fact-Finding Mission of the European Union on the Conflict in Georgia and of the reports of 17 December 2008 and 26 January 2009 of the Monitoring Committee and of resolutions nos. 1633 and 1647 of the Parliamentary Assembly of the Council of Europe on the events in question[36].

90. However, an examination of all the other questions concerning the existence and scope of such an administrative practice and its compatibility with the provisions of the Convention relate to the merits of the case and cannot be examined by the Court at the admissibility stage.

(b) Whether domestic remedies have been exhausted

91. The Court reiterates next that the rule on exhaustion of domestic remedies, were it to be applicable, obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

Article 35 § 1 of the Convention also provides for a distribution of the burden of proof. It is incumbent on the respondent Government pleading non-exhaustion to demonstrate to the Court that the remedy was an effective one available in theory and in practice at the relevant time. However, once this burden of proof has been satisfied it falls to the applicant – in the present case to the applicant Government – to establish that the remedy advanced by the respondent Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports* 1996-IV; *Denmark v. Turkey*, decision cited above; and *Georgia v. Russia (I)*, decision cited above, § 48).

92. In the present case the Court notes that the respondent Government submitted that the rule on exhaustion of domestic remedies had not been complied with because the Georgian nationals had not proved that they had attempted to use the remedies available under Russian law and the complaints by the human rights organisations were unfounded. The applicant Government replied that the remedies theoretically available in the Russian Federation

were not available or effective in practice and that despite the complaints lodged by Georgian victims and by human rights organisations, no effective investigation had been carried out by the Russian authorities.

93. The Court considers that the question of application of the rule on exhaustion of domestic remedies and that of compliance with that rule in the circumstances of the present case are so closely related to that of the existence of an administrative practice (see paragraph 85 above) that they must be considered jointly during an examination of the merits of the case.

94. Accordingly, it decides to join the objection raised by the respondent Government in that respect to the merits of the case.

B. Six-month time-limit

1. The parties' submissions

(a) The respondent Government

95. According to the respondent Government, this question would arise only if the applicant Government were correct in contending that there was no obligation to exhaust domestic remedies; they were not correct in that contention, however, so the question did not arise. Should that argument fail, the answer to the question would depend on the determination of the time when, according to the applicant Government, a particular violation of the Convention had taken place. It was often unclear from the application when the relevant violations were alleged to have occurred, but the respondent Government objected to any complaint arising from events alleged to have occurred more than six months before the application was lodged.

(b) The applicant Government

96. The applicant Government submitted that the application concerned allegations of violations committed both during the active phase of the hostilities (from 7 to 12 August 2008) and after the massive invasion and occupation of Georgian territory by Russian troops (from 12 August 2008 onwards). The six-month period, which began to run on the date on which the alleged violations occurred, had therefore been fully complied with. Indeed, an initial detailed letter setting out the object of the application and the alleged violations had been sent to the Court on 11 August 2008 and a complete application lodged on 6 February 2009. The applicant Government added that the rule did not in any case apply in the event of a continuing violation.

2. The Court's assessment

97. The Court reiterates that in the absence of remedies the six-month time-limit is to be calculated from the date of the act or decision which is said not to comply with the Convention and, further, that it does not apply to a situation that is still continuing (see *Cyprus v. Turkey*, Commission decision cited above, and *Georgia v. Russia (no. I)*, decision cited above, § 47).

98. In the instant case the Court notes that the present application concerns the impugned events that started in South Ossetia and in Abkhazia on 7 August 2008. It also observes that a complete application was lodged with the Registrar of the Court on 6 February 2009 by the Agent of the applicant Government.

99. The Court therefore considers that it does not have to determine whether the request for application of interim measures of 11 August 2008 lodged by the applicant Government properly qualified as an application, given that the respondent Government have not denied that a complete application was lodged with the Court on 6 February 2009.

100. The six-month time-limit provided for in Article 35 § 1 of the Convention has therefore been complied with.

101. Accordingly, the objection raised in that respect by the respondent Government must be dismissed.

C. Conclusion

102. It follows that the applicant Government's complaints cannot be declared inadmissible within the meaning of Articles 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT, BY A MAJORITY

1. *Dismisses* the objections based on failure to comply with the six-month time-limit and on the similarity of the present application with the application lodged with the International Court of Justice;

2. *Joins to the merits* the objections of incompatibility *ratione loci* and *ratione materiae* of the application with the provisions of the Convention as well as the objection of failure to comply with the rule on exhaustion of domestic remedies;

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

Claudia Westerdiek Peer Lorenzen
Registrar President

ANNEXES: LINK

Georgia v. Russia (II)
(no. 38263/08)

Annexes to the decision on admissibility

1. Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009) - Vol. I and extracts from Vol. II of the Report.

