

REQUEST TO SEEK THE PRE-TRIAL CHAMBER'S AUTHORISATION TO EXPAND THE TEMPORAL SCOPE OF THE INVESTIGATION INTO THE SITUATION IN GEORGIA

I. EXECUTIVE SUMMARY

1. As representatives of South Ossetian victims of crimes and human rights violations perpetrated as part of the 2008 war on the territory of Georgia, the Russian Justice Initiative (“RJI”) and Global Diligence LLP (hereinafter, the “Filing Parties”) make this submission under Article 15(2) of the Rome Statute of the International Criminal Court (“ICC Statute”) to request the Prosecutor of the International Criminal Court (“ICC Prosecutor”) to seek the Pre-Trial Chamber’s authorization to expand the temporal scope of the investigation into the *Situation in Georgia* to at least 13 October 2008 (hereinafter the “Request”).

2. The purpose of the Request is to ensure that the investigation into the *Situation in Georgia*¹ includes the facts of the disappearance of three ethnic South Ossetian men: Alan Khachirov (born 22 December 1992), Alan Khugayev (born 23 September 1989) and Soltan Pliyev (born 19 March 1983). They disappeared close to the administrative boundary line (“ABL”), i.e. the border between Georgia and the *de-facto* Republic of South Ossetia (“RSO”). They were last seen on 13 October 2008 on the road between the villages of Kvemo, Korluila and Khelchua.

3. Although there is convincing evidence implicating the Georgian authorities in the disappearances of the three men—put forth by the Commissioner for Human Rights of the Council of Europe (“CHR”), the European Union Monitoring Mission (“EUMM”), the Georgian Young Lawyers Association (“GYLA”), and the parents of the missing persons—there has been no effective investigation in this case in Georgia or by the *de facto* authorities in Tskhinvali.

4. It is submitted that the crimes alleged represent some of the most serious incidents to have occurred during the August 2008 armed conflict, and that the gravity of the crimes requires a full investigation. The facts of the disappearances may be qualified both as war crimes and crimes against humanity. The events took place in the context of and were associated with an armed conflict, and were part of a widespread and systematic attack against South Ossetian civilians. The disappearances may amount to the underlying war crimes of murder/wilful killing, unlawful confinement, wilful deprivation of the right to fair trial to a protected person, and inhuman treatment, and/or the crime against humanity of enforced disappearance, murder

¹ ICC-01/15, *Situation in Georgia*.

and illegal detention. Crucially, the disappearances took place just three days after the date chosen to mark the end of the temporal scope of the authorised investigation (10 October 2008).

5. It is submitted that to leave this case outside the remit of the International Criminal Court (“ICC”) investigation into the *Situation in Georgia* would be contrary to the founding principles of the ICC, resulting in unequal treatment vis-a-vis other victims who suffered from comparable harm as part of the same situation, and whose cases fall within the authorised time-frame. Moreover, inclusion in this investigation represents the victims’ only opportunity for justice in light of a lack of genuine and effective domestic investigations. The Filing Parties fear that excluding these disappearances from the scope of the investigation will contribute to the wider culture of impunity in the region.

6. For the foregoing, we respectfully request the ICC Prosecutor to seek the Pre-Trial Chamber’s authorization to expand the temporal parameters of the investigation into the *Situation in Georgia* to at least the 13 October 2008, in order to bring the disappearances of Messrs. Khachirov, Khugayev and Pliyev into the scope of the *Situation in Georgia*.

II. INTRODUCTION

A. The Filing Parties

7. RJI and Global Diligence LLP (“GD”) file this submission under Article 15(2) of the Rome Statute on behalf of Marina Khachirova (the sister of the disappeared Alan Khachirov), Farizat Kulumbegova (the mother of the disappeared Soltan Pliyev), and Marina Khuriyeva (the mother of the disappeared Alan Khugayev). RJI represents their interests in the European Court of Human Rights jointly with the Georgian Young Lawyers' Association (“GYLA”).

8. RJI is a non-governmental organization with expertise in the protection of human rights in the North and South Caucasus. RJI and its partner organizations utilize domestic and international legal mechanisms to seek justice for grave human rights violations, and have represented over 2000 clients in over 300 cases lodged at the European Court of Human Rights, including South Ossetian and Georgian victims of the August 2008 conflict.

9. RJI’s address for correspondence is:

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10. GD is a law firm based in the United Kingdom specialising in complex legal issues in unstable and conflict-affected regions. Its main practice areas are international criminal law, human rights and justice-sector capacity building. GD partners, of counsel and network of

experts have substantial experience in international courts and tribunals as representatives of victims, defendants and members of the prosecution.

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12. For questions and clarifications in relation to this submission, please contact the Executive Director of RJI, Vanessa Kogan (kogan@srji.org), and GD Partner Alexandre Prezanti (alexprezanti@globaldiligence.com).

B. Sources of Information and Methodology of Documentation

13. The information and evidence used in this Request originate from public and confidential sources.

14. Public sources:

- a. Reports of international bodies, including the OSCE and the Office of the Human Rights Commissioner of the Council of Europe, the ICRC, PACE, UN and EUMM;
- b. General sources of public international law, including basic treaties and conventions;
- c. Case law of the International Criminal Court;
- d. Other public sources, such as interviews with officials.

15. The confidential annex includes the statements of the victims and relevant witnesses, as well as case files obtained from the state authorities. Most of the confidential annex files originate from an application to the European Court of Human Rights (no. 7685/12), filed by RJI on behalf of the victims.

III. FACTUAL BACKGROUND

A. Events of 2008

16. On 13 October 2008, three ethnic Ossetian men—Alan Khachirov (born 22 December 1992), Alan Khugayev (born 23 September 1989) and Soltan Pliyev (born 19 March 1983)—disappeared in the vicinity of the administrative boundary line (“ABL”) - the border between Georgia and the *de-facto* Republic of South Ossetia (“RSO”). The three men were last seen on the road between the villages of Kvemo, Korluila and Khelchua.

17. Soltan Pliyev officially resided in Kirtsina village with his family, but spent most of his time in Tskhinvali with his girlfriend, [REDACTED]. Since autumn 2006, he had been working for the South Ossetian *spetsnaz* (special mission unit). Soltan Pliyev's relatives last saw him on 10 October 2008, when he was leaving Kirtsina village for work.² In the days following his departure from home and his abduction, Pliyev was living at his sister's apartment in Tskhinvali.³

18. Alan Khugayev had been working with Soltan Pliyev for the South Ossetian *spetsnaz*, a fact later confirmed by the RSO Minister of Internal Affairs Mikhail Mindzayev.⁴ On the morning of 13 October 2008, Alan Khugayev left his home in Tskhinvali, South Ossetia. He told his parents that he was going to visit his grandfather, [REDACTED], in Binar village.⁵ In normal conditions, a round trip to the village by car would take approximately five hours.⁶ Alan was driving his father's car, a Laguna blue model VAZ 21099 with the plate number B453XH15.⁷

19. At the time of his disappearance, Alan Khachirov was 15 years of age. On 13 October 2008 at approximately 10 a.m., Alan Khachirov met Alan Khugayev, who suggested joining him for a ride to Binar village.⁸ Alan Khachirov and Alan Khugayev knew each other well because they were taking boxing classes together. Alan Khachirov shouted to his friends who were standing nearby that he would be back soon, and got into Khugayev's car.⁹

20. Sometime between 11 a.m. and noon on 13 October 2008 the car with the three Ossetians was seen travelling in an easterly direction through Khelchua village towards Disevi.¹⁰ Later that day, between 1 and 3 p.m., the vehicle was seen travelling in the opposite direction, from Korkula towards the villages of Koshka and Ditsevi.¹¹

21. Witness [REDACTED] [REDACTED] was grazing cattle near the river close to Korkula village. Around lunchtime on the road from Korkula village he saw a blue VAZ-2109 stopping and three

² Annex 10 - Statement of [REDACTED] of 05.06.2010

³ *Ibid.*

⁴ Annex 11 - Statement of [REDACTED] of 05.06.10

⁵ Annex 12 - Statement of [REDACTED] of 05.06.2010

⁶ CommDH(2010)35: *Monitoring of Investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia*, Commissioner for Human Rights, Council of Europe. Available at: <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2521597&SecMode=1&DocId=2138700&Usage=2>, para. 28, p. 14. Accessed 21.06.2016.

⁷ Annex 12 - Statement of [REDACTED] of 05.06.2010, Annex 19 - Statement of [REDACTED] of 15.09.2011

⁸ Annex 11 - Statement of [REDACTED] of 05.06.2010

⁹ *Ibid.*

¹⁰ CommDH(2010)35, *supra n. 6*, para. 28, p. 14

¹¹ CommDH(2010)35, *supra n. 6*, paras. 28-29, p. 14

men getting out. Mr. [REDACTED] later identified the men by photographs shown to him by the relatives of the missing men. He said that all three were armed.¹²

22. At some point in the afternoon of 13 October 2008 a group of Georgian servicemen, allegedly under the command of Gocha Bliyadze, detained Messrs. Khachirov, Khugayev and Pliyev at the ABL between Georgia and RSO in the vicinity of the road between the villages of Korkula and Khelchua.¹³ According to Alan Khachirov's mother, at least three women saw the men being beaten after their detention.¹⁴ Witness Mr. [REDACTED] (died in June 2009), a relative of Alan Khachirov, stated that he saw the men being transferred by people wearing Georgian army uniforms; he also named the head of the district police service at the time who presumably sanctioned their arrest – Noshri Okropiridze [the name may be inaccurate due to indecipherable handwriting in Russian].¹⁵ Alan Khugayev's mother also mentioned in a statement that according to information she had received from sources that she preferred not to disclose for security reasons, there were two other men along with Mr Okropiridze, who sanctioned and carried out the arrest: Mr Shalva Tramakidze, who worked for the Georgian military *spetsnaz*, and Mr Gocha Bliyadze, the head of the police group that arrested the three men.¹⁶

23. The Organization for Security and Cooperation in Europe ("OSCE") daily patrol report for 14 October 2008, covering the areas of Gori, Ditsi, Arbo, Mereti and Tkviavi, stated that a Georgian police checkpoint on the Tirdznisi-Ditsi road had informed the OSCE patrol that three armed South Ossetian males were detained in Ditsevi on 13 October, and had been transferred to Gori.¹⁷ A further OSCE report, for the period 18-19 October, indicated that the Deputy Head of the Georgian Ministry of Internal Affairs Special Forces Police Regional Headquarters confirmed to OSCE patrol members that the information contained in the Arbo/Mereit daily report for 14 October was correct.¹⁸

B. Search for the disappeared

24. On 14 October 2008, Alan Khugayev's parents tried to reach him on his cell phone. The phone rang (i.e. it was clearly operational) but no one answered.¹⁹ That same afternoon, David Khugayev, father of Alan Khugayev, went to search for his son in Binar village – Alan's

¹²Annex 3 - Statement of [REDACTED] of 25.03.2009

¹³Annex 20 - Statement of [REDACTED] of 15.09.2011

¹⁴Annex 11 - Statement of [REDACTED] of 05.06.10

¹⁵*Ibid*

¹⁶ Annex 20 - Statement of [REDACTED] of 15.09.2011

¹⁷ See at CommDH(2010)35, *supra n. 6*, page 8.

