

Origin English

No. ICC 01/15

Date 17 November 2015

PRETRIAL CHAMBER I

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

SITUATION IN GEORGIA

Public Document with Confidentiality Annexes B, AC, DE 23, 7E, E.9, HF and Public Annexes E11, E.2, E.4, E.5, E.6, E.8, Corrected Version of authorisation of an investigation pursuant to article 15 October 2015 ICC 01/15 Corr

Source: Office of the Prosecutor

Document to be notified in accordance with Regulations of  
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## I. Introduction

1. The Prosecutor hereby requests authorisation from Chamber I, pursuant to article 15(3) of the Rome Statute, with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed 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 attributed to the parties involved in the armed conflict: Georgian armed forces, the South Ossetian forces, and the Russian armed forces. In the course of its examination based on the information available, the Prosecution has identified the following war crimes and crimes against humanity which it reasonably believes fall within the jurisdiction of the International Criminal Court (ICC, or the Court), thus making its request to the Pre-Trial Chamber I to authorise its investigation into the Situation in Georgia:

- Killings, forcible displacements and persecution of Georgian civilians, and destruction and pillaging of property, by South Ossetian forces (with possible assistance by Russian forces); and
- Intentionally directing attacks against Georgian civilians in South Ossetian forces; and against Russian peacekeepers by Georgian forces.

3. Information on other crimes allegedly committed associated with the parties to the conflict is also Application, including on indiscriminate and disproportionate attacks against civilians by both Georgian and Russian armed forces. Given the inherent difficulties with determining issues of responsibility for the conduct of hostilities in the absence of a formal investigation, the information available has not yet enabled the Prosecution to make a determination on the requisite standard as to whether the alleged crimes within the jurisdiction of the Court may have been committed. Nonetheless, if the Trial Chamber authorises an investigation into 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 and sexual slavery, although at this stage no clear information has emerged as to the perpetrators or the link between these crimes and the armed conflict in the wider context. Such allegations could also be investigated in the context of any authorised investigation.
5. The Prosecution also sets out in further detail in the admissibility analysis in relation to potential cases. Since it first opened its preliminary examination, the Prosecution has engaged closely with the national authorities of both Georgia and Russia, and followed the progress of their national investigations into crimes arising from the Situation.
6. Until recently, it appeared that progress was being made. In 2015, national proceedings in Georgia have stalled.

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

7. As set out further in this Application, ongoing tensions and armed clashes between the Georgian separatist forces of the South Ossetian autonomous region within Georgia and a breakaway South Ossetian administration escalated in July to early August 2008 with a series of explosions targeting, among others, both local South Ossetian and Georgian military and political leaders in South Ossetia. On 7 August 2008, the Russian Federation launched an offensive to retake control of the South Ossetian forces of the Russian Federation intervened in South Ossetia, regaining control on 10 August 2008 of localities in the region and extending control thereafter over a 20 km wide buffer zone established within parts of Georgian territory beyond the South Ossetian administrative boundary. Although a ceasefire agreement was brokered on 12 August 2008, crimes continued to be committed. In accordance with a subsequent agreement on 8 September 2008, Russian troops withdrew behind the administrative boundary line of South Ossetia by 10 October 2008 at

8. The Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMG) 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 were displaced. The Government of Georgia claimed that 412 persons lost their lives, 200 were civilians, 170 military and 14 policemen, while 1,000 were wounded, and 10 military and 14 policemen were reported killed. The Russian Federation provided information stipulating that 255 ethnic Ossetian civilians had died and 255 were injured. 162 Russian servicemen were killed and a further 162 were wounded. South Ossetian authorities reported a total of 365 deaths, both civilians and members of South Ossetian forces.

9. The Prosecution has gathered information on alleged crimes to all three parties to the conflict: the Georgian armed forces, Russian armed forces and South Ossetian forces. The alleged crimes have taken place in South Ossetia and areas of the buffer zone at least in the period from 7 August 2008 to 10 October 2008. The Prosecution requests authorisation to investigate the situation from 1 July 2008 so that it may be in a position to investigate precursor events that immediately preceded the commencement of hostilities and which led to the outbreak of violence. This will enable it to determine, in the course of the authorised investigation, whether a sufficient nexus exists between such acts and the required contextual elements for the commission of crimes against humanity. The end date specified for the investigation is 10 October 2008, the date by which, at the



Russian armed forces are reported to have advanced with the administrative boundary line of South Ossetia.

10. In relation to the crimes which are the focus of this information available to the Prosecution indicates that 113 ethnic Georgian civilians were killed as a result of the displacement campaign conducted by South Ossetian forces. It is estimated 13,400 to 18,500 ethnic Georgians were displaced from South Ossetia and buffer zone in areas previously administered by Georgian authorities. Over 5,000 dwellings belonging to ethnic Georgians were reportedly destroyed. There is a basis to believe that the forces committed acts of kidnapping, pillage and destruction of enemy's property, as well as crimes against humanity consisting of murder, forcible transfer of population and persecution were committed against the ethnic Georgians in South Ossetia and the buffer zone. There is also conflicting information on the involvement by the Russian forces in these crimes, with credible reports indicating that some members of the Russian armed forces participated in others instances they stood by passively, while in other instances they intervened to prevent such crimes.

11. There is also a reasonable basis to believe that members of the United Nations Peacekeeping Force Headquarters (JPKF HQ), including UN military and Russian contingents, were at separate times involved in intentional attacks constituting war crimes within the jurisdiction of the Court. In particular, on 7 August 2008 members of a Russian peacekeeping contingent at the Avnevi checkpoint reported

under heavy shelling from South Ossetian positions, deaths and five injuries and the subsequent withdrawal of the Georgian contingent from the JPKF HQ. During the night of 12 August 2008 the Georgian armed forces conducted an attack against JPKF HQ and the base of the Russian Peacekeeping Battalion (RUPKFB) claiming that it targeted peacekeepers. According to the Russian authorities, 10 peacekeepers from the Russian peacekeeping contingent were killed and a number were wounded as a result. There are conflicting allegations from both sides to the conflict that the Georgian peacekeepers had lost their entitlement to the protection given to civilian objects at the moment of each respective attack. However, in mind of the low threshold applicable at this stage of the proceedings, the presumption of civilian character that governs the application of 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 peacekeepers involved in a peacekeeping mission has been committed by the intentional directing of attacks by South Ossetian and Georgian peacekeepers as well as the intentional directing of attacks by the Georgian armed forces against peacekeepers.

12 The Prosecution recalls that crimes identified at the meeting meeting the reasonable basis standard should be considered of relevant criminality within the situation, in the light of the requirements of determining whether one or more crimes within the jurisdiction of the Court has<sup>1</sup> been committed.

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

the Chamber should authorise an investigation into the whole and not just the particular acts or incidents but substantiate that<sup>2</sup> thresholdly, should an investigation be authorised, Prosecution should be permitted to expand its investigation with respect to these or other alleged groups or persons and/or to persons of different qualifications, so as the cases brought forward for prosecution are sufficient. In the authorised situation, the Prosecution would be able to investigate allegations relating to indiscriminate attacks against civilians and based on crimes.

13 As noted above, the timing of this Application has been largely by issues of admissibility as they relate to national proceedings. Until recently, national competent authorities of both Russia and Georgia were engaged in investigations against those who appeared to be most responsible for crimes which are the subject of this Application. These measures, despite some attention and delay, appeared to be advancing through the national and progressive steps to ascertain the criminal responsibility of those involved in crimes.

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

<sup>2</sup> ICC-01/09-19-Corr, paras. 7475.

<sup>3</sup> 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 relation to the occurring in the context of the August 2008 armed conflict are indefinitely suspended. With no foreseeable arrests and no other investigations in relation to the relevant conduct in any other State, the Prosecution has assessed that the Application would be admissible inaction. This potential case would also meet the gravity threshold in light of the manner of commission and impact of the crimes.

15 The potential case relating to the intentional directed against peacekeeping facilities would be partially admissible at this stage. Both the attacks against peacekeepers and Russian peacekeepers would meet the threshold. In relation to the attack against Georgian domestic criminal prosecution in Georgia into this incident similarly been suspended in relation to the attack against peacekeepers, despite the pace of proceedings, the domestic authorities are continuing to progress with the investigations and the investigations do not appear vitiated at this stage by a lack of willingness or inability to do so. This assessment will be kept under review should an investigation be authorised.

16 Despite the political tensions that exist between Russia and Georgia and the heightened security environment, there are no substantial reasons to believe that the ongoing investigation would not serve the interests of justice.

account the gravity of the crimes and victims' mistreatment, victims continue to call for justice in relation to these

## I. Procedural history

17 By letter of 5 October 2015, the Prosecutor notified 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 pursuant to article 15(b)

18 On 8 October 2015, the Presidency of the Court assigned the Trial Chamber I.

19 On 8 October 2015, the Prosecutor submitted a request for authorization in accordance with article 38 of the Regulations of the Court. The Trial Chamber granted the request on 9 October 2015.

## II. 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. The process of gaining independence from the Soviet Union between 1989 and 1991, Georgia faced internal division from the secession of South Ossetia, Abkhaz and Adjara, which had gained autonomous

while Georgia was part of the Soviet Union the last census in South Ossetia conducted in 1989, the population composed of 98,527 inhabitants, in which 28,544 Georgians and 65,270 (66%) ethnic Ossetians. The ethnic composition of South Ossetia prior to the conflict shows that the overall number of inhabitants decreased, but the population remained approximately the same; 24,100 Georgians living in South Ossetia in the time prior to the conflict. While the majority are in the majority Orthodox Christians, Ossetians have their own language and alphabet, differing from the Georgian language in the rest of the geographical area of today's territory of South Ossetia corresponds with the historical territory of the former South Ossetian Autonomous District.

<sup>4</sup> 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.2.35 Independent International Fact Finding Mission on the Conflict in Georgia, Report, Volume I, September 2009, GEOOTP-0002-7757 at 77697770 (€Volume I); Annex E.2.36 Independent International Fact Finding Mission on the Conflict in Georgia, Report, Volume II, September 2009, GEOOTP-0002-7801 at 78137814 (€Volume II).

<sup>5</sup> 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, GEO0001-1242 at 1247 (€The Burden of Recognition•); and Annex E.2.36 IFFMCG, Volume II, GEOOTP-0002-7801 at 7873.

<sup>6</sup> 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 lived in Akhalkalaki 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, GEO0001-0336 at 0357 (€Up in Flames•); Annex E.4.13: International Crisis Group, €Georgia's South Ossetia Conflict: Make Haste Slowly•, 7 June 2007, GEOOTP-0001-1276 at 1282 (€Make Haste Slowly•); Annex E.4.12: International Crisis Group, €Georgia: Avoiding War in South Ossetia•, 26 November 2004, GEO00008-0615 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, GEO-OTP-0006-0003 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 Nuremberg Request of OTP ICC•, 13 March 2015, GEO OTP-0003-1172 at 1177 (€13 March 2015 Report•).

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

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

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

<sup>8</sup> 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 €rayons• or €districts• were transformed into municipalities, including the Akhmagori district (now Akhmagori 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 are Redvi 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 €district• 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.

<sup>9</sup> Annex E.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7879.

<sup>10</sup> Annex E.2.36 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.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7884-7900.

<sup>11</sup> Annex E.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7879-7880.

22 The two year conflict with South Ossetia ended on 24 June 2008 with the signing in Sochi of the Agreement on Principles for Resolving the Georgian-Ossetian Conflict by the Presidents of Georgia and the Russian Federation. The Sochi agreement established a commission, a Joint Control Commission (JCC) and a Russian Peacekeeping Force (JPKF) for South Ossetia. The force was commanded by a Russian officer and consisted of 500 servicemen each provided by Russia, Georgia and the United States. The Conference for Security and Cooperation in Europe established an observation mission in November 1992 to monitor the South Ossetian conflict, mandated to assist conflict resolution and reaching a peaceful political settlement.

23 At the time of the 2008 conflict, South Ossetia was self-declared and 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 elected in 1996 in a non-democratic and considered illegitimate election. In the subsequent 2001 elections in South Ossetia, Eduard Kokoity was elected President of South Ossetia.

<sup>12</sup> Annex E.2.37 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7901.

<sup>13</sup> 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.2.39 OSCE, Factsheet: What is the OSCE?, 29 April 2013, GEGOTP-0008-0669.

<sup>14</sup> For the modalities establishing the CSCE mission see: Annex E.2.40 OSCE, Establishment of the Personal Representative of the Chairmanship Office for Georgia, 6 November 1992, GEGOTP-0008-0673.

<sup>15</sup> Tanayev, K. (ed.), Ossetian Tragedy, The White Book of Crimes against South Ossetia, 2008, (Europe Publishing House: Moscow, 2009), GEGOTP-0009-4398 at 426; Annex E.4.12: ICG, Avoiding War in South Ossetia, GEGOTP-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 Russian 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 a large number of South Ossetian residents following the enforcement of the ceasefire between Russia and Georgia in 2008. The South Ossetian authorities further consolidated this process by enacting their own Citizens Act under which South Ossetians were entitled 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 Duma elections.

25 In 2003, following contested elections in Georgia, the Government of Georgia was ousted in the Rose Revolution and opposition leader Mikheil Saakashvili was elected President of Georgia in 2004. President Saakashvili

<sup>16</sup> Eduard Kokoity was elected twice President of South Ossetia, in 2001 and re-elected on 12 November 2006. Annex E.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7910 and 7923.

<sup>17</sup> Annex E.2.35 IIFFMCG, Volume I, GEO-OTP-0002-7757, at 7787; Annex E.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7955 and 7976 Annex E.2.31: 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.

<sup>18</sup> Annex E.2.36 IIFFMCG, 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.

<sup>19</sup> Annex E.8.37: Ru Novosti, "South Ossetia Began to Issue Its Own Passports", 15 August 2006, GEO-OTP-0008-0777 at 0778 (for English translation, see [E.9.3: Solemn Declaration II, 13 November 2015](#))

<sup>20</sup> 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.

restoration of Georgia's territorial integrity a priority. Following armed clashes between Georgian army and South Ossetian forces in August 2004, the Government sought to introduce a new peace plan for South Ossetia. However, South Ossetia's President Kokoity rejected the plan in October 2005.

The first half of 2006 was marked by a number of steps by President Kokoity with a view to advancing the integration of South Ossetia into the Russian Federation, including a formal application with the Russian Constitutional Court for a cooperation agreement with Russia. In parallel, a number of statements by Russian officials suggested a possible formal agreement with the support of Russia.

<sup>21</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801, at 7820-7821.

<sup>22</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 7914-7918.

<sup>23</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 7918-7919.

<sup>24</sup> 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 there was not a single legal document proving its withdrawal from Russia.

<sup>25</sup> 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 already de facto an 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" [ETM] 2 June 2006, GEGOTP-0010-0115 at 0115 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015).

<sup>26</sup> For instance, on 22 March 2006 Russian Prime Minister Mikhail Fradkov's deputy, Gennady Bukayev, reportedly stated at a joint session of North Ossetia's and South Ossetia's leaderships 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 at 0708.

