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PRETRIAL CHAMBER I

Before: Judge Joyce Aluoch, Presiding Judge
 Judge Cuno Tarfusser
 Judge Péter Kovács

SITUATION GEORGIA

Public Document not Confidential PART Annexes B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ

Corrected Version of the authorisation of an investigation pursuant to article 15 October 2015

Source: Office of the Prosecutor

Document to be notified in accordance with Regulations of
the Court

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I. Introduction

1. The Prosecution requests authorisation from the Chamber pursuant to article 15(3) of the Rome Statute, to proceed with an investigation into the Situation in Georgia from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia.
2. The Prosecution has been conducting a preliminary examination of the Situation in Georgia since August 2008, in the course of which it has gathered information on alleged crimes that it attributes to the parties involved in the armed conflict, namely the Georgian armed forces, the South Ossetian forces, and the Russian armed forces. Based on the information available, the Prosecution has identified the following crimes against humanity which it reasonably believes fall within the jurisdiction of the International Criminal Court (ICC) as the Court's request to the Pre-Trial Chamber to authorise its investigation:
 - Killings, forced displacements and persecution of Georgian civilians, and destruction and pillaging of property, by South Ossetian forces (with possible assistance by Russian forces);
 - Intentionally directing attacks against Georgian peacekeepers, South Ossetian forces; and against Russian peacekeepers and Georgian forces

3. Information on other crimes allegedly committed associated with the parties to the conflict is also Application, including on indiscriminate attacks proposed against civilian targets by both Georgian and Russian. Given the inherent difficulties with determining issues of conduct of hostilities in the absence of a limited investigation, information available to the Prosecution to reach a determination on the requisite standards for war crimes within the jurisdiction of the Court may have been limited. Nonetheless, if the Pre-Trial Chamber authorises an investigation of the Situation, these allegations can be investigated further.
4. Likewise, the Prosecution has gathered information on a number of reports of sexual violence, including rape, although at this stage no clear information has emerged as to the perpetrators or the link between these crimes and the wider context. Such allegations should be investigated in the context of any authorised investigation.
5. The Prosecution also sets out in further detail in this admissibility analysis in relation to the identification of potential suspects. Since it first opened its preliminary examination, the Pre-Trial Chamber has engaged closely with the national authorities of Georgia and Russia, and followed the progress of their national investigations of crimes arising from this situation.
6. Until recently, it appeared that progress was being made in national proceedings in Georgia, but these have stalled since 2015.

Government confirming to the Prosecutor that the proceedings for the alleged displacement of ethnic Georgians from South Ossetia have been indefinitely suspended. The same is true for the alleged displacement of ethnic Ossetians from Georgia. Proceedings into allegations of attacks against Georgian peacekeepers. On the other hand, in relation to the alleged displacement of ethnic Russians from Georgia against Russian peacekeepers, Russian domestic investigations are to be progressed as a matter which will be kept under review and an investigation be authorised.

7. As set out further in this report, sporadic armed clashes between the Georgian army and separatist forces of South Ossetia, an autonomous region within Georgia, began in July 2008. On 7 August 2008, a series of explosions targeting, among others, both local South Ossetian and Georgian military leaders in South Ossetia were carried out. On 8 August 2008, Georgian military forces launched an offensive to retake control of South Ossetia. On 10 August 2008, Russian Federal Armed Forces took control of South Ossetia and extended control thereafter over a 20 km buffer zone established between the boundary of the South Ossetian administrative zone and the boundary of Georgia. An agreement was brokered on 12 August 2008, crimes committed. In accordance with the agreement, on 8 September 2008, Russian troops withdrew from the administrative boundary of South Ossetia. On 10 October 2008, the latest

8. The Independent International Fact-Finding Mission on Conflict in Georgia (IIFMMC), established by the Council of the European Union, reported that about 850 persons died as a result of the conflict, while more than 100,000 civilians fled their homes. The Government of Georgia claimed that 412 persons lost their lives, 365 were civilians, 170 military personnel and 1747 persons were wounded, and 10 military and 14 policemen were reported killed. The Russian Federation provided information that 162 ethnic Ossetian civilians and 255 were among the dead, 162 Russian servicemen were killed and 162 were injured. The South Ossetian authorities reported a total of 365 deaths, both civilians and members of South Ossetian forces.

9. The Prosecution gathered information on alleged crimes against all three parties to the conflict: Georgian armed forces, Russian armed forces in South Ossetia and the forces of the self-proclaimed South Ossetian authorities. The crimes are alleged to have taken place in South Ossetia and in areas bordering the buffer zone at least in the period from 7 August to 10 October 2008. The Prosecution has authorised an investigation into the situation from July 2008 so that it may also investigate precursor events that immediately preceded the commencement of hostilities which led to the escalation of violence. This will enable it to determine, in the context of an authorised investigation, whether a sufficient nexus exists between such acts and the required contextual elements for war crimes or crimes against humanity. The date specified for the investigation is 10 October 2008, the date by which, at the

Russian armed forces are reported to have withdrawn from the administrative boundary line of South Ossetia.

10. In relation to the crimes alleged in this Application, the information available to the Prosecutor indicates that ethnic Georgian civilians were killed in the context of displacement caused by South Ossetia. Further estimates of 18,500 ethnic Georgians possibly displaced from South Ossetia and buffer zones previously under Georgian administration, with over 500 dwellings belonging to ethnic Georgians reported to be destroyed. There is a reasonable basis to believe that crimes of wilful killing, pillage and destruction of enemy property, as well as crimes consisting of murder, forcible transfer of population and persecution were committed against the ethnic Georgian population in South Ossetia and the buffer zones. There is conflicting information on involvement by the Russian armed forces in these crimes. Credible reports indicate that some members of the Russian armed forces were present in other instances, either by passively, while others intervened to prevent them.

11. There is also a reasonable basis to believe that in the Peacekeeping Force Headquarters, including Georgian and Russian contingents, were at separate times the intentional attacks constituting war crimes within the jurisdiction of the Court. In particular, in August 2008, members of the Georgian peacekeeping contingent at the Avenue checkpoint

under heavy shell bombardments resulting in two deaths and five injuries and the subsequent withdrawal of the Georgian contingent from the JPKF HQ. During the night of 11 August 2008 the Georgian armed forces conducted an operation against JPKF HQ and the base of the Russian Peacekeeping Battalion (RUPKFB) claiming that it had lost its position. According to the Russian authorities, 10 peacekeepers were killed and a further 30 were wounded as a result of the conflict. The parties to the conflict, the Georgian and Russian peacekeepers had a right to their entitlement to the protection given to civilian objects at the moment of each respective attack in mind the low threshold applicable at this stage of the proceedings, the presumption of civilian character that governs the law in case of doubt, the Prosecution has concluded on a reasonable basis, at this stage, to believe that the individuals intentionally directing an attack against personnel involved in a peacekeeping mission was a breach of the international law prohibiting the intentional directing of attacks against Georgian peacekeepers by the Ossetian forces against the Georgian peacekeepers and the intentional directing of attacks by the Georgian armed forces against Russian peacekeepers.

12 The Prosecution recalls that under article 15 of the Rome Statute, the meeting of the reasonable standard should be considered as a condition of relevant criminality within the jurisdiction of the Court. The requirement of determining whether one or more crimes have been committed is a jurisdictional requirement of the Court has¹ been established.

¹ ICC-01/09-19-Corr, paras. 145; ICC-02/11-15, para. 32.

the Chamber should authorise an investigation as a whole and not just the particular acts or incidents brought forward to substantiate that² the Prosecution should be authorised to expand or modify its investigation with respect to these or other alleged groups or persons and/or adopt different legal qualifications as the cases brought forward for prosecution are sufficient to justify the authorised situation, the Prosecution would also be able to investigate allegations relating to indiscriminate attacks against civilians and sexual and gender crimes.

13 As noted above, the applications have been determined largely by issues of admissibility as they relate to national proceedings. In the recent past, national authorities of both Russia and Georgia were engaged in investigations against those who are responsible for crimes which are the subject of these investigative measures, despite some attendant challenges and delays in advancing through the investigative process and progressive steps to ascertain the responsibility of those involved in the crimes.

14 However, in March of this year, pursuant to requests for information from the Prosecution, the Government of Georgia

² ICC-01/09-19-Corr, paras. 7475.

³ Pre-Trial Chamber II, "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 March 2010 (ICC-01/09-19-Corr), paras. 7475; Pre-Trial Chamber I, "Decision on the Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-451, 26 October 2011 (ICC-01/04-01/10-451), paras. 21, 27.

in writing that national proceedings in a legal system are the
 occurring in the context of the August 2008 armed conflict
 indefinitely suspended. With no foreseeable resumption of
 no other investigations there could be any way in
 other State, the Prosecution has at the potential case
 relating to the forcible transfer of ethnic Georgians in this
 Application would be admissible, due to the fact that the
 case could meet the gravity threshold in light of the scale,
 manner of commission and the impact.

15 The potential of the intentional directing of attacks
 against peacekeepers and peacekeeping would be partially
 admissible in this regard. Both the attacks against Georgian
 peacekeepers and Russian peacekeepers would meet the
 threshold in relation to the attack against Georgian peacekeepers
 domestic criminal proceedings in Georgia and at
 similarly suspended in relation to the attacks against
 peacekeepers despite the pace of proceedings in Russian
 authorities continue progress with their domestic
 investigations and investigations are not initiated at this
 stage by a lack of willingness to do so genuinely.
 This assessment will be kept under review should an investigation
 be authorised.

16 Despite the political tensions that constrain
 Russia and Georgia and the heightened security environment,
 there are no substantial reasons to believe that the opening of
 an investigation would be in the interests of justice.

account the gravity of the crimes and the needs of the victims continue to call for justice in relation to these

II. Procedural history

17 By letter of 5 October 2015, the Prosecutor notified the President of the Court in accordance with article 45 of the Regulations of the Court, of her intention to submit a request for authorization to investigate into the situation under article 15(3) of the Statute.

18 On 8 October 2015, the Presidency of the Court assigned the matter to the Trial Chamber

19 On 8 October 2015, the Prosecutor submitted a request for authorization to investigate into the situation under article 15(3) of the Regulations of the Court. The Trial Chamber received the request on 9 October 2015.

III. Background

A. Historical context of the 2008 armed conflict

20 The August 2008 armed conflict in Georgia has its roots in the dismantling of the Soviet Union. During the process of gaining independence from the Soviet Union between 1989 and 1991, Georgia faced internal division from the secessionist aspirations of South Ossetia, Abkhazians and Adjara, which had gained autonomous

while Georgia was part of the Soviet Union. According to the last census in South Ossetia conducted in 1989, the population was composed of 98,527 inhabitants, including 28,544 Georgians and 65,270 (66%) ethnic Ossetians. The ethnic composition of South Ossetia prior to the conflict suggests that the overall number of inhabitants decreased, but the number of ethnic Georgians living in South Ossetia in the time prior to the conflict was approximately the same, with 22,400 ethnic Georgians living in South Ossetia in the time prior to the conflict. While the majority of the population in the majority Orthodox Christians, Ossetians have a different language and alphabet, differing from the Georgian language and alphabet in the rest of the country. The geographical area of the territory of South Ossetia corresponds to that of the former South Ossetian Autonomous District.

⁴ Georgians considered independence as a viable perspective for the country since April 1989 when Soviet troops violently broke up peaceful protests in Tbilisi. On 9 April 1991, the Georgian Parliament formally proclaimed independence, Annex E.2.36: Independent International Fact Finding Mission on the Conflict in Georgia, Report, Volume I, September 2009, GEOTP-0002-7757 at 7769-7770 (Volume I); Annex E.2.37: Independent International Fact Finding Mission on the Conflict in Georgia, Report, Volume II, September 2009, GEOTP-0002-7801 at 7813-7814 (Volume II).

⁵ In total, over 80 ethnic groups live in Georgia, the largest, and politically most significant, ones being Georgians, Armenians, Russians and Azeris, followed by the Ossetians. See Cornell, S. E., *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus* (Routledge Curzon: London 2001), p. 129. For information on the 1989 census see Annex E.4.15: International Crisis Group, *South Ossetia: The Burden of Recognition*, 7 June 2010, GEOTP-0001-1242 at 1247 (The Burden of Recognition); Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 7873.

⁶ Based on different estimates provided by Human Rights Watch and International Crisis Group including by relevant actors at the time, as well as information received from the Georgian Government, the Prosecution approximately estimates that out of a total population of around 70,000 persons living in South Ossetia at the time shortly prior to the August 2008 conflict, one third or between 22,000 and 24,000 were ethnic Georgians. Around 4,000 in Akhalkalaki district at the time. Annex E.4.10: HRW, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, January 2009, GEOTP-0001-0336 at 0357 (Up in Flames); Annex E.4.13: International Crisis Group, *Georgia's South Ossetia Conflict: Make Haste Slowly*, 7 June 2007, GEOTP-0001-1276 at 1282 (Make Haste Slowly); Annex E.4.12: International Crisis Group, *Georgia: Avoiding War in South Ossetia*, 26 November 2004, GEOTP-0008-0615 at 0625-0626 (Avoiding War in South Ossetia); Annex E.7.9: Government of Georgia, *Response of the Republic of Georgia to Preliminary Questions from the Office of the Prosecutor of the International Criminal Court*, 10 May 2010, GEOTP-0006-0005 at 0039 (10 May 2010 Report); Annex E.7.4: Government of Georgia, *Short Report on the State of the National Criminal Proceedings of Georgia in Light of the Request of OTP ICC*, 13 March 2015, GEOTP-0003-1172 at 1177 (13 March 2015 Report).

Ossetia, an autonomous Republic of the Russian Federation, is located in the northern part of Georgia's Shida Kartli region and the neighbouring regions of Imereti and Mtskheta-Mtianeti.

21 Clashes broke out between Ossetians and Georgians in Tskhinvali, capital of South Ossetia following a move by Georgian nationalists supported by the Georgian population. In September 1990 South Ossetia declared its sovereignty as a Soviet Democratic Republic within the USSR. This was followed by the election of a nationalist government in October 1990 that formally abandoned South Ossetia and set up a blockade of the territory that lasted until 1991. Rising tensions and further clashes between Ossetians and Georgians escalated into an international armed conflict between 1991 and 1992. During this conflict the government in Georgia was ousted in January 1992 by a coup and South Ossetia declared its independence from Georgia on 29 May 1992.

⁷ See Annex E.7.10: Georgia, The Law of Georgia on Occupied Territories, 23 October 2008, Article 2, GEO-OTP-0008-0675.

⁸ Georgia is administratively divided into two autonomous republics (Abkhazia and Adjara), nine regions and 76 municipalities. During a reform of the administrative division of Georgia in 2006, former administrative units of counties or districts were transformed into municipalities, including the Akhalkalaki district (now Akhalkalaki municipality) in the Region of Mtskheta-Mtianeti and the Gori district (now Gori municipality and the City of Gori) and Kareli district (now Kareli municipality) both in the Region of Shida Kartli. The communities in South Ossetia under Georgian control at the time and relevant for this Application, Eredvi and Kurta (located in the former Gori district) and Tighva (or Tighvi, located in the former Kareli district) also received the status of municipalities. The parts of South Ossetia that were not under Georgia's jurisdiction at the time were not considered by the reform. The districts relevant for this Application, i.e. the districts of Tskhinvali, Java and Znauri (also referred to as Kornisi), thus retained their status of districts and are referred to as such. See Annex E.7.13: Georgia, The Organic Law of Georgia on Local Self Government, 16 December 2005, GEO-OTP-0008-0720 at 0720, 0730-0738.

⁹ Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7879.

¹⁰ Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7879-7880. A non-international armed conflict also raged in Abkhazia from 1992 to 1994; Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7884-7900.

¹¹ Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7879-7880.

22 The two year conflict with South Ossetia ended on 24 July 2009 with the signing in Sochi of the Agreement on Ceasefire and Settlement of the Georgian-Ossetian Conflict by the Presidents of Georgia and the Russian Federation. The Sochi agreement established a joint commission, a Joint Control Commission (JCC) and a Joint Peacekeeping Force (JPKF). The JPKF was to be commanded by a Russian officer and consisted of 500 servicemen each provided by Russia, Georgia and the Russian Federation. The Conference for Security and Cooperation in Europe established an observation mission in November 1992 in the context of the South Ossetian conflict, mandated to assist conflict resolution and reaching a peaceful political settlement.

23 At the time, South Ossetia was governed by a South Ossetian administration, which was not recognized by the Georgian Government. The post of President of South Ossetia was first held by Lyudvig Chibirov, who was conciliatory and considered one of South Ossetia's leaders. In the subsequent 2001 elections in South Ossetia, Eduard Kokoity was elected President of South Ossetia.

¹² Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 7901.

¹³ In 1993, the CSCE was renamed the Organization for Security and Cooperation in Europe (OSCE), an intergovernmental organisation that encompasses political, economic and environmental, and human aspects. All 57 participating States (including from North America, Europe and Asia) enjoy equal status, and decisions are taken by consensus on a politically, but not legally binding basis. Both Georgia and the Russian Federation are OSCE member states. See Annex E.2.40: OSCE, Factsheet: What is the OSCE?, 29 April 2013, GEOTP-0008-0669.

¹⁴ For the modalities establishing the CSCE mission see: Annex E.2.41: OSCE, Establishment of the Personal Representative of the Chairmanship for Georgia, 6 November 1992, GEOTP-0008-0673.

¹⁵ Annex E.4.12: ICG, Avoiding War in South Ossetia, GEOTP-0008-0615 at 0627-0628.

advocated for the integration of South Ossetia into the Russian Federation.

24 From the late 1990s onwards, the Russian Federation granted citizenship and passports to the vast majority of residents of South Ossetia, thereby also granting them pension, medical and other benefits. This policy ultimately resulted in the free movement of South Ossetian residents following the commencement of negotiations between Russia and Georgia. In 2002, the South Ossetian authorities further consolidated this process by introducing their own Citizens Act under which all South Ossetians were required to acquire Russian citizenship in addition to their domestic South Ossetian citizenship. Many Russian passports issued in South Ossetia are understood to have been taken part in the 2004 and 2007 Presidential elections as well as in the 2007 Russian

25 In 2003, following contested elections in Georgia, the Government of Georgia was ousted in the Rose Revolution. Opposition leader Mikheil Saakashvili won the 2004 presidential elections in 2004. President Saakashvili stated that the restoration of Georgia's territorial integrity a priority and

¹⁶ Eduard Kokoity was elected twice President of South Ossetia, in 2001 and re-elected on 12 November 2006. Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7910 and 7923.

¹⁷ Annex E.2.36: IFFMCG, Volume I, GEO-OTP-0002-7757, at 7787; Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7955; Annex E.2.32: Parliamentary Assembly of the Council of Europe, "Situation in Georgia and the consequences for the stability of the Caucasus region", 24 September 2002, GEO-OTP-0010-0042 at 0050.

¹⁸ Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7975; Annex E.7.11: Parliament of Georgia, "Statement on the introduction of visa regime between Russia and Georgia", 24 November 2000, GEO-OTP-0008-0686.

¹⁹ Annex E.8.37: Ru Novosti, "South Ossetia Began to Issue Its Own Passports", 15 August 2006, GEO-OTP-0008-0777.

²⁰ Annex E.6.1: US Congress, Congressional Research Service, "Georgia Conflict in South Ossetia- Context and Implications for U.S. Interests", 13 August 2008, GEO-OTP-0008-0687 at 0692.

reestablished Georgian control over Adjara, another region. Following armed clashes between Georgian and South Ossetian forces in August 2004, the Georgian Government sought to introduce a new peace plan for South Ossetia with substantial autonomy. However, South Ossetian President Kokoity rejected the plan in October 2005.

26 The first half of 2006 was marked by the fact that President Kokoity with a view to advancing the integration of South Ossetia into the Russian Federation, submitted an application with the Russian Constitutional Court for a cooperation agreement with Russia. A number of statements by Russian officials suggested a possible reunification of South and North Ossetia with the support of Russia.

27 In November 2006, coinciding with the end of Kokoity's second term, a referendum was held in order to determine the

²¹ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801, at 7820-7821.

²² Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 7914-7918.

²³ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 7918-7919.

²⁴ Annex E.1: Tanayev, K. (ed.) Ossetian Tragedy, The White Book of Crimes against South Ossetia August 2008 (Europe Publishing House: Moscow, 2009), GEO-OTP-0009-4398 at 4432. Reportedly Kokoity maintained that the republic had always been part of Russia and that there was not a single legal document proving its withdrawal from Russia.

²⁵ In an interview on 2 June 2006, Kokoity stated: "I wish to emphasise that South Ossetia is already de facto an entity of the Russian Federation, because 90% of the citizens of South Ossetia are Russian nationals ~ Russian laws apply in the Republic of South Ossetia; the currency is the Russian rouble; the RF Criminal Code is in force. South Ossetia is a de facto entity of the Russian Federation. We simply have to consolidate this legally." See Annex E.8.42: BBC (Kokoity: South Ossetia is already de facto in Russia) [in Russian], "С. Кокоев: «... т.е. %С.О. - это часть России»" [in Russian], 2 June 2006, GEGOTP-0010-0115.

²⁶ For instance, on 22 March 2006 Russian Prime Minister Mikhail Fradkov's aide, Gennady Bukayev, reportedly stated at a joint session of North Ossetia's and South Ossetia's parliaments in Vladikavkaz that Moscow has "decided in principle" to merge the two entities into a single one within Russia. Russian Minister of Foreign Affairs, spokesman Mikhail Kamynin subsequently stated that Vladikavkaz meeting only discussed a reconstruction program for the "conflict zone" with no implication for the South Ossetia status. Annex E.8.34: Vladimir, S. "Moscow hints it may formalize incorporation of South Ossetia" Eurasia Daily Monitor, Vol. 3, Issue 59, (2006), GEO-OTP-0008-0708.

authorities in South Ossetia, in which nearly 100% reportedly supported independence South Ossetia. In parallel, alternative presidential elections were organised in the Georgian controlled areas of South Ossetia newly established movement National Union of Ossetia Dimitri Sanakoev ethnic Ossetian made a pro-minister under the authority South Ossetian administration with a majority of the ballots were 96% of the voters reported by the supported federal arrangement for South Ossetia a Georgian territorial entity. In 2007, Saakashvili signed a decree recognizing territorial administration with Sanakoev as Head of the Administration. Then Georgian Parliament subsequently approved the decree and provided funds to the Administration from Georgia's state budget. The area controlled by the Sanakoev Administration included predominantly ethnic Georgian villages in Kurta, Eredvi and Tighva municipalities.

²⁷ Annex E.4.13: ICG, Make Haste Slowly, GEO-OTP-0001-1276 at 1282.

²⁸ Annex E.2.37: IIFMCG, Volume II, GEO-OTP-0002-7801 at 7824, 7923; E.4.13: ICG, Make Haste Slowly, GEO-OTP-0001-1276 at 1280, 1283.

²⁹ Annex E.7.16: Government of Georgia, "Report by the Government of Georgia on the Aggression by the Russian Federation against Georgia", January 2010, GEO-OTP-0008-1040 at 1304; Annex E.8.36: Civil Georgia, "Sanakoev appointed as Head of S. Ossetia Administration", 10 May 2007, GEO-OTP-0008-0739; E.4.13: ICG, Make Haste Slowly, GEO-OTP-0001-1276 at 1283.

³⁰ Maps of Georgian controlled areas drawn by the Government of Georgia as well as the Joint Peacekeeping Force show that the Georgian villages administered by Sanakoev were principally located in and around three valleys: the Didi Liakhvi valley in Kurta municipality (north of Tskhinvali, including the villages of Kekhvi, Kurta, Zemo Achabeti, Kvemo Achabeti, and Tamarasheni and the surrounding villages of Kemerti, Dzartsemi and Kheti); Patara Liakhvi valley in Eredvi municipality (northeast of Tskhinvali and including the villages Eredvi, Vanati, Beloti, Prisi, Satskheneti, Atriskhevi, Argvitsi, Berula, and Disevi as well as the surrounding village of Ksuisi); and Froni valley in Tighva municipality (west of Tskhinvali and including Avnevi, Nuli, and Tighva). See Annex E.7.9: Government of Georgia, "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)", 10 May 2010, GEO-OTP-0006-0975 at 0982; E.4.13: ICG, Make haste slowly, GEO-OTP-0001-1276 at 1307, 1308; see also Annex E.4.13: HRW, Up in Flames, GEO-OTP-0001-0336 at 0357.

28 On 16 April, President Putin signed a decree on strengthening official ties and relations with Abkhazia and South Ossetia. In the same decree, representative missions of the Russian Ministry of Foreign Affairs opened offices in Sukhumi and Abkhaz. While this decision was widely criticized by the international community, South Ossetia took it as recognition of its independence.³¹

29 In the months leading up to August 2008, both the Georgian and the South Ossetian sides built up their respective areas of control, while armed clashes increased. The security situation further deteriorated in July 2008 when a series of explosions occurred, including one in a local South Ossetian and Georgian military and police base in South Ossetia.³² These incidents triggered sporadic artillery exchanges between each other's villages and on the night of 7-8 July 2008, four Georgian armed forces servicemen were abducted by South Ossetian authorities and released on 8 July. On 8 July, four Russian military aircraft entered Georgian airspace over the zone of Georgian-South Ossetian conflict. On 24 to 28 July 2008, several explosions occurred in the southern environs of the Georgian administered village of Avnevi, close to the Georgian JPKF Battalion.³⁴

³¹ Annex E.2.37: IIFFMCG, Volume II, GEOTTP-0002-7801 at 7837; Annex E.5.1: Report of Human Rights NGOs about the Violations, Committed during the August War of 2008, August Ruins, 2009, GEOTTP-0001-0999 at 1041 (€August Ruins€).

³² Annex E.4.3: AI, €Civilians in the line of fire: The Georgia Russia Conflict€, 18 November 2008, GEO-OTP-0001-0125 at 0133 (€Civilians in the Line of Fire€).

³³ Annex E.2.37: IIFFMCG, Volume II, GEOTTP-0002-7801 at 8010-8011.

³⁴ Annex E.2.37: IIFFMCG, Volume II, GEOTTP-0002-7801 at 8012.

30 Starting in early August 2008, South Ossetian authorities began to evacuate parts of the ethnic Ossetian population from the town of Tskhinvali.

31 During the afternoon of 6 August 2008, there was a significant increase in violence along virtually the entire administrative boundary line between Georgia and South Ossetia. Hotspots in the Avnevi area (west of Tskhinvali) and the Dzhirgata area (east of Tskhinvali) were particularly active. At 19h00 on 6 August 2008, the Georgian peacekeeping contingent at the Avnevi checkpoint came under heavy shelling from South Ossetian positions. Later that day, Georgian representative H. Q. left the JPC. At 19h00 (Tbilisi time), Georgian President Mikheil Saakashvili stated in a televised address that he had ordered Georgian troops to unilaterally suspend military operations. Heavy fire was also observed by South Ossetian forces and South Ossetian troops when the firing ceased.

32 Shortly before midnight, at 23h50 on 7 August 2008, South Ossetian units reportedly began firing at targets in South Ossetia, including the city of Tskhinvali, with a view to the destruction of the armed forces of Georgia. The Georgian armed forces reportedly used heavy weaponry such as 122mm howitzers, multiple launch rocket systems (MLRS), tank Grad multiple launch rocket systems (Grad MLRS) during this attack in the afternoon of 8 August 2008.

³⁵ Annex E.2.37: IIFFMCG, Volume II, GEOT-0002-7801 at 8014.

³⁶ Annex E.2.37: IIFFMCG, Volume II, GEOT-0002-7801 at 8014.

³⁷ Annex E.2.37: IIFFMCG, Volume II, GEOT-0002-7801 at 8014-8015.

³⁸ Annex E.2.37: IIFFMCG, Volume II, GEOT-0002-7801 at 8015.

³⁹ Annex E.4.3: AI, Civilians in the line of fire, GEOT-0001-0125 at 0151; Annex E.4.10: HRW, Up in Flames, GEOT-0001-0336 at 0380-0388. See also Annex E.2.37: IIFFMCG, Volume II, GEOT-0002-7801 at 8145.

the Georgian forces managed to seize control of a great part of Tskhinvali and several Ossetian villages. Georgian forces entering Tskhinvali met with armed confrontation from Russian forces.

33 Russia began its military operations in South Ossetia on 8 August 2008, the exact date being disputed, when its ground forces moved through the Roki tunnel towards Tskhinvali. In August 2008, Russian artillery and air forces attacked Georgian ground forces in Tskhinvali. On the evening of 8 August 2008, Georgian armed forces withdrew from the centre of Tskhinvali, but maintained positions in the southern parts of the city. The following afternoon, Russian armed forces attempted to regain control of their positions in Tskhinvali, but were met with resistance and withdrew.

34 On 10 August 2008, the Government of Georgia declared a ceasefire and its intention to withdraw its forces from South Ossetia. Russian armed forces and South Ossetian forces however refused their military operations. In violation of the Georgian armed forces' request to be withdrawn from South Ossetia by 11 August 2008, Russian troops pursued by Russian troops, who crossed the administrative lines of both South Ossetia and Abkhazia to set up military bases in a number of Georgian administered towns, including Gori,

⁴⁰ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8015-8016.

⁴¹ According to Russia, Russian troops deployed to South Ossetia through the Roki tunnel on 8 August 2008 at 14:30. Georgia claims that Russian troops and armour illegally entered South Ossetia prior to 8 August 2008 and that the build-up of Russian forces in South Ossetia intensified in the night of 6-7 August 2008 and the late evening of 7 August 2008. Georgia states that the Russian ground offensive through the Roki tunnel commenced on 7 August 2008 at 23:35. None of the contradictory claims could be independently verified. See Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8021, 8026-8027 and 8059.

⁴² Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8016.

⁴³ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8017.

Senaki and⁴⁴ During the final phase of the hostilities units supported by Russian forces attacked Georgian upper Kodori Valley and seized territory which had been by most of the local ethnic Georgian population and armed forces.