¹⁸ *Ibid.*, page 14

¹⁹ Annex 12 - Statement of [REDACTED] of 05.06.2010

intended destination.²⁰ There he learned that Alan had never arrived in Binar.²¹ The relatives of the three men filed applications to the South Ossetian police and the prosecutor's office, as well as to Russian commander Tarasov.²²

25. Between 15 and 18 October, Alan Khachirov's mother obtained information about her son from Dmitry Sanakoyev, Head of the RSO Provisional Administrative Entity of Georgia. His employee ██████████ said that the three men had been arrested for looting and were currently being held in Gldani prison.²³ Subsequently this prison became notorious for its torture practices, footage of which became public in 2012.²⁴

26. On 18 October, Alan Khachirov's mother met with RSO Minister of Internal Affairs Mikhail Mindzayev. He confirmed that he knew about the arrest of two men wearing camouflage and one man wearing civilian clothes. He showed her on the map the road connecting Disevi and Korkula villages—the place where their arrest is said to have taken place.²⁵

27. The relatives of the disappeared appealed to RSO official Alan Badzayev (Bazzayev) for help, because he “had connections in Georgia since serving a sentence in a Georgian prison in 2006-2007.”²⁶ Mr. Badzayev contacted the Deputy Head of the Shida-Kartli police division of Georgia shortly after the disappearance of the three men. The Deputy Head stated that the men had been transferred to the Gori police department, and that their car had been seen there. After some time, they were transferred again to some other place, while the car was taken to Tbilisi. Mr. Alan Badzayev could not reach the police official again. He was later told by a retired Georgian official named Gokeri [name handwritten indecipherably] not to ask about the three men again, because it was a “serious case,” a “dead case.”²⁷ Around five days after the disappearance, the parents of Alan Khugayev found out through a distant relative, ██████████, that her husband ██████████ had witnessed three young Ossetian men being taken to the police station of Mereti village by Georgian servicemen at around 4 pm on 13 October. Mr. ██████████ also saw the blue car that Alan Khugayev had been driving.²⁸

²⁰ Annex 12 - Statement of ██████████ of 05.06.2010

²¹ See the map in CommDH(2010)35, *supra n. 6*, p. 32

²² Annex 10 - Statement of ██████████ of 05.06.2010, Statement of ██████████ of 05.06.2010

²³ Annex 11 - Statement of ██████████ of 05.06.10

²⁴ Videos of Inmates Abuse, Rape Emerge, Available at: <http://www.civil.ge/eng/article.php?id=25220> [Accessed 05.04.16]

²⁵ Annex 11 - Statement of ██████████ of 05.06.10

²⁶ Annex 1 - Statement of ██████████ of 25.03.2009

²⁷ *Ibid.*

²⁸ Annex 12 - Statement ██████████ ██████████ of 05.06.2010

28. On 31 October 2008 a EUMM patrol conducting checks near the ABL was asked by a South Ossetian officer to find out where Messrs. Khachirov, Khugayev and Pliyev were being held.²⁹ The same appeal was made to an OSCE patrol.³⁰ Such requests were repeated to the EUMM on 1 and 6 November 2008.³¹ On 8 November a meeting took place between a Russian military official and the Deputy Head of the EUMM, where the issue of the three missing men was raised.³²

29. In March 2009 the victims' relatives learned from a witness, [REDACTED] (a South Ossetian resident detained in Georgian facilities in 2009) that Alan Khachirov, Alan Khugayev and Soltan Pliyev were allegedly seen in the Mtskheta town court in January 2009.³³

30. On 7 March 2009, a relevant video was posted on the website 'Myvideo.ge' by someone using the pseudonym "kmac,"³⁴ whose real identity was not known.³⁵ The video was removed shortly thereafter, but was re-uploaded on YouTube on 16 March 2010.³⁶ Ms. Venera Tibilova, the mother of Alan Khachirov, says she bought the video via Mr. [REDACTED], a relative of Alan Khachirov who died in June 2009.³⁷ The video shows three men in a situation of apparent captivity or custody, being subjected to what appears to be a threatening and violent interrogation by native speakers of the Georgian language, whose faces are not visible in the video. The three men were positively identified as the three missing persons.³⁸ Mr. Rostik Pliyev, the father of Soltan Pliyev, recognized one of the voices on the video as that of Mr. Omar Kaulashvili describing this person as an ethnic Georgian from Kemerti village.³⁹

31. Once the relatives of the disappeared obtained possession of the video, they handed it over to the RSO Ministry of Internal Affairs and to David Sanakoyev and Boris Chochiyev—the Special Representative for Post-Conflict Settlement of the *de-facto* RSO; GYLA, the victims' representative in Georgia, sent a CD-ROM containing the video recording to the Chief Prosecutor's Office of Georgia.⁴⁰

32. Sometime between 20 and 25 February 2010, witness [REDACTED] saw two Ossetians in the Gldani prison hospital where he was being treated. In his own words, "the two

²⁹ See at CommDH(2010)35, *supra* n. 6, para. 7, p. 10

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Annex 4 - Statement of [REDACTED] of 25.03.2009

³⁴ CommDH(2010)35, *supra* n. 6, p. 15

³⁵ Annex 6 - Letter of Gori district division of MIA, of 18.10.10

³⁶ Video can be accessed at: <http://www.youtube.com/watch?v=SUczCfP6E14>

³⁷ Annex 11 - Statement of [REDACTED] of 05.06.10

³⁸ Annex 15 - Protocol of interrogation of [REDACTED] of 9.09.2010

³⁹ Annex 14 - Letter to the Gori Division of the Ministry of Internal Affairs of Georgia of 30.07.2010

⁴⁰ Annex 5 - Letter of 21.04.2009

Ossetians were closely guarded and no one was allowed to speak to them.”⁴¹ The two Ossetian men were kept in the hospital for five days and afterwards were allegedly taken back to the prison located in the building of the Georgian Ministry of Internal Affairs (the so-called “Saministro prison”). Mr. ██████████ was released from the hospital in April 2010. In July 2010 the relatives of the disappeared showed their photographs and the aforementioned video to Mr. ██████████. Mr. ██████████ identified Soltan Pliyev and Alan Khachirov as the two men whom he had seen in the prison hospital in February 2010. Mr. ██████████ also stated that he had never seen Alan Khugayev in the hospital.⁴²

C. The investigation

33. Between 2008 and 2011 GYLA as well as the relatives of the three missing men actively attempted to pursue an investigation into the disappearances, submitting motions, requests, inquiries and sending in evidence to the Prosecutor’s office. The case also garnered interest on the international level, and was subject to an independent inquiry by Council of Europe experts (CHR experts) in 2008. Nonetheless the investigation has produced little results and the authorities continue to officially deny the involvement of Georgian servicemen in the abduction and disappearance of the three men.

34. On 20 June 2009, a criminal investigation into the unlawful detention of Khachirov, Khugayev and Pliyev was opened on the basis of section 413 of the Georgian Criminal Code. The criminal case file was assigned the number 074098089.⁴³ According to the CHR experts, the official investigation into the disappearance was preceded by an “unofficial” one, which had come to the conclusion that “Pliyev, Khugayev, Khachirov and their vehicle VAZ 21099 are not and have never been on the territories controlled by the Georgian Ministry of Internal Affairs.”⁴⁴ The unofficial investigation report was not part of the official criminal case file, nor was it referenced in any way.⁴⁵

35. On 20 June 2009 a preliminary investigation into the disappearance was opened and transferred to the prosecutor's office of Shida Kartli and Mtskheta-Mtianeti for further investigation.⁴⁶

⁴¹ Annex 15 - Protocol of interrogation of ██████████ of 9.09.2010

⁴² *Ibid.*

⁴³ Annex 13 - Protocol of opening of a criminal investigation of 20.06.2009

⁴⁴ See at CommDH(2010)35, *supra n. 6*, para. 23 page 13.

⁴⁵ See at CommDH(2010)35, *supra n. 6*, para. 17 page 12.

⁴⁶ Annex 7 - Letter of the Chief Prosecutor's Office of Georgia of 24.06.2009. See also at CommDH(2010)35, *supra n. 6*, para. 17, page 12.

36. On 25 March 2010, the mothers of the disappeared men crossed the administrative boundary line (ABL) and went to Gori to give testimony before the prosecutor.
37. In June 2010 the relatives of the disappeared were granted victim status in the criminal case. The CHR experts had made the recommendation to grant victim status to the parents of the three missing Ossetians on 16 April 2010, but at that time the Georgian authorities had refused to do so.⁴⁷
38. GYLA several times requested that the criminal case file be transferred to the Chief Prosecutor's Office of Georgia. The criminal case was transferred to the Chief Prosecutor's office on an unknown date.
39. Despite several detailed requests made by GYLA and the victims' relatives regarding investigative measures undertaken, the authorities refused to provide information, arguing that in accordance with the rules of criminal procedure, victims were only entitled to receive a copy of decisions concerning the termination of investigation and/or termination of criminal prosecution (with no specific answers to the questions posed).⁴⁸
40. The disappearance of Messrs. Khachirov, Khugayev and Pliyev is of interest to a broad range of international actors: the EUMM, the OSCE, the ICRC, and the Council of Europe.⁴⁹ In 2010, the CHR experts were assigned to monitor investigations of specific cases of missing persons during and after the August 2008 armed conflict in Georgia. The report published by the CHR experts included a detailed assessment of the investigation into the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev, which highlighted the major shortcomings of the investigation.⁵⁰
41. The relatives of the disappeared submitted their application to the European Court of Human Rights ("ECtHR") on 9 January 2012. The application was registered under no. 7685/12.⁵¹

D. Investigation after the application to the ECHR

42. After submitting the application to the European Court in 2012, the relatives of the disappeared and their representatives continued to try to obtain information from the Georgian investigative authorities on the progress of the investigation.

⁴⁷ See at CommDH(2010)35, *supra n. 6*, para. 53, p. 19

⁴⁸ Annex 6 - Letter of 18.10.2010, and Annex 18 - Letter of 29.11.2010

⁴⁹ Annex 12 - Statement of ██████████ of 05.06.2010

⁵⁰ See CommDH(2010)35, *supra n. 6*, pages 20-21.

⁵¹ The application is not visible in the HUDOC database of the European Court because it has not yet been communicated to the Georgian Government.

43. The Georgian prosecution authorities were repeatedly requested to obtain call charge records for the telephones belonging to A. Khachirov, A. Khugayev and S. Pliyev in order to shed light on their whereabouts and movements at the time they went missing.⁵² No information was provided in this regard.

44. On 19 February 2013 GYLA was informed that the criminal case on the unlawful detention of Khachirov, Khugayev and Pliyev was forwarded to the District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti on 13 December 2012 and that the investigation was opened under 143 (3) (c) of the Criminal Code of Georgia.⁵³ According to the letter, the inhabitants of Disevi, Ditsi and Koshka villages, as well as police officers, had been interviewed in the context of the pending investigation. The letter further stated that the recommendations provided in the CHR expert report had been taken into account by the investigators.⁵⁴

45. On 9 December 2013 two witnesses—[REDACTED] and [REDACTED]—were interviewed by the Prosecutor's Office in the context of the criminal case. GYLA's lawyer attended the interview as the representative of the relatives of the missing men.

46. Subsequently GYLA tried to obtain further information about the evidence gathered by the investigating authorities. On 8 May 2014 the District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti informed GYLA that they could not interrogate certain persons mentioned by GYLA because they had left Georgia or lived on territory not under the control of Georgia; the District Prosecutor's Office also refused to provide GYLA with copies of the evidence because it was not a party in the criminal case.⁵⁵ At the present time the investigation is still pending.

IV. PROCEDURAL BASIS FOR THE REQUEST

A. Filing Parties have standing to make this Request

47. Under Article 15(2) of the ICC Statute, the ICC Prosecutor shall seek additional information from non-governmental organizations that he or she considers a reliable source and appropriate in the given circumstances. In the *Côte d'Ivoire* case,⁵⁶ Pre-Trial Chamber III analysed reports

⁵² Annex 17 - Complaint of 03.11.2010 (submitted before the application to the ECtHR); Annex 8 - Letter of 21.03.2012.