2. Report by Human Rights Watch (HRW): "Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict Zone over South-Ossetia", 22 January 2009.

3. Amnesty International Report: "Civilians in the line of fire: the Georgia-Russia conflict", EUR 04/005/2008, November 2008.

4. Report by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE: "Human Rights in the war-affected areas following the conflict in Georgia", Warsaw, 27 November 2008.

5. Resolution 1633 (2008) of the Parliamentary Assembly of the Council of Europe (PACE): "Consequences of the war between Georgia and Russia", 2 October 2008, and **PACE Resolution 1647 (2009)** on the implementation of Resolution 1633, 28 January 2009; **reports by the PACE Monitoring Committee**: "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia", preliminary draft explanatory memorandum, 17 December 2008, AS/Mon(2008)33 rev., and final report, Doc. 11800, 26 January 2009.

6. Report by the Council of Europe Committee on Migration, Refugees and Population: "The humanitarian consequences of the war between Georgia and Russia", 12 January 2009, Doc. 11789; **report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights**, parts IV and V: "Human Rights in Areas Affected by the South Ossetia Conflict – Special Mission to Georgia and Russian Federation", 8 September 2008.

7. HRW news releases: "Russia/Georgia: Investigate Civilian Deaths, High Toll from Attacks on Populated Areas", 12 August 2008; "Georgia: International groups should send missions, investigate violations and protect civilians", 18 August 2008; "Georgia: EU mission needs to protect civilians, in security vacuum, frequent attacks and pervasive fear", 15 September 2008; "Russia/Georgia: Investigate abuse of detainees", 21 September 2008; "Georgia: satellite images show destruction, ethnic attacks", 27 August 2008.

8. Special press release by Memorial and Demos: "Humanitarian consequences of the armed conflict in the South Caucasus. The "buffer zone" after the withdrawal of the Russian troops."

9. Concluding observations of the UN Human Rights Committee: Russian Federation, 24 November 2009.

[1] See Annex 1: Vol. 1 and extracts from Vol. II of the Report of the International Fact-Finding Mission. The entire report, available only in English, is available at the following link: http://91.121.127.28/ceiig/Report.html (consulted in September 2011).

[2] See Annex 1: Report of the International Fact-Finding Mission, Vol. I., "The Conflict in Georgia in August 2008", 2.

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

[4] See Annex 8: press release issued by Memorial and Demos Centre: "Humanitarian consequences of the armed conflict in the South Caucasus. The "buffer zone" after the withdrawal of the Russian troops."

[5] See, *inter alia*, Annex 7: Human Rights Watch news releases "Russia/Georgia: Investigate Civilian Deaths, High Toll from Attacks on Populated Areas", 12 August 2008, "Georgia: International groups should send missions, investigate violations and protect civilians", 18 August 2008, see Annex 2: HRW report "Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict Zone over South-Ossetia", 22 January 2009, pp. 91-92, and see Annex 3: Amnesty International report "Civilians in the line of fire: the Georgia-Russia conflict", Index: EUR 04/005/2008, November 2008, pp. 29-31.

[6] See, *inter alia*, Annex 7: HRW news releases cited above, see Annex 2: HRW report "Up in Flames" cited above, p. 111-13, and see Annex 3: Amnesty International report "Civilians in the line of fire" cited above, pp. 32-34.

[7] See, *inter alia*, Annex 2: HRW report "Up in flames" cited above, pp. 111-13 and pp. 158-59, and see Annex 4: report by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE "Human Rights in the war-affected areas following the conflict in Georgia", Warsaw, 27 November 2008, pp. 22-24.

[8] See Annex 7: HRW news release "Georgia: EU mission needs to protect civilians, in security vacuum, frequent attacks and pervasive fear", 15 September 2008.

[9] See Annex 5: report (preliminary draft explanatory memorandum) by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE): "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia", 17 December 2008, AS/Mon(2008) 33 rev. §§ 32-52, and in particular § 46.

[10] See Annex 4: report by the ODIHR cited above, pp. 24 and 37, which conducted interviews with many displaced civilians, and see Annex 7: HRW news release "Georgia: EU Mission needs to protect civilians, in security vacuum, frequent attacks and pervasive fear, cited above.

[11] See Annex 4: report by the ODIHR cited above, p. 24.