35 On 12 August 2008, Russian President Dmitry Medvedev and President Nicolas Sarkozy, the latter acting on behalf of the European Union (EU), agreed in Moscow a six-point plan providing, inter alia, for the cessation of hostilities and the withdrawal of Russian forces to their positions prior to the outbreak of the conflict. The plan was approved by Georgian President Mikheil Saakashvili. Saakashvili and Medvedev signed the agreement on 15 and 16 August 2008 respectively. Despite the public confirmation of a ceasefire by President Medvedev, Russian and South Ossetian forces

⁴⁴ Annex E.2.36: IIFFMCG, Volume I, GEO-OTP-0002-7757 at 7778.

⁴⁵ Annex E.2.36: IIFFMCG, Volume I, GEO-OTP-0002-7757 at 7779.

⁴⁶ The six-point plan included: (1) no resort to the use of force; (2) cessation of military actions for good; (3) free access to humanitarian aid; (4) return of Georgian military forces to their places of permanent deployment; (5) return of Russian military forces to their pre-conflict positions; awaiting an international mechanism, Russian peacekeeping forces will undertake additional security measures; and (6) opening of international discussion on the modalities of security and stability in Abkhazia and South Ossetia. Annex E.4.14: ICG, *Russia vs Georgia: The Fallout*, 22 August 2008, GEO-OTP-0001-0953 at 0962; Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8025.

⁴⁷ President Sarkozy signed a French version of the six-point plan and President Medvedev signed a Russian version. President Saakashvili signed a French version of the plan that also bears the signature of President Sarkozy. There is no document that bears both, the signature of President Medvedev and President Saakashvili. There is furthermore a Russian version of the six-point plan that is signed by the fact-leaders of Abkhazia and South Ossetia, Mr Bagapsh and Mr Kokoity. Copies of the different documents, which are all undated, are provided in Annex E.2.38: Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume III, September 2009, GEO-OTP-0002-8247 at 8811, 8812, 8814, and 8815 (Volume III). In a letter signed sent to President Saakashvili on 14 August 2008, President Sarkozy's office President Saakashvili, approval of the six-point plan on 12 August 2008, provides further clarifications as to point 5 of the plan and requests him to sign the plan. See Annex E.2.38: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8813-8814. President Saakashvili finally signed the plan on 15 August 2008.

⁴⁸ Annex E.8.25: Traynor, I., Harding L. and Womack, H. *Georgia and Russia declare ceasefire* The Guardian 16 August 2008, GEO-OTP-0003-1747.

continued their advances for some time after the 1
cease fire agreement.

36 From 15 August 2008 onwards, Russian troops began
from undisputed Georgian territory a 20km wide buffer
zone in the area adjoining the administrative boundary
Ossetia inside Georgian administrative territory. The buffer zone
was established purportedly with the aim of keeping p
Entry and exit of civilians into the zone was regulated
Russian military checkpoints. Georgian security forces
access. While most of Russian troops withdrew from the
positions beyond the administrative boundaries of South
Abkhazia after 22 August 2008, some of them remained
zone and only withdrew when an implementation agreement
reached on 8 September 2008. According to the agreement,
at least 200 EU observers were to be deployed to the zone
while Russian armed forces were supposed to withdraw
adjacent to the administrative boundary lines of Abkhazia
Ossetia by night on 10 October 2008. On 29 October 2008, the
Russian Foreign Ministry officially confirmed the completion
withdrawal of the Russian forces from the zones adjoining
Ossetia and Abkhazia. However, according to Georgia, four

⁴⁹ Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8025.

⁵⁰ See Annex D.2: Map of Military Operations.

⁵¹ Annex E.1: Leach, P., 'South Ossetia (2008)', in Wilmschurst (ed.), *International Law and the Classification for Conflicts* (Oxford University Press, 2012), GEO-OTP-0003-1496 at 1502.

⁵² 'Mise en Ÿuvre du Plan du 12 août 2008', in Annex E.2.38: IIFFMCG, Volume III, GEO-0002-8247 at 88178818.

⁵³ Annex E.2.37: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8025.

checkpoints were still to be closed by 10 October 2008 of withdrawal agreed to in the implementation agreement.

37 On 26 August 2008, upon a motion of the State Duma, President Dimitri Medvedev issued a decree recognizing South Ossetia as a sovereign and independent State. To date, South Ossetia has been recognised by four UN Member States, namely: Russia, Nicaragua, Venezuela, and the Pacific Island

B. Activities of the Office of the Prosecutor

38 The Situation in Georgia has been under preliminary investigation since 14 August 2008. Prosecution has been in regular contact with relevant actors, including the Governments of Georgia and the Russian Federation, in order to gather and verify information on alleged crimes committed and the existence and gravity of relevant national protection concerns. These diligences included formal requests for information pursuant to article 15(2), Statute to conduct field missions, routine contacts with focal points and interaction with relevant organisations and experts.

39 A total of 14 requests for information have been made to the Government of Georgia, four to the Government of the Russian Federation, three to the Organization for Security and Co-operation in Europe (OSCE) and one to the European Court of Human Rights.

⁵⁴ Annex E.7.12: Ministry of Foreign Affairs of Georgia, "Breaches by Russia of the Ceasefire Agreement: Checkpoints", 10 October 2008, GEOP-0008-0710.

⁵⁵ Annex E.8.35: Ria Novosti "Russia recognizes Georgia's breakaway republics", 26 August 2008, GEOTP-0008-0712; Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 8245.

⁵⁶ Annex E.4.15: ICG, The Burden of recognition, GEOTP-0001-1242 at 1254.

⁵⁷ Office of the Prosecutor, [Prosecutor's Statement on Georgia](#), 14 August 2008.

(ECHR) each of which involved multiple lines of inquiry required extensive fieldwork. A number of missions have also been conducted, Tbilisi, Georgia and three Moscow, Russia.

40. In 2011, the Prosecution confirmed that it had determined that it was a reasonable basis to believe crimes within the jurisdiction of the Court had been committed in the context of the Situation in Georgia. Since 2011, the Office of the Prosecutor has also issued public reports on its preliminary examination of the Situation in Georgia as part of its annual update on the status of its preliminary examination.⁵⁹

41. The main focus of the preliminary examination is to determine the existence and genuineness of relevant national proceedings, and as confirmed by the report in response to the requests for information and the missions to both Georgia and the competent national authorities of the States were engaged in conducting investigations against those who appear responsible for the most serious crimes alleged. As detailed below, these investigative measures, despite challenges and delays, appear to be the case with respect to the investigation conducted by the competent authorities of the Russian Federation into the alleged crimes against Russian peacekeepers.

⁵⁸ Office of the Prosecutor, [OTP Report on Preliminary Examination](#), 13 December 2011, para. 97.

⁵⁹ See Office of the Prosecutor, [OTP Reports on Preliminary Examination 2011-2014](#).

42 Following an apparent lull in national proceedings in end 2012 until mid 2014, the Prosecution on 30 April 2014 the national authorities to provide information on the progressive steps that are being taken, or are envisaged domestically to ascertain the responsibility of those involved in the alleged crimes. June 2014, the Prosecution informed the Georgian authorities that short of this would proceed in accordance with the Prosecution's obligations to submit an application to the Trial Chamber of the Court, seeking authorisation to open an investigation in Georgia due to an absence of relevant national proceedings. In a letter dated 17 March 2015, the Government of Georgia requested that national proceedings in relation to the crimes connected with the displacement of Georgians from South Ossetia, which had until recently significantly progressed, be indefinitely suspended. With no further developments, and no other investigations in relation to such conduct undertaken in the United States, the Prosecution assessed that the potential transfer of ethnic Georgians in an application would be admissible, due to the nature of the Situation.⁶⁰

43 Following a completion of its assessment on gravity and of justice, the Prosecution has therefore been able to proceed at this time, in the light of the factors set out in article 15(1) of the Statute, to a reasonable basis to proceed with an investigation.

⁶⁰ As set out in paragraphs 30-32, although national proceedings in Russia continue, in particular in relation to the alleged attack against Russian peacekeepers, they are not related at this stage to the potential case of the forcible transfer of ethnic Georgians by South Ossetian forces identified in this application. Such national proceedings would, nonetheless, need to be kept under observation should an investigation establish other crimes committed in the context of the Situation.

IV. Examination of the information available

44 The Prosecution has evaluated sources following a consistent methodology based on criteria such as relevance (usefulness of the information to determine the elements of a crime), reliability (trustworthiness of the provider of the information as assessed by internal consistency, corroboration, and completeness of the information), the source's knowledge of the facts, and the scope of the source's knowledge of the facts. Furthermore, it has endeavoured to corroborate the information provided with information available from open and other sources. A comprehensive evaluation of the sources used in this Application is provided in Annex U where references to the sources are provided in Annex Ex.

45 In examining the information available, the Prosecution has taken into account the nature of the proceedings under article 15, the applicable law, as well as the object and purpose of the Rome Statute. Moreover, the limited powers of the Prosecution at the preliminary examination stage have constrained the findings set out in this Application. While the Prosecution has been unable to determine whether there is a reasonable basis to believe that the jurisdiction of the Court have been committed in relation to the offences, in particular those relating to the alleged crimes against ethnic Georgians by South Ossetian forces, intentional directing of attacks against peacekeepers and the peacekeeping mission.

⁶¹ ICC-01/09-19-Corr, paras 73-75; Pre-Trial Chamber III, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire", ICC-02/11-14-Corr, 3 October 2011, paras. 25.

information available is insufficient to enable a determination of other crimes ~~as a result of~~ committed by the parties to the conflict.

46 For example, there is information on other crimes alleged including by the Georgian and the Russian armed forces. The completeness of the information is also documented in particular to conduct of hostilities allegations relating to indiscriminate and disproportionate attacks. However, the supporting material provides only limited information in relation to the elements and underlying facts of the alleged crimes, despite the efforts undertaken by the Prosecution to obtain additional information. In some instances, the information available is derived solely from the conflict, is contradicted by information provided by the other party, and the party has been able to provide corroboration or to conduct a determination on the matter. When assessing the information in its possession, the Prosecution has to account for the possible bias and interests from parties to the conflict, and has therefore focused its examination on allegations ~~as a result of~~ committed by the parties.

47 In this regard, the Prosecution observes that, in the context described above, without additional information or evidence gathered during the course of investigations, it is unclear at this stage why it would rely on one version of accounts from one party and another version from another party, each party's interests promoting a particular narrative.

48. Indeed, other international and domestic bodies have, for similar reasons, been unable to come to a determination on a number of occasions. Notwithstanding the low threshold that is applicable at the Prosecution nor the Chamber on information that is credible or reliable. This is clear from the statutory provisions determining whether the information available establishes a basis to believe that one or more crimes within the jurisdiction have been committed. Similarly, the Prosecutor, and the Chamber, must analyse and evaluate the seriousness of the information available. To do otherwise would require the Court to accept an allegation made by any source at face value.

49. The Prosecution recalls that, in line with the case law of the Court, the information available at such an early stage of the proceedings must not necessarily be comprehensive or conclusive towards only one conclusion. Nonetheless, a distinction should be drawn between conflicting information allowing two different interpretations (which is resolved in favour of an interpretation of the information that, considered in context, does not in any way support a particular interpretation as being reasonable at all, due to its lack of credibility). Accordingly, where the information available

⁶² See for instance paragraphs 171 and 205 below.

⁶³ See article 15(2) (‘The Prosecution shall analyse the seriousness of the information received’), as well as article 15(4), and use of comparable terms in rule 104 (in relation to referrals). For this purpose, the Prosecution submits that it does not have to make a positive determination that information available is ‘manifestly false’ for it not to be accepted for the purpose of a preliminary examination, but whether the Prosecution may reasonably rely on a given piece of information; see *contrario* ICC-01/13-34, para. 35.

⁶⁴ ICC-01/09-19-Corr, paras. 2735; ICC-02/11-14, para. 24; ICC-01/05-01/09 OA, para. 33 regarding the interpretation of reasonable belief under article 15(2). Finding that the Prosecution does not need to prove that the conclusion reached on the facts is the only possible or reasonable one, nor does it need to disprove any other reasonable conclusion. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available.

⁶⁵ ICC-01/09-19-Corr, para. 34.

scant as to prevent a reasonable interpretation, the Chamber refrained from entering a determination on those alleged acts. Since this has no bearing on the overall conclusion that entry into the situation is warranted, a determination on the merits may, in any event, be possible in the context of an investigation. Additional information and evidence can be gathered.

50 The crimes identified in the application as meeting the reasonable suspicion standard should therefore be considered as examples of criminality within the situation in the light of the threshold requirement of determining whether one or more crimes within the jurisdiction of the Court have been committed. Once the threshold has been met, the Chamber should authorise an investigation into the cases as a whole, and not just the specific cases brought forward, to substantiate that the evidence otherwise would determine the direction and scope of future investigation based on the information available at the preliminary examination stage. The Chamber should convert the facts provisionally identified as meeting this threshold into binding parameters to regulate the specific future investigative inquiries.

51 Should an investigation be authorised, the Prosecutor should be permitted to expand on the investigation with respect to the other alleged acts, incidents, groups or persons and/or legal qualifications, so long as the cases brought forward are sufficiently linked to the authorised situation.

⁶⁶ ICC-01/09-19-Corr, paras. 1415; ICC-02/11-15, para. 32.

⁶⁷ ICC-01/09-19-Corr, paras. 7475.

⁶⁸ ICC-01/09-19-Corr, paras. 7475; ICC-01/04-01/10-451, paras 21, 27.

V. Jurisdiction

52 Pursuant to Regulation 49 of the Regulations of the Court, the Prosecution provides the following information setting out the crimes believed to have been committed and the facts being alleged to provide the basis for the belief that the crimes have been committed, and a declaration with respect to whether the listed crimes fall within the jurisdiction of the Court. The information is provided in confidential (law enforcement and judicial) sources and individuals).

A. Alleged crimes within the jurisdiction of the Court

53 On the basis of the available information, and without identifying other possible crimes within the jurisdiction of the Court that may be identified during the course of an investigation, the Prosecution declares that there is a reasonable basis to believe that in the context of the situation, including but not limited to the time period from August 2008 to 10 October 2008, the following crimes have been committed: (a) killing or maiming of civilians (article 8(2)(b)(i)); (b) destroying the enemy's property of an adversary (article 8(2)(b)(ii)); (c) pillage (article 8(2)(e)); (d) intentionally directing attacks against objects involved in a peacekeeping mission (article 8(2)(b)(iii)); (e) crimes against humanity and murder (article 7(1)(a)) or forcible transfer of population (article 7(1)(b)) or persecution against an identifiable group or collectivity on ethnic grounds (article 7(1)(c)) or crimes against humanity.

1. Places of alleged commission of the crimes

54 The above crimes are alleged to have been committed on the territory of South Ossetia. Despite the South Ossetian declaration of independence in May 1992 and its subsequent recognition by a number of UN Member States in 2008 onwards, South Ossetia is generally not considered an independent State and is not a Member State of the United Nations. A number of resolutions adopted by the General Assembly (UNGA) since 2009 refer to South Ossetia as a region of Georgia. For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time alleged crimes were committed and occupied by Russia until 2008. As a result, the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed conflict period, regardless of the nationality of the accused.

55 The main areas where the alleged crimes occurred include: (i) ethnic Georgian villages in the municipalities of Kura and Tskhinvali in the north of South Ossetia; (ii) ethnic Georgian villages in the municipalities of Ergashvili and Tighva in the east of South Ossetia; and (iii) ethnic Georgian villages in the municipalities of Grouni and Tighva in the east of South Ossetia. These areas were under Georgian administrative control at the time of the alleged crimes.

⁶⁹ The UN General Assembly passed different Resolutions on the status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali/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 (sometimes only referred to as "South Ossetia", emphasis added). See UNGA Resolutions A/RES/63/307 (30 September 2009), A/RES/64/296 (13 October 2010), A/RES/65/287 (25 August 2011), A/RES/66/283 (12 July 2012), A/RES/67/268 (23 August 2013), A/RES/68/274 (10 June 2014), A/RES/69/286 (25 June 2015).

armed conflict map locating the incidents is provided in Annex A.2

56. In relation to the unlawful attacks against the Georgian peacekeeping contingent as a whole, the attack point came under heavy shelling from South Ossetian Georgian armed forces at a later date and an attack against the Russian peacekeepers and personnel in the UN PKHQ based in Nizhniy Gorodok in the central part of the SRNPKFB headquarters located in Verkhniy Gorodok in the south of Tskhinvali.

2. Time period of alleged commission of the crimes

57. The above allegations in the Court's jurisdiction 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 11 of the Statute. In this regard, the Prosecution has requested to open the situation from 1 July 2008 so that it may be able to investigate precursor events that immediately preceded the commencement of hostilities and which led to the violence. This will enable it to determine, in the course of its investigation, whether a sufficient nexus exists between the required contextual elements for war crimes or crimes against humanity. The end date requested is 31 October 2008, the date by which, at the latest, Russian armed

reported to have withdrawn behind the administrative boundary of South Ossetia.

58. The first wave of ethnic Georgian population displacement occurred during the active phase of hostilities on the territory of South Ossetia across the administrative boundary with the rest of Georgia from 7 until 12 August⁷⁰. A second wave of forcible displacement occurred after the end of active hostilities on 12 August 2008 until 10 October 2008 during the period of Russian occupation of Georgian territory that lay beyond the administrative boundary of South Ossetia.
59. According to the IFFMCG, a certain number of both ethnic Georgians and Ossetians left South Ossetia prior to 7 August as part of the evacuation initiated by the Ossetian authorities, most of ethnic Georgians remained in their villages when the armed conflict started.
60. On 8 August 2008, the Russian armed forces started bombardments followed by a joint ground offensive by Russian and South Ossetian forces forcing Georgian military to withdraw from their positions in South Ossetia. Ethnic Georgians who remained in South Ossetia after the bombings started were displaced from their homes violently or under a threat of violence during an offensive by South Ossetian forces.

⁷⁰ Annex E.2.39: OSCE Office for Democratic Institutions and Human Rights, "Human Rights in the War-Affected Areas Following the Conflict in Georgia", 27 November 2008, GEO-OTP-0003-1921 at 1953 (OSCE-HRAM Report).

⁷¹ Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8189.

⁷² Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8191.

61. South Ossetian forces reportedly continued to pillage and attack ethnic Georgians in South Ossetia after the active hostilities ended on 12 August 2008. This campaign of intimidating the population aimed to forcibly expel the remaining ethnic Georgians or to prevent them from returning to their homes in South Ossetia. When the Russian armed forces officially withdrew behind the boundary between South Ossetia and Georgia

62. The alleged attacks against both Georgian and Russian civilians were carried out in August 2008.

3. Persons or groups involved

63. 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 Eduard Kokoity. These forces appear to included military units under the South Ossetian Ministry of Defence and Emergencies, well as the Special Purpose Police Squadron (Munitsii Osobogo Naznacheniya) and other police components of the Ministry of Internal Affairs, and soldiers of the

⁷³ Annex E.3.16: GEO-OTP-0005-0937 at 0942; GEO-OTP-0005-0953 at 0959; GEO-OTP-0005-0950 at 0954-0952; GEO-OTP-0005-1003 at 1004-1005; GEO-OTP-0005-1017 at 1024-1022.

⁷⁴ The powers of the President of the Republic are enshrined in the South Ossetian Constitution. According to Article 50 of the constitution, the President of the Republic is the exclusive holder of the executive power. He nominates and ends the function of the Prime Minister as well as the other members of the government. According to section 33 of the article 50, the President is the supreme chief of the army who presides the Security Council and nominates persons at high military command posts. See Annex E.8.40: Constitution of South Ossetia, 8 April 2001, GEO-OTP-0010-0016.

Ossetian Federal Committee of State Security (KGB) (Komitet Gosudarstvennoy Bezopasnosti)

64. The South Ossetian appear to have supported by irregular militia (popularly known as "Russian" or "Georgian"). Militia groups were given names based on their locations of responsibility. For example, the "Kokhatelebi" militia group operated in the area of Kokhati while Dmenis was responsible for the village of Dmeni.

65. As set out below, information available indicates that some members of the Russian armed forces participated in such crimes, while other members of the Russian armed forces stood passively in the face of such crimes, and still others sought to prevent and punish such crimes.

66. The information available also indicates that the South Ossetian militia were involved in carrying out an attack against UN peacekeepers.

67. The information available indicates that the Georgian armed forces consisted of five rifle brigades (including the 1st Infantry Brigade HQ Gori, and the Independent Tank Brigade HQ Gori), up to 10 artillery battalions (including Artillery Regiment HQ Gori), and special forces units.

⁷⁵ Annex E.4.10 HRW, Up in Flames, GEO-OTP-0001-0336 at 0469.

⁷⁶ Annex E.4.10 HRW, Up in Flames, GEO-OTP-0001-0336 at 0469.

⁷⁷ Meeting with Georgian authorities on 22 January 2015 in Tbilisi, Georgia reports that the majority of these groups answered, if only loosely, to a South Ossetian chain of command, which in turn operated in cooperation with the Russian army. Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 0164.

the Ministry of Interior⁷⁸ Reportedly, Central Front Command resorted to the Separate Light Infantry Battalion, the Tank the Separate Armoured Battalion, the Independent Battalion, and 12 Artillery Brigade reported they special forces of the Ministry of Defence in an attack against Russian peacekeepers.

B. Legal characterisation and reasons that the listed crimes are within the jurisdiction of the Court

68. As set out below, the information available provides a reasonable basis to believe that crimes against humanity have been committed in the context of the

1. War Crimes

69. An armed conflict existed on the territory of Georgia from August 2008 until at least 2010. The classification of the armed conflict will require careful analysis of the evidence in the context of any investigation in order to establish whether, despite the short period of direct military confrontation between the Georgian and Russian armed forces from August through 12 August 2008, other crimes occurred in this Application should be governed by the international or non-international armed conflict.

⁷⁸ Annex E.2.37: IFFMCG, Volume II, GE00TP-0002-7801 at 8020.

⁷⁹ Annex E.2.38: IFFMCG, Volume III, GE00TP-0002-8247 at 8303; Meeting with the Russian authorities on 2 February 2011 in Moscow, Russian Federation.

70. As set out below, there is information indicating that from at least 7 August through to 10 October 2008 should be attributed to Russia by the international law applicable in an armed conflict, as a result of Russia's overall control of South Ossetia.

71. In particular, with respect to the time period preceding Russian military intervention in Georgia in 2008, the evidence suggests that the Russian authorities were already involved in organising, planning and coordinating South Ossetian forces with sufficient level of control to render the armed conflict attributable to Georgia and the South Ossetian authorities in that it is a provisional finding should be distinguished from the effective control for the purpose of attributing individual liability. For example, information available does not, at least, suggest that there was no involvement by the Russian authorities in specific military operations of the South Ossetian forces at that time. These hypotheses will need to be tested in the course of an authorised investigation.

72. In relation to the period after 12 August until at least 10 October 2008, Russian forces continued to occupy portions of Georgian territory inside South Ossetia and outside of it in a buffer zone beyond the administrative boundary of South Ossetia. In particular, the alleged crimes occurred in areas previously under Georgian control. The law applicable to the conduct of the South Ossetian forces as an organised armed group in the context of a military conflict is determined by the relationship between the organised armed

and the occupying power and/or the nexus of that armed conflict set out below, the information available that Russia continued to exercise overall control over forces during this period, rendering the framework applicable to South Ossetia a matter of international armed conflict.

73. Alternatively, it cannot be established that Russian authorities exercised overall control over South Ossetia in the relevant time period, it would be more appropriate to adopt a fragmented approach to the classification of the armed conflict. This would suggest that international armed conflict took place between Georgian armed forces and South Ossetia during the period from 7 through 12 August 2008, while a separate armed conflict existed between Georgian and Russian armed forces in the period from 8 August through 1 October 2008. During the occupation period after 12 October 2008, alleged crimes attributed to South Ossetian forces are not related by the law applicable to international armed conflict. The link between such conduct and the occupation exercised by Russian armed forces in portions of Georgia during this time period

74. In relation to jurisdiction over war crimes during the time period described above is a reasonable basis to believe that South Ossetian forces committed war crimes, such as the destruction of property/the property of an adversary (article 8(2)(b)(i) and 8(2)(e)(i)) and pillage (article 8(2)(b)(ii) and 8(2)(e)(ii)) is also a reasonable basis to believe that South Ossetian and

Georgian armed forces committed the war crime
 personnel or objects involved in a peacekeeping m
 8(2)(b)(iii) or article 8(2)(c)(iii) took place in the c
 of a ~~war~~ associated with the armed conflict.

(a) Contextual elements of war crimes

75. The application of article 8 requires the existence
 conflict. An armed conflict exists whenever there is a re
 force between States or protracted armed ~~between~~
 government authorities ~~and~~ armed groups or between s
 groups within a State.

76. A non-international armed conflict is characterised by
 armed hostilities to a certain level of intensity, ex
 internal disturbances and tensions, such as riots, isolate
 acts of violence or other acts of a similar nature, and
 within the confines of a State territory. The hostilitie
 between government authorities ~~and~~ armed
 groups ~~between~~ such groups.

77. In order to distinguish an armed conflict from less s
 violence, such as internal disturbances and tensions
 banditry, the armed confrontation must ~~reach~~ a min

⁸⁰ See Elements of Crimes, second last element of crime under article 8.

⁸¹ ICC-01/04-01/06-2842, para. 533, ICC-01/04-01/06-2842 recalling International Criminal
 Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Tadić, IT-94-1-AR72, Decision on the
 Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. See also-ICC
 01/05-01/08-424, para. 229.

⁸² Lubanga Judgment pursuant to Article 74, para. 533. See Bemba Confirmation of Charges
 Decision para. 231; Côte D'Ivoire Article 15 Decision, para. 119.

intensity and the parties involved in the conflict must be of a minimum degree of organisation.

78. Direct intervention by a State's governmental forces, or intervention by a State operating through State proxies, may internationalise an otherwise non-international armed conflict as long as sovereign nation States are opposed to each other. Indirect intervention, which does not result in two sovereign States opposing each other, will not internationalise a conflict.

79. As regards the necessary degree of control of another State's forces necessary to establish whether an armed conflict has an international character, the Lubanga case concluded that the control test is the correct approach. A State may exercise the required degree of control if it has a role in organising, coordinating or planning the operations of the military group, in addition to financing, training or providing operational support to that group.

⁸³ The Pre-Trial Chamber in the Bemba case raised an issue of difference in wording of article 8(2)(f) of the Statute, which requires the existence of a protracted armed conflict, and thus may be seen to require a higher or additional threshold to be met, which is not set out in article 8(2)(d) of the Statute. The duration of any relevant confrontation is to be considered when assessing whether there was a protracted armed conflict. Lubanga Confirmation of Charges Decision, para. 235. See also the DRC v. Katanga Decision, para. 121 (indicating that the duration of any relevant confrontation is to be considered when assessing whether there is a protracted armed conflict).

⁸⁴ See Situation in the Democratic Republic of Congo, Prosecutor v. Gbemwe, Judgment, 10 October 2014, paras. 183, 185-187 (Katanga Judgment, 10 October 2014, paras. 183, 185-187); Lubanga Judgment pursuant to Article 74, paras. 534-538.

⁸⁵ See ICC-01/04-01/06-2842, para. 541 and ICC-01/04-01/07-3436, para. 1177, both citing ICC-01/04-01/06-803-tEN, para. 209.

⁸⁶ ICC-01/04-01/06-2842, para. 541, recalling Prosecutor v. Tadić, IT-94-1-A, Judgment, 15 July 1999, para. 137.

80. In its judgment, Trial Chamber I also endorsed the view of the Appeals Chamber that, depending on the particular circumstances, conflicts taking place on a single territory at the same time may have a different nature, meaning that international and non-international conflicts may exist.

81. As noted above, in mind of the early stage of the proceedings, the facts available to the Trial Chamber as to the classification of the armed conflict will need to be tested in the context of any authorised investigation of all relevant time periods. The international law applicable in situations of international conflict is applicable to that a fragmented approach is warranted due to the existence of an international and non-international armed conflict. In either approach, there is a reasonable basis to believe that war crimes within the jurisdiction of the Court have been committed.

82. For this purpose, the relevant time period for the application of article 8 can be divided into three phases: (i) from 7 and 8 August 2008, concerning the exchange of hostilities between the armed forces of Georgia and South Ossetia/Russia; (ii) from 8 August 2008 until 12 August 2008, concerning the exchange of hostilities between the armed forces of Georgia and Russia; and (iii) from 12 August 2008 until 12 October 2008, during which Russian armed forces occupied portions of Georgian territory beyond the administrative boundary line of South Ossetia. As stated above, the Prosecution has not sought authorisation to investigate the situation from 1 July 2008 to 7 August 2008.

⁸⁷ ICC-01/04/01/06-2842, para. 540, recalling Prosecutor v. Tadić, IT-94-1-A, Judgement, 15 July 1999, paras. 727, 84.

maybe in a position to investigate or events that immediately preceded the formal commencement and which led to the escalation of violence, subject they enjoy a sufficient nexus with the contextual crimes.

83. During this period depending on the classification of the conflict, there is a reasonable basis to believe that S forces committed crimes of wilful homicide (article 8(2)(a)(i) article 8(2)(c) (i) destroying the enemy's property by an adverse article 8(2)(d) (ii) article 8(2)(e)(xii) pillage (article 8(2)(b)(iv) article 8(2)(e)(v) intentional directing an attack against personnel and objects in a peacekeeping mission (article 8(2)(b)(iii) These crimes took place in the context of and were associated with the conflict.

84. While it is clear that an international armed conflict existed between Georgia and Russia at least after the day of 8-12 August 2008, the subsections below examine the period immediately prior to Russian military intervention on the territory of Georgia during which the Russian armed forces extended their occupation of Georgia beyond the administrative boundary line of South Ossetia, subsequent to the cessation of hostilities.

i. The period of Russian direct intervention

85. The exchange of hostilities between the Georgian armed forces and South Ossetia forces between 7 and 8 August 2008, and the direct involvement as a party to the armed conflict, must be determined as either an international or non-international armed conflict depending on whether Russia exercised overall control over the territory of South Ossetia at the relevant time. As this matter is a factual one, the fact that can only be made in the course of investigations and determinations below are provisions that have been derived in

86. The Prosecution recalls that, in accordance with Article 8 of the Rome Statute, an internal armed conflict, which is otherwise internal, is internationalised if a foreign state exercises overall control over the military of one of the parties to that conflict.