⁵³ Annex 21 - Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of 15.02.2013

⁵⁴ Annex 22 - Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of 16.03.2013

⁵⁵ Annex 16 - Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of 8.05.2014

⁵⁶ *Situation in the Republic of Côte d'Ivoire*, Decision on the Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010" No. ICC-02/11, 22.02.2012. Para.16

submitted to the ICC Prosecutor by non-governmental organizations Human Rights Watch and Amnesty International during the same procedural stage as in the present case.

48. RJI is a non-governmental organization with expertise in the protection of human rights in the North and South Caucasus and has represented victims from the South Ossetia conflict before the European Court of Human Rights. GD specialises in international criminal law and practice before international courts and tribunals. This Request is submitted on behalf of Marina Khachirova (the sister of the disappeared Alan Khachirov), Farizat Kulumbegova (the mother of the disappeared Soltan Pliyev), and Marina Khuriyeva (the mother of the disappeared Alan Khugayev). RJI represents their interests in the European Court of Human Rights jointly with the Georgian Young Lawyers' Association (“GYLA”). Consequently, the Filing Parties have *locus standi* to submit this Request to the ICC Prosecutor.

B. The Prosecutor has the power to request the Pre-Trial Chamber’s authorisation to expand the temporal scope of the investigation

49. In accordance with Article 15(3) of the ICC Statute, the ICC Prosecutor shall request the Pre-Trial Chamber to authorise an investigation, together with any supporting material collected. As the Court has indicated in *The Situation in the Republic of Cote d’Ivoire*,⁵⁷ in case the Prosecutor receives additional information on crimes committed outside of the original temporal framework of the investigation, she may seek to expand the temporal scope of the authorised investigation by using the procedure under Rule 50(4) of the ICC Rules of Procedure and Evidence.

50. The Prosecutor has the same procedural rights under the ICC Statute and ICC Rules of Procedure and Evidence in the *Situation in Georgia* as those relied on to seek authorisation to expand the scope of the investigation in *The Situation in the Republic of Cote d’Ivoire*. Accordingly, the ICC Prosecutor has the power to request the Pre-Trial Chamber’s authorisation to expand the temporal scope of the investigation in the context of the *Situation in Georgia* in order to include the facts set out in this Request.

V. DISAPPEARANCES FALL WITHIN THE JURISDICTION OF THE ICC

51. The Filing Parties respectfully submit that the disappearances of Alan Khachirov, Alan Khugayev and Soltan Pliyev satisfy the Statute’s requirements *ratione temporis*, *ratione loci* and *ratione materiae* and consequently, fall within the jurisdiction of the ICC.

⁵⁷ *Ibid.*, para.2.

A. Disappearances fall within the temporal jurisdiction of the ICC

52. Article 11 of the ICC Statute states that the ICC has jurisdiction over crimes committed from the date of entry into force of the ICC Statute. Georgia deposited its instrument of ratification of the ICC Statute on 5 September 2003 and the Statute entered into force on the territory of Georgia on 1 December 2003 in accordance with article 126(1) of the ICC Statute. The facts relating to the disappearances set out in this Request took place on and after 13 October 2008.
53. Thus, the requirements of jurisdiction *ratione temporis* for the criminal acts relating to the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev are duly met.

B. Disappearances fall within the territorial jurisdiction of the ICC

54. Under Article 12(2)(a) of the ICC Statute, the Court has jurisdiction if the alleged conduct in question occurred on the territory of a State-party. The disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev occurred in the region of South Ossetia, which at the material time was *de jure* a part of Georgia. In this regard, the Filing Parties refer to the Prosecutor's "Request for authorisation of an investigation pursuant to article 15"⁵⁸ where it is stated that despite the South Ossetian declaration of independence of 29 May 1992 and its subsequent recognition by four UN Member States from 2008 onwards, South Ossetia is still regarded by the international community and UN-bodies as an integral part of Georgia.⁵⁹

55. Alternatively, in case the Court should find that the *de jure* status of the territory of South Ossetia as part of Georgia is not sufficient to ground territorial jurisdiction over the *de facto* Republic of South Ossetia, the Filing Parties submit that the Court has territorial jurisdiction over the alleged crimes under the active personality principle. Article 12(2)(b) of the Statute states that the Court has jurisdiction when the accused of the crime is a national of a state party. In the present case, the alleged perpetrators of the crimes are nationals of Georgia.

⁵⁸ *Situation in Georgia*, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16.10.2015, ICC-01/15-4-Corr, ICC-01/15, 17.11.2015.Para.54.

⁵⁹ The UN General Assembly passed different Resolutions on the "Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia" in which it recognizes "the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, including in Abkhazia and the Tskhinvali region/South Ossetia" (sometime only referred to as "South Ossetia", emphasis added). See Annex E.2.21: UNGA Resolution A/RES/63/307 (30.09.2009), Annex E.2.19: UNGA Resolution A/RES/64/296 (13.10.2010), Annex E.2.22: UNGA Resolution A/RES/65/287 (25.08.2011), Annex E.2.231: UNGA Resolution A/RES/66/283 (12.07.2012), Annex E.2.17: UNGA Resolution A/RES/67/268 (23.08.2013), Annex E.2.24: UNGA Resolution A/RES/68/274 (10.06.2014), Annex E.2.25: UNGA Resolution A/RES/69/286 (25.06.2015).

56. Therefore, the Court may exercise jurisdiction (*ratione loci*) over the alleged disappearances of Alan Khachirov, Alan Khugayev and Soltan Pliyev, which occurred on Georgian territory, or alternatively, which were committed by Georgian nationals.

C. Disappearances fall within the subject-matter jurisdiction of the ICC

57. To satisfy the subject matter jurisdiction of the ICC, the alleged conduct must fall within the elements of one of the crimes in Article 5 of the ICC Statute. The same conduct may satisfy the elements of and therefore qualify as more than one crime under the ICC Statute. Given the current procedural stage of the *Situation in Georgia* and the absence of named suspects, it is premature to address the requirements of the mental element under Article 30 of the ICC Statute.⁶⁰ The contextual elements in general and the material elements of specific crimes shall be examined below in relation to all three victims.

i. War Crimes

58. Under the ICC Statute and the applicable international law of armed conflict, the contextual element of all war crimes is the existence of a state of armed conflict.⁶¹ International armed conflict (IAC) “exists whenever there is a resort to armed force between States.”⁶² Occupation of a territory by a foreign force engages the law applicable to international armed conflicts, whether that occupation meets with resistance or not.⁶³ Conflicts can also become ‘internationalised’, where a foreign force is directly engaged in hostilities alongside a rebel group, has overall control over an organised separatist force.⁶⁴ Non-international armed conflict (NIAC) encompasses situations where “several factions [confront] each other without involvement of the government’s armed forces.”⁶⁵ A NIAC must reach a minimum level of

⁶⁰ ICC-02/11-02/11-186, para. 125; ICC-02/11-01/11-656-Red, paras. 208-210; ICC-02/11-14-Corr, para. 29; ICC-01/09-19-Corr, para. 79.

⁶¹ Article 8 ICC Statute; *Prosecutor v. Naletilic and Martinovic*, Case No.IT-98-34 (Trial Chamber), 31.03.2003, para.176; *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No.IT-96-23 and IT-96-23/1 (Appeals Chamber), 12.06.2002, para.56; *Prosecutor v. Tadic*, Case No.IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, para. 70.

⁶² *Prosecutor v. Dusko Tadic*, para.70; *The Prosecutor v. Anto Furundziya*, Case № IT-95-17/1-T, Judgment, 10.12.1998, para.59; *The Prosecutor v. Fatmir Limaj*, Case № IT-03-66-T, Judgment, 30.11.2005, para.84.

⁶³ Article 2 of Geneva Convention IV of 1949: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

⁶⁴ ICTY, *The Prosecutor v. Dusko Tadic*, Appeals Judgment, IT-94-1-A, 15.07.1999, para. 131, 137, 145. See also ICTY, *The Prosecutor v. Zlatko Aleksovski*, Appeal Judgment, IT-95-14/1-A, 24.03.2000, paras.131-134; ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Appeal Judgment, IT-95-14/2-A para. 313.

⁶⁵ *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2.10.1995, para.70.

intensity⁶⁶ and the parties involved in the conflict must show a minimum of organisation.⁶⁷ A NIAC and an IAC may exist in parallel on the territory of the same State.⁶⁸

1. The disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev took place in the context of and was associated with an armed conflict

59. The Filing Parties submit that on 13 October 2008, an IAC continued to exist between Georgia and the Russian Federation and/or Russian-controlled and occupied South Ossetia. The Pre-Trial Chamber ‘Decision on the Prosecutor’s request for authorisation of an investigation’ (“PTC Authorisation Decision”) confirmed that:

“[T]he existence of such international armed conflict is rather uncontroversial as concerns the period of armed hostilities between Georgian and Russian armed forces between 8 and 12 August 2008 and the period of Russian occupation of parts of Georgian territory, in particular the “buffer zone”, until *at least* 10 October 2008.”⁶⁹ (emphasis added)

60. As concerns the period after 10 October 2008, Amnesty International in its report of November 2008 stated that although the Russian withdrawal from the “buffer zones” was completed by 10 October 2008, after this date Russia “*continue[d] to maintain a significant military presence in both South Ossetia and Abkhazia.*”⁷⁰

61. Indeed, the situation in the conflict zone in South Ossetia remained tense after 10 October 2008. In their report of 26 November 2008, the International Crisis Group noted that Russia had not yet fully implemented the Sarkozy-Medvedev agreements of 15 August and 8 September 2008 and was in violation of several parts of the agreements.⁷¹ In particular, Russia was supposed to observe a ceasefire and withdraw to the positions it held before the conflict. However, as of 26 November 2008, Russian forces were still present in Perevi,⁷² even though

⁶⁶ Evidenced by the collective nature of hostilities and the use of regular armed forces rather than the police: see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30.11.2005, para. 135-170.

⁶⁷ Requiring the armed groups to have as a minimum a certain command structure and the capacity to sustain military operations: see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30.11.2005, para. 94-134.

⁶⁸ *1986 Nicaragua case*, ICJ Reports, p. 114; *Tadic Appeal Judgment*, para. 84.

⁶⁹ *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, 27.01.2016, No. ICC-01/15 para 27.

⁷⁰ Amnesty International: *Civilians in the line of fire: the Georgia-Russia conflict*. November 2008, p.11. Available at <https://www.amnesty.org/en/documents/EUR04/005/2008/en/> (Accessed: 17.03.2016).

⁷¹ International Crisis Group (ICG): *Georgia: the Risks of Winter*, 26.11.2008. Europe Report N° 51. http://www.crisisgroup.org/~media/Files/europe/b51_georgia_the_risks_of_winter (Accessed: 17.03.2016).