27. In November 2006, coinciding with the ~~the~~ ~~Kokoity~~ for a second term ~~an~~ ~~rd~~ ~~um~~ was held in areas controlled by the authorities in South Ossetia, in which nearly 100% reportedly supported full independence of South Ossetia. In parallel, alternative presidential elections and a referendum were organized in the Georgian controlled areas of South Ossetia. A newly established political movement Salvation Union led by Dimitri Sanakoev, an ethnic Ossetian ~~an~~ ~~former~~ minister under ~~Kokoity~~ South Ossetian administration, was elected with a majority of 94% of the ballots. In the referendum, the voters reportedly voted in support of a federal arrangement between South Ossetia and thus Georgia's ~~the~~ ~~integrity~~.<sup>27</sup> On 10 October 2007, Saakashvili signed a decree ~~to~~ ~~create~~ ~~a~~ ~~territorial~~ ~~temporary~~ administration within South Ossetia and appointed Saakoev as Head of the Administration. The Georgian Parliament approved the decree and provided funds to the Administration. The Georgian state<sup>29</sup> ~~the~~ ~~area~~ ~~controlled~~ by the Sanakoev Administration included predominantly ethnic Georgian Kurta, Eredvi and Tighva ~~the~~ municipalities.

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

<sup>28</sup> Annex E.2.36 IIFMCG, Volume II, GEO-OTP-0002-7801 at 7824, 7923; E.4.13: ICG, Make Haste Slowly GEO-OTP-0001-1276 at 1280-1283.

<sup>29</sup> Annex E.7.15 Government of Georgia, "Report by the Government of Georgia on the Aggression by the Russian Federation against Georgia", January 2010, GEO-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.

<sup>30</sup> 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: Didi Liakhvi valley in Kurta municipality (north of Tskhinvali, including the villages of Kekhvi, Kurta, Zemo Achabeti, Kvemo Achabeti, and Tashani 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, Atsriskhevi, 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, 10 May 2007 Report "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)", GEO-0006-0975 at 0982;

28. On 16 April 2008, President Putin signed a decree about ties and relations with Abkhazia and South Ossetia. Under the same decree, representative missions of the Russian Ministry of Foreign Affairs were opened up in Sokhumi and Tskhinvali. This decision was criticised by the international community, but South Ossetia took it as recognition of its<sup>31</sup> independence.

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

E.4.13: ICG, Make haste slowly, GEOTTP-0001-1276 at 1307, 1308; see also Annex E.4.11: ICG, Up in Flames, GEOTTP-0001-0336 at 0357.

<sup>31</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-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).

<sup>32</sup> 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).

<sup>33</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8010-8011.

<sup>34</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8012.

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

31 During the afternoon of 6 August 2008, there was shooting along virtually the entire administrative boundary line between South Ossetia and Georgia. Hotspots in the North-Kavkaz area (west of Tskhinvali) and the Dzhirgata area (east of Tskhinvali).<sup>35</sup> On 7 August 2008, the Georgian peacekeeping contingent at the Avnevi checkpoint came under heavy shelling from South Ossetian positions. Later that day, Georgian representatives left the town of Tskhinvali. At 19h00 (Tbilisi time), Georgian President Mikheil Saakashvili stated in a televised address that he had ordered Georgian troops to unilaterally suspend fire. The cease-fire was also observed by South Ossetian forces and ended when the firing reportedly resumed.<sup>37</sup>

32 Shortly before midnight, at 23h50 on 7 August 2008, South Ossetian units reportedly began firing at the town of Tskhinvali. On the city of Tskhinvali, marking the widely acknowledged start of the armed conflict.<sup>38</sup> The Georgian armed forces reportedly used weaponry such as 122mm howitzers, multiple launch rocket system DANA, tank Grad and multiple launch rocket system

<sup>35</sup> Annex E.2.36 IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8014.

<sup>36</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8014.

<sup>37</sup> Annex E.7.17: Government of Georgia, Witness statement, GEO-0008-1793 at 18001801; Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8014-8015.

<sup>38</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8015.

(Grad MLR) During this attack in the afternoon of 8 August 2008, the Georgian forces managed to seize control of a part of Tskhinvali and several Ossetian villages. Georgian forces were entering Tskhinvali from the north, while South Ossetian forces were entering from the south.

33 Russia began its military operation 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 forces withdrew from the centre of Tskhinvali, but maintained positions in the southern parts of the city. The Georgian 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 unilateral ceasefire and its intention to withdraw from South Ossetia. Russian armed forces and South Ossetian forces have continued their military operations. Most of the Georgian armed forces were withdrawn from South Ossetia by 11 August 2008.

<sup>39</sup> Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0151; Annex E.4.10 HRW, Up in Flames, GEOTP-0001-0336 at 0386-0388. See also Annex E.2.36 IFFMCG, Volume II, GEO-OTP-0002-7801 at 8145.

<sup>40</sup> Annex E.2.36 IFFMCG, Volume II, GEOTP-0002-7801 at 8015-8016.

<sup>41</sup> 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.2.36 IFFMCG, Volume II, GEO-OTP-0002-7801 at 8021, 8026-8027 and 8059.

<sup>42</sup> Annex E.2.36 IFFMCG, Volume II, GEOTP-0002-7801 at 8016.

<sup>43</sup> Annex E.2.36 IFFMCG, Volume II, GEOTP-0002-7801 at 8017.

pursued by Russian troops, who ~~ministers~~ ~~set~~ ~~the~~ ~~board~~ ~~ary~~ lines of both South Ossetia and Abkhazia to set up ~~n~~ in a number of Georgian administered towns, including Senaki and<sup>44</sup> ~~During~~ the final phase of the hostilities units supported by ~~Russia~~ attacked Georgian positions in the upper Kodori Valley and seized territory which had been held by most of the local ethnic Georgian population and their ~~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 ~~point~~ ~~to~~ ~~peace~~ ~~six~~ ~~plan~~ providing inter alia, for the cessation of hostilities and the withdrawal of their positions prior to the <sup>46</sup> ~~start~~ ~~of~~ ~~the~~ ~~conflict~~, the plan was approved by Georgian President ~~Saakashvili~~ ~~and~~ ~~President~~ ~~Saakashvili~~. Saakashvili and Medvedev signed the agreement on 1

<sup>44</sup> Annex E.2.35 IIFFMCG, Volume I, GEGOTP-0002-7757 at 7778.

<sup>45</sup> Annex E.2.35 IIFFMCG, Volume I, GEGOTP-0002-7757 at 7779.

<sup>46</sup> 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 ~~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 ~~Fact~~ ~~File~~ ~~August~~ ~~2008~~, GEGOTP-0001-0953 at 0962; Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 8025.

<sup>47</sup> President Sarkozy signed a French version of the ~~point~~ plan and President Medvedev signed a Russian version. President Saakashvili signed ~~and~~ ~~the~~ ~~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 ~~point~~ plan that is signed by the de facto 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.2.37. Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I, September 2009, GEO-OTP-0002-8247 at 8811, 8812, 881 and 886 (Volume III). In a letter signed sent to President Saakashvili on 14 August 2008, President Sarkozy refers to 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.2.37. IIFFMCG, Volume III, GEGOTP-0002-8247 at 8813-8814. President Saakashvili finally signed the plan on 15 August 2008.

respectively.<sup>48</sup> Despite the public confirmation of a ceasefire by President Medvedev, and Russian Ossetian forces reported continued their advances for some time after the 12 August ceasefire agreement.

36 From 15 August 2008 onwards, Russian troops began to move from undisputed Georgian territory but created a 20km buffer zone in the area adjoining the administrative boundary of South Ossetia inside Georgian administrative boundaries.<sup>49</sup> The buffer zone was established purportedly with the aim of keeping the area free of entry and exit of civilians into the zone without the use of Russian military checkpoints. Georgian security forces were not allowed access to the zone.<sup>50</sup> While most of the Russian troops withdrew from positions beyond the administrative boundaries of South Ossetia after 22 August 2008, some remained within the buffer zone and only withdrew when an implementation agreement was reached on 8 September 2008. Under the agreement, at least 200 EU observers were to be deployed to the zone while Russian armed forces were to withdraw from areas adjacent to the administrative boundary lines of Abkhazeti and South Ossetia by midnight on 10 October 2008.<sup>51</sup> On 10 October 2008, the Russian Foreign Ministry officially confirmed the completion of the withdrawal of the Russian forces from the zones adjacent to

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

<sup>49</sup> Annex E.2.36 IFFMCG, Volume II, GEO-OTP-0002-7801 at 8025.

<sup>50</sup> See Annex D.2: Map of Military Operations.

<sup>51</sup> Leach, P., *South Ossetia (2008)*, in Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, 2012), GEO-OTP-0003-1496 at 1502.

<sup>52</sup> *Mise en Yuvre du Plan d'Action de 12 août 2008*, in Annex E.2.37 IFFMCG, Volume III, GEO-OTP-0002-8247 at 8817818.



Ossetia and Abkhaz<sup>53</sup> However, according to Georgia, four checkpoints were still to be closed by 10 October 2008 of withdrawal agreed to in the implementation agreement<sup>54</sup>

370 On 26 August 2008, upon a motion of the State Duma, President Dimitri Medvedev issued a decree recognising South Ossetia as a sovereign and independent state<sup>55</sup> The date that South Ossetia has been recognised by four United Nations (UN) Member States: Russia, Nicaragua, Venezuela, and the Pacific Island of Nauru<sup>56</sup>

#### B. Activities of the Office of the Prosecutor

38 The Situation in Georgia has been under preliminary investigation since 14 August 2008<sup>57</sup> Prosecution has been in regular contact with relevant individuals, including the Governments of Georgia and the Russian Federation, in order to gather and verify information on alleged crimes committed and the existence and progress of relevant national proceedings. This has included formal requests for information pursuant to article 15(2) of the Rome Statute, as well as field missions, routine contacts with focal points, and other interactions with relevant organisations and experts.

39 A total of 14 formal requests for information have been received from the Government of Georgia, four to the Government of the Republic of Georgia

<sup>53</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8025.

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

<sup>55</sup> Annex E.8.35: Ria Novosti "Russia recognizes Georgia's breakaway republics", 26 August 2008, GEGOTP-0008-0712 at 0712 Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8245.

<sup>56</sup> Annex E.4.15: ICJ, The Burden of recognition, GEOTTP-0001-1242 at 1254.

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

Federation, the Organization for Security and Cooperation in Europe (OSCE) and one European Court of Human Rights (ECtHR), each of which has involved multiple lines of work that require extensive follow-up and coordination. A number of missions have also been conducted, including six to Tbilisi, Georgia and Moscow, Russia.

40. In 2011, the Prosecution confirmed that it had determined that there was a reasonable basis to believe that the jurisdiction of the Court had been committed in the context of the Situation in Georgia. Since 2011, the Office of the Prosecutor (OTP or the Office) has issued public reports on its preliminary examination of the Situation in Georgia as part of its annual update on the status of its preliminary examinations.<sup>59</sup>

41. The main focus of the preliminary examination has been the existence and genuineness of relevant national proceedings in Georgia recently, and as confirmed by the Office's ongoing requests for information and the missions to both Georgia and Ukraine to the competent national authorities of both States with a view to conducting investigations against those who appear to be responsible for the most serious alleged crimes. As set out in detail below, these investigative measures, despite the challenges and delays, appeared to be progressing. This was not the case with respect to the investigation conducted in Georgia.

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

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

competent authorities of the Russian Federation into the application against Russian peacekeepers.

42 Following an apparent lull in national proceedings in the end of 2012 until 2014, the Prosecution requested on 30 June 2014 the national authorities to provide information on concrete and progressive steps that are being taken, or are envisaged domestically to ascertain the criminal responsibility in the alleged crimes. In June 2014, the Prosecution informed the Georgian authorities that short of this information it would proceed in accordance with the Prosecution's obligations to submit an application to the Pre-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 informed the Prosecution that national proceedings in relation to the crimes connected with the displacement of ethnic Georgians from South Ossetia, which had until recently significantly progressed, were indefinitely suspended. With no foreseeable resumption of no other investigations in relation to such conduct until the United States, the Prosecution considered that the potential case of the forcible transfer of ethnic Georgians identified in this Application was inadmissible, due to State inaction.

<sup>60</sup> As set out in paragraphs 30-32, although national proceedings in Russia continue, in particular in relation to the alleged attacks 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 review should an investigation establish other crimes committed in the context of the Situation.

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

### III. Examination of the information available

44 The Prosecution has evaluated its sources by a methodology based on criteria such as relevance (usefulness of the information to determine the elements of a possible future case), reliability (trustworthiness of the provider of the information as a source), and quality of the information in itself, to be evaluated by criteria such as internal consistency, external verification, and completeness (the extent of the source's knowledge on a given subject within the scope of relevant facts). Furthermore, it has also corroborated the information provided with information available from open and other sources. A comprehensive evaluation of sources used in this Application is provided in Annex J while full references of the sources are provided in Annex E.

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 investigation procedure. Moreover, the provisions of the Rome Statute and the preliminary examination stage have constrained the findings set out in this Application. While the Prosecution is required to determine whether there is a reasonable basis to believe

<sup>61</sup> 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.

jurisdiction of the Court have been committed in relation to the alleged offences, in particular those relating to the alleged forced displacement of ethnic Georgians by South Ossetian forces, and the alleged directing of attacks against peacekeeping facilities. The information available is insufficient to enable a determination of whether other crimes allegedly committed by the parties to the conflict.

46 For example, there is information on other crimes allegedly committed, including by the Georgian and the Russian armed forces. The completeness of the information is also documented in this Application. In particular, the 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 acts of the alleged crimes. The information undertaken by the Prosecution to obtain additional information in this instance, the information available is derived solely from the conflict, is contradicted by information provided by the other party. The party has been able to provide corroboration or to conduct a determination on the matter. When a determination in its possession, the Prosecutor has also taken into account the interests of the parties to the conflict, and has therefore conducted its examination on allegations corroborated by credible

47 In this regard, the Prosecution observes that, in the circumstances described above, without additional information or evidence gathered during the course of investigations, it is unclear at this stage why it would rely on statements from one party over

another version from another party, considering each promoting a particular narrative.

48. Indeed, other international and domestic bodies have, for similar reasons, been unable to come to a determination on such issues. Notwithstanding the low threshold that is applicable at the Prosecution nor the Chamber should rely on information credible or reliable. This is clear from the statutory determination of 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 should analyse and evaluate the seriousness and the ineliminability of the source. To hold otherwise would require the Court to accept an allegation made by any source at face value.

49. The Prosecution further recalls that, in line with the approach of the Court, the information available at any stage is neither expected to be comprehensive nor exhaustive and does not necessarily point towards only one conclusion. Nonetheless, a distinction should be drawn between conflicting information allowing two different interpretations (which is resolved in favour of an investigation).

<sup>62</sup> See for instance paragraphs 171 and 205 below.

<sup>63</sup> 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 ‘credible’ 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.

<sup>64</sup> 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.

<sup>65</sup> ICC-01/09-19-Corr, para 34.

information that, considered in context, does not in particular interpretation as being reasonable at all, due or lack of credibility. According to the available information, the Chamber is so scant as to prevent a reasonable interpretation, the Chamber refrained from entering a determination in relation to the information. Since this has no bearing on the overall conclusion that the Chamber is warranted, a determination on these facts may, in any event, be possible in the context of an investigation if additional information and evidence can be gathered.