87. Under this criterion, overall control by a foreign state is required, not more than the mere provision of financial assistance, arms, or equipment or training. This requirement, however, does not have to include the issuing of specific orders by the state to the armed forces of each individual perpetrator to be considered to be met.

⁸⁸ ICC-01/04/01/06, para.541. See Prosecutor v. Tadić, IT-94-1-A, Judgement, 15 July 1999, para.84: "It is undisputed that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State." The Tadić approach has been largely echoed in subsequent jurisprudence of the ICTY. See, for instance, Prosecutor v. Delalić et al., IT-96-21-A, Judgement, 20 February 2001, para.26: "The overall control, test set forth in the Tadić Appeal Judgement is . . . the applicable criteria for determining the existence of an international armed conflict."

⁸⁹ Prosecutor v. Aleksovski, IT 95 14/1-A, Judgement, 24 March 2000, paras.1446.

⁹⁰ Prosecutor v. Gotovina, IT-06-90-T, Judgement, 14 April 2011, paras.1675-1676: "Therefore, application of overall control test does not imply that the foreign state is directing everything done by the group."

State (&) has a role in organising, coordinating or military actions of the military group, and training and equipping or providing operational support to that

88. In *Tadić*, the Appeals Chamber held that the Army of the Republic of Yugoslavia (FRY/VJ) had exercised overall control over the Bosnian Serb forces (VRS) on the basis of their former participation in the general direction, coordination and supervision of the activities and operations of the VRS. The judges emphasised the existence of a command relationship between the FRY/VJ and the VRS, encompassing the first, planned leadership, structures and discipline, as well as the same sources of payment of officers and commanders.⁹²

89. The overall control test serves a distinct purpose from the test developed by international courts for the purpose of determining State control over another entity, and is subject to a different standard than the effective control test applied here solely for the purpose of assisting the classification of the armed conflict without prejudice to any attribution of individual criminal

⁹¹ ICC-01/04-01/06, para.541, citing *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 para.137.

⁹² *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 para.146.

⁹³ Assistance to non-State forces, including financing, organising, training, supplying and equipping them, is not sufficient for the attribution of responsibility for acts committed by such forces, unless there is effective control exercised by the assisting State. Thus, in the *Nicaragua* case, the International Court of Justice (ICJ) took the view that the extent of United States involvement in the armed conflict in Nicaragua – even if preponderant in the financing, organising, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation – was per se not sufficient to for the attribution of the acts of the forces to the US, as it was not proved that the latter had effective control of the military or paramilitary operations in the course of which the alleged atrocities were committed; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) Judgement 27 June 1986, I.C.J. Reports 1986, para.115.

90. The information available indicates that at the beginning of the armed conflict, Russia had a role in organising, coordinating and planning the military actions of South Ossetia, in addition to providing them with, at a minimum, training and operational support.

91. In particular, information relating to the temporal scope of the situation, including during the conflict, suggests that the Russian Federation had increasing control over the South Ossetian de facto authorities over time.

92. Russia has long exercised extensive foreign influence over South Ossetia, which involved a gradually increasing degree of Russian State organs over South Ossetian institutions and decision-making processes. The IFFMCG defined Russia's indirect influence in the lead-up to the 2008 conflict as being so deep and exercised on systematic and permanent South Ossetia that the leadership was not effective on its own.

⁹⁴ In accordance with well-settled case law, the "overall control" test calls for an assessment of all the elements of control taken as a whole. See *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, paras.134, 145. It requires in particular a nuanced analysis of the reality of the relationship of the belligerents irrespective of their ostensible structures and overt declarations. See *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para.154.

⁹⁵ Relevant facts and circumstances occurring after the conflict may provide retrospective information on the nature of the relationship between the concerned parties, i.e. foreign State and non-State group, during the hostilities. See, for example, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 157: "An ex post facto confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995 (")."

⁹⁶ See above, Background, paragraphs 220. See also Annex E.2.36: IFFMCG, Volume I, GEO-OTP-0002-7757 at 7786: "This (") process, more visible after 1999 and accelerated in the spring of 2008, appeared stronger than the first"; Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7941: "De facto control of South Ossetia was gradually built up by Moscow. Russian representatives were not present within the South Ossetian leadership before summer 2004. Thus the process of State building was not gradually stabilised after South Ossetia's declaration of independence in 1992, but suffered setbacks after 2004."

⁹⁷ Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7941.

93. This level of control involved the organisational links between the Russian armed forces and South Ossetian forces and before the outbreak of the 2008 armed conflict, the Ossetian factitious, security and intelligence apparatus composed of Russian representatives or ethnic Ossetian nationality who previously served in similar posts in the information available indicates that some of these individuals and/or were appointed to key posts in the Russian administration after the conflict.

94. During the actual exchange of hostilities, the key offices of the Interior Minister of Defence and Emergencies, Chairman of the State Security Committee, and Secretary of the Security Council were all held by former senior officials of the Russian army respectively: Mikhail Mindzaev, former Colonel of the Russian Police and Deputy Head of Russian Ministry of North

⁹⁸ Annex E.2.37: IFFMCG, Volume II, GEOTP-0002-7801 at 7940.

⁹⁹ During the actual exchange of hostilities, the key offices of South Ossetian Minister of Interior, Minister of Defence and Emergencies, Chairman of the Committee for State Security, and Secretary of the Security Council were all held by former senior officials of the Russian army. For instance, V. Lunev, Minister of Defence and Emergencies of South Ossetia from March to October 2008, is understood to have resumed the post of military commissioner for the Russian region of Perm that he had held prior to the conflict. See Annex E.8.6: Kommersant, "Former defender of Tskhinvali led military commission of Perm Krai" [Russian], 1 April 2009, GEOTP-0003-1429 at 1429; Annex E.8.12: RSOnews, "Military Commissioner of Perm Krai Vasily Lufin former Defense Minister of South Ossetia to be promoted soon" [Russian], 1 June 2011, GEOTP-0003-1456 at 1456.

¹⁰⁰ Mikhail Mindzaev was born on 28 September 1955 in North Ossetia, Russian Federation, Annex E.8.32: Ossetian Radio and Television, "Mikhail Mindzaev Hero of Russia" [Russian], 27 July 2010, GEOTP-0008-0665. Mindzaev served as South Ossetian Minister of Interior between 26 April 2005 to 11 August 2008. See Annex E.8.29: BBC News, "Mikhail Mindzaev appointed new Minister of Interior of South Ossetia" [Russian], 26 April 2005, GEOTP-0003-1770 at 1770.

¹⁰¹ Annex E.3.2: ECHR, Georgia v. Russia (n. II) Appl. no. 38263/08, Government of Georgia, Annex 43, 6 February 2009, GEOTP-0002-0330 at 0332; see also Annex E.2.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8329.

Ossetia, Vasily Vasilevich, former Deputy Commander of the military region of South Ossetia, military commissioner for [Russian] province of Pskov, previously employed at the Russian Federal Security Service (FSB, former KGB) in Chechnya, Balkaria, Moscow and Afghanistan, and Colonel of the Russian Army who served in the Siberian military region and in the Chechnya-Ingushetia region of mid

95. Thus Russia's de facto control extended to the different bodies wielding authority over South Ossetia, called High Command of the RSO [Republic of South Ossetia]. In his capacity as Minister of Defense Vasily Lunev had full operational command over South Ossetia's armed forces.

¹⁰² Annex E.8.9: Lenta, «Mikhail Mindzaev [former Deputy Commander of the military region of South Ossetia], 4 March 2015, GEGOTP-0003-1442.

¹⁰³ Annex E.7.30: Government of the Russian Federation, Submission of 28 Volumes of Affidavit, 24 April 2009, Affidavit of V. Lunev- Volume 17, GEGOTP-00073658.

¹⁰⁴ Annex E.8.6: Kommersant, «The former defender of Tskhinvali headed the military post in the Perm region», 1 April 2009, GEGOTP-0003-1429 at 1429.

¹⁰⁵ Annex E.8.6: Kommersant, «The former defender of Tskhinvali headed the military post in the Perm region», 1 April 2009, GEGOTP-0003-1429 at 1429; Annex E.8.12: RSONews, «Military head of the Perm region, General Vasily Lunev, former Defense Minister of South Ossetia will be promoted soon», 1 June 2011, GEGOTP-0003-1456 at 1456. Prior to that, Lunev had served as first deputy head of army in Russian Siberian military region.

¹⁰⁶ Boris Atoev served as a Chairman of the Committee for State Security (KGB) of South Ossetia from 11 December 2006 to April 2014. See Annex E.8.16: Kavkaz Uzel, «Replaced the Responsible of State Security in South Ossetia», 11 December 2006, GEGOTP-0003-1478 at 1480; Annex E.8.17: IA Res, «Boris Atoev, KGB of South Ossetia of the Intelligence Agency that really achieves its mission», 13 June 2014, GEGOTP-0003-1492.

¹⁰⁷ Annex E.8.11: Politkom.ru, Eduard Kokoity, Commander and President of South Ossetia, 20 August 2008, GEGOTP-0003-1449 at 1453.

¹⁰⁸ Annex E.8.48: Kommersant, «There is place for this President in South Ossetia», 4 December 2008, GEGOTP-0002-9496 at 9496; Annex E.3.2: ECHR, Georgia v. Russia (n. 1), Application of the Government of Georgia, GEGOTP-0002-0330 at 0332; Annex E.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8329.

¹⁰⁹ South Ossetia authorities submitted to the IFFMCG that the units engaged in the hostilities responded to the High Command of the RSO [Republic of South Ossetia] Armed forces. See Annex E.2.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8750.

engaged in the hostilities, including deployment of them to the combat zone. Besides the military chain of command, the decision-making authority was vested in the South Ossetian Security Council headed by Anatoly Barankevich. Barankevich and other officers resumed their services as ranking officials within the Russian administration after

96. The information available also indicates the existence and/or coordination of military operations and activities and South Ossetian authorities. For example, prior to commencement of the 2008 armed conflict, in July 2008 armed forces helped to coordinate South Ossetian military operations after four Russian military jets entered Georgian airspace to prevent an alleged attempt by the Georgian authorities

¹¹⁰ Following the firing, by order of the President of South Ossetia I was directed to report to the command post, located under the building of the Parliament of South Ossetia. I arrived at the command post about 23 hours and 50 minutes. My responsibilities under the circumstances of the fact included the coordination of armed forces of South Ossetia. Thereafter, upon my orders all units were deployed to the combat areas. Reports from the divisions to hold the area to operational duty at the command post, the chief of staff and me. Upon assessment of the situation, I shall take adequate measures to repel the Georgian aggression (unofficial translation provided by OTP). See Annex E.7.30: Affidavit of V. Lunev, GEO-OTP-0007-3658 at 3661. In this respect, the IFFMCG concluded that "the regular armed forces of the South Ossetian authorities unquestionably constitute an organised and hierarchically structured group", Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8107.

¹¹¹ Annex E.3.9: ECHR, *Storimans Verhulst, Akkermans and Yecheskeli v. Russia*, Appl. no. 26302/10, 30 August 2010, GEO-OTP-0002-3454 at 3468; Annex E.8.48: Kommersant, "There is no place for this President in South Ossetia" [«ШОСЕТИИ НЕТ ПРЕЗИДЕНТА», 4 December 2008, GEO-OTP-0002-9496.

¹¹² Annex E.8.6: Kommersant, Perm Former defender of Tskhinvali led military commission of Perm Krai, [«Бывший защитник Тсхинвальского района возглавил военную комиссию Пермского края», 1 April 2009, GEO-OTP-0003-1429 at 1429; Annex E.8.12: RSONews, Military Commissioner of Perm Krai Vasily Lunev former Defense Minister of South Ossetia to be promoted soon [«Василий Лунев, бывший министр обороны Южной Осетии, будет повышен», 1 June 2011, GEO-OTP-0003-1456 at 1456.

¹¹³ Annex E.8.48: Kommersant, "There is no place for this President in South Ossetia" [«ШОСЕТИИ НЕТ ПРЕЗИДЕНТА», 4 December 2008, GEO-OTP-0002-9496 at 9496; Annex E.8.15: Kavkaz Uzel, "Barankevich Anatoly Konstantinovich" [«Баранкевич Анатолий Константинович», 21 December 2009, GEO-OTP-0003-1464 at 1466.

Georgian servicemen who were detained by the South Ossetian authorities.

97. Throughout the conflict and its aftermath, Russian forces were present with South Ossetian forces in different conflict zones in the villages of Kekhvi, Kurta, Achabeti, Tamarasheni, Avnevi, and Nul. The available evidence indicates numerous instances, mostly occurring between August and October 2008, demonstrating military coordination or operational cooperation between Russian armed forces and South Ossetian forces, in the context of the attacks reportedly perpetrated against villages inhabited by ethnic Georgians. Russian armed forces appear to have provided operational and logistical support to South Ossetian forces, including by means of aerial reconnaissance, advance of South Ossetian military operations, as well as transportation.

98. Nonetheless, the information available does not indicate that Russian forces were involved on a tactical and operational basis in the attacks.

¹¹⁴ Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 8011.

¹¹⁵ See Annex D.2: Map of Military Operations.

¹¹⁶ Information on selected incidents is primarily based on the accounts of victims and witnesses of the alleged abuses submitted to the ECHR as part of individual applications as well as collected by fact-finding missions dispatched to the conflict region, such as HRW, AI, and OSCE/ODHR. For example, on 9 and 10 August 2008, it is alleged that Russian and Ossetian looters entered together the village of Zemo Koshka, in the Java district, moving in groups of 15, stealing from a number of houses before setting them on fire; Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336 at 0463. Similarly, on 9 August 2008, it is alleged that Russian forces moved into Zemo Achabeti village, a settlement in the Tskhinvali district of South Ossetia, and were followed the next day by Ossetia militia, who acted under the cover of Russian soldiers with tanks who remained in the village; Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336 at 0474. It is further alleged that on 17 August, Russian troops accompanied Ossetian fighters setting on fire the village of Nuli, in the Gori municipality; Annex E.2.39: OSCE/ODHR Report, GEOTP-0003-1921 at 1965. It is also alleged that Ossetian fighters attacked the village of Disevi following Russian aerial bombardment, and proceeded to loot and burn houses, while Russian soldiers held their positions and observed; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0168.

¹¹⁷ Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336 at 0504.

planning and/or the conduct of the specific military operations. South Ossetian forces were actively involved in the attacks, it appears that in certain locations, including where alleged crimes occurred, Russian coordination was high, while in other locations Russian forces acted passively in the face of crimes. In other locations they acted positively to prevent and punish the commission of crimes.

99. Several sources indicate that the Russian Federation supplied South Ossetian weapons, such as missiles and other military equipment, to South Ossetia from Russia, on various occasions, including during the armed conflict. IFFMCG reported that Russian troops were supplying South Ossetia with military equipment, in particular through the Eredvi checkpoint, a road controlled by the Russian administration. IFFMCG referred to an influx of irregular forces from the territory of the Russian Federation to South Ossetia in early August 2008 as well as the presence of Russian armed forces in South Ossetia, apart from the Russian peacekeeping battalion, prior to 10:00 on 8 August 2008.¹¹⁸

100. The IFFMCG concluded that Russia supported South Ossetia in numerous ways, including by training, arming¹¹⁹ and equipping. According to the IFFMCG, the training of South Ossetian forces

¹¹⁸ Annex E.4.10: HRW, *Up in Flames*, GEOT-0001-0336, at 0428-0429; Annex E.4.3: AI, *Civilians in the line of fire*, GEOT-0001-0125 at 0164.

¹¹⁹ E.8.27: Kommersant, *I am not going to hide that Russia has armed it well here* [“Я не скрываю, что Россия хорошо вооружила ее”, 26 September 2005, GEOT-0003-1751 at 1752; Annex E.1: Yury E. Federov, *The Sleep of Reason: The War on Georgia & Russia*, Foreign Policy, Association of International Affairs Research Paper 2008, GEOT-0008-0795 at 0798; Annex E.8.23: Regnum, *Ministry of Foreign Affairs of Georgia officially accused Russia of supplying with arms of separatists*, 22 September 2005, GEOT-0003-1738 at 1738-1739.

¹²⁰ Annex E.4.3: AI, *Civilians in the line of fire*, GEOT-0001-0125 at 0168.

¹²¹ Annex E.2.37: IFFMCG, Volume II, GEOT-0002-7801 at 8027.

¹²² Annex E.2.37: IFFMCG, Volume II, GEOT-0002-7801 at 8068.

¹²³ Vladimir PUTIN: *There was a plan in place, and I think it is no secret that Russia's forces acted in accordance with this plan. I have spoken about this publicly before, and as I say, it is no secret.*

conflict, as well as mobilisation of military equipment and weaponry, was conducted on the basis of a plan drawn up by the Russian Army's General Staff, and subsequently approved by Russian President Vladimir Putin. Reportedly, the Ministry of Interior was responsible for special training to South Ossetian police while members of the Russian Airborne Forces were sent to South Ossetia¹²⁴ forces.

101 Russian influence in South Ossetia should also be set against the context of the broader spectrum of political, economic and social affairs. For example, the policy of conferring Russian nationality to ethnic Ossetians since 2006 onwards¹²⁵ resulted in a new regime for South Ossetia as well as granting South Ossetian members of South Ossetian citizenship entitlements to Russian passports¹²⁶ to those who are a majority¹²⁸ of people living in South Ossetia at the time of

The General Staff drew up this plan somewhere in 2006 or early 2007. I approved it. Furthermore, this plan was used as the basis for training South Ossetian volunteer forces. True, our military specialists, to be honest, did not place much hope in this work, given that resisting any country's regular armed forces, even those of a small country like Georgia, is impossible. But these volunteer forces nevertheless played a major part in the end and courageously defended their homeland. Over the three days before the Russian armed forces arrived, essentially just they and our peacekeepers who were holding off the Georgian forces. So, they did play their part. We mobilised military equipment and arms and so on in accordance with the plan. There is no secret here. We have already discussed all this. Annex E.8.19: Excerpt of: News Kremlin, President of Russia, Press statements and answers to journalists, questions following a meeting with President of Armenia Serzh Sargsyan, 8 August 2012, GEO-0003-1538 at 1542.

¹²⁴ Annex E.5.2: Human Rights Centre Memorial and Demos Centre, 'Humanitarian consequences of the armed conflict in the South Caucasus', 31 October 2008, GEO-0001-1314 at 1319-1320 ('Humanitarian consequences of the armed conflict in the South Caucasus').

¹²⁵ Annex E.2.37: IIFFMCG Volume II, GEOT-0002-7801 at 7955

¹²⁶ See, for example, Annex E.1: Popescu, 'Outsourcing, de facto Statehood: Russia and the Secessionist Entities in Georgia and Moldova', EPRS 109/2006, GEOT-0003-1575 at 1580

¹²⁷ Annex E.2.36: IIFFMCG, Volume I, GEOT-0002-7757 at 7786; See also Annex E.8.21: Associated Press, 'Russia launches passport offensive', 22 February 2009, GEOT-0003-1583 at 1583-1585; Annex E.8.24: Der Spiegel, 'Russia Marches to South Ossetia', 8 August 2008, GEOT-0003-1742 at 1742.

¹²⁸ On 13 August 2008, Russian Ambassador to Azerbaijan Vasili Istratov stated that '80% residents of South Ossetia are Russian citizens and Russian citizenship was issued to them on the basis of Russia's legislation'. See Annex E.8.26: Today.Az, 'Vasili Istratov: Russian passports were issued

were Russian nationals, and as a consequence were subject to varying degrees, to the laws of the Russian Federation with respect to voting rights and military service.¹²⁹

102 Russia has also provided substantial financial assistance to South Ossetian institutions, subsidised goods and services for the population, and has undertaken major investments in infrastructure.¹³⁰ According to the Kremlin, Russian financial assistance to South Ossetia between 2008 and 2014 amounted to 43 billion rubles, totalling more than 90% of South Ossetia's budget.¹³¹ It is also indicated that, in 2017, Russia had allocated 100 million rubles to South Ossetia.¹³²

103 Thus, the information available provides a reasonable basis to conclude that at all times and locations relevant to the Russian application, the Russian armed forces exercised overall control over South Ossetia, sufficient to trigger the application of the law of international conflict.

104 As noted above, the determination is provisional, bearing in mind the early stage of the investigation and may be properly determined during the course of the investigation.

to South Ossetian residents based on Russian legislation, 13 August 2008, GEOTP-0003-1749 at 1749.

¹²⁹ Annex E.237: IIFFMCG, Volume II, GEOTP-0002-7801 at 7940.

¹³⁰ See, for example, Annex E.1: Popescu, *Outsourcing, de facto Statehood: Russia and the Secessionist Entities in Georgia and Moldova*, IJEP 109/2006, GEOTP-0003-1575 at 1580.

¹³¹ Annex E.8.20: News Kremlin, President of Russia Press statement following talks with President of South Ossetia Leonid Tibilov, 18 March 2015, GEOTP-0003-1546 at 1547.

¹³² Annex E.8.28: Osinform, The Prime Minister of South Ossetia, Vadim Brotsev, proposes to adopt the budget after public discussion, *Osinform*, 30 April 2010, GEOTP-0003-1754 at 1755.

¹³³ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 7828.

the evidence does not support this ~~rd a te r re i n a b i r e n~~,
appropriate to adopt a fragmented approach to the ~~cl a~~
armed conflict ~~w o t h d s~~ suggest that ~~i n t e r n a t i o n a l~~ armed
conflict took place between Georgian armed forces and
forces in the ~~p e r i o d f r o m~~ through 12 August 2008, while
separate international armed ~~e x i s t e d~~ ~~f i e l d~~ ~~b e t w e e n~~ Georgian and
Russian armed forces in the period from 8 August through
2008.

105 As described in more detail in the Background section
and the ~~f a c t~~ authorities in South Ossetia built up force
respective areas of control, in the period leading to
armed conflict. Armed clashes increased throughout July
to a deterioration of the ~~s e c u r i t y~~ ~~s i t u a t i o n~~ ~~a t~~ ~~a~~ ~~b~~ ~~r~~ ~~e~~ ~~c~~ ~~f~~ ~~i~~ ~~r~~ ~~e~~
announced ~~G e o r g i a n~~ President ~~S a l m e~~ ~~k h~~ ~~z~~ ~~h~~ ~~v~~ ~~i~~ ~~l~~ ~~7~~ August 2008
held only three hours before fighting ~~r e s u~~ ~~l~~ ~~t~~ ~~e~~ ~~d~~ ~~o~~ ~~n~~ ~~l~~ ~~y~~
Shortly before midnight, at 23h50, Georgian artillery
began firing at targets ~~i~~ ~~n~~ ~~S~~ ~~o~~ ~~u~~ ~~t~~ ~~h~~ ~~O~~ ~~s~~ ~~s~~ ~~e~~ ~~t~~ ~~i~~ ~~a~~ ~~se~~ ~~v~~ ~~e~~ ~~r~~ ~~e~~ ~~e~~ ~~s~~ ~~c~~ ~~a~~ ~~l~~ ~~a~~ ~~t~~ ~~i~~ ~~o~~ ~~n~~
terms of intensity and the widely acknowledged beginning
conflict¹³⁶.

106 In terms of organization, South Ossetian forces acted under
command of the South Ossetian ~~E d u a r d K o s t i~~ ~~l~~ ~~o~~ ~~p~~ ~~y~~ was the
Head of the ~~s o u~~ ~~t~~ ~~h~~ ~~O~~ ~~s~~ ~~s~~ ~~e~~ ~~t~~ ~~i~~ ~~a~~ ~~n~~ ~~l~~ ~~e~~ ~~a~~ ~~d~~ ~~e~~ ~~r~~ ~~s~~ ~~h~~ ~~i~~ ~~p~~ ~~a~~ ~~n~~ ~~d~~ ~~C~~ ~~o~~ ~~m~~ ~~m~~ ~~a~~ ~~n~~ ~~d~~ ~~e~~ ~~r~~

¹³⁴ Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 01320133; Annex E.2.37: IIFFMCG, Volume II, GEGOTP-0002-7801 at 8018012.

¹³⁵ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 80148015.

¹³⁶ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8015.

of the South Ossetian security forces, the military chain of command was the Minister of Defence and Emergencies Vasily Vasilevich Lunev, then the Chief of Army General Sarmatov, and commanders of the main decision making body was the South Ossetian Security Council headed by Anatoly Konstantinovich Barankevich.¹³⁸

107 The South Ossetian force consisted primarily of light rifle units with seconded artillery units and armoured vehicles. The force was composed of members of the South Ossetian Ministry of Interior, the Committee for State Security, the Border Guard and Special Purpose Police Squad OMON, irregular militia. According to the available information, during the August 2008 conflict, the total number of South Ossetian personnel from law enforcement and military agencies did not exceed 3,500 personnel.¹³⁹

108 The composition and structure of the South Ossetian forces changed over time due to the prolonged nature and overall intensity of the fighting. The forces were particularly concentrated in the Tskhinvali area (west of Tskhinvali), and the Prdskhinali area, the fact that heavy military

¹³⁷ See Annex E.8.40: Constitution of South Ossetia, "სამშენიშნავი" ("სტრუქტურა") §5-5.1.1, 8 April 2001 GEO-OTP-0010-0016.

¹³⁸ For example: the 7th battalion (Commander Valeri KOKOEV; Deputy Commander Arsen KVEZEROV), Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-0006-0005 at 0027-0028; the 9th battalion (Commander Volik GOIAEV), Government of Georgia, 10 May 2010 Report, Annex 80, GEO-OTP-0006-0388 at 0388 the mountain battalion (Commander Al BETAUTI), Annex E.2.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8555.

¹³⁹ Annex E.3.9: ECHR, Storimans Verhulst, Akkermans and Yecheskeli v. Russia, Appl. no. 26302/10, 30 August 2010, GEO-OTP-0002-3454 at 3468; Annex E.8.48: Kommersant, "There is no place for this President in South Ossetia" [საქართველოში "ქვეყნისთვის" არაა ადგილი მისთვის], 4 December 2008, GEO-OTP-0002-9496.

¹⁴⁰ Annex E.2.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8750.

¹⁴¹ Annex E.2.38: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8750.

arms were used, as well as the fact that the South controlled parts of the territory of Georgia. The conclusion that an armed conflict existed between the Government of Georgia and South Ossetian authorities during the relevant period. Thus, there was a confrontation between South Ossetian forces and Georgian armed forces from August 2008 at the least, sufficient the level of intensity between parties showed the necessary degree of intensity to trigger, at a minimum, the applicable international armed conflicts.

ii. The period subsequent to the cessation of hostilities

109. The issue of applicable law of armed conflict also arises in respect to the period subsequent to the cessation of hostilities, which the Russian armed forces controlled until 10 October 2008 at the latest, portions of Georgian territory both inside South Ossetia and in the so-called buffer zone beyond the administrative boundary line of South Ossetia. As described below, during this period South Ossetian forces continued to commit crimes within the jurisdiction of Georgia, including unlawful killing/murder, pillage, and destruction of property.

110. The law of international armed conflict applies in situations of military occupation whenever the territory is actually placed under the authority of the hostile army, and extends only to the territory where such authority has been established.

¹⁴² See ICG01/04-01/06-2842, paras. 53-58.

¹⁴³ ICC-01/04-01/07-3436, para. 1179. See generally fn.34 Elements of Crimes; article 4, Hague Regulations (1907); Common Article 2, Geneva Conventions (1949); article 27, Geneva Convention IV (1949).

and can be expected if the occupation encountered no a
resistance.¹⁴⁴ Thus the occupation of a territory by hostile
would exist whenever that a b e e t d e s t a t e control over
the area in question.

111. In its judgement *Nailor & Mactison*, the Trial Chamber
of the International Criminal Tribunal for the former Yugoslavia
provided the following guidelines to assist in the determination
whether the occupying power has established its authority
in the territory in question:

- (i) the occupying power must maintain absolute its
own authority for that of the occupied authorities
have been rendered incapable of functioning public
enemy's forces have surrendered, been defeated
In this respect battle areas may be occupied
territory. However, sporadic local resistance, even
does not affect the reality of occupation; (iii)
power has a sufficient force present, or the capacity
troops within a reasonable time to make the authority
occupying power felt; (iv) a temporary administration

¹⁴⁴ ICC-01/04/01/06-803-tEN, para. 212, cited with approval in ICC-01/04/01/06-2842, para. 542.

¹⁴⁵ See ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) Judgment, 19 December 2005, I.C.J. Reports 2005, paras. 172, 175-176; ECHR, *Cyprus v. Turkey* Appl. no. 25781/94, Judgment, 10 May 2001, paras. 767; *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 580. The term effective control, as used in this context refers to effective control of territory by an occupier, and should be distinguished from the effective control test, as referred to elsewhere in this application, for the purpose of establishing state responsibility; see above fn.159.

established over the territory; (v) the occupying power issued and enforced directions to the¹⁴⁶ civilian population.

112. In the Lubanga judgment, the Trial Chamber examined the issue of military occupation in situations where conflicts of this nature take place on a significant territory where the criminal acts under consideration had a nexus to the occupation. The Trial Chamber found that although the Ugandan Armed Forces were in occupation of Bunia Airport and surrounding environs, the separation of the armed conflict between the Union des Patriotes (UPC) and other State armed groups was occurring in an area distant from the occupied area and could not be said to be related to¹⁴⁷ the Uganda

113. The information available indicates that Russian armed forces deployed in South Ossetia continued to advance and control the administrative boundary between South Ossetia and other parts of Georgia after 12 August 2008 and established a buffer zone of 34 miles only withdrawn by 10 October 2008. In particular, the Russian forces moved into areas previously under Georgian administration. According to OSCE reports from the period August 2008 through October 2008, the Russian armed forces were able to control a

¹⁴⁶ See Prosecutor v. Naletili & Martinović, IT-98-34-T, Judgment, 31 March 2003, para. 217. The ICJ in the case of the Armed Activities on the Territory of the Congo, para. 146, stated that to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an occupying power in the meaning of the term as understood in jus in bello, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. Thus the determining factor for the test of occupation is degree and extent of the control by the intervening troops. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, I.C.J. Reports 2005, p. 168.