⁷² “The Russian forces in South Ossetia have persistently refused to dismantle this checkpoint, in spite of the fact that it is clearly located to the west of the administrative boundary line of South Ossetia”, EUMM statement quoted in “EU Monitors, Tbilisi Concerned over Situation in Perevi,” Civil Georgia, 09.11.2008. “The Russians left in early November

the EUMM confirmed that Perevi was on the Georgian side of the ABL.⁷³ In another clear violation of the commitment to pull back to their pre-7 August positions, Russian forces also remained in the Akhagori district in South Ossetia, in which there had been no Russian troop presence earlier. Moreover, numerous attacks have been documented as taking place after 10 October 2008, resulting in military losses and civilian casualties:

- On 6 November 2008 a South Ossetian resident was allegedly killed by sniper fire near the administrative boundary line.⁷⁴
- On 10 November 2008, two Georgian police were killed and three injured by an improvised explosive device in the village of Dvani, south of South Ossetia. Shots were reportedly fired at the officers after the bomb detonated.⁷⁵
- On 17 November two people were killed and nine injured, reportedly after an unmanned drone crashed in a village near the ABL on the South Ossetian side.⁷⁶ The Georgian Ministry of Internal Affairs claimed that the drone belonged to Russian forces.⁷⁷
- On 23 November 2008 shots were fired in the vicinity of the convoy of Georgian President Saakashvili and Polish President Kaczynski, when their convoy stopped on the ABL near Akhagori on the Georgian side. Georgian and Polish officials accused Russia of being behind the incident.⁷⁸

62. On 18 October 2008 the mother of Alan Khachirov met with the RSO Minister of Internal Affairs, Mikhail Mindzayev, who said that:

“[H]e was aware of the detention of three young men - two of them dressed in plain clothes and one wearing a military uniform. He pinpointed on a map the location where they were detained: a 300 meter-long stretch of the road between Dzhevi and Korkula villages. Mr. Mindzayev also added that at that time many people were detained at the

and were replaced by South Ossetian militia, but on 16 November the South Ossetians were reportedly leaving Perevi and the Russians returning,” from “South Ossetia Militias Pulls out of Perevi,” Civil Georgia, 16.11.2008

⁷³ EUMM press release, “EUMM concerned about situation in Perevi,” 08.11.2008 and “Russian Units Return to Perevi Checkpoint,” 16.11.2008. https://eumm.eu/en/press_and_public_information/press_releases/28/?year=2008&month=12 (Accessed: 17.03.2016).

⁷⁴ “EUMM concerned about situation in Perevi,” 08.11.2008, *supra n. 73*.

⁷⁵ The explosion was reportedly accompanied by gunfire. An EUMM patrol verified the situation, and a spokesperson said, “this attack by an improvised explosive device is an unacceptable breach of the Sarkozy-Medvedev-Agreement. It has to be thoroughly investigated on both sides and the authors duly prosecuted”. Hansjörg Haber, the head of the EU mission, added, “we repeat our call on all sides to prevent further provocations.” Quoted from “EU Monitors Condemn Dvani Blast,” Civil Georgia, 10.11.2008. <http://www.civil.ge/eng/article.php?id=19918> (Accessed 20.06.2016).

⁷⁶ “Two Killed in Blast at S.Ossetian Border,” Civil Georgia, 17.11.2008. <http://www.civil.ge/eng/article.php?id=19974> (Accessed 22.06.2016)

⁷⁷ «В Грузии упал и взорвался беспилотник», Lenta.ru, 17.11.2008. (In Russian). <https://lenta.ru/news/2008/11/17/blast/> (Accessed 22.06.2016).

⁷⁸ “Shots Fired near Georgia Leader”, BBC News, 24.11.2008. <http://news.bbc.co.uk/2/hi/europe/7744859.stm> (Accessed 24.06.2016). Russian Foreign Minister Sergey Lavrov denied that any shots were fired from Russian or South Ossetian positions. “Lavrov called provocation Georgia-South Ossetia border incident,” Itar-TASS, 24.11.2008.

same place. [...] He also said that the two men - Khugayev and Pliyev, work for [South Ossetian] *spetznaz*; and that they should not have mentioned this fact to the Georgians, because it would now be particularly difficult to release them.”⁷⁹

63. Furthermore, even if Russian troops are found to have completed their withdrawal from Georgian-controlled territory and the ‘buffer zone’ by 10 October 2008, there is evidence that they remained in effective occupation of the Georgian territories of South Ossetia and Abkhazia on 13 October 2008 and beyond.⁸⁰ There is also strong evidence, confirmed in the PTC Authorisation Decision, that the Russian Federation exercised overall control over South Ossetian forces.⁸¹

64. In light of the foregoing, the Filing Parties submit that a state of IAC existed on 13 October 2008 between Georgia and the Russian Federation, or Georgia and South Ossetia, which at the material time was occupied by and under the overall control of the Russian Federation.

65. Further or in the alternative, a NIAC may also have existed on the territory of Georgia on 13 October 2008, between Georgia and the Russian-backed separatist forces of South Ossetia.

66. The observations of several NGOs and other experts point to the organized nature of the South Ossetian armed forces. Human Rights Watch reported that South Ossetian forces comprised troops from the RSO Ministry of Defence and Emergencies, the RSO Ministry of Internal Affairs, the RSO Committee for State Security, volunteers, and Ossetian peace-keeping forces.⁸² The Tagliavini Report concluded that “the regular armed forces of the *de facto* South Ossetian authorities unquestionably constitute ‘an organised and hierarchically structured group.’”⁸³ According to eye-witness testimony collected by Amnesty International, both regular South Ossetian forces and an array of paramilitary groups participated in the conflict.⁸⁴

67. Detainees held by the militias described their members as all having identical “star-shaped badges on their belts,” and as being “physically big and strong.”⁸⁵ The paramilitary forces of South Ossetia, as described by HRW, “roll into ethnic Georgian villages across South Ossetia, pack their cars and trucks with anything and everything of value, burn all the houses to

⁷⁹ Annex 11 - Statement of ██████████ of 05.06.2010.

⁸⁰ Amnesty International, *supra n. 70*, page 11.

⁸¹ *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, 27.01.2016, No. ICC-01/15 para 27.

⁸² Human Rights Watch: *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, 2009. <https://www.hrw.org/sites/default/files/reports/georgia0109web.pdf> (Accessed 21.06.2016). Page 5.

⁸³ Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), ‘Report’ Vol. II (2009), Page 65, available at: <www.ceijg.ch/pdf/IIFFMCG_Volume_II.pdf>.

⁸⁴ Amnesty International (AI), *supra n. 70*, page 34.

⁸⁵ Human Rights Watch interview with Kakha Zirakishvili, *supra n. 82*, page 190.

the ground, and move on.”⁸⁶ In any case, the militias were capable of causing widespread destruction.⁸⁷

68. The Parliamentary Assembly of the Council of Europe in its resolution of 2 October 2008 noted that “The Assembly is especially concerned about credible reports of acts of ethnic cleansing committed in ethnic Georgian villages in South Ossetia and the ‘buffer zone’ [...]. It stresses in this respect that such acts were mostly committed after the signing of the ceasefire agreement on 12 August 2008, and continue today [2 October 2008].”⁸⁸

69. From the foregoing it is evident that an armed conflict continued to exist in the vicinity of the ABL after the withdrawal of Russian armed forces from the “buffer zone” on 10 October 2008. In fact, there was even a spike in the level of hostilities, as evidenced by the increased deployments of Georgian security forces, including regular and special police task forces to the ABL region.⁸⁹ As stated in the CHR report, despite the Russian forces’ withdrawal from the ‘buffer zone’, “the area was still characterized by a fragile security situation at the time in question.”⁹⁰

70. Evidence presented in the Factual Background section of this Request raises a reasonable basis to believe that Alan Khachirov, Alan Khugayev and Soltan Pliyev were arrested and detained by Georgian security forces in the vicinity of the ABL. The arrest took place at a time of continued episodes of armed conflict throughout the disputed territory and a spike in the level of hostilities on the ABL, three days after the ‘official’ withdrawal of Russian forces from the ‘buffer zone.’ Moreover, two of the victims – Khugayev and Pliyev – were members of South Ossetian armed forces, and witnesses allege that at least some of the victims were armed. For these reasons, the Filing Parties submit that there is a reasonable basis to believe that the crimes committed against Alan Khachirov, Alan Khugayev and Soltan Pliyev, starting from their arrest on 13 October 2008, took place in the context of and were associated with an IAC and/or a NIAC.

⁸⁶ “Rights Groups Say South Ossetian Militias Burning Georgian Villages,” Radio Free Europe. 30.09.2008. http://www.rferl.org/content/Ossetian_Militias_Burn_Georgian_Villages/1292746.html (Accessed: 17.03.2016).

⁸⁷ “Georgia: Satellite Images Show Destruction”, Ethnic Attacks, Human Rights Watch, 27.08.2008. <https://www.hrw.org/news/2008/08/27/georgia-satellite-images-show-destruction-ethnic-attacks> (Accessed: 17.03.2016).

⁸⁸ PACE, res. 1633 (2008), 2.10.2008, 35th sitting, paras 11–13. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17681&lang=en> (Accessed 26.06.2016).

⁸⁹ The patrol reports of the EUMM confirm that after 10.10.2008 there was a significant redeployment of Georgian security resources in the areas adjacent to the ABL. For example, an EUMM patrol report mentions that there were 20 officers on duty at the Mereti Police Station on 20.10.2008, including ten regular Police officers and ten Special Task Force Police officers - CommDH(2010)35, *supra n. 6*, at para. 43, p. 17.

⁹⁰ *Ibid.*

2. Underlying war crimes committed against Alan Khachirov, Alan Khugayev and Soltan Pliyev

71. Based on the evidence at the Filing Party's disposal, there is a reasonable basis to believe that Alan Khachirov, Alan Khugayev and Soltan Pliyev suffered from some or all of the following underlying war crimes. The ultimate choice of the legal qualification will depend on whether the conflict within which these crimes took place is qualified as an IAC or a NIAC. For the purpose of completeness, underlying crimes applicable in both types of armed conflict are included.

a. Wilful killing (Article 8(2)(a)(i)) and/or Murder (Article 8(2)(c)(i)):

72. The Filing Parties submit the facts of the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev fall within the definition of the crimes of wilful killing and/or murder. The circumstances of the victims' disappearance and the time interval that elapsed since they were last seen, suggest, at the least, a "reasonable basis to believe" that they were killed by and/or during their time in the custody of Georgian authorities.⁹¹

73. According to several witness, Alan Khachirov, Alan Khugayev and Soltan Pliyev were last seen in the vicinity of the ABL, being apprehended by Georgian authorities.⁹² Further evidence exists as to their detention in Georgian prisons,⁹³ and processing through the Georgian justice system.⁹⁴ Moreover, the three victims were positively identified in a video recording of their interrogation and physical and verbal abuse at the hands of what appeared to be persons of Georgian origin.⁹⁵ Regardless of their status at the time of arrest, at the time of their presumed murder all three victims were either civilians or placed *hors de combat*.⁹⁶ For the purpose of this underlying crime, it is irrelevant whether death was caused by an act or omission on the perpetrator.⁹⁷

⁹¹ "Clarifying the fate of Georgians, Ossetians and Russians missing in connection with 2008 hostilities," ICRC news release 10/73 of 29/04/2010, available at <https://www.icrc.org/eng/resources/documents/news-release/2010/georgia-news-290410.htm> (Accessed 27.06.2016).

⁹² See, for example, Annex 3 - Statement of ██████████ of 25.03.2009

⁹³ Annex 11 - Statement of ██████████ of 05.06.2010, Annex 1 - Statement of ██████████ of 25.03.2009, Annex 2 - Statement of ██████████ of 25.03.2009, Annex 15 - The protocol of interrogation of ██████████ of 9.09.2010

⁹⁴ Annex 11 - Statement of ██████████ of 05.06.2010, Annex 1 - Statement of ██████████ of 25.03.2009

⁹⁵ "Ossetians being threatened by Georgian authorities?," YouTube, <https://www.youtube.com/watch?v=SUczCfP6EI4> (accessed:15.03.2016).

⁹⁶ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12.08.1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8.06.1977, 1125 UNTS 3. Article 41.

⁹⁷ *Prosecutor v Bemba*, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15.06.2009, para. 132.