50 The crimes identified in this Application as meeting the standard should therefore be considered as examples of criminality within the<sup>66</sup> 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 that standard has been met, the Chamber should authorise an investigation of the facts as a whole, and not just the particular acts or incidents, to substantiate that<sup>67</sup> the evidence otherwise would determine the direction and scope of future investigation based on the information available at the preliminary examination should not convert the facts provisionally identified as meeting the threshold into binding parameters to regulate the scope of future investigative inquiries.

51 Should an investigation be authorised, the Prosecution should be permitted to expand or modify its investigation with respect to other alleged acts, incidents, groups or persons and/

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

<sup>67</sup> ICC-01/09-19-Corr, paras. 7475.

legal questions, so long as the cases brought forward are sufficiently linked to the authorised situation.

#### IV. Jurisdiction

52 Pursuant to regulation 49 of the Regulations of the Court, the Prosecution provides the following information concerning the crimes setting out the facts being alleged to provide the reasonable basis to believe that the crimes have been committed, and a declaration with respect to the listed crimes fall within the jurisdiction of the Court. Further details are provided in confidential annexes A (list of incidents) and B (list of individuals).

##### A. Alleged crimes within the jurisdiction of the Court

53 On the basis of the available information, and without prejudice to 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 the situation, including but not limited to the period between 7 September 2007 and August 2008 to 10 October 2008, at a minimum the following crimes have been committed: killing/murder (article 8(2)(a)(i)/8(2)(a)(ii)/8(2)(b)(xiii)/8(2)(d)(i)(ii)), rape (article 8(2)(b)(xvi)/8(2)(e)(i)), intentionally directing attacks against personnel or other protected persons of a peacekeeping mission (article 8(2)(b)(iii)/8(2)(e)(ii)), and murder (article 7(1)(a)), deportation or forcible

<sup>68</sup> ICC-01/09-19-Corr, paras. 745; ICC-01/04-01/10-451, paras 21, 27.



population (article 7(1)(d)) and persecution against a group or collectivity on ethnic grounds (article 7(1)(g)) against humanity.

#### 1.Places of alleged commission of the crimes

54 The above crimes are alleged to have been committed on Georgian territory. Despite the South Ossetian declaration of independence in May 1992 and its subsequent recognition by four UN Member States from 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 part of Georgia. For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgian territory at the time of the alleged crimes 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 crimes allegedly occurred in South Ossetia are: (i) Georgian village Kufatah municipality located in the north of Tskhinvali; (ii) ethnic Georgian village Enkhaitsi municipality located in the north of Tskhinvali; (iii) ethnic Georgian village

<sup>69</sup> The UN General Assembly passed different Resolutions on the "Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia" in which it recognizes the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, including in Abkhazia and the Tskhinvali region/South Ossetia (sometimes only referred to as "South Ossetia", emphasis added). See Annex E.2.21:UNGA Resolution A/RES/63/307 (30 September 2009), Annex E.2.19:UNGA Resolution A/RES/64/296 (13 October 2010), Annex E.2.22:UNGA Resolution A/RES/65/287 (25 August 2011), Annex E.2.231:UNGA Resolution A/RES/66/283 (12 July 2012), Annex E.2.17:UNGA Resolution A/RES/67/268 (23 August 2013), Annex E.2.24:UNGA Resolution A/RES/68/274 (10 December 2014), Annex E.2.25:UNGA Resolution A/RES/69/286 (25 June 2015).

the Tighva municipality located in the Tskhinvali; (iv) villages of the Gori and municipality located in the These areas were under Georgian administrated controlled armed conflict. A map locating the main incidents Annex A.2.

56. In relation to the unlawful attacks against peacekeeping peacekeeping contingent Asratvondok point came under heavy shelling from South Ossetian Georgian armed forces at a later date carried out an attack against peacekeepers and peacekeeping facilities at the JPNizhniy Gorodok in the central part of the SRDIKBI headquarters located in Verkhnioy Gorodok - western part of Tskhinvali.

## 2. Time period of alleged commission of the crimes

57. The above alleged crimes fall within 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 the Rome 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 outbreak of 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

humanity. The end date requested in the Application is 12 August 2008, the date by which, at the latest, Russian armed forces were reported to have withdrawn behind the administrative boundary line of South Ossetia.

58. The first wave of crimes relating to the forcible displacement of ethnic Georgian population allegedly occurred during the period of hostilities on the territory of South Ossetia along the administrative boundary line with the rest of Georgia, from 7 to 12 August 2008. A second wave of forcible displacement followed the end of active hostilities, from 12 August 2008 until the end of the period of Russian occupation of Georgia, during the period of Russian occupation of Georgia, that lay beyond the administrative boundary of South Ossetia.
59. According to the IFFMCG, a certain number of both ethnic Georgians and ethnic Ossetians left South Ossetia prior to the start of the evacuation by the Ossetian authorities, but most of ethnic Georgians remained in their villages when the armed conflict started.
60. On 8 August 2008, the Russian armed forces started heavy bombardments followed by a joint ground offensive by Russian and South Ossetian forces, forcing Georgian forces to withdraw from their positions in South Ossetia. Ethnic Georgians who remained in South Ossetia after the bombings started were

<sup>70</sup> Annex E.2.38 OSCE Office for Democratic Institutions and Human Rights, "Human Rights in the War-Affected Areas Following the Conflict in Georgia", 27 November 2008 (OSCE/OPT-0003-1921 at 1953) (OSCE IIRAM Report).

<sup>71</sup> Annex E.2.38 IFFMCG, Volume II, GEGOTP-0002-7801 at 8189.

<sup>72</sup> Annex E.2.38 IFFMCG, Volume II, GEGOTP-0002-7801 at 8191.

their homes violently throughout the violence during the ground offensive by South Ossetian forces.

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 against the population with the aim of forcibly expelling the remaining ethnic Georgians and preventing them from returning to their homes lasted until 10 October 2008. Russian armed forces officially withdrew behind the international boundary between South Ossetia and the rest of Georgia on 10 August 2008.

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 forcible transfer of ethnic Georgians were committed by South Ossetian forces acting under the command of Eduard Kokoity. These forces appear to have included military units from the South Ossetian Ministry of Defence and Emergencies, as well as the Special Purpose Police Unit (SPPU) and the Osobogo Naznacheniya (Special Police Companies) of the South Ossetian Ministry of Defence.

<sup>73</sup> Annex E.3.16: OSCE, Material provided in response to the OTP Request for Information, 8 May 2013 (OSCE Material) GEO-OTP-0005-0937 at 0942; GEO-OTP-0005-0953 at 0959; GEO-OTP-0005-0950 at 0952; GEO-OTP-0005-1003 at 1005; GEO-OTP-0005-1017 at 1024-1022.

<sup>74</sup> 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 sections 330 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, 11 July 2001 (OSCE, 11 July 2001), Žof, 8 April 2001, GEO-OTP-0010-0016 at 00260027 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015).

de facto Ministry of Internal Affairs, and servicemen of the South Ossetian Committee for the Security (Kokhateti Gosudarstvennoy Bezopasnosti

64. The South Ossetian forces appear to have been supported by militia (people's units, Russian and Georgian). Militia groups were given names based on locations of their responsibility. For example, the South Ossetian militia Kokhatelebi operated in the area of Kokhati while Dmenis was responsible for the village of Dmeni.

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

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

67. The information available indicates that the Georgian military unit consisted of nine light infantry and five tanks battalions (including the 1st Infantry Brigade HQ Gori, and the Independent Tank Battalion Gori), up to eight artillery battalions (including Artillery

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

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

<sup>77</sup> 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.

Artillery Brigade HQ Gori), together with special forces of the Ministry of Defence reported by the Central Front Command, resorted to the Separate Light Infantry Battalion, the Separate Armoured Battalion, the Independent Light Infantry Battalion, and the 12th Artillery Brigade supported by the special forces of the Ministry of Defence to carry out an attack against peacekeepers.

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

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

#### 4. War Crimes

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

<sup>78</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8020.

<sup>79</sup> Annex E.2.37 IFFMCG, Volume III, GEGOTP-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 governed by the international law applicable in situations of international armed conflict, as a result of Russia's overall control of South Ossetia.

71. In particular, with respect to the timing of Russia's direct military intervention in Georgia on 8 August, the information available suggests that the Russian authorities were already engaged in organising, planning and coordinating South Ossetian military operations at a sufficient level of control to render the armed conflict between Georgia and the South Ossetian authorities international. This provisional finding should be distinguished from the concept of effective control for the purpose of attributing individual criminal liability. For example, the information available does not suggest that there was effective control by the Russian authorities over specific military operations of the South Ossetian forces at that time. These hypotheses will depend on the context of any further authorised investigation.

72. In relation to the period after the cessation of hostilities on 12 August until at least 10 October 2008, Russian armed forces continued to occupy portions of Georgian territory both inside and outside of its internationally-recognised buffer zone 20km beyond the administrative boundary of South Ossetia. In particular, serious 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 the law of international armed conflict.

determined by the relationship between the organisation and the occupying power and/or the nexus of that armed conflict set out below, the information available suggests that Russia continued to exercise overall control over forces during this period, thereby rendering the framework applicable to South Ossetian forces of international armed conflict.

73. Alternatively, cannot be established that the Russian exercised overall control over South Ossetian forces during the relevant time period, it would be more appropriate to take 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 Ossetian forces 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 10 October 2008. During the occupation period after 12 August 2008, the alleged conduct of South Ossetian forces would still be regulated by the law applicable to international armed conflict in that it would be between such conduct and the occupation exercised by Russian armed forces over the portions of Georgian territory during this time period.

74. In relation to the subject jurisdiction over war crimes during the time period described above, on a reasonable basis to believe that South Ossetian forces committed war crimes of wilful killing (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying property/the property of an adversary (article 8(2)(b)(xv) or article 8(2)(b)(xii)), and pillage (article 8(2)(b)(xvi) or article



is also a reasonable basis to believe that both South Ossetian and Georgian armed forces committed the war crime of attacking personnel or objects involved in a peacekeeping mission (article 8(2)(b)(iii) or article 8(2)(e)(iii)). These crimes took place during and were associated with the armed conflict.

(a) Contextual elements of war crimes

75. The application of article 8 requires the existence of an armed conflict. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organised armed groups or between such groups within a State.

76. A non-international armed conflict is characterised by sustained and serious armed hostilities to a certain level of intensity, extending to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and not of a purely internal nature. The hostilities may be between government authorities and organized armed groups or between such groups.

77. In order to distinguish an armed conflict from less serious forms of violence, such as internal disturbances, riots or acts of violence,

<sup>80</sup> See Elements of Crimes, second last element of each crime under article 8.

<sup>81</sup> 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.

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

banditry, the armed confrontation must reach a minimum intensity and the parties involved in the conflict must have a minimum degree of organisation.

78. Direct intervention by a State's governmental forces or 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 would involve a sovereign State 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 became internationalised, the Lubanga case concluded that the overall control test is the appropriate approach: A State may exercise the required degree of control if it has a role in organising, commanding the military actions of the military group, in addition to financing, training or providing operational support to that group.

<sup>83</sup> 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. Bemba Confirmation of Charges Decision para. 235. See also Côte d'Ivoire Article 15 Decision, para. 121 (indicating that the duration of any relevant confrontation is to be considered when assessing whether there is a protracted armed conflict).

<sup>84</sup> See Situation in the Democratic Republic of Congo, Prosecutor v. Gbemre Katanga, Judgement rendu en application de l'article 74 du Statut, ICC/04/01/07-3436, 7 March 2014, para. 183, 1185-1187 (Katanga Judgement rendu en application de l'article 74); Lubanga Judgment pursuant to Article 74, paras 534-538.

<sup>85</sup> 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.

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

80. In its judgment, Trial Chamber I also endorsed the view of the Appeals Chamber that, despite the fact that actors involved in conflicts taking place on a single territory at the same time may be of different nature, meaning that international and national law may both apply to the same conflicts ~~may exist~~.

81. As noted above, bearing in mind the ~~each~~ ~~stages~~, of the facts available offer two alternative propositions for the classification of the armed conflict, which will need to be considered in the context of any authorised investigation: (a) that at the time the international law ~~is~~ ~~applicable~~ ~~to~~ ~~the~~ ~~conflict~~ of international armed conflict is applicable; or (b) that a fragmented approach is appropriate due to the ~~existence~~ of an international and non-international armed conflict. On 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 the law can be divided into three phases: (i) at least between 7 August 2008, concerning the exchange of hostilities between the Georgian armed forces and South Ossetia forces, prior to the Russian involvement as a party to the armed conflict; (ii) from 7 August until 12 August, concerning the exchange of hostilities between the armed forces of Georgia and the Russian armed forces; and (iii) from 12 August until 8 October 2008, during which the Russian armed forces occupied portions of Georgian territory beyond the administrative boundary line of South Ossetia. As stated above, the Prosecution has

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

authorisation to investigate the situation from 1 July 2008 may be in a position to also investigate a number of that immediately preceded the formal commencement and which led to the escalation of violence at subject they enjoy a sufficient nexus with the contextual crimes.

83. During this time period, depending on the classification of the conflict, there is a reasonable basis to believe that the forces committed the war crimes of killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying the enemy property of an adversary (article 8(2)(b)(xiii) or article 8(2)(b)(xv)), pillage (article 8(2)(b)(xvi) or article 8(2)(e)(v)), directing an attack against personnel and objects involved 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 between Georgia and Russia occurred at least over the period of 12 August 2008, the subsections below examine in more detail the period of Russia's military intervention on the territory of Georgia during which the Russian armed forces extended their occupation of Georgian territory beyond the administrative line of South Ossetia, subsequent to the cessation of

i. The period prior to Russia's direct intervention

85. The exchange of fire between the Georgian armed forces and South Ossetia forces between 7 and 8 August 2008, with Russia's direct involvement as a party to the armed conflict, is classified 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 determinations below are provisionally made and are subject to further determinations that can only be made in the course of investigations and proceedings.

86. The Prosecution recalls that, in the case of an armed conflict, which is otherwise internal, is internationalised if a foreign state exercises overall control over the military operations 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 include the issuing of specific orders by the state.

<sup>88</sup> ICC-01/04-01/06, para.541. See Prosecutor v. Tadić, IT-94-1-A, Judgement 15 July 1999 para.84: "It is indisputable 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 (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 the 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."

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

of each individual<sup>90</sup> permanently be considered to be met with the State (&) has a role in organising, coordinating or directing military actions of the military group, in addition to training, equipping and equipping or providing operational support to that group.

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 of the Republika Srpska (VRS) on the basis of its former participation in the general direction, coordination and supervision of the activities and operations of the VRS. The judges emphasised the existence of a chain of command between the FRY/VJ and VRS, encompassing, in the first place, the leadership, structures and ranks as well as the salaries and payment of officers and<sup>92</sup> commanders.