¹⁴⁷ ICC-01/04-01/06-2842, paras. 564-565.

of Gokhaleti, Variani, Nabakhtevi, and the Akhalgori checkpoints established in and west of the Gvielta and Eastern Natsreti, Nabakhtevi village, Dzvari village, Variani, Karaleti, Megvris, and its bops therefore had control over the area which they were deployed in until October 2008.

114. There is no question that the law of international law applicable to the military occupation by the Russian Federation is applicable to the conduct of an organised armed group of a military occupation is determined by the relationship between the organised armed group and the occupying power and/or that conduct to the armed conflict.

115. If, for example, Russia exercised overall control over forces during the occupation, this would render the framework applicable to South Ossetian forces in international armed conflict. If the requisite level of overall control by Russia is established, South Ossetian forces would be party to the conflict and so the conduct of South Ossetians would be regulated by the law applicable to international armed conflict. As discussed above, the information available indicates that Russia continued to exert a high degree of influence over South Ossetian institutions and its military forces for evidence.

¹⁴⁸ Annex E.3.16: GEOT-0005-0908 at 0909; GEOT-0005-0910; GEOT-0005-0911 at 0912; GEOT-0005-0929 at 0930; GEOT-0005-1028 at 1029; GEOT-0005-1030 at 1031.

¹⁴⁹ Prosecutor v. Tadić, IT-94-1-A, Judgment, 15 July 1999, para. 92.

coordination and operational links between Russian and South Ossetian¹⁵⁰ forces.

116. Nonetheless, even if it cannot be established that the Russian Government exercised overall control of South Ossetia, the alleged crimes attributed to South Ossetian forces would in any event constitute violations of the law of international armed conflict if it can be demonstrated that there was a sufficient link between such conduct and the conflict.

117. The requirement of overall control by a foreign State of an organised armed group to internationalise an armed conflict is not the same test as that required for the conduct of an organised armed group in the context of non-international armed conflict. The requisite test is whether the crimes attributed to the group had the necessary nexus to the international armed conflict, whether they took place in the context of and [were] directly related to an international armed conflict between Russia and Georgia.

118. The post-World War II case law regarding the persecution and plunder of private property in territories occupied by Germany demonstrates that conduct even by private persons or groups can be sufficiently related to a military occupation to constitute violations of international humanitarian law. In particular, the *Leitesdo Industrialists* and *Krupps* cases in the *Flick* and *Krupps* trials demonstrate that the conduct of private persons or groups can be sufficiently related to a military occupation to constitute violations of international humanitarian law.

¹⁵⁰ Annex E.4.10: HRW, *Up in Flames*, GEOTP-0001-0336 at 0463, 0474; Annex E.2.39: OSCE HRAM Report, GEOTP-0003-1921 at 1965; Annex E.4.3: AI, *Civilians in the line of fire*, GEOTP-0001-0125 at 0168.

¹⁵¹ *Elements of Crimes*. The ICTY Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities. *Prosecutor v. Tadić* (IT-94-1-T, Judgment, 7 May 1997, para. 573).

support this proposition. G. I. Farben to United States
Nuremberg Military Tribunal:

[w]here private individuals proceed to exploit the
military occupancy by acquiring private property against
the will and consent of the former owner, such action
not being expressly justified by any applicable provisions
of the Hague Regulations, is in violation of international
law¹⁵²

119. In the Krupp case the accused persons authorised and actively
supported by certain German governmental and military
persons¹⁵³ constituted war crimes because they were
connected to the international German aggression which they
were waging against the Allies.

120. The standard applied in the World War II case law is reflective
of customary international law and consistent with the
armed conflict requirement applied consistently by the
other contemporary international criminal courts and tribunals.
It is not necessary to establish that the initiative to commit
the crimes in question emanated solely from South Ossetian forces
or that it was necessary that the conduct reflected the policy of the Russian
government or of the Russian military leadership towards
ethnic Georgian civilians living in South Ossetia and
under Russian occupation.

¹⁵² United States v. Krauch et al. (I.G. Farben case), US Military Tribunal Nuremberg,
Judgement, 30 July 1948, 8 T.W.C. 1081, 1132.

¹⁵³ United States v. Krupp et al., US Military Tribunal Nuremberg, Judgement, 30 July 1948, 9
T.W.C. 1327, 1346.

121. The information available at this stage indicates that the Georgian forces would not have been able to campaign and forcibly expel the remaining ethnic Georgian civilian population from South Ossetia and the buffer zone from the occupation of Georgian territory by Russian armed forces and that a military operation preceded the occupation. Before the armed conflict, the expulsion of ethnic Georgians inside South Ossetia, particularly in the absence of protection of Georgian forces, could not have taken place in the face of a significant military threat to the Georgian authorities. The military threat that was neutralised after the deployment and movement of Russian armed forces throughout South Ossetia. The military operations of South Ossetian forces and their military operations were also limited by the establishment of check points that were jointly managed by South Ossetian forces with Russian armed forces. South Ossetian forces and Russian armed forces also jointly deployed military forces in the villages of Kekhvi, Kurta, Achabeti, Tamarashevi, Avnevi, and Vanatsevi.¹⁵⁴ Similarly, the area inside the 20km buffer zone around the Russian armed forces, which comprised areas previously under the control of the Georgian authorities, could not have been returned to the control of the Georgian authorities by South Ossetian forces or the ethnic Georgian civilian population but for the creation and existence of the zone of occupation controlled by Russian armed forces.

122. The information available further indicates a direct link between the alleged conduct of South Ossetian forces and the situation of occupation by Russian armed forces. This is demonstrated by the following:

¹⁵⁴ Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336 at 0469; Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, GEOTP-0001-1314 at 1319-1320; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0167-0168. See also Annex D.2: Map of Military Operations.

fact that the commission of crimes against ethnic Georgian and Ossetian forces decreased and eventually Georgian armed authorities regained or previously occupied areas inside the buffer zone in particular in 2008. In 2009, IDPs were ultimately returned to the villages of the former¹⁵⁵ buffer zone.

(b) Alleged war crimes committed against ethnic Georgian

123. The information available provides a reasonable basis to believe that South Ossetian forces forcibly displaced 18,500 between 13 August and 10 October 2008, ethnic Georgians from South Ossetia and the buffer zone. The information available further documents the nature of the conduct, South Ossetia deliberately killed 511 and injured 500 ethnic Georgian civilians and destroyed or severely damaged dwellings belonging to Georgians.

124. Based on the information available at this stage, there is a reasonable basis to believe that between at least 13 August and 10 October 2008, the South Ossetian forces committed at the minimum the following war crimes in the context of the conflict: war crimes of wilful killing/murder (article 8(2)(a)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), or article 8(2)(b)(xvi) or article 8(2)(e)(v)).

125. While this section of the Application focuses on the acts that may constitute war crimes, the ICJ's findings

¹⁵⁵ Annex E.2.21: UNHCR, "Protection of Internally Displaced Persons in Georgia: A Gap Analysis", July 2009, GEOTP-0010-0055 at 0087.

that there is a reasonable basis to believe that these amounted to crimes against humanity under the Statute of the International Criminal Tribunal for the former Yugoslavia, including murder under article 7(1)(a); deportation or forcible transfer of population under article 7(1)(d); and persecution under article 7(1)(e).

- i. Wilful killing pursuant to article 8(2)(a) (in accordance with article 8(2)(c)(i))

126 The actus reus of the crime of wilful killing pursuant to article 8(2)(a) consists of the perpetrator killing one or more persons, or causing the death of one or more persons who were protected under one or more of the Geneva Conventions of 1949.

127 During the military operations launched against the Georgian Government in South Ossetia, the South Ossetians allegedly killed unarmed civilians with weapons in particular in the city of Gori and in the village of Tirdznisi, Ergneti, and other areas. The South Ossetians would arrive in the villages and ordered them to leave. Civilians who resisted were severely beaten and a number of incidents in some cases, persons were beaten and killed deliberately in order to instil fear and coerce the remaining population to leave the area. Witnesses in Georgia on 1 August 2008 stated that the South Ossetians killed ethnic Georgians who refused to kiss

¹⁵⁶ Elements of crimes, Article 8(2)(c)(i)(2).

¹⁵⁷ Annex E.2.39 OSCE HRAM Report, GEO-OTP-0003-1921 at 1943.

¹⁵⁸ Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, GEOTP-0001-1314 at 1316.

¹⁵⁹ Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1059.

the South Ossetia and leave the village of Dzhirgata as confirmed by witness statement given to the Georgian authorities. The course of the national investigation according to this witness, threatened to kill all Georgians who would Ossetia.

128 The Prosecution analysed the information gathered from available sources, including the Government of international NGOs for the period from 7 August to October 2008 for the purposes of establishing the scope of the crime.¹⁶² The examination of the sources provides a reasonable basis to estimate a range of 51 to 113 Georgian civilians killed including persons killed in the municipalities of Gurjipali in the Kurta municipality and six in Tighva municipality in Karabulak municipality.

- ii. Destruction of property pursuant to article 8(2)(b)(xii) and pillage pursuant to article 8(2)(b)(v)

129 The actus reus of the crime of destroying or seizing the enemy property pursuant to article 8(2)(b)(xii) is that the

¹⁶⁰ Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1114.

¹⁶¹ Annex E.7.9: Government of Georgia, Annex 78, Victim's Interrogation Record, 31 August 2008, GEOTP-0006-1511; Protocol of a Victim Testimonial, 31 August 2008, GEOTP-0006-1515.

¹⁶² Annex E.2.39: OSCE-HRAM Report, GEOTP-0003-1921; Annex E.3.16: GEOTP-0005-0763 through GEOTP-0005-0774; International NGOs (Annex E.4.9: HRW, *Russia in Georgia: All Parties in August South Ossetia Conflict Violated Laws of War*, 23 January 2009, GEOTP-0001-0558, Annex E.4.3: AI, *Civilians in the line of fire*, GEOTP-0001-0125); Annex E.7.9: Government of Georgia (10 May 2010 Report, GEOTP-0006-0005; Submission of 17 March 2015, GEOTP-0003-1151), Georgian NGOs (Annex E.5.3: Empathy, 93 Applications of the Victims of Russian-Georgian war 2008, GEOTP-0004-0084 through GEOTP-0004-2018; Annex E.5.1: August Ruins, GEOTP-0001-0999.

¹⁶³ An estimated number of 51 killings is a minimum number of killings allegedly committed during ground offensive; 113 killings include number of reportedly killed including during aerial bombardments.

perpetrator destroyed or seized certain property of a host
was protected from the destruction or seizure under
law of armed conflict.¹⁶⁴

130 The actus reus of the crime of pillage under article 8(2)(b)(xvi) or
article 8(2)(e)(v) is that the perpetrator appropriated
property for private or personal use without the consent¹⁶⁵

131 Open source reports as well as the material submitted by
Georgian victims to the Government indicate that the
South Ossetian forces extensively and systematically
destroyed the property of ethnic Georgian civilians in
settlements inhabited mostly by ethnic Georgians in
the buffer zone. There is no information available to suggest
the destruction and seizure of the protected property was
the military necessity at the time of the commission
of the crimes. Instead, the information available shows that
the forces destroyed and seized the protected property
in violation of international humanitarian law with the
aim of forcibly removing ethnic Georgians from the

¹⁶⁴ Elements of Crimes, Article 8(2)(b)(xiii) and Article 8(2)(e)(xii).

¹⁶⁵ Elements of Crimes, Article 8(2)(b)(xvi) and Article 8(2)(e)(v).

¹⁶⁶ Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801; Annex E.2.4: OCHA, UN Inter Agency Humanitarian Assessment Mission to South Ossetia, Mission Report 2016 September 2008, GEGOTP-0001-0846 (OCHA Mission Report); Annex E.2.39: OSCE SARM Report, GEOTP-0003-1921; Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125; Annex E.5.1: August Ruins, GEOTP-0001-0999; Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, GEOTP-0001-1314.

¹⁶⁷ Annex E.5.3: 93 Applications of the Victims of the August 2008 armed conflict, GEOTP-0004-0084 through GEOTP-0004-1996.

¹⁶⁸ Annex E.7.9: Government of Georgia 10 May 2010 Report, GEOTP-0006-0005; Annexes to the 10 May 2010 Report: Volume 1, GEOTP-0006-0053, Volume 2, GEOTP-0006-0053; Annex E.7.9: Government of Georgia, Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3), 10 May 2010, GEOTP-0006-0975 through GEOTP-0006-1051; Annexes to Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3): Volume 1, GEOTP-0006-1052 through GEOTP-0006-1306, Volume 2, GEOTP-0006-1307 through GEOTP-0006-1574.

territory of South Ossetia. These settlements include Argvitsi, Berula, Disevi, Eredvi, Sesthenksti and Vanati. Eredvi municipality, Kekhvi, Kemerti, Kheiti, Kurta, K Zemo Achabeti, Tamarashanti and Kuinta municipality, Avnevi and Nidli in Highva municipality and the villages of Ergneti, Karaletiki, Megtkveiavi and Zemo Nikozi in the zone¹⁶⁹.

132 The OSCE observed that the homes appeared to have been valuable items prior to having been set on fire, as evidence of remains of major items such as appliances and televisions. Witnesses told HRW that South Ossetians used flammable red substance as fire accelerants. The OSCE documented alleged incidents. HRW noted that forensic evidence points to the fact that houses were deliberately destroyed during battles, shelling or other types of bo

133 An eyewitness stated in his declaration to the Georgian that on 8 and 9 August 2008, South Ossetian forces burned around 10 houses in the village of Narsisi. The forces entered the village during the day and set ethnic Georgian houses on fire one by one¹⁷³.

134 A victim of loss stated that on 9 and 10 August 2008, South Ossetian forces took all valuable belongings from her and neighbors.

¹⁶⁹ See Annex A.1, List of Incidents.

¹⁷⁰ Annex E.2.39: OSCE-HRAM Report, GEGOTP-0003-1921 at 1937-1938, 1947-1949.

¹⁷¹ Annex E.2.39: OSCE-HRAM Report, GEGOTP-0003-1921 at 1962; Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0479.

¹⁷² Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0344.

¹⁷³ Annex E.7.9: Government of Georgia, Evidence of ethnic cleansing of Georgia South Ossetia and adjacent areas (Appendix 3): Annex 67, GEGOTP-0006-0344, and Annex 68, GEGOTP-0006-0345.

in the village of Beloti, including money and furniture set the houses.¹⁷⁴ An ethnic Georgian neighbor of the submitter in his witness statement to the Georgian investigative he witnessed an extensive and destruction of ethnic Georgian houses in the village that took place for three days beginning August 2008. According to the houses were burnt on a selective basis, mainly those that belonged to authoritative village.

135 Also on 13 August 2008, OSCE observers reported that burnt in Tseronisi and in Avlevi as well as another house nearby village. The villagers of Koda told the OSCE mission the same day a group of South Ossetians entered the down a house. According to the same village of the buffer zone were also subject to extensive and burning of houses.

136 On 6 September 2008, HRW found that all houses in Vanati were destroyed except the houses that belonged to Ossetians. Also reported that houses in the villages of

¹⁷⁴ Annex E.5.3: Article 15 communication, 12 July 2013, GEO-OTP-00040458 (GEO original), GEO-OTP-00040470 at 0473 (Engl. Translation).

¹⁷⁵ Annex E.7.9: Government of Georgia, "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)": Annex 71, GEO-00061478, and Annex 72, GEO-OTP-00061483.

¹⁷⁶ Annex E.3.16: GEO-OTP-00050876 at 0876; GEO-OTP-00050937 at 0937; Annex E.3.7: ECHR, Niniashvili v. Russia Appl. no. 8381/09, 12 February 2010, GEO-OTP-00023174 at 3180.

¹⁷⁷ Annex E.3.16: GEO-OTP-00050953 at 0959.

¹⁷⁸ 300 to 500 houses were burned and about 2000 were damaged, Annex E.2.39 HRW Report, GEO-OTP-00031921 at 1947.

¹⁷⁹ Annex E.4.10 HRW, Up in Flames, GEO-OTP-00010336 at 0479.

Nuli that belonged to ethnic Ossetians were spared from the [redacted] that was meted out to the houses of ethnic Georgians.

iii. Alleged involvement of Russian armed forces in the [redacted] attributed to South Ossetian forces

137 The supporting material indicates that Russian troops had become occupying power able to enforce Russian regular and law enforcement measures on the territory in South Ossetia and beyond. HRW reported, for example, that in August 2008, Russian troops established check points enabling them to control the territory and forces which resulted in a significant decrease in the [redacted] and torching of civilian property by ethnic Ossetian forces. Report referred to some witnesses that Russian forces protected civilian population from violence by the South Ossetian forces. OSCE HRAM also reported that the Russian military took immediate steps to prevent or investigate incidents of looting and destruction by South Ossetian forces by increasing patrols in targeted areas and arresting the suspects.

138 Nonetheless, numerous witness accounts are consistent with the Russian armed forces as bystanders to crimes committed by failing to take a preventive attacks by South Ossetians or ethnic Georgians. OSCE HRAM also referred to repeated and consistent accounts of displaced persons from multiple ethnic

¹⁸⁰ Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 168.

¹⁸¹ Annex E.4.10 HRW, Up in Flames, GEOTP-0001-0336 at 465-466.

¹⁸² Annex E.2.39 OSCE HRAM Report, GEOTP-0003-1921 at 1956.

¹⁸³ Annex E.3.16: GEOTP-0005-0919 at 921.

¹⁸⁴ Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 8178.

villages recounting similar experiences of deliberate attacks on ethnic Ossetians following the arrival of the Russian army.¹⁸⁵ In a number of cases, South Ossetian forces had entered villages with Russian military personnel or in the wake of Russian ground or aerial attacks.¹⁸⁶

139 The IFFMCG conducted interviews that also provided accounts ranging from active intervention to stop violent observation, and even in the event the IFFMCG stated that while it appeared difficult to conclude that Russian forces participated in or tolerated the conduct of South Ossetian forces, the number of instances Russian forces did not act to prevent South Ossetian forces from committing crimes.¹⁸⁷

140 With respect to the present case, the Prosecution notes the consistent and repeated accounts of the presence of Russian forces in the vicinity of, a particular location where alleged crimes were reportedly committed by the South Ossetian forces. The information available indicates that at least some members of the South Ossetian forces participated in the commission of the alleged crimes.¹⁸⁸

¹⁸⁵ According to a villager in Vanati, the Russian troops stood by while Ossetians set fire to most houses in the village. Reportedly, the Nuli village was also systematically burned; one witness reported that Russian troops were accompanying Ossetians heading to set the fires, Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1962.

¹⁸⁶ See, for instance: Annex E.4.3: AI, Civilians in the line of fire, GEGOTP-0001-0125 at 0164, 0168; Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1962; Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, 5 November 2008, Annex E.5.2: GEGOTP-0001-1314 at 1315; Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0461 to 0463; Annex E.2.37: IFFMCG, Volume II, GEGOTP-0002-7801 at 8017, 8157-8158.

¹⁸⁷ Annex E.2.37: IFFMCG, Volume II, GEGOTP-0002-7801 at 8158.

¹⁸⁸ Annex E.2.37: IFFMCG, Volume II, GEGOTP-0002-7801 at 8157.

members acted passively, and still others acted to prevent or punish such crimes.

141. The question of overall control for the purpose of conflict has been discussed. The issue of whether or not an individual criminal responsibility can be attributed to members of the Russian armed forces for acts alleged to have been committed by forces which were not the evidence collected during the course of authorised investigations and examinations of various forms of liability under the Statute is addressed above, at least in instances where the Russian armed forces appear to have been unable to prevent and punish such acts with the duties of an occupying power.

(c) Alleged attack against peacekeepers

142. The actus reus of the war crime of attacking personnel involved in a humanitarian assistance or peacekeeping mission requires that the perpetrator directed an attack of a certain nature against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations and that the perpetrator intended to kill or cause serious bodily or mental harm to personnel, installations, material, units or vehicles involved in the mission. It is further required that the perpetrator directed the attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

given to civilians or civilian objects under the international armed conflict.

143. Due to the lack of definition of attack in the Statute of Crime, based on 8(2)(e) and 21(1)(b) of the Statute, Chamber I defines attack as acts of violence against whether in offence or in defence in accordance with Additional Protocol I to the Geneva Conventions of article 13(2) of Additional Protocol I. The requirement for material result or any harmful impact on the attacked objects in this case has to be however a causal connection between the perpetrator and the attack which means between the perpetrator and consequence is necessary so that the concrete consequence, the attack in this case having been caused by the perpetrator.

i. Status of the Joint Peacekeeping Forces

144. In order to apply the elements of the war crime under article 8(2)(b)(iii) to the peacekeeping forces mandate and operations in two questions need to be answered:

a) First, whether the peacekeeping mission under the mandate was established in accordance with the Charter of

¹⁸⁹ Elements of Crimes, Article 8(2)(b)(iii) of the Statute. The equivalent elements of crime are required for the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission under article 8(2)(e)(iii) of the Statute.

¹⁹⁰ Situation in Darfur, Sudan, The Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 65.

¹⁹¹ ICC-02/05-02/09-243-Red, para. 65.

¹⁹² ICC-02/05-02/09-243-Red, para. 66.

b) Second, whether the personnel, installations, material, vehicles of the JPKF was entitled, at the time of the protection afforded to civilians and civilian objects.

Whether the peacekeeping mission under the auspices of the UN Charter mission established in accordance with the UN Charter

145 Pre-Trial Chamber I established that peacekeeping is practical experience and not defined in the UN Charter. Instead, peacekeeping missions are (i) other structures may vary depending on the context in which they cooperate. The basic principles relevant to determining the constitution of a peacekeeping mission: (i) consent of the parties; (ii) (iii) the absence of force except in self-defence.

Consent of the parties

146 Since a peacekeeping mission needs the consent of the parties stationed on the territory, such consent is necessary. The consent of the main parties to the conflict is preferred to the Special Court for Sierra Leone's jurisprudence. In international armed conflicts consent is obtained from the parties, not out of legal obligation, to ensure the effectiveness of the peacekeeping operation.

¹⁹³ ICC-02/05-02/09-243-Red, para. 69.

¹⁹⁴ ICC-02/05-02/09-243-Red, para. 71.

¹⁹⁵ ICC-02/05-02/09-243-Red, para. 71.

¹⁹⁶ ICC-02/05-02/09-243-Red, para. 72.

¹⁹⁷ ICC-02/05-02/09-243-Red, para. 72.

147 As described in the background section of the report, a truce was declared on 24 June 1992 the Sochi Agreement on Principles of Settlement of the Georgian-Ossetian Conflict by the Presidents of Georgia and the Russian Federation. As stipulated by the agreement, JPKF troops were deployed in the Ossetian conflict zone together with the JCC as a coordinating body composed of Georgian, Russian and North Ossetian representatives. The mandate of the JPKF and JCC was to supervise the implementation of the¹⁹⁸ Sochi Agreement.

148 The JPKF consisted of members of forces from the parties to the conflict and in three peacekeeping battalions: a Russian, a Georgian and a battalion from North Ossetia. The force was manned by approximately 500 soldiers and operated under a joint command coordinated by the²⁰¹ JPKF command.

¹⁹⁸ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 7901.

¹⁹⁹ Annex E.7.9: Agreement on Principles of Settlement of the Georgian-Ossetian Conflict (Sochi agreement), 10 June 92, GEO-OTP-0006-1598, Article 3:

1. In order to exercise control over the implementation of the withdrawal of armed formations, disbandment of forces of self-defence and to maintain the regime of security in the region, a Joint Control Commission composed of representatives of opposing parties shall be set up and this Commission shall carry out its functions in close cooperation with the joint group of military observers created in accordance with the agreements reached in Kazbegi.

2. Every Party participating in the work of the Commission shall appoint its own representatives. Headquarters of the Control Commission shall be located in the town of Tskhinvali.

3. Until the aforementioned tasks are implemented, joint forces for coordination of activities aimed at establishment of peace and maintenance of order shall be created within the Control Commission. In addition, special mixed groups of observers, attached to the Control Commission, shall be deployed along the security perimeter.

²⁰⁰ Response of the Government of Georgia to the question of the IIFFMCG, Annex E.2.38: IIFFMCG, Volume III, GEOTP-0002-8247 at 8307; Annex E.8.31: Order of the Commander of the Joint Peacekeeping Forces in the Zone of the Georgian-Ossetian Conflict No. 27: On the organization of patrols in the security zone in order to stabilize the situation, 16 August 2008, Tskhinvali, GEOTP-0008-0584 (Order No. 27).

²⁰¹ The JPKF Commander had the following rights and obligations: 1. Coordination of the operations of the Joint Forces with the leadership of the sides; 2. Organization of cooperation with local law enforcement organs; 3. The organization, through the senior military chiefs of the sides, of mutually agreed operations to carry out the tasks placed upon the Joint Forces; 4. Verification of the execution of the Decision by the service personnel of the peacekeeping forces of the sides; 5. Organization of methodical work with the command staff of the Joint Forces regarding the practical implementation of their functional obligations; 6. Through the senior military chiefs of the sides, the

nominated by the Russian Defence Ministry and approved by the JCC.²⁰²

149 The UN Security Council made multiple supportive resolutions, without formally endorsing it as a regional arrangement in the sense of Chapter VIII of the UN Charter, and granted the UN observer status at the JCC.

150 The Government of Georgia informed the Prosecution that the authorities persistently objected to the presence of peacekeepers in the region during the couple of years of armed conflict and demanded from the international community to replace the JPKF with an internationalised peacekeeping force. According to Georgian authorities, Georgia undertook certain measures to address the problem before different international bodies. In September 2006, in his speech before the UN General Assembly, the Georgian President Saakashvili stated that the Russian

adoption of disciplinary measures to influence the servicemen of the Joint Forces in accordance with the Decision; 6. The adoption of decisive measures against the inadmissible taking of hostages by any one of the sides in conflict; 7. The combined use of the units of the Joint Forces in case of the threat of the outbreak of armed conflict in the zone of responsibility; 8. Systematic reporting to the JCC about the situation of affairs in the zone of the Georgian-Ossetian conflict, and preparation, together with the senior military chiefs of the sides, of proposals for improving the activity of the Joint Forces. Annex E.8.33: Annex No. 1 to the Decision Concerning the Basic Principles of Operation of the Military Contingents and of the Military Observers Designated for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict, 6 December 1994, GEO-OTP-0008-0683.

²⁰² The JCC, a trilateral body with Georgian, Russian, and North Ossetian representatives, plus participation from the Organisation for Security and Cooperation in Europe (OSCE) mandated to supervise the implementation of the Sochi agreement of 1992, Annex E.7.9: Government of Georgia, Evidence of non-neutrality of Russian peacekeepers deployed in Abkhazia and South Ossetia, prior to August 2008 (Appendix IV), GEO-OTP-0006-1575 at 1583.

²⁰³ UN Security Council Resolution 1781, SC/9142 (2007).

²⁰⁴ Annex E.7.7: Government of Georgia, Update Report of the Government of Georgia concerning the National Criminal Proceedings Related to August 2008 Armed Conflict, 12 December, 2011 GEO-OTP-0003-1836 at 1853 (December 2011 Update Report).

should withdraw its peacekeeping force from South Ossetia. The Georgian diplomatic mission also sent a letter to various other countries objecting to the support of Russia for peacekeeping in South Ossetia. In fact, the Georgian authorities admitted that the Sochi Agreement formally remained in force in Georgia until the official revocation was completed. At the time of the attack, the JPKF, including the RUPKFB, was operating with the consent of the parties, even though its mandate was for Georgia was concerned.

Impartiality

151 The Trial Chamber I referred to the UN Peacekeeping Principles and Guidelines to establish that impartiality is crucial to the consent and cooperation of the main parties, but should not be confused with neutrality. UN peacekeepers should be impartial in their dealings with the parties to the conflict and neutral in their execution of their mandate.

152 The Government of Georgia cited several international instruments that Russia, including the Russian peacekeeping forces in Georgia, were not impartial, but were constantly supporting the Ossetian authorities. For instance, on 29 November 2009,

²⁰⁵ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1865.

²⁰⁶ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1865.

²⁰⁷ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1853 and 1865.

²⁰⁸ ICC-02/05-02/09-243-Red, para. 73.

²⁰⁹ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1864-1866. The Government of Georgia also referred to a chapter in the IIFMCG Report

referring to the situation in Abkhazia and South Ossetia, European Parliament adopted a resolution stating that Russian troops have lost their status of neutral, impartial peacekeepers. The Moscow authorities' decision to grant Russian passports to people living in those parts of Georgian territory is further evidence of the situation.²¹⁰

153 The Georgian authorities further argued that the JPKF mandate was violated because the North Ossetian contingent was manned by South Ossetians contrary to the Sochi agreement. JPKF should not have included South Ossetians.

154 The OSCE mission reports however indicate that the mission implemented its mandate on the ground, particularly through Joint Monitoring Teams together with the OSCE military observers to document and inquire about suspicious incidents and explosions in South Ossetia in the period during the armed conflict. For example, on 29 July 2008, the JPKF Commander ordered a Monitoring Team to confirm information on firing which took place in the area close to the administered village of Avagurist. In August 2008, the JPKF and the OSCE military observers registered violations and reported that the exchange of fire between

contributed by an expert whose views were not necessarily shared by the rest of the IIFFMCG and were related to the role of Russia in South Ossetia, but not to the role of the Russian peacekeeping contingent specifically.

²¹⁰ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1866.

²¹¹ Annex E.4.13: ICG, Make Haste Slowly, GEO-OTP-0001-1276 at 1296/1297.

²¹² Annex E.3.16: GEO-OTP-0005-0809.

South Ossetian forces was initiated from the area of their positions.

155 The information available at this stage indicates that that might have jeopardized the impartiality of particular battalions did not necessarily affect the impartiality of the whole peacekeeping mission which was meant to stem from its hybrid nature, and which in effect lasted for almost 16

The use of force except in self

156 Peacekeeping missions which may only use force in order to protect themselves from attack are not of the nature of those established by the UN Security Council under Chapter VII of the UN Charter, which are permitted to use force in order to achieve their objectives, and are not subject to international law.

157 The term peacekeeping mission includes both missions established by the UN and those foreseen by the UN Charter. According to Articles 52(1) and 53(1) of the UN Charter, unions of States or other organizations with the function of maintaining peace and security are allowed, provided that they are consistent with the Principles of the United Nations. Such arrangements are authorized by the Security Council.