74. Given the level of hostility displayed towards the three men during their detention and the documented violent nature of their arrest,⁹⁸ the significant amount of time elapsed since the day of their disappearance, and the inability of Georgian investigators to produce any proof of their continued existence,⁹⁹ the three men are presumed dead. The Council of Europe experts came to the same conclusion in their report on the case, stating that there is “no convincing information in support of the hypothesis that [Khachirov, Khugayev, Pliyev] are alive.”¹⁰⁰

75. The European Court of Human Rights has found in hundreds of judgments that disappearances which occur in life-threatening circumstances lead to the presumption of the death of the victim and entail a violation of Article 2 (right to life) of the European Convention on Human Rights in both its substantive and procedural limb.¹⁰¹ In its jurisprudence concerning the conflict in Chechnya, for example, the Court relied on several factors to ground the presumption that the victim was no longer alive, following unacknowledged detention by state agents, including the amount of time elapsed since the victim was last seen, the inherent danger of unacknowledged detention in the context of an armed conflict, and the lack of any effective investigation into the victim’s fate.¹⁰²

76. In light of the overall context of hostilities and the specific circumstances of their arrest, as well as the fact that almost eight years have elapsed since their disappearance, there is a reasonable basis to believe that Alan Khachirov, Alan Khugayev and Soltan Pliyev are victims of wilful killing and/or murder as defined by Article 8(2)(a)(i) and Article 8(2)(c)(i) of the ICC Statute.

b. Inhuman (Article 8(2)(a)(ii)) and/or cruel (Article 8(3)(c)(i)) treatment:

77. The infliction of severe physical or mental pain or suffering upon one or more protected person (i.e. civilian or combatant placed *hors du combat*) under the Geneva Conventions qualifies as the underlying crimes of inhuman or cruel treatment. The Filing Parties submit the arrest, detention and treatment of Alan Khachirov, Alan Khugayev and Soltan Pliyev in Georgian authorities’ custody fall within the definition of the crimes of inhuman and/or cruel treatment.

⁹⁸ See FACTUAL BACKGROUND – Section A above

⁹⁹ See FACTUAL BACKGROUND – Sections B-D above

¹⁰⁰ CommDH(2010)35, *supra n. 6*, page 8.

¹⁰¹ See, for example, *Aslakhanova and others v. Russia*, Application No. 2944/06, Judgment of 18 December 2012; *Cyprus v. Turkey*, application no. 25781/94, Judgment of 12 May 2001.

¹⁰² See, for example, *Imakayeva v Russia*, Judgment of 9 November 2006, para. 141.

78. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* the war crime of inhuman (or cruel in the context of an NIAC) treatment was committed “by detaining [Bogoro village residents], menacing them with weapons, and imprisoning them in a room filled with corpses of men, women, and children.”¹⁰³

79. Existing evidence of the victims’ detention exhibit a similar level of intensity of cruel and inhuman treatment. The aforementioned video¹⁰⁴ demonstrates clearly how Alan Khugayev, Soltan Pliyev, and 15-year-old minor Alan Khachirov are being aggressively questioned, beaten and threatened by unknown persons of Georgian origin. Aside from the video, there is evidence that the victims were held at the Saministro prison, infamous for the use of torture¹⁰⁵ and that they were subsequently seen in a prison hospital.¹⁰⁶

80. The International Committee of the Red Cross in its study on Customary Humanitarian Law has found that the very fact of enforced disappearance violates, or threatens to violate, a range of customary rules of international humanitarian law, including the prohibition of torture and other cruel or inhuman treatment.¹⁰⁷ Moreover, the very fact of arbitrary detention, with no procedural rights or contact with counsel or family is in itself a form of cruel and inhuman treatment.¹⁰⁸

81. In light of the foregoing, evidence of arbitrary detention and ill-treatment of Alan Khachirov, Alan Khugayev and Soltan Pliyev raises a reasonable basis to believe that all three are victims of inhuman and cruel treatment as defined by Articles 8(2)(a)(ii) and Article 8(3)(c)(i) of the ICC Statute.

c. Unlawful confinement (Article 8(2)(a)(vii)):

82. In addition to constituting cruel or inhuman treatment, the arbitrary deprivation of liberty of combatants or civilians in the context of an IAC may be prosecuted as the crime of unlawful confinement. The lawfulness of confinement hangs on the legitimacy of the grounds for detention and compliance with minimum procedural safeguards. The Filing Parties submit that the detention of Alan Khachirov, Alan Khugayev and Soltan Pliyev falls within the definition of the crime of unlawful confinement.

¹⁰³ ICC-01/04-01/07-649-Anxl A at p. 31.

¹⁰⁴ *Supra n.36*.

¹⁰⁵ Annex 15 - Protocol of interrogation of ██████████ of 9.09.2010

¹⁰⁶ *Ibid.*

¹⁰⁷ International Committee of the Red Cross, *Customary Humanitarian Law. Rule 98. Enforced Disappearance*. https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98 (Accessed 20.04.2016).

¹⁰⁸ International Committee of the Red Cross, *Customary Humanitarian Law. Rule 99. Deprivation of Liberty*. https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 (Accessed 20.04.2016).

83. Enemy combatants may only be detained as prisoners of war for the duration of active hostilities.¹⁰⁹ They must be afforded security from active combat,¹¹⁰ guaranteed standards of hygiene and health,¹¹¹ and must at all times be protected against reprisals and acts of violence and intimidation.¹¹² The internment of civilians is lawful only where there are serious and legitimate reasons to believe that he or she may seriously prejudice the security of the occupying power.¹¹³ All detainees must be promptly informed, in a language they understand, of the reasons for the detention,¹¹⁴ and provided with an opportunity to challenge their detention.¹¹⁵

84. There is sufficient evidence to conclude that Alan Khachirov, Alan Khugayev and Soltan Pliyev were arrested and detained by Georgian authorities on 13 October 2008. The legal authority grounds and reasons their arrest and detention have not been disclosed. There appears to be no public record of the three victims' detention and thus it can be assumed that their detention was arbitrary. Moreover, the aforementioned video¹¹⁶ appears to show that their treatment in detention fell well below the standard required under international law. In the course of their arbitrary detention, the three men disappeared.

85. Therefore, there is a reasonable basis to believe that the arrest and arbitrary detention of Alan Khachirov, Alan Khugayev and Soltan Pliyev in the context of an IAC amounts to the war crime of unlawful confinement under Article 8(2)(a)(vii) of the ICC Statute.

d. Denial of a fair trial (Article 8(2)(a)(vi)):

86. The war crime of denial of a fair trial is the deprivation of one or more persons of a fair and regular trial by denying the judicial guarantees as defined, in particular, in the Third and the Fourth Geneva Conventions of 1949.¹¹⁷ The Filing Parties submit that the arbitrary detention and disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev in the context of an

¹⁰⁹ Geneva Convention III, Articles 21 and 118.

¹¹⁰ Article 23, Geneva Convention III.

¹¹¹ Article 22 and Articles 25-32 of Geneva Convention III.

¹¹² Article 13 of Geneva Convention III.

¹¹³ Article 42 of Geneva Convention IV; Article 78 of Geneva Convention IV; See also: ICTY, *The Prosecutor v Delalić et al.*, Judgment, IT-96-21-T, 16.11.1998, para. 576.

¹¹⁴ Additional Protocol I, Article 75(3); Article 9(2) ICCPR; Article 5(2) ECHR.

¹¹⁵ Article 43 of Geneva Convention IV; Article 9(4) ICCPR; Article 5(4) ECHR.

¹¹⁶ *Supra n. 36.*

¹¹⁷ 1) The right to an independent and impartial court (article 84(2) of GC III); 2) the right to timely notification by the detaining power about any planned trial of a prisoner of war (article 104 of GC III); 3) the right to immediate information on the charges (article 104 of GC III and article 71(2) of GC IV); 5) the principle of legality (article 99(1) of GC III and article 67 of GC IV); 6) the *ne bis in idem* principle (article 86 of GC III and article 117(3) of GC IV); 7) the right to appeal or petition and information on the possibility thereof (article 106 of GC III and article 73 of GC IV); 8) the possibility of presenting a defence and having assistance of qualified counsel (article 99(3) of GC III); 11) the defendant's right to representation by an advocate of his own choice (article 105(1) of GC III and article 72(1) of GC IV); 13) The death penalty may only be imposed under specific circumstances (article 100 of GC III and article 68 of GC IV).

international armed conflict also amount to the war crime of denial of fair trial under Article 8(2)(a)(vi) of the ICC Statute.

87. Evidence points to the fact that Alan Khachirov, Alan Khugayev and Soltan Pliyev were arrested and detained by Georgian authorities for no disclosed reasons or legal grounds. Although hearsay evidence exists that the three men were seen in the Mskheta town court in January 2009,¹¹⁸ the authorities have failed to confirm or disclose any official record of this fact. In the course of their arbitrary detention, the three men disappeared. It is therefore reasonable to conclude that the fair trial guarantees laid down in the Geneva Conventions have been severely violated. Under human rights law, enforced disappearance is generally recognized to violate several fundamental human rights, among them the right to fair trial and judicial guarantees.¹¹⁹

88. For these reasons, there is a reasonable basis to believe that the arrest, detention and subsequent disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev in the context of an IAC constitute the crime of denial of a fair trial under Article 8(2)(a)(vi) of the ICC Statute.

ii. Crimes Against Humanity

89. To be prosecuted as a crime against humanity, an underlying crime must be shown to be part of a widespread or systematic attack against the civilian population, pursuant to a state policy to commit such an attack. In *Prosecutor v. Bemba* the Court considered that the term 'attack' referred to 'a campaign or operation', citing the terminology used in the ICC Statute, which is 'course of conduct.'¹²⁰ Thus, an attack is the sum of the underlying crimes referred to in Article 7(1) of the ICC Statute.¹²¹ The term "civilian population" refers to a group of civilians who are not members of regular armed forces, dissident armed forces or other organised armed

¹¹⁸ Annex 11 - Statement of ██████████ of 05.06.2010, Annex 1 - Statement of ██████████ of 25.03.2009

¹¹⁹ See, e.g., Inter-American Commission on Human Rights, Case 9466 (Peru) (ibid., § 2446), Case 9786 (Peru) (ibid., § 2448) and Third report on the human rights situation in Colombia (ibid., § 2449) and Inter-American Court of Human Rights, *Velásquez Rodríguez* case (ibid., § 2450); see also African Commission on Human and Peoples' Rights, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso* (violation of the right to recognition before the law, right to freedom and security of person) (ibid., § 2441).

¹²⁰ *Prosecutor v Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15.06.2009, para. 75.

¹²¹ "Commission of the acts referred to in Article 7(1) of the Statute constitute the attack itself and, besides the commission of the acts, no additional requirements for the existence of an attack should be proven," ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," ICC-01/05-01/08-424, 15.06.2009, para. 75.

groups.¹²² The attack need not target the entire civilian population,¹²³ as long as its victims constitute an identifiable group rather than randomly selected individuals.¹²⁴ The requirement of a ‘widespread or systematic’ attack is disjunctive,¹²⁵ thus the establishment of either widespread or systematic characteristics of the attack is enough. With regard to ‘widespread,’ the Pre-Trial Chamber in the cases *Prosecutor v. Katanga and Ngudjolo* and *Prosecutor v. Gbagbo* stated that it “connotes the large-scale nature of the attack and the number of targeted persons.”¹²⁶ As for ‘systematic’, the *Katanga and Ngudjolo* and the *Gbagbo* Pre-Trial Chambers stated that this element refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”¹²⁷ A policy to commit the attack may be inferred from evidence of repeated perpetration of the same acts, the mobilisation of armed forces, and the methods employed to implement the attack.¹²⁸

90. According to the Appeals Chamber’s analysis of customary international law in *Prosecutor v. Martić*, as long as an attack is aimed at the ‘civilian population’, it is not necessary to establish that every individual victim of crimes perpetrated as part of that attack satisfies the *jus in bello* definition of ‘civilian’.¹²⁹ Moreover, although it is acknowledged that Alan Khugayev and Soltan Pliyev were members of the RSO *spetsnaz*, this does not preclude the possibility that they were acting in their civilian capacity at the time of their disappearance. Witnesses testify that all three men had set out in a civilian vehicle to visit Mr Khugayev’s

¹²² See Addition Protocol II, Article 1.