89. The overall control test serves a distinct purpose from the test developed by international courts for determining overall control. State control over another entity, and is subject to a different standard than the effective control<sup>93</sup> applied here solely for

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<sup>90</sup> Prosecutor v. Gotovina | T-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."

<sup>91</sup> ICC-01/04-01/06, para.541, citing Prosecutor v. Tadić | T-94-1-A, Judgement, 15 July 1999 para.137.

<sup>92</sup> Prosecutor v. Tadić | T-94-1-A, Judgement, 15 July 1999 para.146.

<sup>93</sup> 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 US involvement in the armed conflict in Nicaragua "even if preponderant or decisive 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 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.

purpose of assisting the classification of the armed conflict without any prejudice to any attribution of individual criminal

90. The information available indicates that already prior to the outbreak of the armed conflict, Russia had a role in organising and planning the military actions of South Ossetian forces, and providing them with, at a minimum, training and operational

91. In particular, the information related to the temporary situation in South Ossetia, including during the conflict, suggests that the Russian Federation exercised de facto control over the South Ossetian authorities over time.

92. Russia has long exercised extensive foreign influence in South Ossetia, which involved a gradually increasing degree of Russian State organs over South Ossetian institutions and decision-making processes. IFFMCG defined Russia's increasing influence in the lead-up to the 2008 conflict as being so de

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<sup>94</sup> 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.

<sup>95</sup> 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 de facto 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 (~)".

<sup>96</sup> See above, Background, paragraphs 290-291. See also E.2.35 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 2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 7941: "De facto control of South Ossetia was gradually taken up by Moscow. Russian representatives were not as 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."

exercised on systematic and permanent basis that the leadership was not confined to town.

93. This level of control was reflected in the organisation of the Russian armed forces and South Ossetian forces and before the outbreak of the 2008 armed conflict, the South Ossetian Ministry of Interior, security and intelligence apparatus composed of Russian representatives or ethnic Ossetians of Russian nationality who previously served in similar posts in the region. Information available indicates that some of these individuals were appointed to high posts in the Russian administration after the conflict.

94. During the actual exchange of hostilities, the key offices of the Russian Ministry 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, respectively: Mikhail<sup>100</sup> Mindzaev Colonel of the Russian

<sup>97</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7941.

<sup>98</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7940.

<sup>99</sup> 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 Krai 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, GEGOTP-0003-1429 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015) Annex E.8.12: RSOnews, "Military Commissioner of Perm Krai Vasily Lunev former Defense Minister of South Ossetia to be promoted soon" [Russian], 1 June 2011, GEGOTP-0003-1456 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015)

<sup>100</sup> 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, GEGOTP-0008-0665 at 0665 Mindzaev served as South Ossetian Minister of Interior between 26 April 2005 to 11 August 2008 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015) See Annex E.8.18: "Mikhail Mindzaev



Police and Deputy Head of Russian Ministry of Internal Affairs, former Deputy Commander of the military region of South Ossetia, military commissioner for [Russian] province of Perm Krai, previously employed at the Russian Federal Security Service (FSB, former KGB) in Chechnya, Dagestan, Ingushetia, Kabardino-Balkaria, Moscow and Altai Republic. Colonel of the Russian Army who served in the Siberian military region and in the Chechnya-Ingushetia region of mid

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appointed new minister of internal affairs [“...”], 26 April 2005, GEGOTP-0003-1495 at 1495 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)).

<sup>101</sup> Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8329.

<sup>102</sup> Annex E.8.9: Lenta, “Mikhail Mindzaev”, 4 March 2015, GEGOTP-0003-1442 at 1442 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)).

<sup>103</sup> Annex E.7.30: Government of the Russian Federation, Submission of 28 Volumes of Affidavit, 24 April 2009, Affidavit of V. Lunev, GEGOTP-0007-3658 (for English translation, see E.9.2: [Solemn Declaration I, 13 November 2015](#)).

<sup>104</sup> 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 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)).

<sup>105</sup> 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 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)); 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 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)). Prior to that, Lunev had served as first deputy head of army in Russian Siberian military region.

<sup>106</sup> 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 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)); Annex E.8.17: “Information Agency”, “Boris Atoev, KGB of South Ossetia is well formed special service, which realistically solves the issues before it”, 13 June 2014, GEGOTP-0003-1492 at 1492 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)).

<sup>107</sup> Annex E.8.11: Politkom.ru, “Eduard Kokoity, Commander and President of South Ossetia”, 20 August 2008, GEGOTP-0003-1449 at 1453 (for English translation, see E.9.3: [Solemn Declaration II, 13 November 2015](#)).

<sup>108</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, 4 December 2008, GEGOTP-0006-0181 at 0181 (English translation: GEGOTP-0006-0173 at 0173); Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8329.

95. Thus Russia's influence and control extended to the different bodies wielding authority over South Ossetia, called High Command of the RSO [Republic of South Ossetia] armed forces.<sup>109</sup> In his capacity as Minister of Defence, Vasily Lunev had full operational command over South Ossetia engaged in the hostilities, including the authority to direct combat zones.<sup>110</sup> Besides the military chain of command, the decision-making authority was vested in the South Ossetian Security Council headed by Anatoly Barankevich.<sup>111</sup> He understood to have resumed their service ranking officials within the Russian administration after

<sup>109</sup> 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.2.37 IFFMCG, Volume III, GEO-OTP-0002-8247 at 8750

<sup>110</sup> 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 at about 23 hours and 50 minutes. My responsibilities under the circumstances 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 line came to operational duty at the command post, the chief of staff. 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 (for English translation, see E.9.2: Solemn Declaration I, 13 November 2015). In this respect, the IFFMCG concluded that "the regular armed forces of the South Ossetia de facto authorities unquestionably constitute an organised and hierarchically structured group." Annex E.2.36 IFFMCG, Volume II, GEO-OTP-0002-7801 at 8107.

<sup>111</sup> 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.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, GEO-OTP-0006-0181 at 0181 (English translation: GEO-OTP-0006-0173 at 0173-0174).

<sup>112</sup> Annex E.8.6: *Kommersant*, "Former defender of Tskhinvali led military commission of Perm Krai", [Russian text], 1 April 2009, GEO-OTP-0003-1429 at 1429 (for English translation, see E.9.3: Solemn Declaration I, 13 November 2015); Annex E.8.12: RSO news, "Military Commissioner of Perm Krai Vasily Lunev former Defense Minister of South Ossetia to be promoted soon" [Russian text], 1 June 2011, GEO-OTP-0003-1456 at 1456 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015).

<sup>113</sup> 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, GEO-OTP-0006-0181 at 0181 (English translation: GEO-OTP-0006-0173 at 0173-0174); Annex E.8.15: *Kavkaz Uzel*, "Barankevich Anatoly Konstantinovich" [Russian text], 1 December 2009, GEO-OTP-0003-1464 at 1466 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015).

96. The information available also indicates the existence and/or coordination of operations and activities between and South Ossetian authorities. For example, prior to commencement of the 2008 armed conflict, in July 2008, Russian 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 to detain South Ossetian servicemen who were detained by the South Ossetian authorities.

97. Throughout the conflict, Russian forces were joint present with South Ossetian forces in different conflict zones in the villages of Kekhvi, Kurta, Achabeti, Tamarasheni, Avnevi, and <sup>114</sup> Ntshoni. The available information indicates numerous instances 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 by the Russian forces in villages inhabited by ethnic Ossetians, the Russian armed

<sup>114</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 80148012

<sup>115</sup> See Annex D.2: Map of Military Operations.

<sup>116</sup> Information on selected incidents is primarily based on the reports 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 alight: 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 also alleged that Ossetians 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.

forces appear to have provided operational and logistic support to South Ossetian forces, including by means of aerial resupply and advance of South Ossetian military operations, and transportation.

98. Nonetheless, the information available does not indicate that Russian forces were involved on a routine basis in the tactical planning and/or the conduct of the specific military operations of South Ossetian forces going from village to village. Instead, it appears that Russian forces were present at certain locations, including where alleged crimes were committed. In locations where coordination was high, while in other locations Russian forces acted passively in the face of crimes, while in other locations they acted positively to prevent and punish the commission of crimes.

99. Several sources indicate that the South Ossetian forces used heavy weapons, such as Grad missiles and other military equipment supplied by Russia, on various occasions, including during the armed conflict. It is also reported that Russian military equipment continued to pass through checkpoints in the village of Eredvi via checkpoints controlled by the Russian forces. The village was being looted and pillaged seemingly by local forces. In addition, the IIFMCTC has identified a flow of irregular forces from the territory of the Russian Federation to South Ossetia.

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

<sup>118</sup> Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336, at 0428-0429; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0164.

<sup>119</sup> Annex E.7.46: Evidence of non-neutrality of Russian Peacekeepers deployed in Abkhazia and South Ossetia, prior to August 2008, Appendix 4 GEOTP-0003-1202, Annex 17, GEOTP-0003-1372 at 1372-1373; Yury E. Federov, "The Sleep of Reason: The War on Georgia & Russia," Foreign Policy, Association of International Affairs Research Paper 2008, GEOTP-0008-0795 at 0798; Annex E.8.23: Regnum, Ministry of Foreign Affairs of Georgia officially accused Russia of supplying with arms of separatists, September 2005, GEOTP-0003-1738 at 1738-1739 (for English translation, see [E.9.3: Solemn Declaration II, 13 November 2015](#))

<sup>120</sup> Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0168.

2008 as well as the presence of some Russian armed forces in South Ossetia, apart from the Russian peacekeeping battalion, on 8 August 2008.

100 The IFFMCG concluded that Russia supported South Ossetian forces in numerous ways, including by training, arming<sup>121</sup> and equipping. According to the IFFMCG, the training of South Ossetian forces during the 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 providing special training to South Ossetian police.

101 Russia's influence in South Ossetia should also be considered in the context of the broader spectrum of South Ossetia's political and social affairs. For example, the implementation of policies conferring Russian nationality to ethnic Ossetians since 2008.

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<sup>121</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8027.

<sup>122</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8068.

<sup>123</sup> 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. The General Staff drew up this plan somewhere in late 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, it was 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 of 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, GEGOP-0003-1538 at 1542.

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

onwards<sup>125</sup> resulted in a new regime for South Ossetia as well as granting South Ossetians, including members of South Ossetian minorities, entitlements to Russian independence<sup>126</sup> and social benefits<sup>127</sup>. Three first majority<sup>128</sup> of people living in South Ossetia at the time of the referendum were Russian nationals, and as a consequence were granted, to varying degrees, to the laws of the Russian Federation with respect to voting rights and military service.

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.<sup>129</sup> According to the Kremlin, Russian financial assistance to South Ossetia between 2008 and 2014 amounted to 43 billion USD totalling at times over 90% of South Ossetia's national budget.<sup>130</sup> It is also indicated that in 2007, Russia had allocated 500 million USD to South Ossetia.<sup>131</sup>

<sup>125</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7955

<sup>126</sup> See, for example, Popescu, *Outsourcing, de facto Statehood: Russia and the Secessionist Entities in Georgia and Moldova* (CEPS 109/2006, GEGOTP-0003-1575 at 1580)

<sup>127</sup> Annex E.235: IIFFMCG, Volume I, GEGOTP-0002-7757 at 7787; See also Annex E.8.21: Associated Press, *Russia launches passport offensive*, 22 February 2009, GEGOTP-0003-1583 at 1583-1585; Annex E.8.24: *Der Spiegel*, *Russia Marches into South Ossetia*, 8 August 2008, GEGOTP-0003-1742 at 1742.

<sup>128</sup> 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.8.20: *Today.Az*, *Vasili Istratov: Russian passports were issued to South Ossetian residents based on Russian legislation*, 13 August 2008, GEGOTP-0003-1749 at 1749.

<sup>129</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7940.

<sup>130</sup> See, for example, Popescu, *Outsourcing, de facto Statehood: Russia and the Secessionist Entities in Georgia and Moldova* (CEPS 109/2006, GEGOTP-0003-1575 at 1580).

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

<sup>132</sup> Annex E.8.28: Osinform, *The Prime Minister of South Ossetia, Vadim Brotsev, proposes to adopt the budget after public discussion* [ქართული სახელმწიფო - შვეიცარია - ჯანდაცვა - სპორტ - სპეციალური - სხვა], 30 April 2010, GEGOTP-0003-1754 at 1755 (for English translation, see 9.3: [Solemn Declaration II, 13 November 2015](#))

<sup>133</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7828.

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

104 As noted above, the above determination is provisional. In the event that, in the course of these proceedings, it is determined that the evidence does not support this determination, it would be appropriate to adopt a fragmented approach to the classification of the armed conflict. This would suggest that if an armed conflict took place between Georgia and South Ossetia, and if Georgian forces in the period from at least 7 through 12 August 2008 and separate international armed conflict existed between Georgian and Russian armed forces in the period from 8 August through 12 August 2008.

105 As described in detail in the Background section above, the de facto authorities in South Ossetia built up forces in their respective areas of control, in the period leading to the outbreak of armed conflict. Armed clashes increased throughout July 2008, leading to a deterioration of the security situation in the region. On 7 August 2008, Georgian President Mikheil Saakashvili announced that Georgia held only three hours before fighting reportedly resumed. Shortly before midnight, at least 150,000 Georgian units reported

<sup>134</sup> Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0133; Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8018012.

<sup>135</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-0002-7801 at 8018015.

began firing at targets in South Ossetia, marking a sea  
terms of intensity and the widely acknowledged beginning  
conflict.<sup>136</sup>

106. In terms of organization, South Ossetian forces acted under  
command of the South Ossetian Commander-in-Chief. The  
Head of the South Ossetian leadership and Commander  
of the South Ossetian security forces in the military chain of  
command was the Minister of Defence and Emergency  
Vasily Vasilevich Lunev, then the Chief of General  
Sarmatov, and commanders of the principal decision  
making body was the South Ossetian Security Council headed  
by Anatoly Konstantinovich Barankevich.<sup>137</sup>

107. The South Ossetian forces consisted primarily of light  
with seconded artillery units and armoured vehicles. They  
composed of members of the South Ossetian Interior,  
the Committee for State Security, the Security Board, the  
Purpose Police Squad OMON, irregular militias and  
According to the available information, during the August

<sup>136</sup> Annex E.2.36: IIFFMCG, Volume II, GEGOTP-0002-7801 at 8015.

<sup>137</sup> See Annex E.8.40: Constitution of South Ossetia, "Št" ("Št" "Št") žššššš  
„...št" „Šššššš", 8 April 2001, Article 50, GEO-OTP-0010-0016 at 00260028 (for English  
translation, see E.9.3: Solemn Declaration II, 13 November 2015)

<sup>138</sup> For example: the 7th battalion (Commander Valeri KOKOEV; Deputy Commander Arsen  
KVEZEROV), Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0003 at  
0027-0028; the 9th battalion (Commander Polik GOIAEV), Government of Georgia, 10 May 2010  
Report, Annex 80, GEO-OTP-0006-0388 at 0388 the mountain battalion (Commander Bla  
BETSAUTI), Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8555.

<sup>139</sup> 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.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, GEO-OTP-0006-0181 at 0181 (English translation: GEO-OTP-0006-0173 at 0173  
0174).