[12] See Annex 2: HRW report “Up in flames” cited above, p. 25 and pp. 159-62, and see Annex 4: ODIHR report cited above, p. 25.

[13] See Annex 2: HRW report “Up in flames” cited above, pp. 173-74, and see Annex 7: HRW news release “Russia/Georgia: Investigate abuse of detainees”, 21 September 2008.

[14] According to the Georgian General Prosecutor’s Office.

[15] See Annex 2: HRW report “Up in flames” cited above, pp. 185-94

[16] See Annex 5: PACE Monitoring Committee report (preliminary draft explanatory memorandum), cited above, §§ 32-52, and in particular § 46.

[17] See Annex 4: ODIHR report cited above.

[18] See Annex 7: HRW news release “Russia/Georgia: Investigate abuse of detainees” cited above.

[19] See Annex 6: Council of Europe, Report by the Committee on Migration, Refugees and Population “Humanitarian consequences of the war between Georgia and Russia”, 12 January 2009, Doc. 11789, and report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, parts IV and V: “Human rights in areas affected by the South Ossetia conflict – Special Mission to Georgia and Russian Federation”, 8 September 2008, and see Annex 4: ODIHR report cited above, pp.48-49.

[20] See Annex 7: HRW news release “Georgia: satellite images show destruction, ethnic attacks”, 27 August 2008, and see Annex 2: HRW report “Up in flames” cited above, pp. 130-42, see Annex 4: ODIHR of the OSCE report, p. 44, and see Annex 3: Amnesty International report “Civilians in the line of fire” cited above, p. 32.

[21] See Annex 2: HRW report “Up in flames” cited above, pp. 120-23, and see Annex 4: ODIHR of the OSCE report cited above, p. 45.

[22] See Annex 4: ODIHR report cited above, pp. 22-24, 27 and 42-46, see Annex 3: Amnesty International report “Civilians in the line of fire”, cited above, p. 42, and see Annex 2: HRW report “Up in flames”, cited above, pp. 130-42.

[23] See Annex 6: report by the Council of Europe Committee on Migration, Refugees and Population cited above.

[24] See Annex 6: report by the Council of Europe Committee on Migration, Refugees and Population cited above, and report (parts IV and V) by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, cited above, and see Annex 4: OIDHR report cited above, pp. 24 and 47-50.

[25] See Annex 5: report by the PACE Monitoring Committee (preliminary draft explanatory memorandum) cited above, §§ 32-52, and in particular § 46.

[26] See Annex 1: Report by the International Fact-Finding Mission, cited above, Vol. II, chap. 6, part 2, A.I, and vol. I., introduction, points 2, 14 and 20.

[27] See Annex 2: HRW report cited above, pp. 8, 15, 21, 35, 123, 125 and 128, see Annex 3: Amnesty International report cited above, p. 31, and see Annex 4 : ODIHR report cited above, pp. 26, 3, 42 and 49.

[28] See, *inter alia*, Annex 2: HRW report "Up in Flames" cited above, p. 123, see Annex 3: Amnesty International report "Civilians in the line of fire" cited above, p. 39, see Annex 9: concluding observations of the UN Human Rights Committee: Russian Federation, 24 November 2009, § 13, and see Annex 5: PACE resolution 1633 (2008) cited above, §§ 6 and 12, and report on the implementation of that resolution, cited above, preliminary draft explanatory memorandum, § 2.

[29] "Legality of the Threat or Use of Nuclear Weapons", advisory opinion of 8 July 1996, § 25; "Military and Paramilitary Activities in and Against Nicaragua" (Nicaragua v. United States of America), ICJ Reports 1986, p. 94, § 176; "Legal Consequences of the Construction of a Wall in Occupied Palestine", advisory opinion of 9 July 2004, § 106.

[30] See Annex 1:Report of the International Fact-Finding Mission, vol. II, chap. 7.

[31] "Case concerning armed activities on the territory of the Congo" (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005, ICJ, § 216.

[32] See First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted in 1864, revised in 1949); Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted in 1949); Third Geneva Convention relative to the Treatment of Prisoners of War (adopted in 1929, revised in 1949); and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted in 1949), and the three Additional Protocols (Protocol I (1977), Protocol II (1977) and Protocol III (2005)).

[33] See Annexes 2,3 and 4: reports by Human Rights Watch, Amnesty International and the ODIHR cited above.

[34] See Annex 5: PACE resolutions 1633 and 1647 cited above and above-cited reports of the Monitoring Committee on the implementation of that resolution.

[35] Ibid.

[36] See Annexes 1, 4 and 5.

GEORGIA v. RUSSIA (II) DECISION