¹²³ ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08-424, 15.06.2009, para. 76.

¹²⁴ ICC, Situation in the Central African Republic, *Prosecutor v. Bemba*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08-424, 15.06.2009, para. 77.

¹²⁵ *Situation in the Republic of Kenya*, ICC PT. Ch. II, ICC PT. Ch. II, ICC-01/09-19, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” 31.03.2010, para. 94.

¹²⁶ *Prosecutor v Katanga and Ngudjolo*, ICC PT. Ch. I, ICC-01/04-01/07-717, “Decision on the confirmation of charges,” 30.09.2008, para. 394; *Prosecutor v Gbagbo*, ICC PT. Ch. I, “Decision on the Confirmation of Charges against Laurent Gbagbo,” ICC-02/11-01/11-656-Red, 12.06.2014, para. 222.

¹²⁷ *Prosecutor v Katanga and Ngudjolo*, ICC PT. Ch. I, ICC-01/04-01/07-717, “Decision on the confirmation of charges,” 30.09.2008, para. 394, citing *Kordić and Čerkez*, ICTY App. Ch., 17.12.2004, para. 94, which is citing *Prosecutor v Kunarac et al.*, IT-96-23 & 23/2, ICTY App. Ch., 12.06.2002, para. 94; *Prosecutor v Gbagbo*, ICC PT. Ch. I, “Decision on the Confirmation of Charges against Laurent Gbagbo,” ICC-02/11-01/11-656-Red, 12.06.2014, para. 223.

¹²⁸ ICC, Situation in The Democratic Republic of Congo, *Prosecutor v. Katanga*, “Judgment”, ICC-01/04-01/07, 7.03.2014, para. 1109; ICC, Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” ICC-01/09-19-Corr, 31.03.2010, para. 121.

¹²⁹ ICTY, *Prosecutor v Martić*, Appeals Judgments, IT-95-11-A, 8 Oct. 2008, paras. 303-312: The Appeals Chamber found that *hors de combat* combatants could also be victims of crimes against humanity.

grandfather in Binar village,¹³⁰ and there is no evidence that any of the victims had been carrying out a military objective. Although Alan Khugayev and Soltan Pliyev may have been wearing military fatigues,¹³¹ this form of dress was extremely common amongst civilians in South Ossetia.¹³² As to witness statements that all or some of the men may have been armed during their arrest,¹³³ given the level of tension and potential for armed attacks in South Ossetia in October 2008, it is reasonable to assume that many civilians carried arms simply for the purposes of self-defence.

91. Alan Khachirov's status is more clear-cut. He was a 15-year-old minor, had never been a member of regular or irregular armed forces, and had taken no part in hostilities. On the day of his disappearance, he was wearing civilian clothes and was accompanying his friends on a family visit to Binar village.¹³⁴ Alan's mother testified that he was unarmed when he left the house.¹³⁵ According to Article 51(1) of the First Additional Protocol to the Geneva Conventions, "[I]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian."

1. The disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev was part of a widespread and/or systematic attack against the civilian population pursuant to a state policy to commit such an attack

92. According to the Independent International Fact-Finding Mission on the Conflict in Georgia ("IIFMCG"),¹³⁶ one of the main underlying reasons for the outbreak of armed conflict in 2008 was the unresolved relationship between Georgian authorities and ethnic minorities living within Georgia's borders. The report carefully notes that a period of "increasingly aggressive language use and churning of emotions" could be observed preceding the armed conflict of August 2008. In public statements, the threat of force became more pronounced and

¹³⁰ Annex 12 - Statement of ██████████ of 05.06.2010

¹³¹ Annex 3 - Statement of ██████████ of 25.03.2009

¹³² See, for example: «Уж мы пойдем ломить стеною?», *Профиль*, 05.11.2007: «Уже три с лишним года самая популярная в Южной Осетии мужская одежда — это камуфляж». http://www.profile.ru/politics/item/54384-items_24563 (Russian only). See also: «На Кавказе без 5 минут война?» Репортаж о событиях в Южной Осетии 2 августа 2008 года, *Slon*, 18.08.2009. «А в самой республике [Южной Осетии] никакой мобилизации не нужно. Потому что камуфляж тут — как национальная одежда.» http://slon.ru/russia/na_kavkaze_bez_5_minut_voyna-109535.xhtml (Russian only). (Accessed 21.06.2016)

¹³³ Annex 3 - Statement of ██████████ of 25.03.2009

¹³⁴ Annex 11 - Statement of ██████████ of 05.06.2010

¹³⁵ *Ibid*

¹³⁶ Independent International Fact-Finding Mission on the Conflict in Georgia. http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmhc_report.pdf (Accessed: 15.03.2016), page 34.

ever more frequent, and there was also an increase in unfriendly actions by officials in the run-up to and during the violent phase of the conflict.

93. Furthermore, the unfolding of the initial Georgian armed attack against Tskhinvali illustrates a hostile position towards Ossetian civilians. A mere few hours before the attack, as Amnesty International writes in its report,¹³⁷ residents of Tskhinvali watched as the Georgian President declared a ceasefire on television. Several hours later, on the morning of 7 August 2008, the city came under a surprise attack from shelling with Grad multiple rocket launchers and heavy artillery by Georgian forces. Amnesty International includes the following testimony in its report:

“We were listening to Saakashvili who was saying that he agrees to any negotiations. We felt comfortable ... I was drinking tea and suddenly I heard gunfire followed by tanks, artillery...we all went downstairs. Two hours later I heard explosions, the house shook, the roof exploded and these four GRAD missiles fell on our house. The sofa and other stuff caught fire. We heard an airplane and it aimed at us and started firing at us with a machine gun. My brother and I hid downstairs again. After a while another GRAD fell and half of the house was destroyed. I was in shock. The Georgians claim that they fired at positions of Russian soldiers. This is a lie. There was no soldier here. They were firing at peaceful citizens. There was nothing military here. I was here with my brother and mother... ”¹³⁸.

94. Human Rights Watch researchers documented multiple apartment buildings in Tskhinvali hit by tank fire. The large-scale attack of the civilian-populated city has been deemed at least “indiscriminate” and “disproportionate” and that in many cases precautions were not taken to avoid or minimize loss of civilian life.¹³⁹ In some cases, it was clear that the tanks and infantry fighting vehicles fired at close range into basements of buildings,¹⁴⁰ when it was common knowledge that civilians used basements as shelters. There is also evidence that South Ossetian civilians who were trying to flee the conflict zone were deliberately targeted by Georgian forces.¹⁴¹

95. A significant number of incidences of arbitrary detention of South Ossetian civilians were recorded during and after the active phase of the conflict. Detention was often unacknowledged and accompanied by ill-treatment and subsequent unfair trials, illustrating a hostile Georgian government

¹³⁷ Amnesty International, *supra n. 70*, page 9.

¹³⁸ Kazbek Djiloev interview, *Ibid*, page 26.

¹³⁹ Human Rights Watch, *supra n. 82*, page 6.

¹⁴⁰ *Ibid*, page 58.

¹⁴¹ *Ibid*, pages 53-55.

policy towards ethnic Ossetians and highlighting the risk faced by Ossetian civilians of being subjected to enforced disappearance. In *Up in Flames*, Human Rights Watch states that during active combat in South Ossetia, the Georgian military detained at least 32 Ossetians. The Georgian authorities claimed that all those detained were combatants, although they did not produce evidence to that effect, and according to HRW there are grounds to contest the authorities' "blanket" determination that all of the detainees were combatants.¹⁴² At least five of the detainees reported having been beaten by Georgian soldiers at the moment of their detention.¹⁴³ The 32 detainees were released between August 21 and 27 in exchange for Georgian civilian detainees. Among several testimonies included from the Ossetian detainees is that of 66-year old Tengiz Bakaev, who was detained on 8 August in Znauri district. Bakaev described his detention as follows:

*"When the Georgians entered the house ... my wife hid somewhere in the yard... I told them weapons were wrong and fighting was wrong. I am a Christian, a Pentecostal, and we abhor fighting. And they asked what kind of passport I have, and I told them, "A Russian one and an Ossetian one." They said, "You'll be coming with us." I said, "I won't go," and they hit me in the head and dragged me off... On the way to Kareli I was beaten, but not as badly as the other guys who were ... with me. Probably because I was older ... But they did beat me on my face and on my back with their fists and gun butts."*¹⁴⁴

96. In addition to arbitrary detentions, the Filing Parties are aware of at least two enforced disappearances of South Ossetians—Radik Ikayev and Tomaz Kabisov—that occurred in August 2008. At the time of his detention Ikayev worked as a police officer in South Ossetia and was a member of a "volunteer defence group."¹⁴⁵ Kabisov was detained for allegedly possessing a grenade, although this fact cannot be confirmed since he was tried in absentia, as described below.

97. According to an expert report by the Council of Europe Commissioner for Human Rights Thomas Hammarberg, there is no doubt that Radik Ikayev "was captured and detained by Georgian military personnel on 8 August in or near the village of Bakati-Kau in the Znauri District. It is also certain that he was subsequently taken to one of the lock-up wards of the Gori Police station, where he remained for a few days and then in the Georgian military barracks located in Vaziani. He was last seen alive on 22 August 2008, and was in Georgian custody at

¹⁴² *Ibid*, page 79.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*, page 83.

¹⁴⁵ CommDH(2010)35, *supra n. 6*, page 22.

the time.”¹⁴⁶ Bakaev Tengiz, whose testimony was cited by Human Rights Watch, was detained together with Ikayev and both feature in a videotape, in which they are handcuffed on the ground surrounded by Georgian servicemen. Bakayev states in testimony that Ikayev was severely beaten following their detention, while they were being transported to a different village.¹⁴⁷

98. In *Up in Flames*, Human Rights Watch describes the “possible enforced disappearance” of Tomaz Kabisov, who was detained on 8 August along with several other Ossetians, but who was not among the Ossetian detainees exchanged between 21 and 27 August.¹⁴⁸ Subsequently, the disappearance of Tomaz Kabisov was confirmed by criminal case materials obtained by GYLA, according to which Kabisov was detained for illicit purchasing, keeping and carrying of grenade by police officers in the village of Kvemo Nikozi, Gori district, on 8 August 2008. After his detention he was taken to the temporary detention isolator in Gori and on the second day he was transferred to Khashuri pre-trial detention centre. Other ethnic Ossetians were detained with him there, but after 10 August the others were transferred to Borjomi without Kabisov. No one has seen Kabisov since then, and he was later tried and found guilty *in absentia* of illegal possession of firearms.¹⁴⁹

99. The practice of abduction of South Ossetian civilians near the ABL following the active phase of conflict also indicates a continuation of the governmental policy of restricting the fundamental rights of South Ossetian civilians to liberty and security of person. The Council of Europe Human Rights Commissioners’ report revealed that after the withdrawal of Russian forces the ABL was still characterized by a fragile security situation with frequent incidents such as *abductions and a number of arrests as well* (emphasis added).¹⁵⁰ These arrests and abductions continued into October and November 2008.

100. For example, the report notes that several persons were apprehended in the area of interest between 10 and 15 October 2008. On 14 October 2008, Lev Tekhov and Oleg Gigolaev were traveling on the same stretch of road where Khachirov, Khugaev and Pliev had been seen on the previous day. According to the statement of Lev Tekhov, he and Gigolayev were wearing civilian clothes, driving a civilian car and did not have any weaponry on them.¹⁵¹ Georgian law enforcement officials confirmed to the experts that Lev Tekhov and Oleg Gigolaev had been apprehended in the village of Koshka, and that they were taken to Gori and subsequently released over the

¹⁴⁶ *Ibid*, page 8. See also *Tabuyeva and others v Russia*, Application of 23.06.2011 to the European Court of Human Rights.