<sup>140</sup> Annex E.2.37: IIFFMCG, Volume III, GEGOTP-0002-8247 at 8750 Annex E.4.10: HRW, Up in  
Flames, GEO-OTP-0001-0336 at 0469



the total number of South Ossetian personnel from law military agencies did not exceed 500 persons.

108. The composition and structure of the Georgian armed Ossetian forces under the command of the South Ossetian I the prolonged nature and overall intensity of the fight forces, especially in Tskhinvali, Aghdara, and the PrDM area, the fact that heavy arms were used, as well as the fact that the South controlled parts of the territory of Georgia support the an armed conflict existed between the Government of de facto South Ossetian authorities during the relevant period. Thus, the armed confrontation between South Ossetian forces and Georgian armed forces had, by 7 August, reached a sufficient level of intensity between parties showing the necessary degree of organisation, to trigger, at a applicable international armed conflicts.

ii. The period subsequent to the cessation of hostilities

109. The issue of the applicable law of armed conflict as respect to the period subsequent to the cessation of which the Russian armed forces remained until 10 October 2008 at the latest, in occupied Georgian territory both inside South Ossetia and outside of it in the so-called zone 2000 beyond the administrative boundary line of South Ossetia. As described below, during this period South Ossetian

<sup>141</sup> Annex E.2.37 IFFMCG, Volume III, GEO/TP-0002-8247 at 8750.

<sup>142</sup> See ICG01/04/01/06-2842, paras. 533-538

continued to commit crimes within the jurisdiction of the  
including wilful killing/murder, pillage, and destruction

110. The law of international armed conflict applies in situ  
occupational military occupation exists whenever the territory is  
actually placed under the authority of the hostile army,  
and extends only to the territory where such authority has  
been exercised, even if the occupation encourages  
resistance. Thus the occupation of territory by a hostile state  
would exist whenever that hostile state asserts effective  
control over the area in question.

111. In its judgment in *Naila & Mactan*, 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 effectively established  
control in the territory in question:

- (i) the occupying power must be in a position to exercise  
its own authority for that of the occupied authorities  
have been rendered incapable of functioning publicly  
and enemy forces have surrendered, been defeated

<sup>143</sup> ICC-01/04-01/07-3436, para. 1179. See generally fn.34 Elements of Crimes; article 46, Hague  
Regulations (1907); Common Article 2, Geneva Conventions (1949); article 27, Geneva Convention  
IV (1949).

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

<sup>145</sup> 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. 2581/94, Judgment, 10 May 2001, paras. 776  
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.

In this respect battle areas may not be considered territory. However, sporadic local resistance, even if it does not affect the reality of occupation; (iii) the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; (iv) a temporary administration is established over the territory; (v) the occupying power issues and enforces directions to the<sup>146</sup> civilian population.

112. In the Lubanga judgment, the Trial Chamber further examined the nature of military occupation in situations where conflicts of an armed nature take place on a single territory, in order to determine whether 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 the surrounding environs, the separation of an armed conflict between the Union des Patriotes (UPC) and the State of the Democratic Republic of Congo and other armed groups was occurring a long distance away from Bunia and could not be said to be related to the Uganda

113. The information available indicates that Russian troops deployed in South Ossetia continued to advance

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<sup>146</sup> See Prosecutor v. Naletilić & Martinović, IT-98-34-T, Judgement, 31 March 2003, para. 217. The ICJ in the case of the Armed Activities on the Territory of the Congo clarified 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 *ius 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), Judgement, 19 December 2005, I.C.J. Reports 2005, p. 168.

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

administrative boundary line of South Ossetia into Georgia after 12 August 2008 and established 34 miles only withdrew from the buffer zone by 10 October 2008 into areas previously under Georgian administered control. According to OSCE reports, in the period from 21 October through October 2008, the Russian armed forces were able to control the area of Gokharleti, Variani, Nabakhtevi, and the Akhmagori checkpoints established east and west of the village of Ig Eastern Natsreti, the Nabaklage, Dzvari village, Kvena Variani, Karaleti, Megvri. Russian troops therefore had control over the areas in which they were deployed in October 2008.

114. There is no question that the law of international humanitarian law applied to the military occupation by the Russian forces. The law applicable to the conduct of an organised armed group in a military occupation is determined by the relationship between the organised armed group and the controlling powers of that conduct to the armed conflict.

115. If, for example, Russia exercised overall control over the forces during the occupation, it would render the framework of international humanitarian law applicable to South Ossetia as an international armed conflict. If the requisite level of overall control by Russia is established, South Ossetian forces would effectively

<sup>148</sup> Annex E.3.16 OSCE Material GEO-OTP-0005-0908 at 0909-0910; GEO-OTP-0005-0911 at 0912-0913; GEO-OTP-0005-0929 at 0930-0931; GEO-OTP-0005-1028 at 1029; GEO-OTP-0005-1030 at 1031.

to the conduct so the conduct of the South Ossetians regulated by the law applicable in international armed conflict. discussed above, the information available indicated continued to exert a high degree of influence over institutions and its military forces, and military evident coordination and cooperation between Russian armed forces and South Ossetian forces.<sup>150</sup>

116. Nonetheless, even if it cannot be established that exercised overall control of South Ossetian forces, attributed to South Ossetian forces would be regulated by the law of international armed conflict if it can be determined there was a sufficient link between such conduct and the overall control.

117. The requirement of overall control by a foreign State of an armed group to attribute international armed conflict is not the same test as that required for the conduct of an organised armed group in the context of international armed conflict. Rather, the requisite test for crimes attributed to the South Ossetian forces had the connection to the international armed conflict, whether they took place in the context of and [were] a part of international armed conflict between Russia and Georgia.<sup>151</sup>

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<sup>149</sup> Prosecutor v. Tadić, IT-94-1-A, Judgement, 15 July 1999, para. 92.

<sup>150</sup> Annex E.4.10: HRW, Up in Flames, GEOTP-0001-0336 at 0463, 0474; Annex E.2.38 OSCE HRAM Report, GEGOTP-0003-1921 at 1965; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0168.

<sup>151</sup> Elements of crimes. The ICTY held that the 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.

118. The post-World War II case law relating to spoliation of private property in territories occupied by Germany demonstrates that conduct even by private persons or be sufficiently related to a military occupation to crimes. In particular, the judgments in the Industrialists Trials the Flick Case, the G. Farben Case and the Krupp Case support this proposition. *United States v. Nuremberg Military Tribunal*:

[w]hen private individuals proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such acts not being expressly justified by any applicable provisions of the Hague Regulations of international law.<sup>52</sup>

119. In the Krupp Case, the acts of persons authorised and actively supported by certain German governmental and military persons constituted war crimes because they were connected to the international armed conflict Germany was waging against the Allies.

120. The standard applied in the post-World War II case law is reflective of customary international law and consistent with the armed conflict requirement applied by the ICTY and all other contemporary international criminal courts and not necessary to establish that the initiative to com

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

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

question emanated solely from South Ossetian forces necessary that it reflected the overall policy of the government or of the Russian military leadership to ethnic Georgian civilians living in South Ossetia and Russian occupation.

121. The information available at this time indicates that South Ossetian forces would not have been able to forcibly expel the remaining ethnic Georgian civilian population from South Ossetia and the buffer zone of the occupation of Georgian territory by Russian armed forces had the military advances preceded the outbreak of 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 without a significant military response from the Georgian government. The 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 through 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 depopulated villages of Kekhvi, Kurta, Athamari, Asheni, Eredvi, Vanati, Avnevi, and Nuli.<sup>154</sup> Similarly, the area inside the 20km buffer zone of the Russian armed forces, which comprised areas previously under the control of the Georgian authorities, could not have been taken over by South Ossetian forces against the ethnic Georgian

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<sup>154</sup> Annex E.4.1: HRW, Up in Flames, GEOTF-0001-0336 at 0469; Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, GEOTF-0001-1314 at 1315; Annex E.4.3: AI, Civilians in the line of fire, GEOTF-0001-0125 at 0167-0168. See also Annex D.2: Map of Military Operations.

but for the creation and existence of the zone of occupied  
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  
fact that the commission of crimes against ethnic Georgian civilians  
by South Ossetian forces decreased and eventually ceased as  
authorities regained control over previously occupied areas of the  
buffer zone. In particular, 28,800 IDPs were ultimately able to  
return to the villages of the former buffer zone.<sup>155</sup>

(b) Alleged war crimes committed against ethnic Georgian civilians

123. The information available provides a reasonable basis to believe that  
South Ossetian forces forcibly displaced 18,500 between 13 August and  
ethnic Georgians from South Ossetia and the buffer zone. The  
information available further indicates that during the conflict,  
South Ossetian forces deliberately killed between 100 and 200  
ethnic Georgian civilians and destroyed or heavily damaged  
dwellings belonging to ethnic Georgians.

124. Based on the information available at this stage, there is a reasonable  
basis to believe that between 10 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(e))

<sup>155</sup> Annex E.2.20 UNHCR, "Protection of Internally Displaced Persons in Georgia: A Gap Analysis", July 2009, GE00TP-0010-0055 at 0087.



8(2)(c)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), or article 8(2)(b)(xvi) or article 8(2)(e)(v)).

125. While this section of the Application of the Statute of the International Criminal Tribunal for the former Yugoslavia may constitute war crimes, section V-2732. paragraph 1 states that there is a reasonable basis to believe that these acts amounted to crimes against humanity under the Statute, including murder under article 7(1)(a) and/or forcible transfer of population under article 7(1)(d); and persecution under

i. Wilful killing pursuant to article 8(2)(a)(i) or murder pursuant to article 8(2)(c)(i)

126. The actus reus of the crime of wilful killing pursuant to article 8(2)(a)(i) consists of the fact that the perpetrator killed 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 population to gain control over the Georgian administered areas in South Ossetia, South Ossetian forces allegedly killed unarmed civilians and destroyed weapons in particular in the city of Gori and in the village of Tirdznisi, Ergneti, and the village of ... South Ossetian forces would attack ethnic Georgian villages, by then inhabited mostly by women, children, and elderly and ordered them to leave. Civilians who resisted

<sup>156</sup> Elements of crimes, Article 8(2)(c)(i)(1).

<sup>157</sup> Annex E.2.38 OSCE-HRAM Report, GEO-OTP-0003-1921 at 1943

were severely beaten and in a number of instances cases, persons were beaten and killed deliberately in population in order to instil fear and coerce the remainder to leave the area. Witnesses told Georgian NGOs that on 11 August 2008 South Ossetian forces killed a Georgian because he refused to fly the South Ossetian flag and leave the village of Dvani. This killing was confirmed by a witness in a statement given to the Georgian government during the course of the national investigation. These forces, according to a witness, threatened to kill all Georgians who would remain in South Ossetia.

128 The Prosecution analysed the information on alleged killings from available sources, including the Government of Georgia, international and local NGOs, and from 7 August until 31 October 2008 for the purposes of establishing the scope of the crimes.<sup>162</sup> The examination of these multiple sources provided a reasonable basis to believe an estimated range of 49 to 113 Georgians were killed during 49 persons killed in the

<sup>158</sup> Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, GEOTP-0001-1314 at 1317.

<sup>159</sup> Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1059.

<sup>160</sup> Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1114.

<sup>161</sup> Annex E.7.9: Government of Georgia 10 May 2010 Report Annex 78, Victims Interrogation Record, 31 August 2008, GEOTP-0006-1511 at 1511; Annex 79, Protocol of a Victim Testimonial, 31 August 2008, GEOTP-0006-1515 at 1516.

<sup>162</sup> Annex E.2.38 OSCE HRAM Report, GEOTP-0003-1921; Annex E.3.6: OSCE Material GEO-OTP-0005-0763 through GEO-OTP-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, GEO-OTP-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 GEO-OTP-0006-0003; Government of Georgia, Annex E.7.1: November 2014 Update Report GEO-OTP-0003-0003; Georgian NGOs (Annex E.5.3: Empathy, 93 Applications of the Victims of the Russo-Georgian war 2008, GEO-OTP-0004-0106 through GEO-OTP-0004-1806, Annex E.5.1: August Ruins, GEOTP-0001-0999.

<sup>163</sup> 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.

municipality, 40 in the Gori municipality, 13 in the Kurta municipality, six in Tighva municipality, and five in Kareli municipality.

ii. Destruction of property pursuant to article 8(2)(b)(xii) and pillage pursuant to article 8(2)(e)(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 perpetrator destroyed certain property of a hostile party that was protected from the destruction or seizure under international law of armed conflict.

130 The actus reus of the crime of pillaging pursuant to article 8(2)(e)(v) is that the perpetrator appropriated certain property for private or personal use without the consent of the owner.

131 Open source reports as well as the material submitted by Georgian victims to the Government indicate that the South Ossetian forces have systematically pillaged and destroyed the property of ethnic Georgian civilians in the region.

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

<sup>165</sup> Elements of Crimes, Article 8(2)(b)(xv) and Article 8(2)(e)(v).

<sup>166</sup> Annex E.2.38 IFFMCG, Volume II, GEGOTP-0002-7801; Annex E.2.4: OCHA, UN Inter Agency Humanitarian Assessment Mission to South Ossetia, Mission Report, 30 September 2008, GEGOTP-0001-0846 (OCHA Mission Report); Annex E.2.38 OSCE-HRAM Report, GEGOTP-0003-1921; Annex E.4.10 HRW, Up in Flames, GEGOTP-0001-0336; Annex E.4.3: AI, Civilians in the line of fire, GEGOTP-0001-0125; Annex E.5.1: August Ruins, GEGOTP-0001-0999; Annex E.5.2: Memorial and Demos, Humanitarian Consequences of the armed conflict in the South Caucasus, GEGOTP-0001-1314.

<sup>167</sup> Annex E.5.3: 93 Applications of the Victims of the August 2008 armed conflict, GEGOTP-0004-0106 through GEGOTP-0004-1806

<sup>168</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0003 (Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)), GEGOTP-0006-0975 through GEGOTP-0006-1051; Annexes to (Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)): Volume 1, GEGOTP-0006-1052 through GEGOTP-0006-1306, Volume 2, GEGOTP-0006-1307 through GEGOTP-0006-1574

settlements inhabited mostly by ethnic Georgians in South Ossetia in the buffer zone. There is no information available on the destruction and seizure of the protected property of these settlements for the military necessity at the time of the commission of the crimes. Instead, the information available shows that the forces destroyed and seized protected property in violation of international law with the aim of forcibly removing ethnic Georgians from the territory of South Ossetia. These settlements include Argvitsi, Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskhvili, Eredvi municipalities, Kalkhvi, Kemerti, Kheiti, Kurta, Kvemo Aghvasheni, Zemo Achabeti, Tamara Dzantshvili, Kuntakhi municipalities, Avnevi and Nidli in the Tighva municipality and the villages of Ergneti, Karaleti, Megvrekisi, Tkviavi and Zemo Nikozhva in the buffer zone.<sup>169</sup>

132 The OSCE observed that the homes appeared to have been destroyed by fire, with valuable items prior to having been set on fire, as evidenced by the presence of remains of major items such as appliances, televisions, and furniture. Witnesses told HRAM and HRW that the forces used a flammable red substance or gasoline to set the houses on fire.<sup>170</sup> The OSCE also documented alleged crimes, including HRW, noted that the evidence points to the fact that houses were deliberately destroyed during battles, and that the types of bombs used were incendiary.<sup>171</sup>

<sup>169</sup> See Annex A.1, List of Incidents.

