



## Situation in Georgia

### *Summary of the Prosecution's Request for authorisation of an investigation pursuant to article 15*

13 October 2015

## I. Introduction

1. On 13 October 2015, the Prosecutor requested authorisation from the Pre-Trial Chamber, pursuant to article 15(3) of the Rome Statute, to proceed with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008.
2. Ongoing tensions and sporadic armed clashes between the Georgian army and separatist forces of South Ossetia, a semi-autonomous region within Georgia governed by a breakaway South Ossetian *de facto* administration escalated during the beginning of August 2008 with a series of explosions targeting, among others, both local South Ossetian and Georgian military and political leaders in South Ossetia. On 7 August 2008, the Georgian military launched an offensive to retake control of South Ossetia. The armed forces of the Russian Federation intervened on the side of South Ossetia, taking control on 10 August 2008 of localities in South Ossetia and extending control thereafter over a 20 km “buffer zone” established within parts of Georgian territory beyond the boundary of the South Ossetian administrative zone. Although a cease-fire agreement was brokered on 12 August 2008, crimes continued to be committed. In accordance with a subsequent agreement concluded on 8 September 2008, Russian troops withdrew behind the administrative boundary line of South Ossetia by 10 October 2008 at the latest.
3. The Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), established by the Council of the European Union, reported that about 850 persons died as a result of the armed conflict

while more than 100,000 civilians fled their homes. The Government of Georgia claimed that 412 persons lost their lives, out of which 228 were civilians, 170 military and 14 policemen, while 1747 persons were wounded, and 10 military and 14 policemen were reported missing. The Russian Federation provided information stipulating that 162 ethnic Ossetian civilians had died and 255 were injured, and that 48 Russian servicemen were killed and a further 162 were injured. The South Ossetian *de facto* authorities reported a total of 365 deaths of both civilians and members of South Ossetian forces.

4. The Prosecution has gathered information on alleged crimes attributed to all three parties to the conflict: the Georgian armed forces, the Russian armed forces and South Ossetian forces. 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. The Prosecution has requested authorisation to investigate the situation from 1 July 2008 in order to be able to also investigate precursor events that immediately preceded the formal commencement of the hostilities. This will enable it determine, in the context of any future investigation, whether a sufficient nexus exists between such acts and the required contextual elements for war crimes or crimes against humanity. The end date specified for any authorised investigation is the 10 October 2008, the date by which, at the latest, Russian armed forces are reported to have withdrawn behind the administrative boundary line of South Ossetia.

## **II. Subject-matter jurisdiction**

### ***A. War crimes***

5. An armed conflict occurred on the territory of Georgia from 7 August 2008 until at least 10 October 2008. The classification of the armed conflict will require careful analysis of the evidence available in the context of any authorised investigation in order to establish whether, despite the short period of direct military confrontation between the Georgian and Russian armed forces from 8 August through 12 August 2008, other time periods covered by this application should be governed by the law applicable in international or non-international armed conflict.

#### **1. War crimes committed in the context of the forcible displacement of ethnic Georgians**

6. The information available to the Prosecution indicates that between 51 and 113 ethnic Georgian civilians were killed in the context of a forcible displacement campaign conducted by South Ossetian forces. A further estimated 13,400 to 18,500 ethnic Georgians were forcibly displaced from South Ossetia and the 20 km “buffer zone” created alongside the administrative boundary line between South Ossetia and the rest of Georgia, while over 5,000 dwellings belonging to ethnic Georgians were reportedly destroyed.

7. Based on the information available at this stage, the Prosecution finds that there is a reasonable basis to believe that between at least between 7 August and 10 October 2008, the South Ossetian forces have committed at the minimum the following war crimes in the context of an armed conflict: war crimes of wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying the enemy’s property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), and pillage (article 8(2)(b)(xvi))

or article 8(2)(e)(v)). These crimes took place in the context of and were associated with the armed conflict.

8. There is conflicting information on the involvement by the Russian armed forces, with credible reports indicating that at least some members of the Russian armed forces participated in the commission of such crimes, while in others instances they stood by passively, while in other still they intervened to prevent such crimes. Based on the information available, it does not appear at this stage that members of the Russian armed forces were among those most responsible for these crimes.