¹⁴⁷ *Tabuyeva and others v Russia*, paras. 14.2-14.8

¹⁴⁸ Human Rights Watch, *supra n. 82*, page 85.

¹⁴⁹ Criminal Case materials on file with GYLA and RJI.

¹⁵⁰ CommDH(2010)35, *supra n. 6*, page 8.

¹⁵¹ Annex 2 - Statement of [REDACTED], 25.03.2009

administrative boundary line at Koshka. However, despite the subsequent confirmation of this fact, their detention was not registered in Georgian police records relating to the period of October 2008. Unacknowledged detention is a particularly severe offense that places individuals at a high risk for enforced disappearance.

101. The Filing Parties also cite the following facts as submitted to the ECtHR as further proof of the existence of a widespread and systematic attack against the civilian population of South Ossetia. On 15 October 2008, 50-year old ██████████, a resident of Disevi in Gori District, was detained—unarmed and in civilian clothes—on the ABL and brought to the police station in Gori. He was kept in pre-trial detention until March 2009, when a court found him guilty of illegal possession of arms and sentenced him to 5 years’ imprisonment after an unfair trial.¹⁵² ██████████, a 67-year old resident of Disevi and ██████████ fellow villager, was detained on 1 November 2008 at the ABL, and then suffered the same fate as ██████████. On 2 December 2009 ██████████ and ██████████ were taken from Gori to Ergneti, where they were “exchanged” for Georgian prisoners.¹⁵³ On 8 October 2008, seven ethnic Ossetian men were detained on the ABL. All seven were in civilian clothes.¹⁵⁴ Most detainees were held for several months without trial and then exchanged for Georgian prisoners. Three of them, ██████████, ██████████ and ██████████, were sentenced to 3.5 years’ imprisonment for illegal arms possession after an unfair trial and for several weeks their families could not ascertain their whereabouts. In total, five of the above-mentioned detainees spent over one year in Georgian prisons in poor conditions.

102. Overall, although there are no officially accepted statistics, independent experts and non-governmental organisations documented 118 civilian deaths on the South Ossetian side during 7-12 August¹⁵⁵ and 32 detentions of South Ossetians, whose identity as combatants was not confirmed.¹⁵⁶ Following the active phase of fighting, experts documented at least 16 incidences of arbitrary detention (including the victims in the present case) up until 25 October 2008,¹⁵⁷ often followed by subsequent inhuman and degrading treatment against the detainees, demonstrating the widespread nature of the attack. The consistent pattern of perpetration, backed by violent rhetoric and official hostility on the part of Georgian authorities towards South Ossetians, portrays the systematic nature of the attack, and evidences the existence of a state policy to commit such an attack.

¹⁵² *Tekhov and Tekhov v Georgia*, application to the ECtHR submitted on 02.06.2010.

¹⁵³ *Ibid*, para. 14.24.

¹⁵⁴ *Kaziyev and Others v. Georgia*, Urgent Measures Request, 17 September 2009 at para. 14.7-14.10.

¹⁵⁵ See, Van den Brande, “The situation on the ground in Russia and Georgia in the context of the war between those countries,” Memorandum by Luc Van den Brande, chairperson of the Ad Hoc Committee of the Bureau of the Parliamentary Assembly of the Council of Europe, Doc. 11720 Addendum II, 29.09.2008.

¹⁵⁶ Human Rights Watch, *supra n. 82*, page 79.

¹⁵⁷ *Supra n. 151, 152, 154.*

103. The disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev on 13 October 2008 fits within the pattern of abductions, arbitrary detentions and disappearances of South Ossetians during and after the active part of the conflict in August 2008. Consequently, the Filing Parties submit that the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev occurred as part of a widespread and/or systematic attack on the civilian population of South Ossetia, pursuant to Georgian state policy to commit such an attack.

2. Underlying crimes against humanity committed against Alan Khachirov, Alan Khugayev and Soltan Pliyev

104. The Filing Parties submit that the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev satisfies the elements of the crime against humanity of enforced disappearances, as defined by Article 7(1)(i) of the ICC Statute.

105. Alan Khachirov, Alan Khugayev and Soltan Pliyev disappeared on 13 October 2008, on the road between the villages of Kvemo, Korluila and Khelchua in the vicinity of the ABL. Witnesses and official reports confirm that they were arrested and detained by Georgian authorities.¹⁵⁸ Following their arrest, and despite numerous requests by family members, international investigators, non-governmental organisations and legal representatives, Georgian authorities have consistently refused or failed to provide any information on the fate or whereabouts of the three victims.¹⁵⁹

106. Further or alternatively, there is a reasonable basis to believe that disappearance and related ill-treatment of Alan Khachirov, Alan Khugayev and Soltan Pliyev may qualify as the crime against humanity of illegal imprisonment (Article 7(1)(e)), murder (Article 7(1)(a)) and other inhumane acts (Article 7(1)(k). In the interest of brevity, discussion of how the facts of the victims' disappearance satisfy the elements of these crimes are hereby incorporated by reference, *mutatis mutandis*, from the section on underlying war crimes above.

iii. Conclusion

107. To satisfy the subject matter jurisdiction of the ICC, the alleged conduct must fall within the elements of one of the crimes in Article 5 of the ICC Statute. As long as the conduct fits within the definition of one of the crimes, the ICC may exercise its jurisdiction to investigate

¹⁵⁸ Annex 15 - The protocol of interrogation of ██████████ of 9.09.2010

¹⁵⁹ See FACTUAL BACKGROUND – Sections C-D above

and examine the matter at trial. The Filing Parties submit that they have successfully demonstrated that there is a reasonable basis to believe that the disappearance and related ill-treatment of Alan Khachirov, Alan Khugayev and Soltan Pliyev satisfies the elements of a number of war crimes and crimes against humanity, including the war crimes of murder, unlawful confinement and cruel or inhuman treatment and the crime against humanity of enforced disappearance.

VI. DISAPPEARANCES FALL WITHIN THE OVERALL SCOPE OF THE GEORGIA SITUATION

108. In her Request for Authorisation, the ICC Prosecutor asked the Pre-Trial Chamber “to be permitted to expand or modify [her] investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.”¹⁶⁰ The PTC agreed with the ICC Prosecutor’s position, stating that “*events which did not occur in or around South Ossetia or which occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto [...]*.”¹⁶¹

109. The filing parties respectfully submit that the disappearances of Alan Khachirov, Alan Khugaev and Soltan Pliev are sufficiently linked to the current parameters of the *Situation in Georgia*, because they are (a) similar or related to other crimes under investigation and (b) are proximate in time to the authorized investigation. If however, the ICC Prosecutor deems that an investigation into the conduct set out in this Request requires the Pre-Trial Chamber’s express authorisation, the Filing Parties submit that such an authorisation is merited, as the alleged crimes fall within the jurisdiction of the Court and are sufficiently proximate, both in time and character, to be included in the parameters of the investigation into the *Situation in Georgia*.

A. Disappearances are directly related to the August 2008 conflict

110. In the Request for Authorisation, the ICC Prosecutor seeks authorization to proceed with an investigation into the “Situation in Georgia covering the period from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity committed in and around South

¹⁶⁰ Request for Authorisation, paras 12, 51, 277

¹⁶¹ *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, 27.01.2016, No. ICC-01/15 para 64

Ossetia.”¹⁶² After the most active period of hostilities in August 2008 and following the agreement reached in Moscow on 8 September 2008, Russian forces withdrew from most parts of the “buffer zone” on 8-9 October 2008.¹⁶³ The Georgian police returned to the “buffer zone” on 10 October 2008.¹⁶⁴ However, as demonstrated in the Factual Background, armed confrontations continued after 10 October 2008, reaching the threshold of an armed conflict. On this basis, the disappearances of Alan Khachirov, Alan Khugaev and Soltan Pliiev on 13 October 2008 happened in the context of the armed conflict that began in August 2008 and should be considered contiguous with, or at least directly related to, that conflict.

111. The disappearances of the three men occurred, initially, in the same location as those crimes that currently fall under the authorised investigation. As the Prosecutor states in her Request for Authorisation: “The crimes are alleged to have taken place in South Ossetia and areas within the ‘buffer zone’ from at least 7 August until 10 October 2008.”¹⁶⁵ The buffer zone incorporates the ABL separating South Ossetia on the Georgian and Russian sides. The disappearances that occurred on 13 October 2008 took place on the road between the villages of Korkula and Khelchua—on or in the immediate vicinity of the ABL.

112. Furthermore, serious violations of humanitarian and human rights law, in particular arbitrary detention, continued to occur in the buffer zone between 10 October 2008 and 1 November 2008. As shown above, between 8 and 15 October 2008, 11 ethnic South Ossetian civilians were arbitrarily detained on the ABL by Georgian authorities (not including the victims in the present case). Seven Ossetian civilians were detained on 8 October alone. Their detentions were not registered, putting them at risk of enforced disappearance. Some of the detainees were subjected to unfair trials and were convicted. All of them were eventually “exchanged” for ethnic Georgians in South Ossetian jails, although some of them spent over one year in Georgian prisons on fabricated criminal charges, and at times were held *incommunicado* from their family members.¹⁶⁶

113. The disappearance of Alan Khachirov, Alan Khugayev, and Soltan Pliyev—which began with their arbitrary arrest and detention in the region of the ABL on 13 October 2008—should be considered contiguously with those arbitrary detentions that occurred very near that date and which fall into the scope of the authorized investigation, as there are no obvious characteristics that would distinguish these situations, either factually or legally.

¹⁶² Request for Authorisation, paras 1 and 349.

¹⁶³ Request for Authorisation, para. 36; Annex E.2.38-Corr, p. 17; Annex A.2.36, p. 226; Annex E.4.3, p. 10.

¹⁶⁴ See *supra*, para. 69.

¹⁶⁵ Request for Authorisation, para. 4.

¹⁶⁶ *Supra*, para. 100.

114. For these reasons, the Filing Parties submit that the forces involved, time, location and context of the crimes alleged in this Request are directly related to the armed conflict of August 2008 and its immediate aftermath, the events of which are subject to the authorised investigation.

B. Disappearances are similar to/related to conduct under investigation

115. In its *Decision on the Prosecutor’s request for authorization of an investigation*, the Pre-Trial Chamber held that “the requisite elements of both the alleged war crimes as well as the alleged crimes against humanity are met.”¹⁶⁷ The crimes in question include: (i) the war crimes of wilful killing (Article 8(2)(a)(i)) or murder (Article 8(2)(c)(i)); and (ii) the crimes against humanity of murder (Article 7(1)(a)), and persecution (Article 7(1)(h)).¹⁶⁸ The conduct relating to the disappearances of Alan Khachirov, Alan Khugayev, and Soltan Pliyev is closely associated with the crimes already under investigation, committed by all sides to the conflict.

116. The ICC Prosecutor’s preliminary examination revealed inconclusive information on indiscriminate attacks on South Ossetian civilians by Georgian armed forces, mainly due to the lack of access to and cooperation from South Ossetia. It is anticipated that further investigation will determine that deaths, injuries or property damage amounted to war crimes within the jurisdiction of the Court. At this stage the Filing Parties would point to the severity of the allegations concerning potential war crimes committed as part of Georgian forces’ indiscriminate attack against Tskhinvali and the existing evidence in support of these allegations, cited in the Prosecutor’s *Request*.¹⁶⁹ The Filing Parties further submit that the investigation of the nature and conduct of the armed attack on Tskhinvali may contribute to establishing the fact of a “widespread and systematic” attack on the civilian population for the purposes of alleged crimes against humanity committed by Georgian forces.