<sup>170</sup> Annex E.2.38 OSCE HRAM Report, GEGOTP-0003-1921 at 1937-1938, 1947-1949.

<sup>171</sup> Annex E.2.38 OSCE HRAM Report, GEGOTP-0003-1921 at 1962; Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0479.

<sup>172</sup> Annex E.4.10 HRW, Up in Flames, GEGOTP-0001-0336 at 0344.

133 An eyewitness, stated in his declaration to the Georgia that on 8 and 9 August 2008 the South Ossetian force houses in the village of Vanati. These forces entered the day and set ethnic Georgian houses<sup>173</sup> on fire one by one

134 A victim of looting stated that on 9 and 10 August 2008 forces took all valuable belongings from her and neighbors in the village of Beloti, including money and furniture. She set the houses<sup>174</sup> of ethnic Georgian villagers of Nuli, such as in his witness statement to the Georgian investigative committee. He witnessed an extensive and destruction of ethnic Georgian houses in the village<sup>175</sup> for three days between 10 and 11 August 2008. According to the witness, houses were burnt on a basis, mainly those that belonged to authoritative figures in the village<sup>176</sup>.

135 Also on 13 August 2008, OSCE observers reported that houses burnt in Tseronisi and in Avlevi as well as other houses in nearby villages. The villagers of Koda told the OSCE mission that on the same day a group of South Ossetians entered the village and burnt down a house<sup>177</sup>. According to the same, the villages of the

<sup>173</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3): Annex 67, GEO-OTP-0006-0344 and Annex 68, GEO-OTP-0006-0345.

<sup>174</sup> Annex E.5.3: 93 Applications of the Victims of the August 2008 armed conflict, GEO-0004-0106 through GEO-0004-1806, GEO-OTP-0004-0458 (GEO original), GEO-OTP-0004-0470 at 0473 (Engl. Translation).

<sup>175</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3): Annex 71, GEO-0006-1478 at 1478-1479, and Annex 72, GEO-OTP-0006-1483 at 1483.

<sup>176</sup> Annex E.3.16: OSCE Material, GEO-OTP-0005-0876 at 0876; GEO-OTP-0005-0937 at 0942 Annex E.3.7: ECHR, Niniashvili v. Russia, Appl. no. 8381/09, 12 February 2010, GEO-OTP-0002-3174 at 3180.

<sup>177</sup> Annex E.3.16: OSCE Material, GEO-OTP-0005-0953 at 0959.

buffer zone were also subject to extensive destruction of houses.<sup>178</sup>

136 On 6 September 2008, HRW found that all houses in Vanati were destroyed except the houses that belonged to South Ossetia.<sup>179</sup> AI also reported that houses in the villages of Nuli that belonged to ethnic Ossetians were spared from destruction that was meted out to the houses of ethnic Georgians.

iii. Alleged involvement of Russian armed forces in the destruction attributed to South Ossetian forces

137 The supporting material indicates that by 12 August 2008, the Russian military had become an Occupying Power able to enforce Russian law and law enforcement measures on the territory in South Ossetia beyond. HRW reported, for example, that on 13 August 2008, Russian troops established check points enabling them to control the movement of forces which resulted in a significant decrease in the number of houses and torching of civilian property.<sup>181</sup> The OSCE HRAM Report referred to some instances where Russian forces prevented the civilian population from violence by the South Ossetian forces.<sup>182</sup> OSCE further reported that the Russian military took immediate steps to prevent or investigate incidents of destruction attributed to South Ossetian forces.

<sup>178</sup> 300 to 500 houses were burned and about 2000 were damaged, Annex 2008 OSCE HRAM Report, GEO-OTP-0003-1921 at 1947.

<sup>179</sup> Annex E.4.10 HRW, Up in Flames, GEO-OTP-0001-0336 at 0479.

<sup>180</sup> Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 0168.

<sup>181</sup> Annex E.4.10 HRW, Up in Flames, GEO-OTP-0001-0336 at 0465-0466.

<sup>182</sup> Annex E.2.38 OSCE HRAM Report, GEO-OTP-0003-1921 at 1956.

South Ossetian forces by increasing patrols in targeted areas, and by arresting the suspects.

138 Nonetheless, numerous witness accounts are consistent with the Russian armed forces as bystanders, often failing to take action to prevent attacks by South Ossetian ethnic Georgian forces. OSCEHRAM also referred to repeated consistent accounts of displaced persons from multiple ethnic villages recounting the presence of deliberate destruction of ethnic Ossetians following the arrival of the Russian forces. In a number of cases, South Ossetian forces had entered villages with Russian military personnel or in the wake of Russian aerial attacks.

139 The IIFMCG conducted interviews that also provided accounts ranging from active intervention to stop violence to passive observation, and even in some cases where IIFMCG stated that while it appeared difficult to hold Russian forces systematically responsible, they participated in or tolerated the conduct of South Ossetian forces. These seemed to be credible and converging reports indicating

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<sup>183</sup> Annex E.3.16 OSCE Material GEO-OTP-0005-0919 at 0921.

<sup>184</sup> Annex E.2.36 IIFMCG, Volume II, GEGOTP-0002-7801 at 8180.

<sup>185</sup> 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 and helping to set the fires, Annex E.2.38 OSCEHRAM Report, GEGOTP-0003-1921 at 1962-1963.

<sup>186</sup> See, for instance: Annex E.4.3: AI, Civilians in the line of fire, GEGOTP-0001-0125 at 0164, 0168; Annex E.2.38 OSCEHRAM Report, GEGOTP-0003-1921 at 1962; Annex E.5.2: Memorial and Demos, Humanitarian consequences of the armed conflict in the South Caucasus, 5 November 2008, GEGOTP-0001-1314 at 1316; Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0461 to 0463; Annex E.2.36 IIFMCG, Volume II, GEGOTP-0002-7801 at 8017, 8157-8158.

<sup>187</sup> Annex E.2.36 IIFMCG, Volume II, GEGOTP-0002-7801 at 8157-8158.

number of instances Russian forces did not act to prevent South Ossetian forces from committing crimes.

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 reportedly committed by the South Ossetian forces. The evidence available indicates that at least some members of the Russian forces participated in the commission of the alleged crimes. Some members acted passively, and still others attempted to prevent such crimes.

141. The question of overall control for the purpose of commission of crimes has been discussed above. The issue of whether individual criminal responsibility may be attached to Russian armed forces for crimes allegedly committed by South Ossetian forces will depend on the evidence collected during the authorised investigation and an examination of the facts of liability under the Statute. As described above, in some instances, the Russian armed forces appear to have failed to prevent and punish such acts consistent with the obligations of an occupying power.

(c) Alleged attack against peacekeepers

142. The actus reus of the war crime of attacking personnel involved in humanitarian assistance or peacekeeping operations

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<sup>188</sup> Annex E.2.36 IFFMCG, Volume II, GEGOTP-00027801 at 8157.





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

- a) First, whether the peacekeeping mission under the Statute was established in accordance with the Charter of the United Nations;
- b) Second, whether the personnel, installations, material, armaments and vehicles of the JPKF was entitled, at the time of the attack, to the protection afforded to civilians and civilian objects under international law.

Whether the peacekeeping mission under the Statute was established in accordance with the UN Charter

145. Trial Chamber I established that peacekeeping is a concept defined by practical experience and not defined under international law. UN Charter peacekeeping missions are not statutorily defined, but their functions depend on the context in which they operate. The basic principles are relevant for determining the conditions for a peacekeeping mission: (i) consent of the parties; (ii) impartiality; (iii) the use of force only in self-defence.

## Consent of the parties

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

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

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

146 Since a peacekeeping mission needs the consent of the parties to be stationed on the territory, such consent is necessary. In the absence of the consent of the main parties to the conflict, the matter should be referred to the Special Court for Sierra Leone's jurisprudence on international armed conflicts. Consent is obtained from the parties, not out of legal obligation, but rather to ensure the success of the peacekeeping operation.<sup>197</sup>

147 As described in the background section, following the signing of the Sochi Agreement on Principles of Settlement of the Georgia-Ossetian Conflict by the Presidents of Georgia and the Russian Federation on 24 June 1992, a Joint Peacekeeping Force (JPKF) was established. The JPKF was deployed in the conflict zone, together with the Joint Control Commission (JCC) coordinating body composed of Georgian, Russian and North Ossetian representatives. The mandate of the JPKF and JCC was to supervise the implementation of the Sochi Agreement.<sup>198</sup>

148 The JPKF consisted of members drawn from the parties to the conflict and comprised three peacekeeping battalions: a Russian

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

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

<sup>198</sup> Annex E.2.36 IIFFMCG, Volume II, GEGOTP-0002-7801 at 7901.

<sup>199</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEGOP-0006-0003, Agreement on Principles of Settlement of the Georgia-Ossetian Conflict (Sochi agreement), 10 June 1992, GEGOTP-0006-1598 at 1598 Article 3:

1. In order to exercise control over the implementation of the withdrawal of armed formations, disbanding 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 on 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.

a Georgian battalion and a battalion from North Ossetia. The force was manned by approximately 500 soldiers. The battalions operated under a joint command coordinated by the JPKF, which was commanded and nominated by the Russian Defence Ministry and approved by the JCC.<sup>202</sup>

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

150 The Government of Georgia informed the Prosecution that the authorities persistently objected to the presence of the Russian peacekeepers in the region during the couple of years of armed conflict and demanded from the international community the replacement of the JPKF with an internationalised peacekeeping force.

<sup>200</sup> Response of the Government of Georgia to the questionnaire of the IIFFMCG, Annex 37, IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8307.

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

<sup>202</sup> The JCC, a trilateral body with Georgian, Russian, and North Ossetian representatives, plus participation from the Organisation for Security and Cooperation in Europe (OSCE), was mandated to supervise the implementation of the Sochi agreement of 1992, Annex E.7.9: Government of Georgia, 10 May 2010 Report: 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.

<sup>203</sup> Annex E.2.18: UN Security Council Resolution 1781, SC/9142 (2007).

instead.<sup>204</sup> According to Georgian authorities, Georgia undertook measures to address the problem before different international bodies. In September 2006, in his speech before the UN General Assembly, then Georgian President Saakashvili stated that the Russian Federation should withdraw its peacekeepers from the South Ossetia. A diplomatic mission also sent to the region by different countries objecting to the support of Russian peacekeepers in South Ossetia. However, 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 separatist authorities, although tainted consent as 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 parties, but should not be confused with neutrality or inactivity. UN peacekeepers should be impartial in their dealings with the parties to the conflict and neutral in their execution of their mandate.<sup>205</sup>

<sup>204</sup> 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).

<sup>205</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report (GEO-OTP-0003-1836 at 1865).

<sup>206</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report (GEO-OTP-0003-1836 at 1865).

<sup>207</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report (GEO-OTP-0003-1836 at 1853 and 1853).

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

152 The Government of Georgia cited these materials as sources to argue that Russia, including the Russian peacekeeping forces in Georgia, were not impartial, but were constantly supporting the South Ossetian authorities. For instance, on 29 November 2008, referring to the conflict in Abkhazia and South Ossetia, the European Parliament adopted a resolution stating that the Russian troops have lost their status of neutral, impartial peacekeepers and that the Moscow authorities' decision to grant Russian citizenship to people living in those parts of Georgian territory is further exacerbating the situation.

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

154 The OSCE mission reports however indicate that the JPKF implemented its mandate on the ground, particularly through the Joint Monitoring Team, in accordance with the OSCE military observation document and inquire about sporadic firing incidents in South Ossetia in the period prior to and during the armistice. For example, on 29 July 2008, the JPKF Commander ordered the Monitoring Team to confirm information on firing which occurred

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<sup>209</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1864-1866. The Government of Georgia as referred to a chapter in the IIFFMCG Report 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 contingents specifically.

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

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

the area close to the Georgia administrative border. Since August 2008, the JPKF and the OSCE military observers reported violations and reported that the exchange of fire between 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 and did not necessarily affect the impartiality of the whole peacekeeping mission which was meant to stem the hybrid nature, and which in effect lasted for almost 16

The use of force except on self

156 Peacekeeping missions may only use force to defend themselves protected from attack under article 8 of the Rome Statute enforcement missions established by the UN Security Chapter VII of the UN Charter, which are permitted to self-defence in order to achieve their objectives, are international humanitarian law.

157 The term peacekeeping mission includes both missions under the UN and those foreseen by the UN Charter. According to articles 52(1) and 53(1) of the UN Charter, unions of States and intergovernmental organisations with the goal of maintaining peace are allowed, provided that they are consistent with the

<sup>212</sup> Annex E.3.16 OSCE Material GEO-OTP-0005-0809 at 0810

<sup>213</sup> Annex E.3.16 OSCE Material GEO-OTP-0005-0840 at 08430844

<sup>214</sup> ICC-02/05-02/09-243-Red, para.74.

Principles of the United Nations and their powers of authorization by the Security Council.<sup>215</sup>

158 The JPKF were the only armed forces that were allowed in the region of South Ossetia. Peacekeepers were allowed to carry out tasks that were listed in protocols adopted on the basis of the principles of checking weapons, prohibition of import and export of military technology, prevention of clashes between different armed activities of illegal armed units, barring the entry into the zone of armed groups; impeding the transit in the non-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 on 2 July 1994.

159 Although some of its tasks amounted to robust peacekeeping, it was not allowed to use force ~~in its mandate~~; instead, peacekeepers had to monitor violations of the ceasefire and report them to the JCC. 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

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<sup>215</sup> ICC-02/05-02/09-243-Red, paras. 756.

<sup>216</sup> Annex E.7.32: Annex no.1 to the JCC /Joint, Control 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 at 05600563.



mission in accordance with the UN Charter entitled to a protected civilian status.

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

161 Peacekeeping forces are entitled to the protection afforded defined in the Additional Protocol I to the 1949 Geneva Conventions. 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 not a civilian. It is of no doubt whether a person is a civilian, that person shall be considered to be a civilian.

162 Article 50 of Additional Protocol I and article 13(3) of Additional Protocol II establish that civilians are not to be the object of attack. Civilians are those persons who are not members of the armed forces and who are not taking a direct part in hostilities. Civilians involved in peacekeeping missions enjoy protection from attack and for such time as they take a direct part in hostilities. Direct participation in hostilities includes acts of direct participation in hostilities including bearing arms, using or taking up arms, taking part in military operations, conduct or operations, armed fighting, participating in attacks against enemy personnel, equipment, transmittal of information for the immediate use in the hostilities, and transporting weapons in proximity to the military operations. The requirement for direct participation in hostilities is that the timing

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<sup>217</sup> ICC-02/05-02/09-243-Red.

of the attack is nevertheless, they do not lose such protection if they use armed force only for the purpose of self

163. Installations, material, units or vehicles involved in a military mission are also entitled to the protection given to civilians unless and for such time as their presence or location makes an effective contribution to the military action of a party to the conflict and insofar as their total or partial destruction, neutralisation, in the circumstances ruling at the time, would result in a military advantage.

ii. Alleged attack against Georgian peacekeepers

164. According to Georgian authorities, South Ossetian forces attacked Georgian peacekeepers positions prior to the start of hostilities. Georgian peacekeepers locations were reported to be attacked by South Ossetian forces from 29 July 2008; in Sarabuki on 31 July; 4 August; 5 August (2 Georgian peacekeepers wounded); 6 August (38 Georgian peacekeepers wounded); in Avnevi on 7 August; in Avnevi and Fronevart on 7 August starting at 20h30 on 7 August 2008.