²¹³ Annex E.3.16: GEOTTP-0005-0840.

²¹⁴ ICC-02/05-02/09-243-Red, para.74.

²¹⁵ ICC-02/05-02/09-243-Red, paras.75-76.

158 The JPKF were the only armed force allowed to exercise in the region of South Ossetia. Peacekeepers were allowed to check persons, prohibit import and export of technology, prevent clashes between different groups, monitor activities of illegal armed units, barring the entry into the conflict zone of armed groups; impeding the transit in the conflict zone of armaments. The activities of the Peacekeeping Forces were governed by the Regulations on the Joint Forces to Establish and Maintain Law and Order in the Conflict Zone, which were adopted under Protocol No. 3 at the meeting of the JCC held on 6 December 1994.

159 Although some of its tasks amounted to a global mandate, the JPKF was not allowed to use force to enforce its mandate; instead, peacekeepers had to monitor violations of the ceasefire and report them to the JCC. In return, the JCC was required to investigate such violations.

Conclusion

160 Despite some ambiguities that increased over time, the available evidence indicates that the JPKF fulfilled the criteria for a protected civilian status in accordance with the UN Case Law and protected civilian status.

²¹⁶ Annex E.7.32: Annex no.1 to the JCC /Joint, Commission/ Decision of 6 December 1994, Regulations on the Basic Principles of Operation of Military Contingents and Military Observer Groups Designated for the Normalization of the Situation in the Zone of the Georgian Conflict, GEO-OTP-0008-0560.

Status of protection of peacekeepers, installations, materials and the peacekeeping mission at the time of the attack

161 Peacekeeping forces are entitled to the protection afforded by Article 44 of the 1949 Geneva Convention and in Article 43 of this Protocol. In case of an attack, a person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (4) of the Convention and in Article 43 of this Protocol is considered to be a civilian, unless it is proved that he or she is a member of the armed forces of a party to the conflict.

162 Article 50 of the Additional Protocol I and article 13(3) of the Additional Protocol II establish that civilians are not to be the object of attacks and for such time as they take a direct part in hostilities. Civilians involved in peacekeeping missions enjoy protection from attacks and for such time as they take a direct part in hostilities. Examples of direct participation in hostilities include: bearing arms, using or taking up arms in military or hostile operations, armed fighting, participating in attacks against enemy personnel, equipment, transmitting military information for the benefit of the belligerent, and transporting weapons in proximity to combat operations.²¹⁷ The requirement for direct participation is that the timing of the attack is necessary. Nevertheless, such protection is not lost if they use armed force only for the purpose of self-defence.

163 Installations, material, units or vehicles involved in a peacekeeping mission are also entitled to the protection given to civilians.

²¹⁷ ICC-02/05-02/09-243-Red.

²¹⁸ ICC-02/05-02/09-243-Red, para 83.

unless and for such time as their nature, location, purpose and an effective contribution to the military effort to a conflict and insofar as their total or partial destruction, neutralisation, in the circumstances ruling at the time, or military advantage.

ii. Alleged attack against Georgian peacekeepers

164 According to Georgian authorities, South Ossetian F attacked Georgian peacekeepers positions prior to the hostilities. Georgian peacekeepers locations were reported by South Ossetian forces on 29 July 2008; in Sarabuki on 29 July; 4 August; 5 August (2 Georgian peacekeepers wounded); 6 August (3 Georgian peacekeepers wounded); in Avnevi on 7 August. Avnevi and Frone valley starting at 20h30 on 7 August 2008.

165 The most serious incident allegedly happened on 7 August 2008 in Avnevi South Ossetia attacked Georgian peacekeepers who manned a checkpoint. The checkpoint was reportedly heavily shelled with 100mm and 120mm art

²¹⁹ ICC-02/05-02/09-243-Red, para 89.

²²⁰ Annex E.7.19: Government of Georgia, Witness Statement, GEO-0008-1812 at 1812.

²²¹ Annex E.7.9: Government of Georgia, Chronology of the August 2008 events, Appendix 2; GEO-OTP-0006-0539 at 0545; Annex E.3.16: GEO-OTP-0005-0830 at 0831.

²²² Annex E.7.9: Government of Georgia, Chronology of the August 2008 events, Appendix 2; GEO-OTP-0006-0539 at 0546

²²³ Annex E.7.9: Government of Georgia, Chronology of the August 2008 events, Appendix 2; GEO-OTP-0006-0539 at 0547.

²²⁴ Annex E.7.17: Government of Georgia, Witness statement, GEO-0008-1793 at 1798.

²²⁵ OTP meeting with Georgian authorities on 22 June 2010 in Tbilisi, Georgia.

²²⁶ Annex E.2.38: IIFMCG, Volume III, GEO-OTP-0002-8247 at 8310; Annex E.7.9: Government of Georgia, Chronology of the August 2008 events, Appendix 2; GEO-0006-0539 at 0550; Annex E.7.19: Government of Georgia, Witness Statement, GEO-0008-1812 at 1815.

²²⁷ Annex E.7.17: Government of Georgia, Witness statement, GEO-0008-1793 at 1800/1801.

Ossetian forces unit located in the village of Ghechtagu that as a result of the attack, several Georgian peacekeepers were killed, eight peacekeepers were wounded and a Georgian peacekeeping unit's armoured vehicle was destroyed by the return of fire from the Georgian peacekeepers.

166 According to the JPKF Commander at the time, General [redacted], this attack occurred on 2 August 2008 and it was determined who started the attack at the time.

167 The exact timings and the precise circumstances surrounding the conduct would require verification in the context of an authorised investigation. The investigation appears to have preceded the formal commencement of the conflict on 7 August 2008. However, given the temporal proximity and the close connection to a number of precursor incidents, the level of violence and the investigation will be based on the basis of the evidence that there is a sufficient nexus between the killing of the Georgian peacekeepers and the elements for war crimes or crimes against humanity. Information at this stage suggests that there is

168 In particular, information available provides a reasonable basis to believe that, by the time of this incident at the latest, Georgian forces and the highly organised Ossetian forces were sufficiently intense to constitute an armed conflict. Because of the attack against the Georgian peacekeepers,

²²⁸ Annex E.2.38: IIFFMCG, Volume III, GEOTP-0002-8247 at 8309.

²²⁹ Meeting with the Russian authorities on 10 March 2010 in Moscow, Russian Federation.

the context of this armed conflict it would, at a minimum, be a war crime pursuant to article 8(2)(e)(iii). Alternatively, if it can be established that a Russian armed force exercised overall control over South Ossetian forces at the time of this conflict, the conduct would have been rendered international and would give rise to application of the law of international armed conflict, providing criminal jurisdiction pursuant to article 8(2)(b)(iii).

169 Despite the limited information available in the precise circumstances of the attack, the fact that peacekeepers were attacked is not, in any part, the allegation that the Georgian peacekeepers initiated the attack does bring into question whether the attack they had the right to the protection given to them as peacekeepers and civilian observers, bearing in mind the threshold applicable at this stage of the procedure, and the civilian character that governs the application of the law. In doubt, the Prosecution has concluded on a reasonable basis to believe that South Ossetia committed the war crime of intentionally directing an attack against personnel and objects of a peacekeeping mission pursuant to article 8(2)(b)(iii) and 8(2)(e)(iii).

iii. Alleged attack against Russian peacekeepers

²³⁰ ICC-02/05-02/09-243-Red, para. 89, citing article 52(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949 (EAPI) and ICTY Trial Chamber Judgment, 5 December 2003, case No. IT-98-T, para. 51. See also article 52(3) of API.

170 The JPKF had two bases in Tskhinva and its headquarters JPKF based in Nizhniy Gorodok in the central part of Tskhinva and the Russian Peacekeeping Forces Battalion were headquartered in Vnukhniy Gorodok in the southern part of Tskhinva. (RUPKFB HQ) The RUPKFB HQ counted 528 servicemen of the Russian Federation's Peacekeeping Battalion from the command of Lt Col K.A. Atkhvashvili. At the time of the exchange of fire on 8 August 2008, the battalion had 296 servicemen at its disposal at the BRONKFB. The JPKF HQ was composed of Russian peacekeepers under the command of Maj General M.M. Kulakhmetov. In addition, there were 162 Russian servicemen on duty at 12 peacekeeping observation posts.

171 The material obtained from the reports provides only limited information in relation to the contextual elements and nature of the alleged crimes, despite efforts undertaken by the ICJ to obtain additional information. In many instances, the information available is derived solely from one party to the conflict, and is often provided by information provided by the other, and no third party has been able to provide corroboration or to come to a more definitive determination on the matter. The IIFMCG, AI and HRW were unable to corroborate claims made by the peacekeepers as they could not assess whether the time of the alleged offenses, the peacekeepers had lost their protection.

²³¹ Annex E.8.31: Order No. 27, GEOTP-0008-0584.

²³² Officers of the Georgian peacekeeping battalion located at the premises of JPKF HQ reportedly left their post in the afternoon on 7 August 2008, prior to the alleged military offensive. Annex E.7.17: Government of Georgia Witness interview, GEOTP-0008-1793 at 1801; Annex E.2.38: IIFMCG, Volume III, GEOTP-0002-8247 at 8310

²³³ Eredvi, Tamarasheni, Vanati, Kekhvi, Pauk, Prisi, Avnevi, Tsunaristba, Kverneti, Andzisi, Artsevi, and Megvrekishi. Annex E.8.31: Order No. 27, GEOTP-0008-0584.

virtue of having ~~glitake~~ ~~enparthe~~ ~~hostilitie~~ ~~it~~ The conclusions reached by the Prosecution are therefore provisional in

172 While ~~thac~~ ~~tha~~ ~~an~~ ~~exchange~~ ~~of~~ ~~fire~~ ~~in~~ ~~the~~ ~~RUPKFB~~ ~~HQ~~ occurred on 8 August 2008 ~~in~~ ~~the~~ ~~same~~ ~~domain~~ ~~contentious~~ ~~issues~~ ~~that~~ ~~are~~ ~~set~~ ~~out~~ ~~in~~ ~~the~~ ~~submitted~~ ~~account~~ ~~with~~ ~~the~~ ~~three~~: the Russian peacekeeping ~~RUPKFB~~ ~~HQ~~ at the ~~time~~ ~~directly~~ participating in the hostilities ~~for~~ ~~the~~ ~~infrastructure~~ ~~base~~ ~~being~~ used to make an effective contribution to the ~~eparitly~~ ~~ay~~ ~~acti~~ conflict, and were ~~thus~~ ~~rendered~~ ~~legitimate~~ ~~military~~ ~~target~~; whether the Georgian armed forces initiated the ~~ack~~ ~~instead~~ responded to ~~live~~ ~~fire~~ ~~from~~ ~~the~~ ~~direction~~ ~~RUPKFB~~ ~~HQ~~ the attack on the RUPKFB HQ on 8 August 2008 resulted in Russian peacekeepers ~~30~~ ~~others~~ ~~were~~ ~~wounded~~.

173 As noted above on 18 June 2012, Russian authorities submitted to the Prosecution 28 volumes of records ~~and~~ ~~additional~~ their own investigation ~~including~~ ~~witness~~ ~~statements~~ ~~and~~ ~~reports~~ ~~on~~ ~~weapons~~ ~~used~~ ~~by~~ ~~the~~ ~~Georgian~~ ~~armed~~ ~~forces~~ ~~allegedly~~ ~~lawful~~ ~~attack~~. This material was submitted in support of allegations that the ~~Georgians~~ ~~deliberately~~ ~~attacked~~ JPKF HQ the centre of Tshkinvali and the RUPKFB Verkhniy Gorodok located ~~on~~ ~~the~~ ~~southern~~ ~~skirts~~ ~~of~~ Tshkinvali ~~at~~ ~~the~~ ~~time~~ ~~when~~ ~~Russian~~ ~~peacekeepers~~ ~~and~~ ~~their~~ ~~property~~ were entitled to protected status

²³⁴ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8131.

²³⁵ Annex E.2.37: IIFFMCG, Volume II, GEOTP-0002-7801 at 8130.

²³⁶ Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0151.

174 The supporting material submitted by the Russian authorities states that the attack against the Russian peacekeeping forces on 8 August 2008, when the Georgian armed forces opened fire on the Tamarasheni observation post with the RUPKF arms, mortars, artillery, Grad rocket launchers, rockets, 2 T-72 tanks, 2 SU-26 airplanes, and 2 BMP minutes later, the Georgian armed forces reportedly carried out mortar attack against the JPKF HQ in Tskhinvali followed by second attack with LRSA at 04h08. The JPKF HQ allegedly came under Georgian fire again at 05h05 around 05h05 when the JPKF commander Major M. Kujlahmetov ordered the destruction of confidential documents and electronic data storage equipment.

175 According to information provided by the Russian authorities, around 06h35 on 8 August 2008, a tank, located on the road leading from Zikmazi to Tskhinvali, fired a base that hit a post, located on the roof of the RUPKFB HQ barracks, I.Ya. Lotfifollowing this attack on the RUPKFB HQ, the Russian armed forces carried out a larger attack on the RUPKFB HQ with arms, mortars, artillery and then the attack lasted around 15 minutes. At approximately 07h00, Georgian tanks moved into Tskhinvali and destroyed an infantry fighting vehicle (type B-M, P hull number 619) and an armoured patrol vehicle (BRDM) that had been on the Tskhinvali road to separate the opposing sides. Two peacekeepers alleged to have been

²³⁷ Russian authorities claimed that this attack occurred at 23h57 on 7 August, Meeting with the Russian authorities on 10 March 2010 in Moscow, Russian Federation.

²³⁸ Annex E.8.31: Order No. 27, GEOTP-0008-0584.

²³⁹ Annex E.7.24: Government of the Russian Federation, Witness statement, GEOTP-0001-1354 at 1360.

²⁴⁰ Annex E.8.31: Order No. 27, GEOTP-0008-0584.

killed. The Georgian armed forces allegedly opened fire on the RUPKFB HQ at 07h40 and 8h00, killing another peacekeepers. In the course of the attack on the RUPKFB HQ, Georgian forces allegedly targeted a medical aid post and ambulances which were located inside the compound and marked with Red Cross symbols. The bombing of the RUPKFB HQ said to have continued through the day until 9 August 2008.

176. In the period between 8 and 10 August 2008, the Georgian forces allegedly attacked also other observation posts of the Peacekeeping Battalions from the JPKF in Eredvi, Van Prisi, v. Aevi, Tsunaristba, Kverneti, Andzisi, Arts Megvrek'isi.

177. In support of its claim that the attack was premeditated as well in advance, Russian authorities submitted two CDs allegedly seized by Russian forces in South Ossetia after the withdrawal of Georgian forces. These two CDs were dated between 2005 and 2007 and reportedly contain targets for future military operations in the RUPKFB HQ.

178. Further, according to the Russian authorities, the contingent left JPKF HQ at 14h43 on 7 August 2008 and these forces knew that the JPKF HQ was about to be attacked. It is alleged that shortly before its departure, the Georgian forces started

²⁴¹ Annex E.8.31: Order No. 27, GEOTP-0008-0584.

²⁴² Annex E.8.31: Order No. 27, GEOTP-0008-0584.

²⁴³ Annex E.7.29: The Prosecution received the 2 CDs in question from Russian authorities on 11 October 2011, GEOTP-0005-1385 through GEOTP-0005-1505. The Prosecution could however not verify the authenticity of the material nor come to a conclusion that the RUPKFB HQ was identified as a military target.

firing from the side of Avnevi in the direction of K
 artillery, tanks and armoured personnel carriers.²⁴⁴ The barriers
 commander of the Georgian peacekeeping battalion
 Mamuka Kurashvili, explained that he had ordered the Georgian
 peacekeeping battalion to leave the JPKF HQ in Tskhinvali
 17h00 on 7 August after the JPKF Commander refused to provide
 additional security guarantees to Georgian peacekeepers.
 Tskhinvali.²⁴⁵ The guarantees sought after the earlier described
 incident in which Georgian peacekeepers were stationed at
 Avnevi checkpoint came under heavy shelling from
 positions, which started around 14h00 that day.

179 Further, according to a narrative timeline provided by the
 Georgian authorities, between 5h30 and 5h18 August 2008, the
 Georgian Central Front forces encountered heavy shelling in the
 northern area of Zhenkovo towards Tskhinvali.
 Georgian witnesses deployed at the time gave statements to
 Georgian investigators and reconnaissance as well as other
 intelligence sources showing that the shelling originated from
 the outskirts of Tskhinvali.²⁴⁶ Most of the positions were
 identified as being located on higher ground around the
 JPKF HQ firing towards the Georgian armed forces on the
 road to Tskhinvali.

²⁴⁴ Annex E.8.31: Order No. 27, GEOTP-0008-0584.

²⁴⁵ Annex E.7.17: Government of Georgia, Witness statement, GEOT-0008-1793.

²⁴⁶ According to the testimony of the reconnaissance officer of the Batumi Battalion of the Central Front forces, the mortars used in the backyard of the JPKF HQ were being employed for shelling against the Georgian positions. However, this witness did not directly see the artillery launching the mortars as he could not see the peacekeeping compound buildings from the fire. Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOT-OTP-0003-1836 at 1848, 1856.

180 The Georgian timeline indicates that on August 5, 2008, Georgian forces moved 3000 meters away from the east side of RUPKFB HQ their way towards Tankinvalier fire from snipers, machine-guns, rocket grenades and armoured vehicles from a direction of RUPKFB HQ. As a result, it is alleged that Georgian soldiers were killed and injured and several Georgian tanks destroyed. The Georgian forces are said to have refrained from returning fire for at least 15 minutes while they waited for superior orders. At 06:00, the Georgian forces apparently instructed the infantry forces to return fire and employ tank support. The Georgian artillery of the First Infantry Brigade Artillery Battalion next attacked on RUPKFB HQ at or about 06:30. According to the Georgian authorities, the Russian forces used machine-guns, automatic rifles, and light artillery in the attack.

181. In addition to the allegations that the Georgian troops were first fired at from the RUPKFB HQ, authorities also alleged that the Russian peacekeepers lost their protected status because they took direct part in hostilities as of 22 August 2008. It is alleged that the Russian peacekeepers do not have the military advantage of South Ossetians by providing them with

²⁴⁷ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1847; Annex E.7.9: Government of Georgia, Chronology of August 2008 events, GEO-OTP-0006-0539 at 0554-0552; Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0005 at 0029.

²⁴⁸ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1848.

²⁴⁹ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1848; Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0005 at 0032.

²⁵⁰ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1849-1850.

²⁵¹ Annex E.2.38: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8310.

the coordinates of Georgian military and infrastructure of the RUPKFB HQ available for South Ossetian military positions.

182 In support of the above, the Georgian authorities submitted a transcript of a 23 second telephone conversation between Commander of the JPKF Kulakhmetov and the Head of the Georgian peacekeeping contingent Kurashvili on 8 August 2008, in which the former said to and admitted that Russian peacekeepers were providing coordinates for artillery shelling of Ossetian forces.

183 According to the Russian authorities, the conversation took place but added that its content was distorted. In particular, it is claimed that interpreters were constantly reporting on the movements of tanks and artillery firing on the territory under their mandate. The communication is said to have been made by the Russian peacekeepers, to have been deliberately open for transparency pursuant to the Sochi agreement and applicable protocols, a degree of coordination between peacekeepers and the conflict was asserted under the provision of the

²⁵² Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1848; Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0005 at 0029-0031.

²⁵³ The translated transcript reads: "Kulakhmetov: Hello. Kurashvili: Miniurovich, your people are giving coordinates. Kulakhmetov: Of course they are giving [coordinates]. Why did you think that we would not? You are pounding here and you think that we should do something about this (swearing)?", Telephone intercept, 8 August 2008, Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 39, GEO-OTP-0006-0220. The Prosecution also received an audio version of the intercepted conversation from the Government of Georgia, GEO-OTP-0006-0219.

²⁵⁴ Meeting with the Russian authorities on 24 January 2014 in Moscow, Russian Federation.

²⁵⁵ See Annex E.8.33: Annex No. 1 to the Decision Concerning the Basic Principles of Operation of the Military Contingents and of the Military Servers Designated for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict, 6 December 1994, GEO-OTP-0008-0683. For full text see above, footnote 201.

therefore permitted with applicable legal framework content at this stage

184 The Georgia authorities further claimed that one of the attack South Ossetian sniper, Oleg Galavanov, was on main building of RUPKFB HQ to correct the South Ossetian artillery fire against Georgian units. Georgian transportation coordinators by contrast the Russian authorities claim that Galavanov was located on the roof of the university building next to he was wounded by Georgian attack Russian peacekeepers transported him to the medical facility within the compound where he was killed due to the destruction as a subsequent Georgian attack. According to Georgia, any transfer of Galavanov to a hospital in the area was highly unlikely given the state of affairs at the time.

185. In addition to the presence of the South Ossetian, the Georgia authorities argued that Russian peacekeeping forces actively contributed to the military advantage of both the Russian regular forces and South Ossetian forces. They complained to the RUPKFB HQ facilities and infrastructure.

²⁵⁶ Annex E.2.38: IIFFMCG, Volume III, GEOT-0002-8247 at 8346.

²⁵⁷ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOT-0003-1836 at 1861-1862.

²⁵⁸ Annex E.7.28: Response from the South Ossetian Ministry of Defence, addressed to the Investigative Committee of the Russian Federation, dated 27 January 2014, GEOT-0005-0660.

²⁵⁹ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOT-0003-1836 at 1862-1863.

²⁶⁰ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOT-0003-1836 at 1861.

186 For instance, Anatoly Bakhmetyev, Security Council Chairman of the South Ossetian Authority, acknowledged in an interview that he decided to give the RUPKFB HQ order to secure the road leading to the JPKF HQ and, for that purpose, South Ossetian forces occupied the surrounding area and blocked the nearby crossroads. He stated that as a result of those positions that South Ossetian forces ambushed and attacked Georgian police officers moving through the town.

187 Reported, however, that the peacekeeping mission was strictly for the purpose of monitoring the situation and to host members of the South Ossetian forces. South Ossetian forces were also not allowed in the compound, except those necessary for medical care and were admitted to the medical unit, for administrative activities. The Russian peacekeepers were also subject to the scrutiny of relevant stakeholders and the presence of South Ossetian forces at the RUPKFB HQ would have been easily known.

188 The Prosecution recalls that the presence of a member of the party would not, in and of itself, remove the protection afforded to persons or objects if they were entitled to such protection. In such a case, such, examination of this particular allegation relates to the question of whether the Russian peacekeepers were at the time directly participating in the hostilities. If the issue concerns consideration as to the proportionality of the use of force in response to the shooting of Odette Gataeva, which appears to have been directed to other parts of the RUPKFB HQ compound and not

²⁶¹ Annex E.7.9: Government of Georgia, 10 May 2010 Report Annex 24, Kommersant, "There is no place for this President in South Ossetia", 4 December 2008, GEP/00006-0173.

²⁶² Meeting with the Russian authorities on 24 January 2014 in Moscow, Russian Federation.

just the bullet was allegedly looted depending on the indiscriminate nature of such firearms and could constitute the crime of internationally directing of attacks against personnel and objects.

189 The information available remains indeterminate in number of issues related to the Russian peacekeeping contingent RUPKFB HQ at the time of the attack. It is entitled to the protection of civilians and civilian objects. Included in this is information on the role of Oleg Galavan and whether the Georgian armed forces initiated the attack or live fire coming from the RUPKFB HQ. The precise chain of events and the width of the alleged verification in the context of any authorised investigation bearing in mind the low threshold applicable at this procedure, and the presumption of civilian character application of the law in ²⁶³ case of prosecution has concluded that there is a reasonable basis, at this stage, to believe that a crime of intentionally directing an attack against persons involved in a peacekeeping mission has been committed with respect to the intentional directing of attacks by the Georgian and Russian peacekeeping personnel and installations at the RUPKFB base during the night of 7 to 8 August 2008. article 8(2)(b)(iii).

²⁶³ ICC-02/05-02/09-243-Red, para. 89, citing Article 52(2) of API and ICTY, The Prosecutor v. Stanislav Galic Trial Chamber Judgment, 5 December 2003, case No. IT-98-T, para. 51. See also Article 52(3) of API.

(d) Alleged Indiscriminate and Disproportionate Attacks

190 The Prosecution has examined information available on other crimes allegedly committed by the parties to the conflict. In particular, Georgian and Russian armed forces are alleged to have launched indiscriminate and disproportionate attacks against civilians.

i. Alleged Indiscriminate and Disproportionate Attacks by Georgian armed forces

191 The Georgian armed forces deployed in South Ossetia included light infantry brigades, five tank battalions, eight artillery units, Special Forces units, and members of the Ministry of Internal Affairs. The President of Georgia was in South Ossetia on 12 August 2008.²⁶⁴

192 The Prosecution has examined allegations that Georgian military forces carried out indiscriminate attacks against civilians and civilian property during the military offensive against the city of Tskhinvali and the surrounding area. The attack started on the night of 7 August 2008. The article 15 communications received on behalf of victims through the embassy in The Hague also contain allegations that in the course of the Georgian military offensive on the city of Tskhinvali and surrounding villages in South Ossetia on 9 August, the armed forces carried out indiscriminate and disproportionate attacks against civilian targets in South Ossetia.

²⁶⁴ Annex E.2.37: IIFFMCG, Volume II, GE02TP-00027801 at 8020.

193 These attacks reportedly resulted in civilian deaths and considerable damage to civilian buildings dedicated to education, including schools, hospitals and HRW. Civilian residential areas were also targeted. For example, a document dated 8 November 2008, allegedly carried out by Georgian armed forces in the vicinity of Tskhinvali between 7 and 8 August 2008, during the South Ossetian Central Republic. Hospitals may have been targeted.

194 According to HRW, during a small ground offensive in Georgia, the armed forces used weapons that lack sufficient precision and were not accurately used against military targets in close proximity to civilians and civilian infrastructure. The use of Grad MLRS and cluster munitions is also reported. On 7 August 2008, Georgian Air-25 by type aircraft are alleged to have dropped bombs on several villages in Nogkakheta and Khetaguro, resulting in a number of civilian deaths and injuries.²⁶⁵ While over 100 civilians were estimated to have been injured in Tskhinvali, many of which were occupied at the time, according to eyewitness accounts.²⁶⁶

²⁶⁵ Annex E.4.3: AI, Civilians in the line of fire, GEOTTP-0001-0125 at 0148.

²⁶⁶ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0383-0384.

²⁶⁷ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0380.

²⁶⁸ Annex E.4.4: AI, Georgia/Russia conflict: Protection of civilians and accountability for abuses should be a priority for all, 01 October 2008, GEOTTP-0003-1196; Annex E.2.4: OCHA Mission Report, GEOTTP-0001-0846; Annex E.4.3: AI, Civilians in the line of fire, GEOTTP-0001-0125.

²⁶⁹ Annex E.4.4: AI, Georgia/Russia conflict: Protection of civilians and accountability for abuses should be a priority for all, 01 October 2008, GEOTTP-0003-1196; Annex E.4.5: AI, The human cost of war in Georgia, 01 October 2008, GEOTTP-0003-1397; Annex E.2.3: Consolidated Appeals Process (CAP), Georgia Crisis: Flash Appeal, 18 August 2008, GEOTTP-0001-0660 at 0669; Annex E.2.38: IFFMCG, Volume III, GEOTTP-0002-8247 at 8737; Annex E.7.24: Government of the Russian Federation, Witness statement, GEOTTP-0001-1354; Annex E.4.9: HRW, Russia/Georgia: All Parties in August South Ossetia Conflict Violated Laws of War, 23 January 2009, GEOTTP-0001-0558.

195 The information available with regard to the nature of the circumstances of attacks, and scale of the damaged civilian areas in this state. IFFMCG examples demonstrate that South Ossetian forces were responsible for firing at Georgian forces from locations in civilian areas, or for setting up defensive positions in civilian infrastructure. In response to these attacks, Georgian forces appear to have targeted military objectives located near densely populated areas in Tskhinvali and, surrounding areas, causing the destruction of civilian objects.²⁷⁰

196 The type of weaponry used in each incident also remains an example. IFFMCG records indicate that Grad MLRS were used in the south and southwest of Tskhinvali. By their nature, Grad MLRS use of urban areas renders them incapable of striking solely military targets or of avoiding extensive damage to civilian property within a radius of 1000m from the intended target. As a result, their use in civilian areas could amount to the launching of indiscriminate attacks, depending on the facts of the attacks, unless they are proportionate within the meaning of article 8(2)(b)(i). However, this would require an assessment of the exact nature and scale of the used weapons and their area of spread, the character of the targeted military objectives, the physical proximity of civilian areas to military objectives, or the availability of alternative weapons, which is a fact-specific stage.

²⁷⁰ Annex E.2.37: IFFMCG, Volume II, GEOTTP-0002-7801 at 8128, 8132, 8133.

²⁷¹ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0392; Annex E.2.39: OSCE/HRAM Report, GEOTTP-0003-1921 at 1954.

²⁷² Annex E.2.37: IFFMCG, Volume II, GEOTTP-0002-7801 at 8145.

197 Thus, owing to the insufficiency of the information available, the Prosecution is at this stage to determine whether there is a reasonable basis to believe that lawful attacks by Georgia armed forces amount to a war crime within the scope of the Court's jurisdiction. The Court should without prejudice to other possible findings that may be made in the course of investigations. In particular, a prompt assessment of the evidence on the context of the attacks to determine whether injuries or property damage amounted to a war crime is within the Court's jurisdiction.

ii. Alleged Indiscriminate and Disproportionate Attacks by Russian armed forces

198 The Russian armed forces active in Georgia consisted of tactical groups (reinforced elements) from the 19th (North Ossetia) and 42nd (Chechnya) Motorized Divisions, deployed under the command and control of the Plan North Caucasus Military District during combat operations in Ossetia. These forces were also supported by five Russian 58th (HQ Vladikavkaz) and the Russian 76th Division. The President of Russia was their Supreme Chief of the Armed Forces of the Russian Federation and

199 The Prosecution has reviewed allegations relating to attacks by the Russian armed forces against civilians

²⁷³ See William Fenrick, 'The prosecution of unlawful attack cases before the ICJ', in *Yearbook of International Law*, Vol. 7, 2004, p. 159.