## **2. Alleged attack against peacekeepers**

9. There is also a reasonable basis to believe that both South Ossetian forces and Georgian armed forces committed the war crime of attacking personnel or objects involved in a peacekeeping mission (article 8(2)(b)(iii) or article 8(2)(e)(iii)).
10. In particular, on 7 August 2008 members of the Georgian peacekeeping contingent at the Avnevi checkpoint are alleged to have come under heavy shelling from South Ossetian positions, resulting in two deaths and five injuries and the subsequent withdrawal of the Georgian contingent from the Joint Peacekeeping Force Headquarters (JPKF HQ).
11. During the night from 7 to 8 August 2008 the Georgian armed forces conducted a military operation against JPKF HQ and the base of the Russian Peacekeeping Forces Battalion (RUPKFB) claiming that it had lost its protected status. According to the Russian authorities, 10 peacekeepers

belonging to the Russian peacekeeping contingent were killed and a further 30 were wounded as a result.

12. There are conflicting allegations from the parties to the conflict that the Georgian and/or Russian peacekeepers had lost their entitlement to the protection given to civilians and civilian objects at the moment of each respective attack. However, bearing in mind the low threshold applicable at this stage of the procedure, and the presumption of civilian character that governs the application of the law in case of doubt, the Prosecution has concluded that there is a reasonable basis, at this stage, to believe that the war crime of intentionally directing an attack against personnel and objects involved in a peacekeeping mission has been committed with respect to the intentional directing of attacks by South Ossetian forces against Georgian peacekeepers as well as the intentional directing of attacks by the Georgian armed forces against Russian peacekeepers.

#### ***B. Crimes against humanity***

13. The information available provides a reasonable basis to believe that crimes against humanity were committed during the 2008 armed conflict in Georgia. In particular, there is a reasonable basis to believe that South Ossetian forces committed the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)), and persecution against any indefinable group or collectivity on ethnic grounds (article 7(1)(h)). These crimes were allegedly committed as part of a widespread and/or systematic attack against ethnic Georgian civilians in South Ossetia, involving the multiple commission of the above mentioned acts against the ethnic Georgian civilian population in South

Ossetia and the surrounding “buffer zone” and in pursuance of a policy of the South Ossetian *de facto* authorities to forcibly expel ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to sever any remaining links with Georgia and secure full independence.

### *C. Conclusion on the alleged crimes within the jurisdiction of the Court*

14. The information available provides a reasonable basis to believe that the following conduct has been committed in Georgia during the period from 7 August 2008 to 10 October 2008: wilful killing/murder (article 8(2)(a)(i)/8(2)(c)(i)), destroying the enemy’s property/the property of an adversary (article 8(2)(b)(xiii)/8(2)(e)(xii)), and pillage (article 8(2)(b)(xvi)/8(2)(e)(v)); attacking personnel or objects involved in a peacekeeping mission (article 8(2)(b)(iii)) as war crimes; and murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)) and persecution against an identifiable group or collectivity on ethnic grounds (article 7(1)(h)) as crimes against humanity. This is without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of investigations.

#### *Places of alleged commission of the crimes*

15. The above crimes are alleged to have been committed on Georgian territory. Despite the South Ossetian declaration of independence of 29 May 1992 and its subsequent recognition by four UN Member States in 2008 onwards, South Ossetia is generally not considered an independent State and is not a Member State of the UN. A number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South

Ossetia as a part of Georgia. For the purposes of the present application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of alleged crimes and occupied by Russia at least until 10 October 2010. As such, the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed conflict period, irrespective of the nationality of the accused.

16. The main areas where the crimes allegedly occurred include: (i) ethnic Georgian villages of the Kurta municipality located in the north of Tskhinvali; (ii) ethnic Georgian villages of the Eredvi municipality located in the north-east of Tskhinvali; (iii) ethnic Georgian villages in the Tighva municipality located in the south-east of Tskhinvali; (iv) villages of the Gori municipality located in the “buffer zone”.

17. In relation to the unlawful attacks against peacekeepers, the Georgian peacekeeping contingent stationed at Avnevi checkpoint came under heavy shelling from South Ossetian positions. The Georgian armed forces subsequently carried out their attack against the Russian peacekeepers and peacekeeping facilities at the Joint Peacekeeping Forces (JPKF) and the Russian Peacekeeping Forces Battalion (RUPKFB).