<sup>218</sup> ICC-02/05-02/09-243-Red, para 83.

<sup>219</sup> ICC-02/05-02/09-243-Red, para 89.

<sup>220</sup> Annex E.7.19: Government of Georgia, Witness Statement, GEO-0008-1812 at 184.

<sup>221</sup> 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: OSCE Material, GEO-OTP-0005-0830 at 0831.

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

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

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

<sup>225</sup> Meeting with Georgian authorities on 24 June 2010 in Tbilisi, Georgia.

<sup>226</sup> Annex E.2.7: IIFFMCG, 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.

165 The most serious incident alleged to have occurred on 7 August 2008 in Abkhaz South Ossetia attacked Georgian peacekeepers who maintained the checkpoint was reportedly heavily shelled with 120mm artillery by South Ossetian forces unit located in the village of Klekhat. As a result of the attack, two Georgian peacekeepers were killed, five peacekeepers were wounded and the Georgian peacekeeping unit's armed vehicle was destroyed by the return of fire from the Georgian peacekeepers.

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

167 The exact timing of and the precise circumstances surrounding the conduct would require verification in the context of an authorised investigation. The investigation has not yet proceeded the formal commencement of the investigation on 7 August 2008. However, given the temporal proximity and the close connection between the two incidents, the level of violence and the investigation will be based on the basis of the evidence collected and the relationship 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

<sup>227</sup> Annex E.7.17: Government of Georgia, Witness statement, GEO-0008-1793 at 18001801.

<sup>228</sup> Annex E.2.3: IFFMCG, Volume III, GEOTP-0002-8247 at 8309.

<sup>229</sup> Meeting with the Russian authorities on 10 March 2010 in Moscow, Russian Federation.

168. In particular, the information available provides a reasonable basis to believe that, by the time of this incident at the latest, Georgian armed forces and the highly organized South Ossetian forces were sufficiently intent to commit an international armed conflict. Because the attack against the Georgian peacekeepers was carried out in the context of this armed conflict it would, at a minimum, constitute a war crime pursuant to article 8(2)(e)(iii). Alternatively, if it is established that the Russian armed forces exercised overall control over South Ossetian forces at the time of this conflict, the attack would give rise to application of the international armed conflict provisions of article 8(2)(b)(iii).

169. Despite the limited information available regarding the precise circumstances of the attack, the fact that peacekeepers were attacked is not in dispute. The allegation that the Georgian peacekeepers initiated the attack does bring into question whether the attack falls within the scope of the protection given to peacekeepers and civilian observers, bearing in mind the threshold of civilian character that governs the application of the provisions. In the absence of doubt, the Prosecution has concluded that there is a reasonable basis to believe that South Ossetia committed the war crime of intentionally directing an attack against personnel and objects

<sup>230</sup> 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 (API) and ICTY Trial Chamber Judgment, 5 December 2003, case No. IT-98-T, para. 51. See also article 52(3) of API.

a peacekeeping mission pursuant to article 8(2)(b) and 8(2)(e)(iii)

iii. Alleged attack against Russian peacekeepers

170 The JPKF had two tasks in Tskhinvali: the JPKF HQ was based in the central part of Tskhinvali and the Russian Peacekeeping Forces Battalion was located in the western part of Tskhinvali. The RUPKFB HQ counted 528 servicemen of the Russian Federation's Peacekeeping Battalion from the command of Lt Col K.A. At the time of the exchange of fire on 8 August 2008, the battalion had 296 servicemen dispersed at the RUPKFB HQ. While the JPKF HQ was composed of Russian peacekeepers under the command of Maj General M. M. Kulakhmetov. In addition, there were 162 servicemen on duty at 12 peacekeeping observation posts.

171 The material obtained from the parties provides only limited information in relation to the contextual elements and motives of the alleged crimes, despite efforts undertaken by the ICJ to obtain additional information. In many instances, the

<sup>231</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

<sup>232</sup> 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.2.3: IFFMCG, Volume III, GEOTP-0002-8247 at 8310

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

available derived solely from one party to the conflict, by information provided by either, and no third party has been able to provide corroboration or to come to a relevant determination. The IIFFMCG, AI and HRW were unable to corroborate claims solely as they could not assess whether, at the time of the offensive, the peacekeepers had lost their protection virtue of having taken a neutral position. The conclusions reached by the Prosecution are provisional in nature.

172 While there was an exchange of fire in the RUPKFB HQ occurred on 8 August 2008, the domain contentious issues that arise from the submitted information are: Russian peacekeepers attacking RUPKFB HQ at the time directly participating in the hostilities for the infrastructure was being used to make an effective contribution to the military action, and were thus rendered legitimate military targets; (i) whether the Georgian armed forces initiated the attack instead responded to incoming fire from the RUPKFB HQ. The attack on the RUPKFB HQ on 8 August 2008 resulted in Russian peacekeepers and others were wounded.

173 As noted above on 18 June 2012, Russian authorities submitted the Prosecution 28 volumes of records and additional their own investigation including witness statements and reports on weapons used by Georgian armed forces during alleged unlawful attack. This material was submitted in s

<sup>234</sup> Annex E.2.3: IIFFMCG, Volume II, GEOOTP-00027801 at 8131.

<sup>235</sup> Annex E.2.3: IIFFMCG, Volume II, GEOOTP-00027801 at 8130.

<sup>236</sup> Annex E.4.3: AI, Civilians in the line of fire, GEOOTP-0001-0125 at 0151.

allegations that the Georgian forces deliberately attacked the JPKF HQ at the centre of Tshkinvali and the RUPKFB Verkhniy Gorodok located on the southern outskirts of Tshkinvali at a time when Russian peacekeepers and their property were entitled to protected status.

174 The supporting material submitted by the Russian authorities states that the attack against the Russian peacekeepers occurred on 8 August 2008, when the Georgian armed forces opened fire on the Tamarasheni observation post of the RUPKFB using small arms, artillery, Grad rocket launchers, rockets, T-72 tanks, SU-26 biplanes, and BMP-2 armoured personnel carriers. At 03h30 minutes later, the Georgian armed forces carried out a mortar attack against the JPKF HQ in Tshkinvali, followed by a second attack at 04h08. The JPKF HQ was again under Georgian fire at 05h05 around 05h05 when the JPKF commander Major Mikhailov 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 on the road leading from Nizkni to Tshkinvali, fired at the Glazob post, located on the roof of the RUPKFB HQ barracks, in I.Ya. Lotfifollowing this attack on the RUPKFB HQ, the Russian armed forces carried out an attack on the RUPKFB HQ using small arms, mortars, artillery and tank guns. The attack lasted

<sup>237</sup> Russian authorities claimed that this attack occurred at 23h57 on 7 August 2008. Meeting with the Russian authorities on 10 March 2010 in Moscow, Russian Federation.

<sup>238</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

<sup>239</sup> Annex E.7.24: Government of the Russian Federation, Witness statement, GEOT-0001-1354 at 1360 (for English translation see E.9.2: Solemn Declaration, 13 November 2015)

<sup>240</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

minutes. At approximately 07h00, Georgian tanks m  
Tskhinva~~ll~~ieged~~l~~lyed on and destroyed an infantry fighting  
(type B-M, Hull number 619) and an armoured patrol  
BRDM) that had been placed on the Tshkinvali road  
opposing sides. Two peacekeepers~~er~~ alleged~~l~~ly duty have been  
killed. The Georgian~~am~~med~~o~~ force~~al~~leged~~l~~ly opened fire on the  
RUPKFB HQ at 07h40 and 8h00, killing another two  
peacekeepers. In the course of the attack on the R  
Georgian~~me~~ force~~s~~ alleged~~l~~ly targeted a medical aid post a  
ambulances which were located inside the compound a  
marked with Red Cross~~sy~~ The~~bo~~sshelling of the RUPKFB HQ  
said to have~~cont~~inued through the day until 9 August 2008.

176 In the period between 8 and 10 August 2008, the Geor  
alleged~~l~~ly attacked also other observation posts of the  
Peacekeeping Battalions from the JPKF in Eredvi, Vanat  
Prisi, Avnevi, Tsunaristba, Kverneti, Andzisi, A  
Megvrek~~ts~~si.

177 In support~~of~~ its claim that the attack was premeditated  
well in advance~~the~~ Russian authorities~~mitt~~ed~~ts~~ two CDs that were  
alleged~~l~~ly seized by Russian~~sm~~ forces~~for~~ in~~the~~ South Ossetia after the  
withdrawal of Georgian~~fo~~ forces. These two CDs were da  
between 2005 and 2007~~re~~ported~~to~~ contain targets for future  
military operations~~in~~ the RUPKFB HQ~~243~~.

<sup>241</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

<sup>242</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

<sup>243</sup> The Prosecution received the 2 CDs in question from Russian authorities on 11 October 2011. 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.



178 Further, according to the Russian author JPKFs, the contingent left JPKF HQ at 14h43 on 7 August 2008. These forces knew that the JPKF HQ was a bus stop but allegedly that shortly thereafter the Georgian side started firing from the side of Avnevi in the direction of K... artillery, tanks and armoured personnel carriers. The commander of the Georgian peacekeeping battalion Mamuka Kurashvili, explained that officers of the Georgian peacekeeping battalion to leave the JPKF HQ in Tskhinvali at 17h00 on 7 August after the JPKF Commander refused additional security guarantees to Georgian peacekeepers. Tskhinvali these guarantees were sought after the earlier desecration incident in which the Georgian peacekeeping contingent stationed at Avnevi checkpoint came under heavy shelling from Russian positions, which occurred at 14h00 that day.

179 Further, according to a narrative timeline provided by the Georgian authorities, between 05h18 August 2008, the Georgian Central Front forces encountered heavy shelling in the northern area of Zhenokhvane about 10km towards Tskhinvali. Georgian military services employed at the time gave statements to Georgian investigative organs as well as other intelligence sources who confirmed that the mortars originated from the outskirts of Tskhinvali.

<sup>244</sup> Annex E.8.31: Order No. 27, GEOTP-0008-0584.

<sup>245</sup> Annex E.7.17: Government of Georgia, Witness statement, GEOT-0008-1793 at 1801

<sup>246</sup> According to the testimony of the reconnaissance officer of the Batumi Battalion of the Central Front forces, the mortars installed in the backyard of the JPKF HQ were being used for shelling against the Georgian positions. However, this witness did not directly see the artillerymen launching

Most of the host positions were identified as being located higher ground RUPKFB HQ firing towards the Georgian armed forces moving by the road to Tskhinvali.

180 The Georgian timeline indicates that at 06h00 on August 05h50 2008 Georgian armed forces started 4000 meters away from the east side of RUPKFB HQ their way towards Tskhinvali under fire from snipers, machine-guns, rocket grenades and armoured vehicles from a direction towards RUPKFB HQ. As a result, it is alleged that Georgian soldiers were killed and injured and several Georgian tanks damaged. The Georgian forces are said to have refrained from returning fire for at least 15 minutes while they waited for approval from superiors. At 06h15 the Georgian armed forces apparently instructed the infantry forces to return fire and employ tank support.<sup>249</sup> The Georgian anti-aircraft artillery of the First Infantry Brigade Artillery Battalion conducted the next attack on RUPKFB HQ at or about 06h30. According to the Georgian authorities, the attack involved the use of anti-aircraft rockets, automatic rifles, and light artillery used in the attack.<sup>250</sup>

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the mortars as he could not see the peacekeeping compound buildings from the mortar fire, Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1848, 1855-1856.

<sup>247</sup> 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 the August 2008 events, GEO-0006-0539 at 0554-0552; Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0003 at 0029.

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

<sup>249</sup> 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-0006-0003 at 0032

<sup>250</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1848-1850.

181. In addition to the allegations the Georgian troops were first fired at from the RUPKFB HQ in Georgia, the author 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 Russian peacekeepers contributed to military advances in South Ossetia as by providing them with the coordinates of Georgian military and infrastructure of the RUPKFB HQ. The RUPKFB HQ is also responsible 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 RUPKFB HQ, Kulakhmetov and the Head of the Georgian peacekeeping contingent, Khasbiyev, at 00h23 on 8 August 2008, in which the former said he admitted that Russian peacekeepers were providing coordinates for artillery shelling of Ossetian forces.

183. According to the Russian authorities, in the conversation that took place but added that its content was taken out of context. In particular, it is claimed that peacekeepers were constantly reporting on the movements of tanks and artillery firing on the territory of their mandate. The communication is said to be the

<sup>251</sup> Annex E.2.3: IIFFMCG, Volume III, GEGOTP-0002-8247 at 8310.

<sup>252</sup> 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-0006-0003 at 0029-0031.

<sup>253</sup> The translated transcript reads: Kulakhmetov: Hello. Kurashvili, 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 nothing 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-0006-0219.

<sup>254</sup> Meeting with the Russian authorities on 24 January 2014 in Moscow, Russian Federation.

Russian peacekeepers, to have been able to open for transparency pursuant to the Sochi agreement and applicable protocols, a degree of coordination between peacekeepers and the conflict was not provided for in the provision of a coordinated framework therefore permitted under applicable legal framework at this stage

184 The Georgia authorities further claimed that one of the attack South Ossetian sniper, Oleg Galavanov, was on main building of the RPK Factory in October 2008 South Ossetian artillery fire against Georgian units. Georgia trans-coordinated by contract the Russian authorities that Galavanov was located on the roof of the university building next to he was wounded by Georgian and Russian peacekeepers transported him to the medical facility within the compound where he was killed due to the destruction as a subsequent Georgia attack on the Georgia county transfer of Galavanov to the medical facility, the was highly unlikely given the state of affairs at the time.

185 In addition to the presence of the South Ossetian in the Georgia authorities argued that Russian peacekeeping force

<sup>255</sup> 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 Observers Designated for the Normalization of the Situation in the Zone of the Georgia-Ossetian Conflict, 6 December 1994, GEOTP-0008-0683. For full text see above, footnote 201.

<sup>256</sup> Annex E.2.3: IIFFMCG, Volume III, GEGOTP-0002-8247 at 8346.

<sup>257</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1861-1862.

<sup>258</sup> Annex E.7.28: Response from the South Ossetian Ministry of Defence, addressed to the Investigative Committee of the Russian Federation, dated 27 January 2011, GEO-OTP-0005-0660 (English translation: Annex E.7.28.1)

<sup>259</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1862-1863.

actively contributed to the military advantage of both the Russian regular forces and South Ossetian forces, by providing support to the RUPKFB HQ facilities and infrastructure.<sup>260</sup>

186 For instance, Anatoly Barankevich, the Security Council Representative for the South Ossetia fact authority, acknowledged in an interview that he decided to agree to the RUPKFB HQ order to secure the road leading to the JPKF HQ and, for the purpose of South Ossetian forces, to secure the surrounding area by crossroads. He stated that from those positions that South Ossetian forces ambushed and attacked Georgian police moving through the town.