117. The Filing Parties also point to the systematic practice of arbitrary detention by both sides to the conflict. The Prosecutor’s *Request* mentions, for example, the detention of around 345 Georgian civilians in the period from August through October 2008, many of whom were held in detention facilities administered by the South Ossetian authorities in poor conditions for up to 16 days.¹⁷⁰ Upon further investigation it may be determined that a nexus exists between individual cases of arbitrary detention and the attack against the Georgian civilian population. Similarly, the Filing Parties urge further investigation into evidence submitted concerning

¹⁶⁷ *Decision on the Prosecutor’s request for authorization of an investigation*, Para. 26

¹⁶⁸ *Ibid*, Para. 7.

¹⁶⁹ *Request for Authorisation*, Page 96.

¹⁷⁰ *Ibid*, Page 111.

arbitrary detention of South Ossetian civilians or persons placed *hors de combat* by the Georgian authorities, for the purposes of determining whether such detentions constituted an attack against the South Ossetian population.

118. As part of the alleged crimes against humanity committed against Georgian civilians, the Pre-Trial Chamber stated that “these acts were reportedly committed with a view to forcibly expelling ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to change the ethnic composition of the territory, sever any remaining links with Georgia and secure independence.”¹⁷¹ By analogy, the Filing Parties point to the evidence of the widespread and systematic attack on South Ossetian civilians that took various forms—including indiscriminate attacks on civilians and civilian property, and also arbitrary detentions. The Filing Parties respectfully submit that the documentation of attacks against South Ossetians by Georgian forces evinces an analogous aim of preserving the territory of South Ossetia as part of Georgia and of subjugating South Ossetia to the authority of Tbilisi. Detentions of South Ossetians by Georgian forces exhibit the hostile attitude of the Georgian authorities towards South Ossetians, often resulting in grave violations of humanitarian and human rights law on a large scale.¹⁷²

119. The disappearances of Alan Khachirov, Alan Khugayev and Soltan Pliyev arguably figure among the most serious incidents of the August 2008 conflict. Furthermore, in light of the central position of the Georgian security, penitentiary and criminal justice officials in this case, there is a probability that the group of persons that are likely to form the object of the investigation into crimes by Georgian authorities will capture those who may bear the greatest responsibility for the crimes set out in this Request.

120. For these reasons, the Filing Parties submit that the conduct in relation to the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev is closely related to the crimes currently falling within the remit of the authorised investigation.

C. Disappearances are proximate in time to the authorised investigation

121. The disappearances of Alan Khachirov, Alan Khugaev and Soltan Pliev occurred on 13 October 2008, just three days beyond the time limit originally requested by the Prosecutor.

¹⁷¹ Decision on the Prosecutor’s request for authorization of an investigation, Para. 21.

¹⁷² For example, a South Ossetian detained by Georgian forces during the active phase of the conflict stated the following: *They asked me, "Why are the Russians bombing us?" ... [and], "Who's your president?" I said, "Kokoity?" They hit me and asked again. And I said, "Do you mean Putin?" So they hit me again. It's only later that I realized they wanted me to say "Saakashvili."* From Human Rights Watch, *supra n.* 82, page 82.

122. From the *Request for Authorisation*, it is evident that the cut-off date for the authorized investigation was chosen to coincide with the official withdrawal of Russian forces from the buffer zone on 10 October 2008. However, as demonstrated above, the withdrawal that occurred on 10 October 2008 was not complete and in fact Russia at that time was in violation of the ceasefire agreement.¹⁷³ Armed confrontations and human rights violations that were directly related to the main hostilities in August 2008 continued to take place after 10 October.

123. Furthermore, as pointed out above, similar unacknowledged detentions of South Ossetians on the ABL occurred throughout the first half of October 2008, including on 8 October 2008, less than a week before the detention that led to the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev. The Filing Parties respectfully submit that to choose a date for the outer limit of the *Situation in Georgia* on the basis of Russia's official withdrawal ignores the reality of continuing confrontations and crimes in the days that followed.

124. In conclusion, the Filing Parties submit that the disappearances of Alan Khachirov, Alan Khugaev and Soltan Pliyev are sufficiently linked to the events and crimes that form part of the authorised investigation and therefore should be included in the overall scope of the *Situation in Georgia*.

VII. EXPANDING THE TEMPORAL SCOPE OF THE INVESTIGATION IS IN THE INTEREST OF JUSTICE

125. Expanding the temporal scope of the investigation will serve the interests of justice as prescribed by Article 53 of the ICC Statute. Conversely, excluding the case of Alan Khachirov, Alan Khugaev and Soltan Pliyev from the scope of investigation would be contrary to the ICC's founding principles for the following reasons.

a. Lack of genuine and effective domestic investigations

126. As demonstrated in the Factual Background section of this Request, there has been no effective investigation into the disappearance of Alan Khachirov, Alan Khugayev and Soltan Pliyev. The victim's representatives referred to the Georgian, Russian, and South Ossetian authorities on numerous occasions, but there has been no substantive progress in the investigation, despite the extensive attention paid to this incident by the Council of Europe Human Rights Commissioner. The CHR report, published on 29 September 2010, included a

¹⁷³ See *supra*, paras. 58-60.

detailed and independent assessment of the investigation into the disappearance and highlighted many investigative shortcomings. Following the publication of the report, the Georgian authorities did not rectify the majority of the errors pointed out by the experts.

127. The relatives of the disappeared persons have not remained passive throughout the domestic proceedings. They provided the official investigative bodies with pertinent information such as names, dates, and physical evidence in form of a video-recording, and their representatives regularly petitioned the authorities to undertake certain investigative steps. None of these efforts have had any significant impact on the effectiveness of the investigation.

128. In these circumstances, an investigation by the ICC Prosecutor is the last resort for the victims' relatives in their pursuit to discover the fate of their loved ones and to achieve some measure of accountability.

b. Inequality of treatment vis-a-vis other victims

129. There are many factual and legal similarities between the incidents concerning the disappearances of Alan Khachirov, Alan Khugayev and Soltan Pliyev, and other crimes that currently fall under the remit of the investigation, including disappearance and arbitrary detention. The alleged disappearances of Radik Ikayev and Tomasz Kabisov are two examples of disappearances that occurred during the active phase of the conflict, but which exhibit several factual similarities with the disappearances of Alan Khachirov, Alan Khugayev and Soltan Pliyev. All of the above persons were detained on or near the ABL (Tskhinvali region) and then transferred to Georgian territory. Other victims of crimes that may fall within the scope of the *Situation in Georgia* have described a similar set of circumstances, including victims of arbitrary detention along the ABL.

130. The exclusion of the victims on the grounds that the relevant events took place just three days after the chosen time-frame for the investigation would also be unfairly formalistic, taking into consideration the fact that other victims of violations that are part of an overall pattern of attack that includes the present victims may become participants in the case.

c. Excluding the disappearances from the scope of the investigation contributes to the wider culture of impunity

131. The case at hand is not isolated but is representative of abuses that have taken place during and in the aftermath of the 2008 conflict, including disappearances, arbitrary detentions, hostage-taking and unfair trials. Excluding this case may have a "chilling effect" on other South Ossetian victims, who would otherwise wish to seek justice before the ICC. Many of these

potential victims are sceptical about the possibility of seeking justice at the ICC, and a decision to exclude cases will only further dissuade them from participating in the ongoing investigation.

132. Moreover, the investigation of this case may shed light on other alleged violations that could be examined by the ICC. For example, according to the statement of Mr. Alan Badzayev (Bazzayev), a witness in the present case, he was held at the Republican Prison Hospital, where he was tortured with the use of electric shock. His statement implies that two of the disappeared men in the case at hand were in the same “torture hospital.”¹⁷⁴ His allegations have not been substantially analysed by investigators at the domestic level, and thus an ICC investigation into the network of perpetrators involved in the present case may present the only real possibility to investigate these allegations.

133. Finally, to exclude the case at hand from the remit of the investigation would mean to forego the possibility of examining the evidence that may lead to the identification of the perpetrators of the crime, including a videotape of the detention of the disappeared men.

134. In conclusion, the exclusion of the case at hand from the remit of the investigation into the *Situation in Georgia* would contribute to the wider culture of impunity that has reigned up until the present time as regards abuses committed during the August 2008 conflict.

V. CONCLUSION

135. The Filing Parties are requesting the ICC Prosecutor to seek the Pre-trial Chamber’s authorization to expand the temporal scope of the investigation into the *Situation in Georgia* to at least 13 October 2008, in order to include the disappearance of three ethnic South Ossetian men Alan Khachirov (born 22 December 1992), Alan Khugayev (born 23 September 1989) and Soltan Pliyev (born 19 March 1983) into the *Situation in Georgia*. To ignore this case would be contrary to the interests of justice, given the gravity of the crime alleged, the evidence available as to the perpetrators, and the inequality in the treatment of the victims in this case vis-à-vis victims in other similar cases, some of which occurred a mere few days before.

136. There is a reasonable basis to believe that the disappeared men were arrested, exposed to inhuman treatment and subsequently killed by the Georgian authorities, although their fate still remains unknown. The evidence in the case includes numerous witness statements, forensic evidence and a video-recording of their abuse in custody. Although there have been serious allegations implicating Georgian military and law enforcement officials in the disappearances of the three men—including by the Commissioner for Human Rights of the Council of Europe—there has been no effective domestic investigation in this case.

¹⁷⁴ Annex 1 - Statement of ██████████ of 25.03.2009

137. It is submitted that the disappearances fall within the ICC's jurisdiction and can be qualified both as war crimes and crimes against humanity—crimes that are currently being investigated by the ICC in the context of the *Situation in Georgia*.

VI. REQUEST

138. For the reasons stated above, the Filing Parties respectfully request the ICC Prosecutor to seek the Pre-Trial Chamber's authorisation to expand the temporal parameters of the investigation into the *Situation in Georgia* to at least 13 October 2008, in order to bring the cases of Alan Khachirov, Alan Khugayev and Soltan Pliyev into the scope of the authorized investigation.

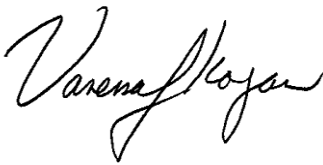
VII. ANNEXES

1. Statement of ██████████ of 25.03.2009
2. Statement of ██████████, 25.03.2009
3. Statement of ██████████ of 25.03.2009
4. The Statement of ██████████ of 25.03.2009
5. Letter of 21.04.2009
6. Letter of Gori district division of MIA, 18.10.2010
7. Letter of the Chief Prosecutor's Office of Georgia of 24.06.2009
8. Letter of 21.03.2012
9. Tekhov and Tekhov v Georgia, application to the ECtHR submitted on 02.06.2010
10. Statements of ██████████ of 05.06.2010
11. Statement of ██████████ of 05.06.10
12. Statement of ██████████ of 05.06.2010
13. Protocol of opening criminal investigation of 20.06.2009
14. Letter to the Gori Division of the Ministry of Internal Affairs of Georgia of 30.07.2010
15. The protocol of interrogation of ██████████ of 9.09.2010
16. Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of 8.05.2014
17. Complaint of 3.11.2010
18. Letter of 29.11.2010
19. Statement of ██████████ of 15.09.2011
20. Statement of ██████████ of 15.09.2011
21. Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of 15.02.2013

22. Letter of District Prosecutor's Office of Shida Kartli and Mtskheta-Mtianeti of
16.03.2013

Moscow and London, 29 June 2016

Signed:

A handwritten signature in black ink, appearing to read 'Vanessa Kogan' in a cursive script.

Vanessa Kogan

Executive Director of RJI

A handwritten signature in black ink, appearing to read 'Alexandre Prezanti' in a cursive script.

Alexandre Prezanti

Partner of Global Diligence LLP