*Time period of alleged commission of the crimes*

18. The above alleged crimes committed at least in the period from 7 August 2008 until 10 October 2008 fall under the Court’s jurisdiction *ratione temporis*, since Georgia deposited its instrument of ratification of the Rome Statute on 5 September 2003 and the Statute entered into force for Georgia on 1 December 2003, in accordance with article 126(1) of the Statute.

*Persons or groups involved*

19. The information available indicates that the alleged crimes related to the forcible transfer of ethnic Georgians were committed by South Ossetian forces acting under the command of *de facto* President Eduard Kokoity. These forces appear to have included military units under the South Ossetian *de facto* Ministry of Defence and Emergencies, as well as the Special Purpose Police Squad (OMON - *Otryad Militsii Osobogo Naznacheniya*), several police companies of the South Ossetian *de facto* Ministry of Internal Affairs, and servicemen of the South Ossetian *de facto* Committee for State Security (KGB - *Komitet Gosudarstvennoy Bezopasnosti*).
20. The South Ossetian forces appear to have been supported by irregular militias (*Opolchentsy* in Russian, *Dajgupebebi* in Georgian). Militia groups were given names based on locations of their zone of responsibility. For example, the South Ossetian militia group Kokhatelebi operated in the area of Kokhati while Dmeniselebi were responsible for the village of Dmeni.
21. The information available indicates that at least some members of the Russian armed forces participated in the commission of such crimes, while other members of the Russian armed forces acted passively in the face of such crimes, and still others acted to prevent and punish such crimes.
22. The information available also indicates that the South Ossetian forces were involved in carrying out an attack against Georgian peacekeepers.

23. The information available further indicates that the Georgian armed forces consisted of nine light infantry and five tank battalions (including the 1st Infantry Brigade HQ Gori, and the Independent Tank Battalion HQ Gori), up to eight artillery battalions (including Artillery Regiment and Artillery Brigade HQ Gori), together with special forces and units of the Ministry of Interior. Reportedly, the Central Front Command resorted to the Separate Light Infantry Battalion, the Tank Company of the Separate Armoured Battalion, the Independent Ballistic Tank Battalion, the 1<sup>st</sup> and 2<sup>nd</sup> Artillery Brigade supported by the special forces of the Ministry of Interior to carry out an attack against Russian peacekeepers.

#### *D. Other alleged crimes*

24. This application also documents the information available on other crimes allegedly committed by the parties to the conflict. In particular, both the Georgian and Russian armed forces are alleged to have launched indiscriminate and disproportionate attacks against civilian targets. Given the inherent difficulties with determining issues related to the conduct of hostilities in the absence of an investigation, the limited information available has not permitted the Prosecution to reach a determination, at this stage, whether war crimes within the jurisdiction of the Court may have been committed. Nonetheless, this has no impact on the conclusion of this Application that an investigation is warranted, and such allegations can be submitted for proper investigation and qualification in the context of any authorised situation.

25. The Prosecution also gathered reports on a limited number of cases of sexual and gender-based violence, including rape, with no clear information on the alleged perpetrators. While the low number of cases

may be due to under-reporting, the Prosecution could not reach a determination at this stage as to whether these alleged crimes were sufficiently linked to the alleged attack against the civilian population for the purpose of crimes against humanity or had a nexus to the armed conflict. Such allegations would also require verification in the context of any authorised investigation.

26. The Prosecution recalls that crimes identified at the article 15 stage as meeting the reasonable basis standard should be considered as examples of relevant criminality within the situation, in the light of the threshold requirement of determining whether one or more crimes within the jurisdiction of the Court has been committed.<sup>1</sup> Once that threshold is met, the Chamber should authorise an investigation into the situation as a whole and not just the particular acts or incidents brought forward to substantiate that threshold.<sup>2</sup> Accordingly, should an investigation be authorised, the Prosecution should be permitted to expand or modify its 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.<sup>3</sup>

### **III. Admissibility**

27. The admissibility criterion requires an assessment of the existence and genuineness of relevant national proceedings (complementarity) and an assessment of gravity. Consistent with the prior case law of the Court with respect to article 15 applications, the Prosecution has set out for this

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<sup>1</sup> ICC-01/09-19-Corr, paras. 14-15; ICC-02/11-15, para. 32.

<sup>2</sup> ICC-01/09-19-Corr, paras. 74-75.