²⁷⁴ Annex E.2.37 IFFMCG, Volume II, GEGOTP-00027801 at 8021.

property during the air and ground operations between August 2008. These attacks reportedly resulted in civilian injuries and considerable damage to civilian objects, hospitals and civilian dwellings.²⁷⁵

200 The information available on these alleged attacks, in respect to the circumstances and planning, intended to the scale of collateral damage, is insufficient at this reasonable basis to believe that members of the Russian bear criminal responsibility for the commission of these

201 The Russian armed forces are alleged to have carried out and disproportionate attacks against civilians and civilian property with weapons that cannot be accurately used against military civilian areas, such as the MBR Sofand cluster munitions. These attacks reportedly resulted in civilian deaths and considerable damage to civilian objects, including schools, and civilian dwellings.²⁷⁶

202 The information available indicates that Russian reportedly carried out air attacks in the areas of Tskhin in South Ossetia and around Vajin in the Gori municipality. The town of Gori was subject to aerial bombardment in four or five different areas in the period between 8 2008.²⁷⁷

²⁷⁵ Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0148.

²⁷⁶ Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0148.

²⁷⁷ Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 81328148.

203 According to the OSCE report of 8 August 2008, the Ministry of Foreign Affairs reported that Russian aircraft bombed military and civilian targets in Gori, Kareli and the Georgian villages of Prisi and Tamaracarsdine. In the OSCE spot report, on 11 August 2008, Georgian officials reported that it appeared that attacks by Russian military targeted military installations, they resulted in the destruction of civilian and Gori.

204 On the morning of 12 August, for example, the Russian military reportedly carried out a rocket attack on the main square of Gori Municipality Administration building. As a result of the attack, at least eight civilians were killed and 130 injured. Witnesses of the attack described that they saw numerous small explosions in quick succession of each other, suggesting the use of cluster munitions. Although the Russian military initially denied that it used cluster munitions in Gori, Foreign Minister Sergei Lavrov announced on 13 August 2008 that Russian forces were active in the area. A witness interviewed attested to the absence of military targets in the vicinity.

205 The IFFMCG could not reach a definite conclusion on the attacks carried out by the Russian armed forces on 12 August 2008.

²⁷⁸ Annex E.3.16: GEOTTP-0005-0849 at 0850.

²⁷⁹ Annex E.3.16: GEOTTP-0005-0865 at 0866.

²⁸⁰ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0552-0554; Annex E.4.3: AI, Civilians in the line of fire, GEOTTP-0001-0125 at 0154-0155; Annex E.4.4: AI, Georgia Russia Conflict: Protection of civilians and accountability for abuses should be a priority for all, 01 October 2008 GEOTTP-0003-1196 at 1199; Annex E.4.8: HRW, Russia Georgia - Investigate Civilian Deaths, 13 August 2008, GEOTTP-0003-1410; Annex E.3.9: ECHR, Storimans v. Verhulst, Akkermans and Yecheskeli v. Russia, Appl. no. 26302/10, 30 August 2010, GEO-OTP-0002-3454 at 3478, 3481, 3502.

public and residential civilian buildings, and other civilian objects in Tskhinvali and surrounding villages as well as in relation to the attack against cultural property, on the basis of information on the facts relating to the circumstances of the military operations.²⁸¹

206 HRW documented the attack against the military hospital in Gori by Russian armed forces on 13 August 2008.²⁸² According to this source, a Russian military helicopter fired a rocket at hospital staff in the hospital yard.²⁸³

207 The information available, however, indicates that most of the air attacks appeared to have targeted Georgian military objects outside built up areas. The proximity of civilian objects to military targets varied. In some cases, the military targets were within civilian areas, including civilians and civilian residences. According to HRW, Russian forces targeted Georgian military located in the city of Gori, where the military base of the artillery brigade concentrated in the city.²⁸⁴ In addition, some civilian objects hit by Russian forces were reportedly used for military purposes by Russian forces at the moment of the Russian attack, which would make them legitimate military targets. For instance, HRW reported that Russian air forces carried out several attacks on and near Sch

²⁸¹ Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 8133, 8137, and 8142.

²⁸² Annex E.4.10: HRW, Up in Flames GEO-OTP-0001-0336 at 0436.

²⁸³ See Annex E.2.37: IIFMCG, Volume II, GEOTP-0002-7801 at 8135. While the Mission concluded that "the helicopter fire at the hospital in Gori seems to indicate a deliberate targeting of this protected object" and that "this may amount to a war crime", the Prosecution notes that this assessment is solely based on the same report produced by HRW.

²⁸⁴ Annex E.4.10: HRW, Up in Flames GEO-OTP-0001-0336 at 0434.

the moment when around 100 members of the Georgia were present in the yard.²⁸⁵ of the school

208As such, the information available at his stage remain enable a determination whether there is a reasonable that the attacks by Russian armed forces amounted to intentionally directing attacks against civilian objects under articles 8(2)(b)(i) and 8(2)(b)(ii), or the war crime of launching an attack in the knowledge that such attack would cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and overall military advantage anticipated under article 8(2)(b)(i) intentionally directing attacks against hospitals under

209In relation to the war crime of intentionally directing attacks against civilians and civilian objects as well as the war crime of intentionally directing attacks against hospitals, there is a further information on the nature of targets, circumstances of the damage caused relevant to establishing whether the attack were civilians and/or civilian objects and whether the attack were intended such civilians and/or civilian objects to be the target of the attack, as required under Statute of Rome

210With respect to the war crime of excessive incidental damage, the elements of the crime require that the

²⁸⁵ Annex E.4.10: HRW, Up in Flames GEO-OTP-0001-0336 at 0435; See also Annex E.2.37: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8134 (The IFFMCG concluded that “the Mission has no information indicating that schools not used for military purposes were deliberately attacked.”)

²⁸⁶ Elements of Crimes, articles 8(2)(b)(i) and 8(2)(b)(ii).

aware that the attack would cause incidental death, injury, or damage, such an extent as to exceed such incidental damage in relation to the concrete and direct military advantage anticipated in light of the information available at this stage in relation to the planning of the attacks, the nature and extent of the damage occurred, the number and nature of military personnel killed, the positions of artillery, location of enemy combatants, the scale of collateral damage that the alleged attacks caused, and the extent to which the attacks were necessary to assess the elements of the required proportionality. In particular, what concrete and direct military advantage was anticipated and actually gained by the Russian armed forces.

211 This finding should be made without prejudice to other possible findings that may be made during the course of an investigation. In the course of a more in-depth assessment of the facts and circumstances, further evidence on the context of the attacks to determine whether deaths, injury, or damage amounted to a war crime within the jurisdiction of the Court.

(e) Nexus between the individual acts and the armed conflict.

212 In order for the acts to constitute war crimes, it is necessary that the conduct took place in the context and associated with an armed conflict of an international character. The nexus must be closely related to the hostilities, meaning that the armed conflict must play a substantial role in the perpetration of the crime.

²⁸⁷ According to footnote 36 of the Elements of Crimes, the expression "concrete and direct military advantage" refers to a military advantage that is foreseeable by the perpetrator at the time of the attack. Such advantage may or may not be temporally or geographically related to the object of the attack; Elements of Crimes, article 8(2)(b)(iv), page 19. Elements of Crimes also clarify that the knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time; Elements of Crimes, article 8(2)(b)(iv), footnote 37, page 19.

²⁸⁸ See William Fenrick, "The prosecution of unlawful attack cases before the ICTY," Yearbook of IHL, Vol.7, 2004, p. 159.

²⁸⁹ Elements of Crimes under article 8(2)(a) and 8(2)(b), second last element.

substantial role in the perpetrator's decision and his the crime, and the manner in which the crime was. Nonetheless, the armed conflict need not be considered a reason for the conduct need not have taken place amidst of the battle.

213. In determining whether or not the act in question is related to the armed conflict, the Chamber may take into account the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a combatant; the fact that the victim is a member of the opposing party; the fact that the act may be part of the ultimate goal of a military campaign; and the fact that the act was committed as part of or in the context of the perpetrator's duties.

214. The Prosecution based its analysis in this part on the fact that it found a reasonable basis to believe that the following crimes were committed: willful killing/murder (8(2)(a)(i)), destruction of the enemy's property/the property of an adversary (8(2)(b)(xiii)/8(2)(e)(xii)), assault on civilians (8(2)(d)(v)); intentionally directing attacks against personnel or objects protected under international law (8(2)(b)(ii)(e)(iii)).

215. The above acts took place in the context of an armed conflict, irrespective of whether the specific acts were committed in the area or in the vicinity of the conflict.

²⁹⁰ ICC-01/04-01/07-3436, para. 1176; ICC-02/11-14-Corr, para.150.

²⁹¹ ICC-02/11-14-Corr, para.150. See also Situation in the Democratic Republic of Congo, ICC-01/04-01/06-803tEN, paras. 2828; ICC-01/04-01/07-717, para.380.

²⁹² ICC-01/04-01/07-717, para. 382.

between Georgian and Russian armed forces in South Ossetia, as well as in the immediate aftermath of hostilities while Russian forces maintain their occupation of Georgian territory.

216 The nexus between the armed conflict and the alleged crimes is further demonstrated by the fact that the perpetrators were members of the armed forces of the South Ossetian authorities, while the victims of the alleged crimes were civilians as a matter of principle. They were entitled to the protection given to civilians and civilian objects under international law. With respect to the alleged crimes against the civilian population, it appears to have been the pursuance of a policy of the South Ossetian authorities to forcibly expel Georgian civilians from the territory of South Ossetia in furtherance of their overall objective to sever any remaining links with Georgia. The attacks against personnel and objects of a peacekeeping mission were also in the context of the allegations that the Georgian and/or Russian peacekeepers of each party were not entitled to protected status.

217 On the basis of the evidence, it appears that the armed conflict played a substantial role in the perpetration of the alleged crimes. Moreover, the armed conflict played a substantial role in the ability of the perpetrators to commit the crimes and the manner in which the crimes were committed. The perpetrators would not have been able to commit the crimes in the absence of the armed conflict and the ensuing occupation of the armed conflict.

perpetrators were apprehended at a location where the crimes committed.

2. Crimes against humanity

218 The information available provides a reasonable basis to believe that crimes against humanity were committed during the 2008 armed conflict in Georgia. It is a reasonable basis to believe that South Ossetian forces committed the crimes against murder (article 7(1)(a)), deportation or forcible transfer (article 7(1)(d)), and persecution against a national or ethnic collectivity or groups (article 7(1)(e)). These crimes were allegedly committed as part of a widespread or systematic attack against ethnic Georgian civilians, involving the multiple commission of the above mentioned acts against the Georgian civilian population in South Ossetia and the buffer zone in pursuance of a policy of the South Ossetian authorities to forcibly expel Georgians from the territory of South Ossetia furtherance of the overall objective of any remaining links with Georgia to secure full independence.

(a) Contextual elements of crimes against humanity

219 The contextual elements of crimes against humanity are: (i) an attack directed against any civilian population; (ii) the organisational nature of the attack; (iii) the widespread or systematic nature of the attack; (iv) a nexus between the individual act and the attack.

knowledge of the²⁹³. In light of the nature of the current proceedings, and bearing in mind that there is no evidence before the Court, the last requirement cannot be added at this stage, as knowledge is an aspect of the mental element of article 30(3) of the Statute. Prosecution directed its analysis to the first four elements.

(b) Acts allegedly committed by Soufiane Othman

i. Attack directed against any civilian population

220 Article 7(2)(a) defines an attack directed against any civilian population as a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against a civilian population pursuant to or in furtherance of a State policy to commit such an attack.

Course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against a civilian population

221 In accordance with article 7(2)(a), a course of conduct involving the multiple commission of acts, and not more than a few isolated incidents or acts as referred to in article 7(1) of the Statute

²⁹³ ICC-02/11-14-Corr, para. 29.

²⁹⁴ 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.

²⁹⁵ Article 7(2)(a). See also, e.g., ICC-02/11-02/11-186, para. 125; ICC-02/11-01/11-656-Red, para. 208; ICC-01/04-02/06-309, para. 23; ICC-02/11-14-Corr, para. 28; ICC-01/04-01/07-717, para. 393.

occurred.²⁹⁶ The term is not restricted to ²⁹⁷ multiple attacks to a campaign or operation carried out against the civilian

222. In the context of an armed conflict, civilian population refers to persons who are civilians, as opposed to members of armed forces and other combatants. Civilian population must be the primary object of the attack and not a collateral effect. However, the presence of certain civilians does not necessarily deprive a population of its civilian status. It is not necessary for the potential civilian victims of a crime under article 7 to constitute a group distinguished by nationality, ethnicity or other distinguishing features. A distinction is only necessary for a finding of persecution pursuant to article 7(1)(h).

223. According to the available information, attacks were carried out deliberately at the end of the Georgian population of villages and the municipal territory of South Ossetia along the administrative boundary between South Ossetia and the rest of Georgia, including within the 20 km wide

²⁹⁶ ICC-01/04-01/07-3436, para. 1101; ICC-01/05-01/08-424, para. 81.

²⁹⁷ See Elements of Crimes, Article 7, Introduction, para. 3. See also ICC-01/04-01/07-3436, para. 1101.

²⁹⁸ ICC-01/04-01/07-3436, paras. 1097, 1101; ICC-02/11-01/11-656-Red, para. 209; ICC-01/09-19-Corr, para. 80. See also ICC-02/11-01/11-9-Conf, para. 30; ICC-01/05-01/08-424, para. 75; ICC-01/09-01/11-373, para. 164.

²⁹⁹ ICC-01/04-01/07-3436, para. 1102; ICC-02/11-14-Corr, para. 33; ICC-01/09-19-Corr, para. 82; ICC-01/05-01/08-424, para. 78.

³⁰⁰ ICC-01/04-01/07-3436, para. 1104; ICC-02/11-01/11-9-Conf, para. 30; ICC-02/11-14-Corr, para. 33; ICC-01/05-01/08-424, para. 76.

³⁰¹ ICC-01/04-01/07-3436, para. 1105; ICTY Prosecutor v. Tadić, IT-94-1-T, Judgement, 7 May 1997, para. 638.

³⁰² ICC-01/04-01/07-3436, para. 1103; ICC-02/11-14-Corr, para. 32.

224 The attacks systematically targeted the following Georgia consistent pattern of deliberately killing, beating and civilians, and looting and burning their houses and other selective targets. IFFMG, OSCE, and HRW documented systematic burning and looting of houses belonging to 21 villages.

225 The information available on the nature and manner of commission of the attacks and the profile of civilians targeted show that the incidents constituted a campaign or operation carried out against the civilian population. Upon entering the village, the trucks, both Ossetian and Georgian, reportedly looted the property of ethnic Georgians and set them alight. The witnesses testified that more than 100 South Ossetians entered the village of Achkhuti shouting 'burn all these houses!' and 'do not leave any of the remaining inhabitants were forced to watch their property while the perpetrators mutilated them. A direct witness of the alleged crimes stated that while burning the houses, the Ossetian forces told present ethnic Georgians 'you can get warm near the fire from your houses'.

³⁰³ Annex E.2.37: IFFMG, Volume II, GEOTTP-0002-7801 at 819-8198; Annex E.2.39: OSCE HRAM Report, GEGOTP-0003-1921 at 1946-1949; Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 047-0472.

³⁰⁴ ICC-01/04-01/07-3436, paras. 1097, 1101; ICC-02/11-01/11-656-Red, para. 209; ICC-01/09-19-Corr, para. 80. See also ICC-02/11-01/11-9-Conf, para. 30; ICC-01/05-01/08-424, para. 75; ICC-01/09-01/11-373, para. 164.

³⁰⁵ Annex E.7.9: Government of Georgia, 'Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)', 10 May 2010, Annex 46, Witness Declaration, GEOTTP-0006-1341.

³⁰⁶ Annex E.2.37: IFFMG, Volume II, GEOTTP-0002-7801 at 8173.

³⁰⁷ Annex E.5.3: Article 15 communication, GEO-OTP-0004-0939 (GEO original), GEOTTP-0004-0953 (Engl Translation).

226. It is reported in some villages that private houses belonging to ethnic Ossetians were not attacked.³⁰⁸ In other cases, it is alleged that Ossetians guided South Ossetian forces through the villages of houses belonging to ethnic Georgian.

227. During the pillage and destruction, HRW and OSC-GRAM also documented several witness accounts describing many executions where beatings and injury of ethnic Georgian members of the South Ossetian army while civilians were generally threatened to leave in pain or punishment or death. Another witness accounts that members of the South Ossetian army threatened that they would kill all Georgians and residents alike.

228. The victims reported included women and elderly who were unable to leave their homes. The witness described that on 12 August 2008, Ossetian forces entered her house, dragged her husband and her to the yard and after beating them mercilessly, shot them dead. They also took her belongings, directed automatic weapons against her house and tried to set her house on fire. Another witness reported the killing of

³⁰⁸ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0479.

³⁰⁹ Annex E.7.9: Government of Georgia, "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)", 10 May 2010, Annex 71, GEOTTP-0006-1478; and Annex 72, GEOTTP-0006-1483.

³¹⁰ Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0481; Annex E.2.39: OSC-GRAM Report, GEOTTP-0003-1921 at 1957.

³¹¹ Annex E.5.3: Article 15 communication, GEOTTP-0004-1216 (GEO original), GEOTTP-0004-1232 (Engl. Translation).

³¹² Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 0496.

year-old man by South Ossetian forces after which his house
aligned³¹³

229 As described above, this information indicates that
members of the Russian armed forces participated in
such crimes, while other members of the Russian army
passively in the face of crimes, and still others acted to
punish such crimes.

230 The OSCE/HRAM report³¹⁴ in the period from August
October 2008, primarily South Ossetia, detained
around 345 civilians, of whom many were elderly, disabled
poor conditions. These detention facilities were under the
South Ossetian forces in various locations in South Ossetia
the villages of Tamarasheni, Java, Kekhvi and the
Civilians were detained for up to 16 days after which
they were released through the ICRC. The factual
circumstances of arrests and detentions however is limited
to determine the extent between the individual arbitrary
detention and the attack against the civilian population.

231 The Prosecution also gathered limited information on cases
of rape related to the armed conflict cases that
the Government of Georgia reported to OSCE/HRAM.³¹⁵ The
Prosecution is mindful that the limited figures could be the
insecurity and existing social stigma attached to sexual violence.

³¹³ Annex E.4.10 HRW, Up in Flames, GEOTTP-0001-0336 at 0484

³¹⁴ See paragraphs 137-141.

³¹⁵ Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1957-1959.

³¹⁶ Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1957.

Georgia, which deferred victims from reported alleged violence.³¹⁷ The information available on these alleged crimes however is limited, in particular with respect to the attributes insufficient to determine whether the reported cases were part of the attack against the civilian population and sporadic in nature.

Pursuant to or in furtherance of organisational policy

232 Pursuant to article 7(2)(a) of the Statute, the course of multiple commission of acts under article 7(1) must be pursuant to or in furtherance of a State or organisational policy to commit such attack.

233 The Elements of Crimes for article 7 provides that a State that actively promotes or encourages such attack against a civilian population in violation of paragraph states a policy, which has a civilian population as a target of the attack would be implemented by State or organs of the State. Such a policy may, in exceptional circumstances, be a deliberate failure to take action, which is conscious and encouraging such attack. The existence of such a policy

³¹⁷ OSCE-HRAM noted that: "Although the issue of SGBV was raised in interviews with individuals, it did not feature prominently, which may well be because the subject is still considered largely taboo in much of Georgia and victims may face a very real potential for social ostracization. In addition, many of the interviews were carried out in circumstances such as the lack of privacy which were not conducive to discussing this issue." Annex 39:2 OSCE-HRAM Report, GEO OTP-0003-1921 at 1939.

³¹⁸ Elements of Crimes, Article 7, Introduction, para. 3. See also OGC 11-01/11-656-Red, para. 214.

inferred solely from the absence of governmental action.³¹⁹

234 The Trial Chambers have found that the requirement of a State organisational policy under article 7 implies that the regular pattern of arm attack which is planned, directed or organised as opposed to spontaneous acts is a sufficient criterion.³²⁰ However, the policy need not be explicitly defined or formalised. The Trial Chamber II has expressed the view that the existence of a State or organisational policy may, in some cases, be inferred from the repetition of acts conforming to the same logic, the existence of preparatory activities or collectively orchestrated or coordinated by the State or organisation.³²¹

235 With respect to the term 'organisation', the Trial Chamber II has indicated that the determination of whether an organisation is a 'State or organisation' under the Statute may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population.³²² The Trial Chambers have indicated that the determination of whether an organisation qualifies as an organisation under the Statute must be made on a by-case basis. In this regard, the Trial Chamber II has identified

³¹⁹ Elements of Crimes, Article 7(3), footnote 6.

³²⁰ ICC-01/09-19-Corr, paras. 856; ICC-01/05-01/08-424, para. 81. See also ICC-02/11-01/11-9-Conf, para. 37; ICC-02/11-14-Corr, para. 43.

³²¹ ICC-02/11-01/11-656-Red, para. 215; ICC-01/09-01/11-373, para. 210; ICC-01/09-19-Corr, paras. 856; ICC-01/05-01/08-424, para. 81; ICC-02/11-14-Corr, para. 43. See also ICC-02/11-01/11-9-Conf, para. 37; ICC-01/04-01/10-465-Red, para. 263; ICC-01/09-01/11-373, para. 210.

³²² ICC-01/04-01/10-465-Red, para. 263; ICC-02/11-01/11-9-Conf, para. 37; ICC-02/11-14-Corr, para. 43; ICC-01/09-19-Corr, paras. 856; ICC-01/05-01/08-424, para. 81. See also ICC-01/04-01/07-3436, para. 1108. See also ICC-02/11-01/11-656-Red, para. 215 (there is no requirement that the policy be formally adopted).

³²³ ICC-01/04-01/07-3436, para. 1109. See also ICC-02/11-02/11-186, para. 128 (referring to considerations such as that preparatory activities were undertaken for the purpose of the possible use of violence against civilians in order to keep Gbagbo in power and that the violence was a planned and coordinated effort of Gbagbo and his inner circle).

³²⁴ ICC-01/09-01/11-373, para. 184.

several factors that may be taken into account in determining whether a group qualifies as an armed group under article 7 of the Statute, including: a) whether the group is under a command, or has an established hierarchy; b) whether the group possesses resources, means, and sufficient capacity (including the ability to coordinate) to carry out a widespread or systematic attack on a civilian population; c) whether the group exercises control over part of the territory of the State; d) whether the group directs activities against the civilian population as a primary aim; e) whether the group articulates, explicitly or otherwise, an intent to attack a civilian population; and f) whether the group is a non-State actor, which fulfils some or all of the above criteria. However, these factors are not a rigid legal definition and need to be exhaustively fulfilled. Trial Chamber II, therefore, found that the group does not necessarily have to have an elaborate structure (that of a State) nor does it have to have State-like features; instead what is essential is that it possesses the capability to carry out the objective of attacking a civilian population.

236. In addition to qualifying as an armed group for purposes of article 8 of the Statute, the South Ossetian forces of the South Ossetian authorities also satisfy many of the criteria

³²⁵ See also ICC-01/04-02/06-309, paras. 145, 18.

³²⁶ See also ICC-01/04-02/06-309, paras. 147 (considering that the UPC/FPLC had an effective system of communication and its channels of communication made it possible for various levels of the UPC/FPLC of the situation on the ground and to convey instructions from above, as well as that it had the means and capability to carry out military operations over a prolonged period of time such as in relation to funding and weapons supply).

³²⁷ ICC-01/04-01/07-3436, paras. 1119-120; ICG02/11-14-Corr, para.46, recalling ICG01/09-19-Corr, paras. 903; ICC-01/09-01/11-373, para. 185. See also ICC-02/11-01/11-656-Red, para.217; ICC-02/11-01/11-9-Conf, para. 37; ICC-01/05-01/08-424, para. 81; ICC-01/04-01/07-717, para. 396.

³²⁸ ICC-02/11-14-Corr, para. 46; ICC-01/09-19-Corr, paras.90-93. See also ICC-01/09-01/11-373, para. 185.

³²⁹ ICC-01/04-01/07-3436, paras. 1119-121.

for an organization for the purpose of their activities. The existence of a responsible command, hierarchical structure, group's capability to coordinate and carry out a wide systematic attack. The South Ossetian administration was organized in State institutions and reflected a structure of the State with a Parliament, government and judiciary. This administration was in command of around 3,500 members of the Ministry of Defence, the South Ossetian Ministry of Internal Affairs, Special Purpose Forces, regular militias, and volunteers, all placed under the responsibility of the South Ossetian President. The South Ossetian forces were equipped with light armoured vehicles, tanks, automatic weapons and grenades.

237 By August 2008, the South Ossetian authorities controlled parts of the territory in South Ossetia, including substantial parts of Znamensk district, with the exception of two Georgian villages (Avnevi and Nuli) forming part of Tighva municipality and parts of Tskhinvali district, except for the areas North and North Tskhinvali (Kurta and Erudvi municipalities) and the western part of Akhalkalaki municipality.

238 The attacks on the civilian population in South Ossetia were not spontaneous acts of violence, but were committed as part of the policy of the South Ossetian leadership to achieve the complete expulsion of ethnic Georgians from South Ossetia and to further advance its overall objectives.

³³⁰ Also referred to as Kornisi district.

³³¹ Annex E.7.9: Government of Georgia, 10 May 2010 Report, GE0TP-0006-0005 at 00360037.

Georgia and secure full independence. Specifically, this campaign was primarily directed at the Georgian village of Bulnisi and the Kheura, Eredvi and Tighva municipalities.

239 The South Ossetian leadership acknowledged some policy of expulsion in their public statements. On 15 September, South Ossetian President Eduard Kokoity publicly stated that Georgian civilians will not be allowed to go back to their homes because the South Ossetian authorities were in the process of returning South Ossetian refugees. Asked about the situation in the Georgian enclaves in South Ossetia, he said: "Nothing special. We have in fact flattened everything there. Another South Ossetian official, the Chairman of Parliament, Znaur Gasiev, reported only 22 August 2008: "The war will start again & We did a nasty thing, I know. But Georgian civilians cannot return here anymore because we burnt all their houses in the enclave. There was no other way to stop this war and cut the knot."

240 The periodic publication also reported a South Ossetian intelligence officer saying: "We burnt these houses. We want to ensure that they [ethnic Georgians] cannot come back, but if they come back, this will be a Georgian enclave again and the same will happen."

³³² Annex E.8.22: Korrespondent.net, "Kokoity: Georgians face no threat of discrimination in South Ossetia" [TM "S"], "CE: - „...†" %Š "CE • «—§††† 'Šš—•†††• † «—"§•CE], 23 August 2008, GEO-OTP-00031728.

³³³ Annex E.8.2: "Eduard Kokoity: We flattened practically everything there" (€"•††—™"Š") CE: •††† —†ŠCEŽŠŠ••—"•††•Š(•), August 15, 2008, GEO-OTP-00029502 at 9502.

³³⁴ Annex E.8.3: Komsomolskaia Pravda, "They have refused to negotiate. What will it do next?" [„...†† ŠŠ "CE •••. †CE" Š††† '††CE" ††††?], 22 August 2008, GEO-OTP-00031384.

³³⁵ Annex E.8.30: The Economist "The war in Georgia: A Caucasian journal", 21 August 2008, GEO-OTP-00031775

241 The supporting material further indicates that the policy of ethnic cleansing of Georgian residents from South Ossetia was passed from the lower echelons of the South Ossetian leadership to the South Ossetian leadership through the chain of command. On 22 August 2008, the Deputy Head of the South Ossetian Administration of the Ministry of Defence, Kvezerov, reportedly received an order to destroy the villages of Kvezerov that remained in Kekhvi and Eredvi.³³⁶ On 13 August 2008, Kvezerov stated that ethnic Georgian villages of Dis and Eredvi and Kakhvi were destroyed on 17-18 September 2008. Serzh Bestaev, member of the Civil Detachment of Mugu, acknowledged that there is not a single Georgian left in the villages that Avnevi and others are razed.³³⁸ At Ocikhi, a member of the ECHR testified that during his detention by South Ossetian forces in August 2008 at the administrative border of Tsikhe and Tamarasheni, a member of South Ossetian forces told him that the order to physically devastate all Georgian villages was issued.

242 With respect to the irregular militias, the local heads of the police stations appeared to have received orders and served as a channel of communication between commanders of irregular militias and the South Ossetian military command.

³³⁶ Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 80, GEOTP-0006-0388 at 0388.

³³⁷ Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 63, GEOTP-0006-1421 at 1421.

³³⁸ Annex E.7.9: Government of Georgia, Evidence of ethnic cleansing of Georgia's South Ossetia and adjacent areas (Appendix 3), 10 May 2010, Annex 56, Intercepted communication dated 19 September 2008, GEOTP-0006-1386.

³³⁹ Annex E.3.4: ECHR, Lursmanashvili (Otar) v Georgia and Russian Federation, Appl. no. 10001/11, Witness statement, GEOTP-0002-2385 at 2386.

³⁴⁰ Annex E.7.2: The investigative material submitted by the Government of Georgia on 5 November 2014, GEGOTP-0003-0024

243 The policy of ethnic cleansing can be also inferred from the pattern of attacks against Georgian civilians and the systematic nature of the looting and destruction of property belonging to ethnic Georgians. The intimidation campaign that eventually drove out ethnic Georgians from South Ossetia was implemented on the ground by South Ossetian forces. As witness alleged by the South Ossetian forces say that they would exterminate the whole Georgian ethnicity and everybody else. A record that the South Ossetian forces shouted to ethnic Georgians: Get out! We don't want any Georgians.³⁴¹

244 By contrast, the information available at this stage does not indicate the existence of a State or organisational policy of the Russian Federation or the Russian Federation in relation to the crimes alleged to have been committed either by those members of the Russian armed forces or by South Ossetian forces in the commission of crimes by South Ossetian forces. The crimes allegedly committed by South Ossetian forces are not the result of the crimes allegedly committed by South Ossetian forces.

ii. Widespread or systematic nature of the attack

245 The reference to a widespread or systematic attack is not to be taken as random acts from the concept of crimes against humanity. The reference to a widespread or systematic attack, and not the alleged individual acts are relevant to the determination of the widespread or systematic nature of the attack. In this regard, the adjectives

³⁴¹ Annex E.7.9: Government of Georgia, "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)", 10 May 2010, Annex 50, Protocol of a Victim Testimonial, GEOTP-0006-1358 at 1359.

³⁴² Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0168.

³⁴³ ICC-01/04/01/07-3436, para. 1123; ICC-01/04/01/07-717, para 394. See also ICC-02/05-01/07-1, para. 62.

³⁴⁴ ICC-01/09-19-Corr, para. 94 ICC-01/05-01/08-424, para. 151. See also ICC-01/04/01/07-717, para. 395.

widespread refers to the large scale nature of the number of victims .

246 The term widespread encompasses the large scale nature of the attack, which should be massive, frequent, carried out with considerable seriousness and directed against a large number of victims and refers both to the large scale nature of the attack and to the number of victims including an attack carried out over a large geographical area or an attack in a small geographical area against a large number of victims. A widespread attack could also be the cumulative effect of a series of inhumane acts or the effect of an inhuman act of extraordinary magnitude.

247 The term "systematic" refers to the "organised nature of the violence and the improbability of the crimes occurring" often be expressed through patterns of crimes, in the absence of accidental repetition of similar criminal conduct on a large scale.

³⁴⁵ ICC-02/11-14-Corr, para. 53, recalling ICC-01/09-19-Corr, para. 95 (internal footnotes omitted).

³⁴⁶ ICC-01/05-01/08-424, para. 83; ICC-02/11-01/11-656-Red, para. 222; ICC-02/11-14-Corr, para. 53, recalling ICC-01/09-19-Corr, para. 95; ICC-02/11-01/11-9-Conf, para. 49.

³⁴⁷ ICC-02/11-01/11-656-Red, para. 222; ICC-01/04-01/07-3436, para. 1123; ICC-02/11-14-Corr, para. 53, recalling ICC-01/09-19-Corr, para. 95; ICC-02/11-01/11-9-Conf, para. 49. See also ICC-02/11-02/11-186, para. 131; ICC-02/11-01/11-9-Conf, para. 49; ICC-01/05-01/08-424, para. 83; ICC-02/05-01/07-1, para. 62; ICC-02/05-01/12-1-Red para. 19. See also ICC-01/04-02/06-309, para. 24.

³⁴⁸ ICC-01/04-01/07-717, para. 395; ICC-01/05-01/08-424, para. 83.

³⁴⁹ ICC-02/11-01/11-9-Conf, para. 49.

³⁵⁰ ICC-02/11-01/11-656-Red, paras. 222-223; ICC-01/04-01/07-3436, paras. 1098, 1123; ICC-01/04-01/07-717, para. 394. See also ICC-02/05-01/07-1, para. 62; ICC-01/05-01/08-424, para. 83; ICC-02/05-01/07-1, para. 62; ICC-02/05-01/09-3, para. 81; ICC-01/09-01/11-373, para. 179.

³⁵¹ ICC-02/11-01/11-656-Red, para. 223; ICC-01/04-01/07-3436, para. 1123; ICC-02/11-14-Corr, para. 54, recalling ICC-01/09-19-Corr, para. 96; ICC-02/11-01/11-9-Conf, para. 49. See also ICC-01/04-01/07-717, para. 397; ICC-02/05-01/07-1, para. 62; ICC-02/05-01/12-1-Red para. 19. See also ICC-01/04-02/06-309, para. 24.

248 Although the requirement is phrased as set forth in the alternative available information, there is a reasonable basis to conclude that the attack directed against the civilian population in Georgia was widespread and systematic.

249 The attacks took place on a large scale and targeted civilian victims. Over a period of time, the South Ossetian forces perpetrated large scale crimes against the civilian population in South Ossetia, including killings, beatings, forcible displacement, and burning of civilian property. The alleged acts of violence resulted in the forcible displacement of over 18,400 ethnic Georgian inhabitants from South Ossetia and the buffer zone.

250 National investigators in Georgia estimated that over 15,000 dwellings belonging to ethnic Georgians were destroyed, including 3,050 dwellings in Kurta municipality, 373 dwellings in Eredvi municipality, and 418 dwellings in Tighva municipality in the buffer zone. 270 dwellings were destroyed in the Kurta municipality and 267 in Gori municipality.³⁵² According to the Government of Georgia, 13,400 residents of the villages of Kurta, Eredvi and other municipalities had their homes destroyed as a consequence of the attacks.

251 Based on the assessment of UNOSAT HR Satellite imagery, it was determined that by 22 August 2008 a total of 177 dwellings in the village of

³⁵² Annex E.7.9: Government of Georgia 10 May 2010 Report, GEOT/TP-0006-0005 at 0040042

Tamarasheni were destroyed or severely damaged, 153 Kurta and 115 in the village of Kvemo Achabeti

252 The attack was conducted so as to be directed against the great majority of ethnic Georgian villages in South Ossetia in addition to Georgian villages in the municipalities of Agvizon, Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskheneti and the municipalities of Kekhvi, Kemerti, Kheiti, Kurta, Kvemo Achabeti, Tamarasheni, Dizart, Kurta municipality, Avnevi and Nuli Highva municipality and the villages of Dvar, Karaleti, Megvrekisi, Tkviavi and Zemo Nikozi in the

253 The Prosecution further submits that the alleged acts were not isolated or random but rather the attack was a signature since it was launched pursuant to the policy of South Ossetian leadership to forcibly displace ethnic Georgians from South Ossetia, as noted in the report. The information available shows that the attacks in South Ossetia were planned, organized and followed a pattern. As set out in the report and detailed in annex A, entering the ethnic Georgian villages in South Ossetia, systematic pillaging and burning of civilian homes, and killing, severely beating and otherwise torturing the remaining civilian population to leave their villages.

254 According to the EGI, the acts in question appeared to be well organized as evidenced by the trucks to take the looted goods

³⁵³ Annex E.4.10 HRW, Up in Flames, GEOT/TP-0001-0336 at 0478.

including the removal of reusable water filters.³⁵⁴ OSC-ERAM also found that there was a systematic campaign of arson against homes and other civilian buildings in isolated villages predominantly by ethnic Georgian forces.³⁵⁵ The lack of planning is provided by the fact that South Ossetian soldiers allegedly laid bottles of gasoline ready for entering villages and houses at night.³⁵⁶ A victim, for example, reported that South Ossetians were carrying gasoline with them to enter the village of Z Achabeti on August 20, 2008, having looted his neighborhood houses and set their houses on fire.³⁵⁷

255. In the context of the forcible displacement campaign in South Ossetia, between 511 and 1,300 ethnic Georgian civilians were killed and a reported 5,000 dwellings belonging to ethnic Georgians were destroyed.³⁵⁸ As a result, an estimated 13,500 ethnic Georgians were forcibly displaced from South Ossetia to the buffer zone created alongside the international border between South Ossetia and the rest of Georgia.

iii. Nexus between individual acts and the attack

256. To establish individual criminal responsibility, a link must be established between the above acts and the attack against a civilian population in order for crimes against humanity to be established. This requires consideration of the nature or

³⁵⁴ Annex E.2.37: IIFMCG, Volume II, GEOTTP-0002-7801 at 8168.

³⁵⁵ Annex E.2.39: OSC-ERAM Report, GEOTTP-0003-1921 at 1962.

³⁵⁶ Annex E.4.10 HRW, Up in Flames, GEOTTP-0001-0336 at 0479

³⁵⁷ Annex E.4.10 HRW, Up in Flames, GEOTTP-0001-0336 at 0474

³⁵⁸ ICC-01/04-01/07-3436, para. 1124; ICC-01/09-19-Corr, para. 97.

consequences of the act.³⁵⁹ Accordingly, analysis is to be carried out on a case-by-case basis with regard to each particular act.³⁶⁰ Nonetheless, in the nature of the proceedings, the subject of such consideration is directed towards the situation as a whole without focusing on specific criminal acts, what is necessary for the purpose of procedure.

257 The nexus can, in many instances, be deduced in part from the features of the attack (in terms of their characteristics, aims, targets, alleged perpetrators, and times and locations).

258 For the purpose of the present proceedings, when an individual criminal act and the attack can be inferred from: (i) spatial and temporal overlap between the attack and the criminal act; that the same perpetrator is responsible for both the attack on the civilian population and individual victims; (ii) the victims, who are identified as the organisation or individuals mentioned above; (iii) multiple and recurrent acts of violence over a protracted period of time, which demonstrate a consistent pattern of conduct, including the use of firearms to intimidate ethnic Georgians, accompanied by looting and destruction of their property, in order to forcibly expel them from the area.

³⁵⁹ ICC-01/05-01/08-424, para. 86.

³⁶⁰ ICC-01/09-19-Corr, para. 135.

³⁶¹ ICC-01/09-19-Corr, para. 135.

³⁶² ICC-02/11-01/11-656-Red, para. 212. See also ICC-01/09-19-Corr, para. 135.

(c) Alleged crimes against humanity

259 On the basis of the available information, it is concluded that there is a reasonable basis to believe that crimes under the Statute have been committed in the context of the Situation

a. Murder under article 7(1)(a);

b. deportation or forcible transfer of population under article 7(1d); and

c. persecution against a identifiable group or collectivity on ethnic grounds under article 7(1)(h).

i. Murder

260 The actus reus of the crime of murder requires that the perpetrator kills one or more persons.

261 To date, the Prosecution received information in 11 cases of deliberate killings of ethnic Georgians in South Ossetia along the administrative line committed in the context of the forcible displacement of ethnic Georgians from the areas noted above in paragraph 225. These killings allegedly took place during the systematic campaign of ethnic cleansing of South Ossetians and the attendant looting and destruction of property belonging to ethnic Georgians in South Ossetia.

³⁶³ Elements of Crimes, article 7(1)(a)(1). The term "killed" is interchangeable with "caused death", according to the footnote to this article of the Elements of Crimes (footnote 7, page 5).

zone³⁶⁴! It is added that the murder victims were shot, beaten and burned inside their homes.

ii. Deportation or forcible transfer of population

262 The actus reus of the crime of deportation or forcible transfer of population requires that the perpetrator forcibly transferred, without grounds permitted under international law, persons to another State or location, by expulsion or other coercive means. Such person or persons must have lawfully been present in the area from which they were deported or transferred.

263 As the Elements of Crimes do not restrict the definition of deportation or forcible transfer to physical force, but may include threat of force or that caused by fear of violence, duress, detention, oppression or fear, it is not necessary that the perpetrator used force or coercion against persons in another person or by taking advantage of a coercive environment.

264 From August 2008 onwards, South Ossetia intentionally targeted and deported lawful residents of ethnic Georgian from South Ossetia to the buffer zone of forcible displacement in two main phases: 1) during the active hostilities from 12 August 2008 and 2) after the end of active hostilities, from 2008 onwards.

³⁶⁴ See paragraphs 1262-1268.

³⁶⁵ Article 7(2)(d) of the Statute defines "deportation or forcible transfer of population" to mean "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". "Deported or forcibly transferred" is interchangeable with "forcibly displaced", Elements of Crimes, ft. 13.

³⁶⁶ Elements of Crimes, article 7(1)(d).

³⁶⁷ Elements of Crimes, article 7(1)(d), ft. 12.

265 Coercive tactics that South Ossetian forces used to create an atmosphere of fear, terrorise the local population and ethnic Georgians to leave their homes and villages, including the use of threats of violence, looting and destruction of property.³⁶⁸ More than 24 villages of Utrta, Tighva and Eredvi municipalities in the South Ossetia were completely or partly destroyed in order to force ethnic Georgians to leave the villages. Avgvitsiruba, Disevi, Eredvi, Beloti, Ksuisi, Sa and Vanati in Eredvi municipality, Kekhvi, Kemerti, Kvemo Achabeti, Zemo Achabeti, Darnatsaerikuni and municipality, Avnuli and Tighva municipality and the villages of Dvani, Ergneti, Karaleti, Megvrekisi, Tkviavi, Zemo buffer zone.

266 Furthermore, OSCE reports September 2008 in Gof houses in the villages of Tirochisis and Avlekiordi and Ditsa. On 24 November 2008, the village of Disevi which consisted of approximately 300 ethnic Georgians during the conflict, completely destroyed and deserted. The families reported to be driven out by torching and looting in the South Ossetia started around 11 August 2008 and continued

³⁶⁸ See Annex E.2.37: IIFMCG, Volume II, GEOTTP-0002-7801 at 819-8197; Annex E.5.1: August Ruins, GEOTTP-0001-0999 at 1055.

³⁶⁹ See Annex E.4.10: HRW, Up in Flames, GEOTTP-0001-0336 at 047-0483; Annex E.4.3: AI, Civilians in the line of fire, GEOTTP-0001-0125 at 015-0170; Annex E.2.39: OSCE HRAM Report, GEOTTP-0003-1921 at 196-1966; Annex E.5.1: August Ruins, GEOTTP-0001-0999 at 1121-1200; Annex E.3.16: GEO-OTP-0005-0937 at 094-0944; GEO-OTP-0005-0953 at 095, 0956, 0958; GEO-OTP-0005-1017 at 1022. See also Annex A.1, List of Incidents.

³⁷⁰ Annex E.2.39: OSCE HRAM Report, GEOTTP-0003-1921 at 19471; Annex E.3.16: GEOTTP-0005-0937 at 0940.

³⁷¹ Annex E.3.16: GEOTTP-0005-0937 at 0942.

³⁷² Annex E.3.16: GEOTTP-0005-0937 at 0941.

through October³⁷³. The IFFMCG mission conducted March and June 2009 observed ethnic Georgian villages to the north of Tskhinvali, from Tamarashveni, were still completely empty³⁷⁴.

267 UNOSAT maps of relevant areas also show active fire around Tskhinvali on 12 August, 2008, after the ceasefire agreement of 12 August³⁷⁵. This 2008 satellite imagery indicates that the destruction occurred as a deliberate policy to the villages, rather than the exchange of fire.

268 The fact that the destruction and looting of ethnic Georgian villages continued after the signing of the ceasefire agreement implies an objective of acts of violence by Georgian troops, but to gain control of the South Ossetian villages and to prevent them from returning to their homes. A witness testified that South Ossetians told him they would not allow Georgians from the area to leave [the area] would never be able to come back³⁷⁶ again.

269 By May 2009, UNHCR and the Commissioner for Human Rights reported to the Council of Europe that the armed conflict caused internal displacement of approximately 500,000 persons from South Ossetia and other conflict affected areas in Georgia while additional 36,000 fled from South Ossetia to the Russian Federation.

³⁷³ Annex E.4.10 HRW, Up in Flames, GEOTP-0001-0336 at 0470480.

³⁷⁴ Annex E.2.37: IFFMCG, Volume II, GEOTP-0002-7801 at 8192.

³⁷⁵ Annex E.2.14: UNOSAT, Update 1: Active fire locations for Tskhinvali, South Ossetia, Georgia (7-20 August 2008), dated 20 August 2008, GEOTP-0008-0614.

³⁷⁶ See Annex E.2.37: IFFMCG, Volume II, GEOTP-0002-7801 at 8080.

³⁷⁷ Annex E.7.9: Protocol of Victim Testimonial, 21 August 2008, GEOTP-0006-1365 at 1366.

378 The UNHCR further reported that over 100,000 estimated 138,000 internally displaced persons are unable to return to their homes in three Shida Kartli, Imereti, Guria, Samegrelo-Zemcho Svaneti regions. Georgian authorities reported that these areas include 28,800 IDPs who returned to the villages of the former. According to the UNHCR and the Government of Georgia, 30,000 persons remained displaced. At the end of 2008, UNHCR estimated that some 18,500 displaced people from South Ossetia are unlikely to return in the foreseeable future, as their villages and houses had been destroyed or damaged. In addition, South Ossetian authorities opposed their return in public declarations. This number includes 13,400 residents of Kurta, Ereklisi and other municipalities whose houses were destroyed and their return is unlikely. According to Georgia's Ministry of Foreign Affairs, in September 2008 the total population in some 24 major Georgian villages in the area which were under the control of the Government of Georgia prior to August 2008, comprised

378 Annex E.2.21: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTTP-0010-0055 at 0087; Annex E.2.27: Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 'Report on human Rights Issues Following the August 2008 Armed conflict', 15 May 2009, GEOTTP-0001-0883 at 0887.

379 Annex E.2.21: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTTP-0010-0055 at 0087; Annex E.3.16: GEOTTP-0005-0937; GEOTTP-0005-1037; GEOTTP-0005-1042; GEOTTP-0005-1045; GEOTTP-0005-1054; GEOTTP-0005-1076.

380 Annex E.2.21: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTTP-0010-0055 at 0087.

381 Annex E.2.21: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTTP-0010-0055 at 0087; Annex E.2.27: Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 'Report on human Rights Issues Following the August 2008 Armed conflict', 15 May 2009, GEOTTP-0001-0883 at 0887.

382 Annex E.4.6: AI, 'Civilians in the Aftermath of War', GEO-OTP-0001-0197 at 0203 (referring to UNHCR, 'Displacement Figures and Estimates August 2008 Conflict' updated in May 2009).

383 Annex E.2.21: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTTP-0010-0055 at 0087.

384 Annex E.5.2: Memorial and Demos, 'Humanitarian consequences of the armed conflict in the South Caucasus', GEOTTP-0001-1314 at 1321.

385 Annex E.7.9 Government of Georgia, 10 May 2010 Report, GEOTTP-0006-0005 at 0039.

of whom some 13,260 had been internally displaced September³⁸⁶ 2008. December, 2014 Georgian Ministry of Intern Displaced Persons from the Occupied Territories and that around 15,000 persons permanently displaced from So Ossetia as a result of the 2008 armed conflict, of whom 7,000 from Kurta municipality, 5,242 from Eredvi, and 2,758 from Tighva municipality.

270 Since the ethnic Georgian population prior to the conflict is estimated around 23,000 (excluding Akhagori municipality), and today 15,000 persons from Kurta, Eredvi and Tighva municipalities remain permanently displaced, the ICJ submits that ethnic Georgian population living in the region has been reduced by at least 75 percent.

iii. Persecution

271 In addition to the contextual elements mentioned above, the act of persecution is defined in the ICJ Statute as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity

³⁸⁶ Annex E.2.4: OCHA, Inter-Agency Humanitarian Assessment Mission to South Ossetia, Mission Report, 1620 September 2008, GEOTP-0001-0846 at 0852.

³⁸⁷ Numbers reported in Annex E.7.4: Government of Georgia, 13 March 2015 Report, GEOTP-0003-1172 at 1177. This excludes displaced from Akhagori municipality.

³⁸⁸ See above paragraph 20 and footnote 6.

³⁸⁹ The significant decrease of the number of ethnic Georgians in South Ossetia is confirmed by statistics provided on the webpage of the Russian Ministry of Foreign Affairs citing the South Ossetian State Department of Statistics. According to these statistics for the year 2012, South Ossetia had a total population of 51,572 of which 45,950 (89,1%) are ethnic Ossetians and 4,590 (8,9%) ethnic Georgians, Annex E.7.4. Ministry of Foreign Affairs of the Russian Federation, Mission Report to the Republic of South Ossetia, 22 May 2014, GEOTP-0008-0684 at 0684.

collectively. Article 7(1)(h) specifies that it must be against any identifiable group or groups on political, racial, national, ethnic, cultural, religious, gender as defined or other grounds that are universally recognized as under international law, in connection with any act referred to in paragraph 7 or any crime within the jurisdiction of the Court.

272 As previously addressed, there is a reasonable basis to believe that South Ossetian forces have committed deportation or forcible transfer of population against humanity, as well as articles 7(1)(a)(1)(d) and 7(1)(e) war crimes, including pillage (pursuant to articles 8(2)(a)(i), 8(2)(b)(i), and 8(2)(b)(ii)). These alleged crimes constitute severe deprivations of fundamental rights contrary to international law, including the right to life and the right to private property. Information available further confirms that South Ossetian forces targeted the victims of these acts by reason of their identity as Georgians within the meaning of article 7(1)(h) of the Statute.

273 As noted above, direct witnesses of the crimes include a Georgian man shouting to the victims to "run or die" and threatening to exterminate all Georgians in the area. South Ossetian forces deliberately killed and injured victims belonging to the Georgian ethnic group, and threatened them to leave their homes in South Ossetia.

³⁹⁰ The Chambers referred to the persecutory acts as "severe deprivations of fundamental rights". In the Muthaura et al. Confirmation of Charges Decision, Trial Chamber II, applied its findings in relation to the separately charged killings, displacement, rape, serious physical injuries and serious mental suffering to constitute severe deprivations of fundamental rights. These findings, combined with the intentional and discriminatory targeting of civilians based on their political affiliation, satisfied the objective elements of persecution. Muthaura et al. Confirmation of Charges para. 283; See also ICC/04-02/06, para. 58.

³⁹¹ Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1180.

and looted their houses and their personal property. The above acts of violence resulted in the deaths of 113 cases of the killings of ethnic Georgians and the destruction of 5,000 dwellings belonging to ethnic Georgians.

VI. Admissibility

274. Article 53(1) provides that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether the case is or would be admissible under Article 17.

275. Previous decisions under article 15 have held that admissibility at article 15 should be assessed against certain criteria defining a potential case such as: (i) the gravity of the crimes involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the gravity of the crimes within the jurisdiction of the Court allegedly committed during the investigation that are likely to be the focus of an investigation for the purpose of the future case(s).

276. Accordingly, the Prosecution has provided confidential annexes. Annex A presents an indicative list of crimes within the jurisdiction of the Court allegedly committed during the most serious incidents within the jurisdiction available to the Prosecution. Annex B presents a preliminary list of persons who appear to be the most responsible for the most serious crimes and an indication of their specific role.

³⁹² ICC-01/09-19-Corr, para. 59 ICC-02/11-14, paras. 190-191.

277 For the reasons set out in paragraph 275, the Prosecution's identification of incidents or groups of persons that are likely to shape future preliminary in nature and considered for future admissibility assessments in an investigation by the Prosecution should be permitted to expand or modify with respect to these or other alleged acts, incidents, and/or adopt different legal qualifications, so long as forward for prosecution are sufficiently linked to the situation.

A. Complementarity

278 As the Appeals Chamber has stated in paragraph 1712(a) in *Prosecution v. Gotovina et al.*, a two-fold test: (i) whether, at the time of the proceedings admissibility challenge, the ongoing investigation or prosecution of the case at the national level (if it is answered in the affirmative, (ii) whether the State is genuinely to carry out such investigations or prosecutions. Inaction by a State renders a case inadmissible before the Court to an assessment of gravity under article 17(1)(d) set out above, this assessment is carried out in relation to the potential areas likely to be the focus of investigation by the Prosecution.

³⁹³ ICC-01/09-19-Corr, para. 60.

³⁹⁴ ICC-01/09-19-Corr, paras. 745; ICC-01/04-01/10-451, paras 21, 27.

³⁹⁵ ICC-01/04-01/07-1497, paras. 1 and 78; ICC-01/11-01/11-466-Red, para. 26; ICC-01/11-01/11-239, para. 6; ICC-01/05-01/08962-Corr, paras. 107-109.

³⁹⁶ ICC-01/04-01/07-1497, para. 78.

1. National proceedings in Georgia

279 The Office of the Chief Prosecutor of Georgia (OCPG) is the principle body responsible for investigating crimes arising from the 2008 conflict. Criminal case no. 0740883079.

280 The investigative activities of the OCPG can be divided into different periods: 1) activities carried out from the commencement of the investigation in 2008 until December 2011; 2) activities conducted around the change of government in Georgia and subsequent restructuring of the OCPG period from January 2012 to January 2014; the most recent activities during the period from January 2014 to date.

281 While the investigative steps taken were in 2008 to identifying evidence mainly through witness statements and forensic examination, the 2014 investigative activities on identifying individuals allegedly responsible for the pillaging of protected property belonging to ethnic Georgian.

282 The investigation covered the time period from 18 August 2008, the date of Russia's withdrawal from South Ossetia. The crime scene was divided into two Eastern sector that included the Tskhinvali region/South Ossetia and the Gori and Kareli; and (ii) the Western

³⁹⁷ Meeting with Georgian authorities on 23 September 2013 in Tbilisi, Georgia

that included the Kodori Gorge as well as district bordering Abkhazia.

283. Immediately following the outbreak of hostilities in August 2008, the Georgian government launched two preliminary investigations into the alleged crimes against Georgian civilians committed in South Ossetia.

284. The first investigation was opened on 9 August 2008 in relation to crimes under article 407 and article 412(1) (intentional violation of the norms of humanitarian law in the international or internal armed conflicts) of the Criminal Code of Georgia. The second investigation was launched on 11 August 2008 in relation to the crime under article 413(a) (looting as a war crime).

285. At the instruction of the Chief Prosecutor in Georgia in 2009, the two preliminary investigations were transmitted to the Criminal Division of the OCPG, for consolidation into a unified investigation with respect to all crimes alleged to have been committed during the August 2008 armed conflict and its aftermath. The investigation into alleged genocide was dropped because it was not manifestly founded.

286. The OCPG divided the investigation into five lines of inquiry called clusters: 1) ethnic cleansing, including the forcible

³⁹⁸ Upon receipt of notification that a crime may have been committed, a preliminary investigation phase of the national proceedings is started in accordance with article 66 of the Criminal Procedure Code. The preliminary investigation is focused on the situation in which the crime was allegedly committed and not on specific persons.

³⁹⁹ Annex E.7.9: Government of Georgia, 10 May 2010 Report GEO-OTP-0006-0005 at 0012.

displacement of Georgians South Ossetia) a unlawful attacks on civilian population attributed to both Georgian armed forces; 3) attacks on peaceful civilians and an attack against the Russian peacekeepers in Georgia; and 4) enforced disappearance and torture incidents committed by Russian, Ossetian and Georgian forces; and 5) non-organized acts of war crimes and other violations to be isolated and sporadic in nature.

287. The line of inquiry into alleged crimes of forcible transfer of Georgians from South Ossetia included incidents of burning and pillaging of protected property belonging to Georgians, as well as aerial bombardment, shelling and killing of Georgian civilians during the August 2008 armed conflict.

288. In the course of the investigation, the OCHR has interviewed over 7000 witnesses in 30 affected areas, including the Gori and Kakheti districts. Various forensic experts were used to conduct forensic medical examinations to assess damage to property which resulted in 43 expert reports covering damaged objects, telephone

⁴⁰⁰ Annex E.7.1: Government of Georgia, "Update Report Concerning the National Criminal Proceedings of Georgia over the Crimes against Humanity and War Crimes related to the August 2008 Armed Conflict", November 2014, GEOTP-0003-0003 at 00050006. (November 2014 Update Report)

⁴⁰¹ Annex E.7.1: November 2014 Update Report, GEOTP-0003-1151 at 1154.

⁴⁰² Annex G: Government of Georgia, Letter dated 17 March 2015, GEOTP-0003-1169 at 1169.

⁴⁰³ Annex G: Government of Georgia, Letter dated 17 March 2015, GEOTP-0003-1169 at 1169.

These include: Gori, Poti, Region of Samegrelo, Ganmukhuri, Kaspi District, Kakheti District, Arkevani Village in Bolnisi District, Kharagauli District, and the City of Oni, Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOTP-0003-1836.

intercept⁴⁰⁴ public statements from South Ossetia facto authorities, media reports, intelligence reports and satellite imagery by the OCPG as well as consultations with the UN Institute for Training and Research (UNITAR) to identify destroyed property in South Ossetia.⁴⁰⁵

289 The investigative teams also took into consideration monitoring missions from the EU, UN, OSCE, OCHA, and other international and governmental organizations such as the HRWA, Georgian civil society groups, and the UN Human Rights Office. In addition, the OCPG received a number of complaints submitted to the ECHR through the Georgian State Representative alleging violations of human rights by the Georgian Government. The Georgian investigator's review included the investigation case files.

290 Since its commencement however, the national investigation have faced main obstacles, (i) the lack of access to South Ossetia, and (ii) the absence of cooperation from the Russian Federation.

291 Until December 2011, the Georgian authorities attempted to overcome the lack of access to the territory of South Ossetia and fill in the gaps in the investigation.

⁴⁰⁴ The Government of Georgia submitted 10 telephone intercepts (with transcripts) between representatives of the North Ossetian peacekeeping battalion and facto authorities as well as a telephone intercept (with transcript) between Senior Commander of Georgian Peacekeepers Mamuka Kurashvili and the Commander of JPKF Marat Kulakhmetov, dated 8 August 2008, Annex E.7.9: the Annex to the 1st Memorandum, GEOTDP-0006-0219.

⁴⁰⁵ Annex E.7.7: December 2011 Update Report, GEOTDP-0003-1836 at 18431844, 18741875.

initiated the process of accessing the satellite imagery from open sources where unavailable through open sources. The OCP approached private companies in order to retain relevant satellite imagery.⁴⁰⁷ This process also took into consideration the work conducted by NGOs such as HRW, the Coalition of Georgian NGOs.

292 Second, the Georgian Government attempted to bring victims and witnesses before the OCP in order to hear testimonies regarding allegations committed by Georgian nationals. Since these efforts were unsuccessful, the OCP requested assistance from the EU for the Incident Prevention and Response Mechanism, where such requests are still pending. The OCP approached legal counsels of victims located in the region of the South Ossetia to undertake questioning and legal and security guarantees and reimbursement of their expenses.⁴⁰⁸

293 The OCP also sought, without success, for questioning a number of reportedly crucial witnesses of Russian nationality

⁴⁰⁶ Annex E.7.39: Government of Georgia, Annex 17, Google Maps satellite imagery of the Verkhniy Gorodok and Tskhinvali areas, as well as of the sites visited by Georgian investigators, GEOTTP-0005-0600 through GEOTTP-0005-0601; Annex E.7.40: Government of Georgia, Annex 18, Google Maps satellite imagery of the Zemo Nikozi and surrounding areas, GEOTTP-0005-0602 through GEOTTP-0005-0603; Annex E.7.41: Government of Georgia, Annex 19, Google Maps satellite imagery of the Verkhniy Gorodok and Tskhinvali areas where the Russian and Georgian peacekeeping forces were positioned, GEOTTP-0005-0604 through GEOTTP-0005-0605; Annex E.7.42: Government of Georgia, Annex 23, Google Maps satellite imagery of the HQ location of the Georgian peacekeeping forces, GEOTTP-0005-0637 through GEOTTP-0005-0638.