<sup>3</sup> ICC-01/09-19-Corr, paras. 74-75; ICC-01/04-01/10-451, paras. 21, 27.

purpose the potential cases that would likely arise from an investigation of the situation. The Prosecution's identification of the incidents or groups of persons that are likely to shape future case(s) is preliminary in nature and should not be considered binding for future admissibility assessments.<sup>4</sup> Should an investigation be authorised, the Prosecution should be permitted to expand or modify its 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.<sup>5</sup>

#### *A. Complementarity*

28. The timing of the present Application has been determined largely by issues of admissibility as they relate to the progress of national proceedings. The Prosecution recalls that the Situation in Georgia has been under preliminary examination since 14 August 2008. Until recently the competent national authorities of both Russia and Georgia were engaged in conducting investigations against those who appeared to be most responsible for crimes which are the subject of this application. These investigative measures, despite some attendant challenges and delays, appeared to be advancing through the taking of concrete and progressive steps to ascertain the criminal responsibility of those involved in the alleged crimes.

29. More recently, however, national proceedings in Georgia have paused. In March of this year, pursuant to requests for information from the

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<sup>4</sup> ICC-01/09-19-Corr, para. 60.

<sup>5</sup> ICC-01/09-19-Corr, paras. 74-75; ICC-01/04-01/10-451, paras. 21, 27.

Prosecution, the Government of Georgia officially conveyed in writing that national proceedings in relation to the alleged displacement of ethnic Georgians from South Ossetia had been indefinitely suspended. With no foreseeable resumption apparent, and no other investigations in relation to such conduct underway in other States, the Prosecution has assessed that the potential case relating to the forcible transfer of ethnic Georgians as identified in this Application would be admissible, due to State inaction.

30. The potential case relating to the intentional directing of attacks against peacekeepers and peacekeeping facilities would be partially admissible at this stage. In relation to the attack against Georgian peacekeepers, the Georgian authorities informed that domestic criminal proceedings in Georgia over war crimes and crimes against humanity allegedly committed in the context of the August 2008 conflict have been suspended, and the Prosecution has assessed that these acts would meet the gravity threshold. In relation to the attack against Russian peacekeepers, which would also meet the gravity threshold, the competent Russian authorities are presently continuing to progress with their domestic investigations and these investigations do not appear vitiated at this stage by a lack of willingness or inability to do so genuinely. This assessment will be kept under review should an investigation be authorised.

## *B. Gravity*

31. Based on the information available, the potential cases that are likely to arise from an investigation into the situation would be of sufficient gravity to justify further action by the Court.
32. With respect to the crimes allegedly committed within the incidents that are likely to be the object of the Prosecution's investigation, these include war crimes of wilful killing, as well as the crimes against humanity of murder, forcible displacement of civilian population and persecution. These offences, together with attendant crimes of looting and destruction of civilian property were committed on a large scale as part of a plan and in furtherance of a policy to expel ethnic Georgian from the territory in South Ossetia.
33. The crimes allegedly committed by South Ossetian forces caused a high number of direct and indirect victims, with an estimated 51 to 113 persons killed, over 5,000 dwellings deliberately destroyed, and somewhere in the range of 13,400 - 18,500 ethnic Georgians forcibly displaced from South Ossetia and the "buffer zone".
34. The information available suggests that the crimes were committed with particular cruelty and on discriminatory grounds, as evidenced by patterns of close range killings and executions as well as the infliction of serious bodily injuries, together with the widespread and systematic destruction and looting of ethnic Georgian property. The victims were typically intimidated and humiliated, and forced to watch their homes being razed to the ground.

35. The expulsion campaign had a severe impact on the large number of direct victims whose homes and way of life has been destroyed, those who suffered injuries, and on those who have lost family members. The information available suggests that the victims were “deeply affected and traumatized by their experience during the conflict”. As a result of this campaign of violence, the civilian population of ethnic Georgians in South Ossetia was substantially reduced. The Prosecution estimates that the ethnic Georgian population living in the conflict zone was reduced by at least 75%.
36. The victims remain displaced to this date due to the destruction of their homes and administrative measures taken by the South Ossetian *de facto* authorities to prevent their return and continue to face a fragile security situation.
37. With respect to the potential case relating to the intentional directing of attacks against peacekeepers and peacekeeping facilities, both the attack against the Georgian peacekeepers by South Ossetian forces and the attack against Russian peacekeepers by Georgian armed forces would meet the gravity threshold. According to Georgian authorities, Georgian peacekeepers who manned a checkpoint in Avnevi were heavily shelled from South Ossetian positions, resulting the killing of two Georgian peacekeepers and the injury of five others. According to the Russian authorities 10 Russian peacekeepers were killed while 30 of them were wounded as a result of the attack against their facility, while the RUPKFB compound was destroyed, including a medical facility within the compound and peacekeepers armoured vehicles which served as a separation line between the Georgian military and South Ossetian civilians.

38. Reportedly Georgian armed forces purportedly targeted the JPKF and RUPKFB headquarters when they opened a tank fire and launched missiles and GRAD rockets against the peacekeeping mission personnel and objects. In the course of the attack, the Georgian military opened fire on a number of peacekeepers at the moment when they were trying to help those peacekeepers who were located in attacked armoured vehicles.

39. The Pre-Trial Chamber I in the *Abu Garda* case established that the attack on peacekeepers had a grave impact on members of the peacekeeping mission as victims of the attack as well as on their families. Moreover, the attack had a grave impact on local population which conditions of life depended on the implementation of the mission.<sup>6</sup>

40. Since the JPKF tasks included the implementation of the ceasefire agreement and maintenance of the regime of security in South Ossetia, the alleged attack on their personnel and premises could have had a grave impact both on victims of the attack and their families as well as on the local civilian population of South Ossetia.

41. With respect to the groups of persons likely to be the focus of the Prosecution's future investigation listed in Annex B.1, the information available indicates their rank in political or command positions and their alleged role in the violence in ordering, facilitating or otherwise contributing to the commission of alleged crimes.

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<sup>6</sup> ICC-02/05-02/09-243-Red, paras. 33-34.

#### **IV. Interests of Justice**

42. Victims of alleged crimes within the context of the situation have manifested their interests in seeing justice done in various ways. The Prosecution has sought to ascertain the interests of victims, through direct consultations with organisations representing victims in Georgia as well as through an examination of communications and publicly available information.

43. Georgian human rights organisations representing victims have in consultations with, communications to the Prosecution and public reports repeatedly stressed the desire of victims who have survived the August 2008 conflict to restore justice. In an open letter to the Prosecutor, dated 24 April 2012, seven Georgian and international human rights organisations manifested that they “believe that the victims of the Georgian-Russian war deserve to see justice done, that these serious crimes do not go unpunished, and that there should be no impunity [...]”, stressing the “undeniable role” the ICC has to play in ensuring that “justice is delivered to victims”.

44. In meetings with the Office of the Public Defender/Ombudsman of Georgia the need for an independent investigation by the ICC into the August 2008 conflict was repeatedly stressed and the high public demand for justice confirmed. The Prosecution took furthermore into consideration views expressed by the Parliamentary Assembly of the Council of Europe, which has recurrently called for independent investigations into allegations of war crimes and violations of international human rights and humanitarian law in its resolutions and whose Co-Rapporteurs for Georgia and Russia have expressed support for an international

investigation crimes committed in the context of the August 2008 conflict which would be in the basic interest of the people if conducted in a transparent manner.

45. Neither in communications from victims nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims, the Prosecution received views that the interests of justice would not be served by an investigation into the situation in Georgia.

46. The Prosecution notes the ongoing tense relationship between Georgia and the Russian Federation, and has considered the security concerns raised by the Georgian authorities with regard to their pursuing national proceedings. However, while a tense security and political environment might pose a challenge to Georgia's national investigations, in light of the mandate of the Prosecution, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, based on the information available the Prosecution has not identified substantial reasons to believe that the opening of an investigation into the situation would not be in the interests of justice.

## **V. Conclusion**

47. For the reasons set out above and on the basis of the information presented and the supporting material, the Prosecution respectfully requests the Pre-Trial Chamber to authorise the commencement of an investigation into the situation in Georgia from the period 1 July 2008 until 10 October 2008.

48. In compliance with Rule 50, on 13 October 2015, the Prosecutor provided notice to victims or their legal representatives of her intention to request authorisation and informed them that pursuant to Regulation 50(1) of the Regulations of the Court they have 30 days to make representations to the Chamber.