⁴⁰⁷ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOTTP-0003-1836 at 1873.

⁴⁰⁸ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEOTTP-0003-1836 at 1873. See Government of Georgia, Annex 31, email sent by the Prosecution Service of Georgia to the legal representatives of victims before the ECtHR, asking them to convey the invitation for formal interview, GEOTTP-0005-0728 through GEOTTP-0005-0729.

through judicial assistance requests for service by
authorities

294 Finally, OCP obtained some of the material they the
Russian investigation through a successful individual application before
the ECtHR, alleging violation of Article 41⁴⁰⁹ Particular, particularly,
Georgian authorities have established in *Shmiganovskaya v.*
Georgia before the ECtHR.⁴¹¹

295 Although the national investigation by the OCP had sufficient
evidence to identify suspects by 2010, in December 2010 the OCP
informed the Prosecution that [d]ue to technical requirements
and corroborations for some fragments of allegations
charges without indicating a time frame when this process would
finished.

296 The investigation was delayed at the end of 2012 and during
the first half of 2013 following the appointment of Aron
new Chief Prosecutor on 25 October 2012 who required
restructuring and reorganizing the work of his office.
In restructuring his office, the new Chief Prosecutor prioritized
the investigation of financially committed individuals former

⁴⁰⁹ According to the Georgian authorities, in December 2010, requests were issued to serve
summonses for the taking of statement from two alleged victims of one incident. These two requests
were denied by Russian Prosecutor's Office. In March 2011, the OCPG sent modified requests
taking into account grounds for denial of the earlier requests. Apparently, these two requests have
not been replied to. Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO
OTP-0003-1836 at 1867-1868.

⁴¹⁰ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO OTP-0003-1836 at
1844, 1874.

⁴¹¹ Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO OTP-0003-1836 at
1844.

⁴¹² Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO OTP-0003-1836 at
1875.

government officials and addressed human rights complaints against the government administration

297. In March 2013, the OCPG started reviewing files approximately 150 volumes of documents related to committed in the context of the August 2012 conflict. 7,000 witness statements, as well as forensic and medical. In May 2013 the Chief Prosecutor sent a representative group with the aim of expediting the investigation process and many cases were prosecuted. Five days later, on 15 May 2013 the Prosecutor publicly announced the investigation of the alleged crimes committed during the August 2008 and

298. In September 2013, the OCPG informed the Prosecution that the process of verifying and analysing allegations received from victims or collected through intelligence activities for identifying potential suspects. The OCPG informed the Prosecution that a comprehensive update report on the progressive investigative steps and planned activities for specific cases was to be submitted to the Prosecution in 2013.

299. Between November 2013 and January 2014 the Chief Prosecutor changed twice which created a vacuum in the decision-making process and postponed the submission of the report. In addition, the three different Chief Prosecutors in that

⁴¹³ Annex E.8.4: Global Times, "Georgia to investigate war crime allegations related to conflicts in Ossetia", 15 May 2013, GEOTP-0003-1389 at 1389.

different policies without their cooperation with the Court investigation into August 2008 events.

300 Following the resignation of Chief Prosecutor Archil Tskitishvili in November 2013, the new Chief Prosecutor, Otar Partskhaladze, took office in late November 2013 and two months later

301 On 20 January 2014, the Prime Minister of Georgia announced that the Chief Prosecutor, Giorgi Burdakov, would, by June 2014, the Prosecution requested the OCPG determine for national proceedings in Georgia no later than October 2014 by concrete, tangible and pertinent evidence that government investigations or prosecutions have been ongoing against persons who appear to bear the greatest responsibility for the most serious crimes arising from the armed conflict of August 2008. The Prime Minister informed the OCPG that short of this evidence, in accordance with the Prosecutor's statutory obligations, the application to the Trial Chamber of the Court, seeking authority to open an investigation into the situation in Georgia, would be based on relevant national proceedings. In the process of consultations between the OCPG and the Georgian Prosecution, the OCPG submitted an update report on national proceedings in Georgia for 2014 and relevant supporting material on 18 December 2014 and provided information on the investigative steps that

⁴¹⁴ Annex E.9.1: Office of the Prosecutor of the International Criminal Court, Letter to the Chief Prosecutor of Georgia, 10 June 2014, GEO-P-0010-0012.

⁴¹⁵ Annex E.7.1: Government of Georgia, "Update Report Concerning the National Criminal Proceedings of Georgia over the Crimes against Humanity and War Crimes related to the August 2008 Armed Conflict," November 2014, GEO-TP-0003-0003.

⁴¹⁶ Annex E.8.40: Constitution of South Ossetia ("S'ch'ch'") § 57 ("S'ch'ch'") 8 April 2001, GEO-OTP-0003-0016.

carried out until November 2014 to identify and prosecute alleged perpetrators.

302 However, in its letter of 17 March 2015, the Government of Georgia informed the Prosecution that further progress of the proceedings related to the alleged crimes is being prevented by a fragile security situation in the occupied Georgia and in the areas adjacent thereto, where violence against civilians is still widespread. As a example, the Government of Georgia referred to 393 violations of civilians across conflict lines in the period from 2008 to 2014. Georgia authorities' commencement of prosecution of crimes related to the 2008 armed conflict trigger aggressive and unlawful reactions by the occupying forces would prompt certain backlashes from the groups engaged in the violence across the country. The security and safety of witnesses of alleged crimes committed in the 2008 armed conflict was stated to be particularly at risk since these witnesses are located close to South Ossetia and are at high risk of being subjected to threats and arbitrary actions by South Ossetian authorities. According to Georgia authorities, such detention has occurred in the Tskhinvali region on 9 December 2013 and 17 March 2015. Georgia stated that there is no prospect of further progress of domestic proceedings related to the 2008 armed conflict. Further to clarification sought from the Georgian authorities and the Prosecution, this suspension of domestic proceedings is a result of the forcible transfer and persecution of the ethnic Georgian population.

⁴¹⁷ Annex G: Government of Georgia, Letter dated 17 March 2015, OIG-0003-1169 at 1170.

⁴¹⁸ Annex G: Government of Georgia, Letter dated 17 March 2015, OIG-0003-1169 at 1170.

of South Ossetia the buffer by South Ossetian forces, including acts of killing/murder, pillage and destruction of enemy's property; as well as (ii) the attack by South Ossetia against the Georgian peacekeepers.

303 Accordingly, the Prosecution submits that the intermittent progress made over a number of years, proceedings have come to a standstill, meaning that authorities are currently inactive. Moreover, further concrete and progressing steps taken, or are envisaged to being taken, domestically criminal responsibility of those involved in the alleged. Prosecution emphasises that no decision within the meaning of article 17(1)(b) has been taken at national authorities domestic proceedings falling within the scope of article 17(1)(b) indefinitely suspended by their continued inactivity. In line with the case law of this Court, the Prosecution submits that admissibility must be determined on the basis of the facts as they exist at the time of the determination and that the assessment of national proceedings on future facts by particular states that are external to the control of competent authorities is too abstract and remote to control. At the time of the

⁴¹⁹ Annex G: Government of Georgia, Letter dated 17 March 2015, OIG-0003-1169 at 1170.

⁴²⁰ The Appeals Chamber has previously held that admissibility must be determined on the basis of the facts as they exist at the national level at the time of the admissibility proceedings. *Prosecutor v. Gotse*, Trial Chamber II, paras. 101-102, ICJ 01/07-1497, para. 56. Trial Chamber II has also held that the assessment cannot be made in the light of possible, hypothetical proceedings that may or may not take place in the future, stating that the conditioning of admissibility determinations on the basis of possible future charge circumstances would be tantamount to engaging in hypothetical judicial determination. *Prosecutor v. Gotse*, Trial Chamber II, paras. 101-102, ICJ 02/04-01/05-377, para. 51. In the *Banda & Jerbo* case, Trial Chamber IV also rejected a defence request for a temporary stay of proceeding for an indefinite period due to the current security situation and the active obstruction of the GoS, holding *inter alia*, that the alleged infringement on

2. National proceedings in the Russian Federation

304 The Russian authorities investigated alleged crimes related to the armed conflict on 8 August 2008. The investigation falls exclusively under the mandate of the Committee of the Russian Federation.

(a) National proceedings in relation to the displacement camp

305 In relation to the potential identified in the application related to the campaign to forcibly expel ethnic Georgians from the buffer zone, the Investigative Committee in the Prosecution in the course of the investigation, mainly in 2012-2014, it verified allegations against Russian security forces and Georgian NGOs had submitted to Russian authorities on behalf of Georgian victims. The submissions included 88 complaints and 575 allegations brought by 600 Georgian victims through the Young Lawyers Association (YLA). The allegations included murder and attempted murder, destruction of property, and pilferage.

306 The Investigative Committee informed the Prosecution that it found no evidence of the involvement of Russian security forces in the commission of alleged crimes committed in the context of the armed conflict.

accused person's rights were too hypothetical and abstract to warrant the remedy sought. OJSC 03/09-410, paras. 71-58.

⁴²¹ In 2007, the Investigative Committee was created as a part of the Prosecutor General's Office under the name 'The Investigative Committee of the Prosecutor's Office of the Russian Federation'. Following an adoption of the federal law on 27 September 2010, the Investigative Committee changed its name to 'The Investigative Committee of the Russian Federation' because it became separated from the Prosecutor General's Office; Annex E.8.39: Interfax, 'Следственный комитет России', 27 September 2010, OJSC-010-0009.

⁴²² Meeting with the Russian authorities on 24 January 2014 in Moscow, Russia.

⁴²³ Meeting with the Russian authorities on 24 January 2014 in Moscow, Russia.

2008 armed conflict. In plain investigative Committee that the investigation established command of the Armed Forces of the Russian Federation had taken exhaustive measures to prevent pillage, violence, indiscriminate use of force during the entire period of the Russian military control during the conflict.

307 This conclusion was based on more than 2000 Russian servicemen from 50 Russian military units deployed during the 2008 armed conflict members of South Ossetia forces as well as Georgian civilians. Investigative Committee also compared satellite imagery of the territory of South Ossetia from before and after 31 August 2008 in order to assess the alleged destruction of buildings. Investigators working in the conflict zone do not detail the destruction of buildings, installations, and infrastructure. That ethnic Georgian villages were indeed not destroyed as a consequence of shelling or other bombardment.

308 As described earlier, these findings that the Russian military failed to prevent or punish were partially confirmed by information that has been deemed credible by the Prosecution, which information suggests that Russian personnel participated in, or were passive in the face of, crimes committed by South

⁴²⁴ Annex E.7.22: Government of the Russian Federation, Embassy of The Russian Federation in the Netherlands, 18 June 2012, GEO-OTP-0001-1332 at 1334.

⁴²⁵ Annex E.7.22: Government of the Russian Federation, Embassy of The Russian Federation in the Netherlands, 18 June 2012, GEO-OTP-0001-1332 at 1333.

⁴²⁶ Annex E.7.31: Government of the Russian Federation, Memorandum on materials of criminal case no. 201/3741088, For presentation in the Ministry of Foreign Affairs of Russia in accordance with questions prepared by representatives of the International Criminal Court, March 2010, GEO-OTP-0008-0485 (March 2010 Memorandum)

309 The verification process by the Russian investigative reportedly hampered by inability to access Georgian victims statement to the Investigative Committee, which was reportedly explored with representatives of Georgian victims to receiving victims statements in the territory of third

310 According to the Russian authorities, the Investigative submitted six requests for legal access to 570 individuals who submitted alleged Russian services as well as access to information on alleged perpetrators that had been collected by the Georgian investigative authorities.

311 The Russian investigative did not address allegations against South Ossetian forces. Russia considers South Ossetia as an independent State in August 2008 and considers the State's authorities as competent authorities to investigate crimes committed by South Ossetian forces. According to the Russian authorities, South Ossetian judicial authorities, including law enforcement and judiciary, are responsible for conducting investigations and alleged crimes committed in South Ossetia.

312 Accordingly, the Prosecution has determined that, despite reported verification efforts, and progressive steps been taken to ascertain the criminal responsibility

⁴²⁷ Meetings with Russian authorities on 23 and 24 January 2014 in Moscow, Russia.

⁴²⁸ Meetings with Russian authorities on 3 February 2011 and 23 January 2014 in Moscow, Russia.

⁴²⁹ Meetings with Russian authorities on 23 January 2014 in Moscow, Russia.

involved in the alleged attacks the potential case(s) identified in this Application on the basis described in Annexes A.1

(b) National proceedings the alleged attack against Russian peacekeepers

313 The Investigative Committee had initially started two lines of inquiry as part of the national investigation in relation to alleged attacks by Georgian armed forces. The first line of inquiry was in connection with a criminal case no. 04/100/05 dated 2 August 2008 in relation to the killing of Russian peacekeepers by Georgian armed forces under the provisions of article 105 of the Criminal Code of Russia. This case was opened on 9 August 2008 in relation to charges of murder and murder of civilians who were nationals of the Russian Federation residing in South Ossetia, committed by Georgian armed forces. In addition, on 12 August 2008 authorities opened a further criminal case no. 2001/37 of the 08 charge of genocide.

⁴³⁰ Article 105 of the Criminal Code of Russia concerns the crime of murder and provides that: The murder:

- a) of two or more persons;
 - b) of a person or his relatives in connection with the official activity of this person or the discharge of his public duty;
 - f) committed by a generally dangerous method;
 - m) committed repeatedly
- shall be punishable with deprivation of liberty for a term of eight to 20 years, or by death penalty or deprivation of liberty for life.

Article 105 of the Criminal Code of the Russian Federation, English translation, GEOT/TP-0009-4948.

⁴³⁰ 1. Cruel treatment of prisoners of war or civilians, deportation of civilian populations, plunder of national property in occupied territories, and use in a military conflict of means and methods of warfare, banned by an international treaty of the Russian Federation, shall be punishable by deprivation of liberty for a term of up to 20 years.

2. Use of weapons of mass destruction, banned by an international treaty of the Russian Federation, shall be punishable by deprivation of liberty for a term of 10 to 20 years.

⁴³¹ Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEOT/TP-0008-0485

crimes allegedly committed by the Georgian military based on the information gathered during initial Soviet investigations.

314 The investigation authorities reported by collected 400 volumes of material in relation to the alleged crimes. The since August 2008 investigation reported identified over 13 items as material evidence and examined over 11 incident scenes in civilian areas, in office buildings, power facilities, and communications infrastructure, the positions of the peacekeeping battalions in Tskhinvali in South Ossetia, 100 witnesses who were identified as victims of the alleged civilian killings. Russian national peacekeepers were interviewed in relation to the alleged crimes. The investigation further conducted forensic examinations of samples, satellite imagery, military equipment and media records.

315 The information indicates that the Georgian military offensive against the Russian peacekeeping forces before the national investigation and considerable investigative work made to comprehend the events with respect to this incident since August 2008. The investigation conducted and the evidence submitted to the Prosecution 28 volumes of material in relation to peacekeeping in the event. The volumes indicated that the Russian investigation authorities collected vast amount of evidentiary material, including witness statements, photo and video forensic evidence, expert report.

⁴³² Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, OCEO 0008-0485.

⁴³³ Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEOTP-0008-0485.

316 Based on the gathered evidence, the Investigative Committee is unable to identify persons allegedly responsible for the attacks against the Russian peacekeepers on 7 and 8 August 2008. The Russian authorities, however, informed the Prosecutor that further national proceedings were hampered by certain obstacles. The Russian authorities encountered in the course of the investigation.

317 On 18 October 2011, the Russian Federation informed the Prosecutor that the lack of cooperation of the Government of Georgia and the immunity enjoyed by senior officials of Georgia were an obstacle to genuine advancements in the investigation. On 18 June 2012, a letter was sought to ascertain whether national proceedings had been suspended, consistent with the work of the Investigative Committee had been rendered genuinely. The Russian authorities specified that refusal of Georgia to provide information and immunity of senior officials of foreign States, in accordance with the rules of criminal procedure of the Russian Federation constitute grounds for termination of the case. Thus, the national proceedings with respect to the case are carried on.

318 On 23 January 2014, following the change of government in Georgia, the Russian authorities inform the Prosecutor that

⁴³⁴ Meetings with Russian authorities on 23 January 2014 in Moscow, Russia.

⁴³⁵ Annex E.7.38: Response of the Russian Federation to OTP letter No. OTP/RUS/1509/10 PM 15 September 2011, 18 October 2011, G-OTP-0010-0005.

⁴³⁶ E.7.22: Government of the Russian Federation, Letter to the Office of the Prosecutor of the International Criminal Court, 18 June 2012, G-OTP-0001-1332.

obstacles do exist and do not hamper the progress of the national investigation.

319 Since the investigative Commission is conducting a twofold work with respect to the attack against the Russian peacekeepers and witnesses and victims of the attack interviewed; (ii) additional expertise in relation to the attack as well as forensic analysis is being provided to the teams. Prosecution has been informed that the activities of the Investigative Commission have been extended until February 12, 2016.

320 The Prosecution notes that according to the Russian authorities, the investigation activities at the national level. At this stage, the information available does not indicate that the proceedings are being undertaken for the purpose of shielding the person(s) from criminal responsibility, or conducted in a manner that is inconsistent with an independent person(s) concerned with the justice due to unjustified delay or lack of independence of impartiality that may have made the Russian authorities to obtain the accused or necessary evidence not appear to constitute a bar to the proceedings. The Prosecution intends to keep this assessment under review in the context of any authorised investigation.

3. National proceedings in third States

321 The available information does not indicate any nation or any other States with jurisdiction in relation to crimes that have been committed in the context of the Situation.

322 In this regard, the Prosecution considers that South Ossetia should be part of the territory of Georgia and not a State. Since article 17 is premised on national investigations and prosecutions by a State which has jurisdiction, it is not considered that the South Ossetian authorities would have standing before this Court to lodge an admissibility challenge to article 19 (2) (b).⁴³⁷ Nevertheless, for sake of completeness, the Prosecution observed that information available from only proceedings conducted by Ossetian authorities in relation to the period under consideration concerns 16 individuals for charge of, but only 46 suspects received administrative penalties and similar non-criminal charges the rest were reportedly awaiting trial. Information available indicates that individuals have faced criminal proceedings in South Ossetia conduct which constitutes a crime within the jurisdiction of the Court.

4. Conclusion on complementarity

323 In the light of the indefinite suspension of national proceedings in Georgia, the Prosecution has concluded that it is not possible to

⁴³⁷ Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1994.

forcible transfer of ethnic Georgians. Application would be currently admissible as a potential case relating to intentional directing of attacks against peacekeepers facilities would be partially admissible at this stage. attack against Georgian peacekeepers, authorities similarly indefinitely suspended their domestic proceedings constituting State Inaction to the attack against Russian peacekeepers, the competent Russian authorities are progressing with their domestic investigations and these do not appear vitiated at this stage by a lack of willingness to do so genuinely. This assessment will be kept under investigation be a contribution to other alleged crimes for which it has been unable to achieve determination due to the insufficiency of the information available. It will continue to assess the existence and genuineness of relevant national proceedings such alleged conduct for as long as the situation investigation, should an investigation into the situation

324 The Prosecution has communicated its position on admission of the Georgian and Russian authorities with No State or article 18 or article 19, bring forward any change in circumstances. Prosecution will seek the cooperation of competent authorities of the Russian Federation and Georgia and will be able to assess admissibility of cases.

B. Gravity

325 The gravity assessment under article 7(1)(d) against the backdrop of a potential like case to arise from investigation is in a ⁴³⁸thin.

326 The assessment of gravity includes both qualitative considerations based on the prevailing facts and circumstances and non-exhaustive factors that ~~the assessment~~ include the scale, nature, manner of commission of the crimes, and their ⁴³⁹impact.

327 As set out earlier, the Prosecution Application to do the confidential annexes presenting an indicative list within the jurisdiction of the Court allegedly committed most serious incidents within ~~the available~~ information (Annex A.1 preliminary list of persons or that appear to be the most responsible for the most serious an indication of their specific role (Annex

328 Based on the information available, these are likely to arise from an investigation in ~~two~~ insufficient gravity to justify further action by the Court

329 With respect to crimes allegedly committed within the in are likely to be the ~~the~~ Prosecution as listed in Annex A. These include the war crimes/~~of~~ ~~murder~~ killing

⁴³⁸ ICC-01/09-19-Corr, paras. 50, 58 and 88; ICC-02/11-14, para. 202.

⁴³⁹ ICC-02/05-02/09-243-Red, para.31; ICC-01/09-19-Corr, para. 188; ICC-02/11-14, paras.203-204. See also regulation 29(2) of the Regulations of the Office of the Prosecutor.

articles 8(2)(a) and 8(2)(b) as well as crimes against humanity of murder, forcible displacement of civilians and rape under articles 7(1)(a), 7(1)(b) and 7(1)(c). Together with attendant crimes of destruction of property under articles 8(2)(d) and 8(2)(e) and 8(2)(b) and 8(2)(c) were committed on a large part of a plan and in furtherance of a policy to expel ethnic Georgian from the territory in South Ossetia.

330 The crimes committed by South Ossetians caused a high number of direct and indirect victims. At least 5,000 persons killed over 5,000 dwellings deliberately destroyed somewhere in the range of 10,000 ethnic Georgians displaced from South Ossetian buffer zone.

331 The information available suggests that the crimes were committed with particular cruelty and on discriminatory grounds. The patterns of close range killings and the infliction of serious bodily injuries together with widespread and systematic destruction of ethnic Georgian property were typically intimidating and forced to watch their homes being razed to the ground.

332 The expulsion campaign had a severe impact on a number of direct victims whose homes and way of life has been destroyed who suffered injuries, and on thousands of others. The information available suggests that the victims were and traumatized by their experience during the conflict.

⁴⁴⁰ Annex E.2.39: OSCE/HRAM Report, GEGOTP-0003-1921 at 1927

of this campaign of violence, the civilian population of
in South Ossetia substantially.⁴⁴¹ As noted above,
Prosecution estimates that the ethnic Georgian population
conflict zone was reduced by at least

333 The victims remain displaced due to the destruction of their
homes and administrative buildings. South Ossetian facto
authorities prevent them from returning to face a fragile security
situation.

334 With respect to the potential for the intentional direct
attacks against peacekeepers and peacekeeping facilities
against Georgian peacekeepers by South Ossetian forces
attack against Russian peacekeepers by Georgian armed forces would
meet the gravity threshold. According to Georgian authorities, Georgian
peacekeepers who were killed in Avnevi were heavily shelled
from South Ossetian positions. The killing of two Georgian
peacekeepers and injury of five others, and the destruction
of vehicles involved in a peacekeeping mission.
Russian authorities 10 Russian peacekeepers were killed
and they were wounded as a result of the attack. In addition,
the RUPKFB compound was destroyed, including a mine
within the compound and peacekeepers armoured vehicles
served as a separation line between the Georgian military and
Ossetian civilians.

⁴⁴¹ Based on the demographic data published by the South Ossetian State Department of
Statistics in 2012, out of 28,544 (30% of the total population in South Ossetia) ethnic Georgians in
South Ossetia recorded in 1989, there were 4,590 (8% of the total population in South Ossetia) of
ethnic Georgians in South Ossetia recorded in 2012.

⁴⁴² See paragraph 270.

⁴⁴³ Meeting with the Georgian authorities on 27 March 2013 in Tbilisi, Georgia.

335 The Trial Chamber I in the *Gotse* case established that the attack on peacekeepers had a grave impact on the peacekeeping mission as victims of the attack as well as their families. Moreover, the attack had a grave impact on the local population whose conditions depended on the implementation of the mission.⁴⁴⁴

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

337 With respect to the groups of persons likely to be targeted by the Prosecution's future investigation, the available indicators, including their alleged role in the alleged crimes, facilitating or otherwise contributing to the commission of alleged crimes.

VII. Interests of justice

338 Under article 15(1) of the Statute, while jurisdiction and admissibility are positive requirements that must be satisfied, the interests of justice is a potential countervailing consideration that may prevent the Prosecutor from proceeding. As such, the Prosecutor is not required to conduct an investigation if it is not in the interests of justice, but rather if there are specific circumstances or substantial reasons to believe that the investigation is not in the interests of justice.

⁴⁴⁴ ICC-02/05-02/09-243-Red, paras. 334.

it is not in the interests of justice to conduct an investigation at this time.⁴⁴⁵

339 Victims of alleged crimes within the context of the conflict have manifested their interests in seeing justice done in the Prosecution. The Prosecution has sought to ascertain the interests of victims through direct consultations with organisations representing victims, as well as through an examination of communication and other available information.

340 For instance, the Prosecution received 93 individual communications from ethnic Georgians who allege to be victims of, among other things, forcible displacement and inhumane treatment committed in North Ossetia or Gori and Karabakh. These communications were submitted by an NGO that was approached by persons claiming to be victims of torture and inhuman, degrading treatment or punishment in the context of the August 2008 conflict. It is noted that the Prosecution has received 110 such communications.⁴⁴⁶

341 Georgian human rights organisations representing victims have submitted communications to the Prosecution and the Office of the Prosecutor. Reports repeatedly stressed the desire of victims who were affected by the August 2008 conflict to see justice done.⁴⁴⁷ In a letter to the Prosecutor, dated 24 April 2012, seven Georgian and international human rights organisations manifested that they be

⁴⁴⁵ Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 67-71.

⁴⁴⁶ Annex E.5.3: Article 15 communication, dated 21 November 2011, ~~GE0~~-0004-0090 at 0090.

⁴⁴⁷ See for example Annex E.5.1: August Ruins, ~~GE0~~P-0001-0999 at 1007.

victims of the Georgian war deserve to see justice done and these serious crimes uncovered, and that there should be no impunity [8], stressing the undeniable role of the ICC in ensuring that justice is delivered to victims.

342. In meetings with the Office of the Public Defender/Ombudsman of Georgia, the need for an independent investigation by the ICC in the August 2008 conflict was repeatedly stressed and the demand for justice confirmed. Prosecution took further more 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 international human rights and humanitarian law violations whose Rapporteurs for Georgia and Russia have expressed support for an international investigation of crimes committed in the August 2008 conflict which would be in the basic interest of Georgia if conducted in a transparent manner.

343. Neither in communications from victims consultations with organizations representing or knowledgeable of the interests of victims, nor prosecution received views that the justice would not be served by an investigation into the August 2008 conflict in Georgia.

⁴⁴⁸ Annex E.4.16: International Federation for Human Rights (FIDH), ICC: A formal investigation must be opened on the 2008 conflict in Georgia, 24 April 2012, GEO-0008-0658 at 0659. The letter is signed by the Georgian Young Lawyers Association (GYLA), Human Rights Centre (HRC), Article 42 of the Constitution, Organization of the Public Defender, International Centre on Conflict and Negotiations (ICCN), Norwegian Helsinki Committee (NHC) and the International Federation for Human Rights (FIDH).

⁴⁴⁹ Meetings at the Office of the Public Defender on 27 March 2013 in Tbilisi, Georgia and on 12 June 2015 at the ICC.

⁴⁵⁰ PACE Resolutions 1683 (2009), 1633 (2008) and 1647 (2009) and meeting with the PACE Co Rapporteurs for Georgia and Russia on 6 November 2013 in Paris, France.

344. The Prosecution notes the close relationship between Georgia and the Russian Federation, and has considered the concerns raised by the Georgian authorities with regard to national proceedings. However, while a tense security environment might pose a challenge to Georgia's national investigation, in light of the mandate of the Prosecution, as the object and purpose of the Statute, and taking into account 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.

VIII. Procedural issues

345. The Prosecution informs the Chamber, in compliance with rule 50, on 31 October 2015, the Rules provide notice to victims or their legal representatives to request a hearing and informed them that pursuant to rule 50(1) of the Regulations of the Chamber, they have 30 days to present their observations to the Chamber.

346. The Prosecution will publish a notice pursuant to rule 50(1) in both Georgian and Russian languages on the ICC website, and send it to ICC's contact database of about 4,000 individuals worldwide, including about 70 Georgian and Russian media outlets, equally divided between them. The notice will be disseminated through national television and radio stations, news agencies, news sites, online news portals, and other media, which it is anticipated will make prominent reference to the notice. The notice will be published in its entirety by the Chamber in its 10 October 2015 editions. Additionally,

notice will be sent to about 50 individual recipients (Georgian Russian civil society actors, NGOs and senders of around 15 communications) a brief summary of the Prosecution Application in Georgian and Russian languages

347. The Prosecution respectfully suggests that the procedure that Pre Chamber III established in the Côte d'Ivoire situation for victims' representatives to participate in article 15(3) of the Statute be applied in the situation in Georgia to ensure that proceedings are carried out in an expeditious manner. The Prosecution suggests that the victims' representatives who are not at risk on account of their activities of the Court then order that the victims' representatives received by the Court in relation to the Request for authorisation of investigation were to be provided forthwith to the Victims Participation and Reparation Section of the Registry and (ii) the VPRS provide a single, consolidated report on the collective and individual representations submitted to the Chamber in due time.⁴⁵¹

348. The Prosecution also informs the Chamber that it will propose to apply article 18(1) of the Statute upon a decision of the Chamber to authorise an investigation into the situation in Georgia. In article 18(1), such notification can only occur after the determination of the Chamber on the Application of the Prosecution.

⁴⁵¹ Full lists of recipients and samples of media coverage are provided in Annex H.2.

⁴⁵² Situation in the Republic of Côte d'Ivoire, Order to the Victims Participation and Reparations Section Concerning Victims, Representations Pursuant to Article 15(3) of the Statute, ICC-02/11/03, 6 July 2011, page 6. See also Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, ICC-02/11, 23 June 2011, paras. 1779.

IX. Relief requested

349 For the reasons set out above and on the basis of what is presented and the support in the Prosecution respectfully requested authorisation for the Trial Chamber to proceed with an investigation into the Situation in the Georgia from 1 July 2008 to 10 October 2008, for war crimes and humanitarianly allegedly committed in and around South Ossetia.

Fatou Bensouda, Prosecutor

Dated 16th October 2015

At The Hague, The Netherlands