187 Reported, however, the peacekeeping mission was strictly for the purpose of to host members of South Ossetian forces. South Ossetian forces were also not allowed in the compound, except those for medical care and were admitted to the medical unit, activities of 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.<sup>261</sup>

188 The Prosecution recalls that the presence of a member of the party would not, in and of itself, remove the protection of persons or objects, if they were entitled to such protection. In such, examination of this particular allegation relates to the

<sup>260</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GECOTP-0003-1836 at 1861.

<sup>261</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 24, "There is no place for this President in South Ossetia", 4 December 2008, GECOTP-0006-0181 at 0181 (English translation: GECOTP-0006-0173).

<sup>262</sup> Meeting with the Russian authorities on 24 January 2014 in Moscow, Russian Federation.

question whether the Russian peacekeepers were at the time directly participating in the hostilities. If they were not, the issue concerns consideration as to the proportionality of the live fire in response to the Oleg Galavanov, which appears to have been directed to other UNPKFB HQ compound and not just the Oleg Galavanov allegedly located on the basis of the indiscriminate nature of such fire and would constitute the crime of internationally directing of attacks against personnel and objects.

189 The information available remains in relation to the number of issues related to the Russian peacekeeping contingent UNPKFB HQ at the time of the attack. It is not entitled to the protection given to civilians and included in this information the location and role of Oleg Galavanov and whether the Georgian armed forces initiated the attack in response to live fire coming from the UNPKFB HQ. The precise chain of events and the role of the alleged perpetrator in the context of any authorised investigation bearing in mind the low threshold applicable at this procedure, and the presumption of civilian character in the application of the law in case of doubt, should be considered. There is a reasonable basis, at this stage, to believe that the crime of intentionally directing an attack against persons involved in a peacekeeping mission has been committed by the intentional directing by the Georgian armed forces

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<sup>263</sup> 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 N 08179-T, para. 51. See also Article 52(3) of API.

Russian peacekeeping personnel and installed IFFMCG and the RUPKFB base during the night of 7 to 8 August 2008 article 8(2)(b)(iii).

(d) Alleged Indiscriminate 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 committed indiscriminate and disproportionate attacks against civilians.

i. Alleged Indiscriminate Disproportionate Attacks by Georgian armed forces

191 The Georgian armed forces deployed in South Ossetia included two light infantry brigades, five tank battalions, eight armoured Special Forces units, and members of the Ministry of Internal Affairs. The President of Georgia was in South Ossetia at the time.

192 The Prosecution has examined allegations that the Georgian armed forces carried out indiscriminate attacks against civilians and civilian property and a ground offensive against the city of Tskhinvali and its surroundings started on the night of 7 to 8 August 2008. Article 15 of the Rome Statute of the International Criminal Court, which was received on behalf of the Russian Federation at the Russian embassy in The Hague also contains allegations that in

<sup>264</sup> Annex E.2.3: IFFMCG, Volume II, GEGOTP-00027801 at 8020.

Georgian military offensive on the city of Tskhinvali villages in South Ossetia, the armed forces carried out indiscriminate disproportionate attacks against civilian targets in South Ossetia.

193 These attacks reportedly resulted in civilian deaths and considerable damage to civilian objects or buildings, including schools, hospitals and other civilian residential areas. 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, may have been targeted.

194 According to HRW, during aerial ground offensives, 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 tanks, Grad MLRS and cluster munitions is also reported. On 7 August 2008, Georgian Air-25 type aircraft are alleged to have dropped bombs on residential areas in Nogkakheta and Khetaguro, resulting in the number of civilian deaths and scores of injuries.<sup>268</sup> While over 100 civilians were estimated to have been

<sup>265</sup> Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0148.

<sup>266</sup> Annex E.4.10 HRW, Up in Flames, GEOTP-0001-0336 at 0383-0384.

<sup>267</sup> Annex E.4.10 HRW, Up in Flames, GEOTP-0001-0336 at 0380.

<sup>268</sup> Annex E.4.4: AI, Georgia-Russia conflict: Protection of civilians and accountability for abuses should be a priority for all, 01 October 2008, GEOTP-0003-1196 at 1198-1199; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 0149-0150.



in Tskhinvali many of which occupied at the time according to eyewitness accounts<sup>269</sup>

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

196 The type of weaponry used in each incident also remains an issue. IFFMCG records that MLRS were used in the southern and southwest of Tskhinvali. By their nature, 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. Their use in civilian areas could amount to the launching of attacks discriminating between civilians and military targets, depending on the nature of the attacks, which is unlawful within the meaning of article 8(2)(b)(i) and (ii) and is not proportionate within the meaning of article 8(2)(b)(iv). However, this would require an

<sup>269</sup> Annex E.4.4: AI, *Georgia/Russia conflict: Protection of civilians and accountability for abuses*, 01 October 2008, GEO-OTP-0003-1196 at 1199; Annex E.4.5: AI, *The human cost of war in Georgia*, 01 October 2008, GEO-OTP-0003-1397; Annex E.2.3: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8737; Annex E.4.9: HRW, *Russia/Georgia: All Parties in August-South Ossetia Conflict Violated Laws of War*, 23 January 2009, GEO-0001-0558.

<sup>270</sup> Annex E.2.3: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8128, 8132, 8133.

<sup>271</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0392; Annex E.2.3: OSCE/HRAM Report, GEO-OTP-0003-1921 at 1954.

<sup>272</sup> Annex E.2.3: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8145.

exact nature and ~~scope~~ of weapons and their effects, the area of spread ~~of~~ ~~the~~ ~~attacks~~, the character of the targeted ~~the~~ physical proximity of residential civilian areas to ~~the~~ or the availability of alternative weapons ~~with~~ ~~in~~ ~~this~~ ~~stage~~.

197 Thus, ~~in~~ ~~the~~ ~~light~~ ~~of~~ ~~the~~ ~~insufficiency~~ ~~of~~ ~~the~~ ~~information~~ ~~available~~, the Prosecution is ~~at~~ ~~liberty~~ ~~to~~ ~~determine~~ ~~whether~~ ~~there~~ ~~is~~ ~~a~~ ~~reasonable~~ ~~basis~~ ~~to~~ ~~believe~~ ~~that~~ ~~the~~ ~~attacks~~ ~~by~~ ~~Georgia~~ ~~armed~~ ~~forces~~ ~~are~~ ~~committed~~ ~~within~~ ~~the~~ ~~jurisdiction~~ ~~of~~ ~~the~~ ~~Court~~ ~~is~~ ~~not~~ ~~precluded~~ ~~without~~ ~~prejudice~~ ~~to~~ ~~other~~ ~~possible~~ ~~findings~~ ~~that~~ ~~may~~ ~~be~~ ~~made~~ ~~during~~ ~~the~~ ~~course~~ ~~of~~ ~~investigation~~ ~~in~~ ~~particular~~, ~~an~~ ~~assessment~~ ~~of~~ ~~the~~ ~~severity~~ ~~of~~ ~~the~~ ~~injuries~~ ~~and~~ ~~property~~ ~~damage~~ ~~to~~ ~~determine~~ ~~whether~~ ~~the~~ ~~injuries~~ ~~or~~ ~~property~~ ~~damage~~ ~~amounted~~ ~~to~~ ~~a~~ ~~war~~ ~~crime~~ ~~within~~ ~~the~~ ~~jurisdiction~~ ~~of~~ ~~the~~ ~~Court~~.

ii. Alleged Indiscriminate and Disproportionate Attacks by Russian armed forces

198 The Russian armed forces in Georgia consisted of five re- tactical groups (reinforced ~~elements~~ ~~of~~ ~~the~~ ~~19th~~ ~~North~~ ~~Ossetia~~) and 42nd (Chechen) ~~Divisions~~ ~~deployed~~ ~~under~~ ~~the~~ ~~command~~ ~~and~~ ~~control~~ ~~of~~ ~~the~~ ~~Planned~~ ~~North~~ ~~Caucasus~~ ~~Military~~ ~~District~~ ~~during~~ ~~combat~~ ~~operations~~ ~~in~~ ~~North~~ ~~Ossetia~~. These forces were also supported by five ~~of~~ ~~the~~ ~~Russian~~ ~~58th~~ ~~Army~~ (HQ Vladikavkaz) and the Russian

<sup>273</sup> See William Fenrick, "The prosecution of unlawful attack cases before the ICJ," *Yearbook of IHL*, Vol.7, 2004, p. 159.

Division. The President of Russia was their Supreme Chief of the Armed Forces of the Russian Federation at

199 The Prosecution has reviewed allegations unlawful to attacks by the Russian armed forces against civilian 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.

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 commission of these crimes.

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

202 The information available indicates Russian armed forces reportedly carried out air attacks in the areas of Tskh

<sup>274</sup> Annex E.2.3: IFFMCG, Volume II, GEGOTP-0002-7801 at 8021.

<sup>275</sup> Annex E.4.3: AI, Civilians in the line of fire, GEGOTP-0001-0125 at 0148.

<sup>276</sup> Annex E.4.3: AI, Civilians in the line of fire, GEGOTP-0001-0125 at 0148.

in South Ossetia and around Tqviavi and Variani municipality. The town of Gori was subject to aerial bombardment by four or five different units in the period between 8 and 12 August 2008.<sup>277</sup>

203 According to the OSCE report of 8 August 2008, the Georgian Ministry of Foreign Affairs reported that Russian aircraft bombed military and civilian targets in Gori, Kareli and the Georgian villages of Prisi and Trialeti. According to 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 deaths of citizens of Ajara and Gori.<sup>278</sup>

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 injured. Victims 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 fired cluster munitions in Gori, Foreign Minister Sergei Lavrov confirmed on 12 August 2008 that Russian forces were active in the area. A Russian soldier interviewed attested to the absence of military targets in the vicinity.<sup>279</sup>

<sup>277</sup> Annex E.2.3: IFFMCG, Volume II, GEGOTP-0002-7801 at 813-814.

<sup>278</sup> Annex E.3.16 OSCE Material, GEO-OTP-0005-0849 at 0850.

<sup>279</sup> Annex E.3.16 OSCE Material, GEO-OTP-0005-0865 at 0866.

<sup>280</sup> Annex E.4810: HRW, Up in Flames, GEOTP-0001-0336 at 052-0454; Annex E.4.3: AI, Civilians in the line of fire, GEOTP-0001-0125 at 015-0155; Annex E.4.4: AI, Georgia Russia

205 The IFFMCG could not draw a definite conclusion on the legality of the attacks carried out by the Russian armed forces on public and residential civilian buildings, and other civilian objects in Tskhinvali and surrounding villages as well as acts in relation to the destruction of cultural property, owing to insufficient information relating to the circumstances of the military operations.<sup>281</sup>

206 HRW documented the attack against the military hospital in Gori by Russian armed forces on 08 August 2008.<sup>282</sup> According to this source, a Russian military helicopter fired a rocket at the hospital and the hospital yard.<sup>283</sup>

207 The information available, however, indicates that most of the air attacks appeared to have targeted Georgian military and civilian objects outside built up areas. The proximity of these targets to civilian objects varied. In some cases, the military targets were within civilian areas and civilian residences. According to HRW, Russian forces targeted Georgian military bases in Gori, including the military base and the artillery brigade concentrated in the city of Gori in mid-July 2008.<sup>284</sup> In addition, some civilian objects hit by Russian forces were reportedly used for military purposes by

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Conflict: Protection of civilians and accountability for abuses should be a priority for all, 01 October 2008, GEO-OTP-0003-1196 at 1199; Annex E.8: HRW, "Russia-Georgia - Investigate Civilian Deaths", 13 August 2008, GEO-OTP-0003-1410 at 1410-1411; Annex E.3.9: ECHR, *Storimans-Verhulst, Akkermans and Yecheskeli v. Russia*, Appl. no. 26302/10, 30 August 2010, GEO-OTP-0002-3454 at 3478, 3481, 3502.

<sup>281</sup> Annex E.2.3: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8133, 8137, and 8142.

<sup>282</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0436.

<sup>283</sup> See Annex E.2.3: IFFMCG, Volume II, GEO-OTP-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.

<sup>284</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0434.

forces at the moment of the Russian attack, which rendered legitimate military targets. For instance, HRW reported that air forces carried out several attacks on and near School No. 1 at the moment when around 100 members of the Georgia Air Force were present in the yard<sup>286</sup> of the school.

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

209. In 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 lack of information on the nature of targets, circumstances of attack, and extent of the damage caused relevant to establishing whether the attacks were against civilians and/or civilian objects and whether the attacks were intended such civilians and/or civilian objects to be the primary or secondary target of the attack, as required under the Rome Statute.

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<sup>285</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0435; See also Annex E.2.3: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8134 (The IIFFMCG concluded that "the Mission has no information indicating that schools used for military purposes were deliberately attacked.")

<sup>286</sup> Elements of Crimes, articles 8(2)(b)(i) and 8(2)(b)(ii).

210 With respect to the war crime of excessive incidental damage, the elements of the crime require that the perpetrator was aware that the attack would cause injury, death or damage of such an extent as to be clearly excessive in relation to the direct military advantage anticipated. The information available at this stage in relation to the planning of the attacks and the nature of military targets, such as barracks, positions of artillery, location of enemy command posts, scale of collateral damage that the alleged attacks caused, is insufficient to assess the elements of the required proportionality. In particular, it is not clear what concrete and direct military advantage was actually gained by the Russian armed forces.

211 This finding should be without prejudice to other possible findings that may be made during the course of an investigation. In order to conduct a depth assessment of the alleged violations, further evidence on the context of the attacks to determine whether deaths, injuries or damage amounted to a war crime within the jurisdiction of the Court is required.

(e) Nexus between the incident and the armed conflict

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<sup>287</sup> 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 relevant time. 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.

<sup>288</sup> See William Fenrick, "The prosecution of unlawful attack cases before the ICJ," *Yearbook of IHL*, Vol.7, 2004, p. 159.

212. In order for the acts to constitute war crimes, it is necessary that the conduct took place in or was directly associated with an armed conflict of an international character. The acts must be closely related to the hostilities, meaning that the armed conflict must play a substantial role in the perpetrator's decision and his commission of the crime, and the manner in which the crime was committed. Nonetheless, the armed conflict need not be considered the sole reason for the conduct and the conduct need not have taken place in the midst of the battle.

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

214. The Prosecution based its analysis in this part of the trial on the fact that it found a reasonable basis to believe that the following crimes were committed: willful killing/murders (Article 8(2)(c)(i)), destruction of the enemy's property/the property of an adversary (Article 8(2)(b)(xiii)/8(2)(e)(xii)), and rape (Article 8(2)(d)(v));

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

<sup>290</sup> ICC-01/04-01/07-3436, para. 1176; ICG02/11-14-Corr, para.150.

<sup>291</sup> ICC-02/11-14-Corr, para.150. See also Situation in the Democratic Republic of Congo, ICC-01/04-01/06-803tEN, paras. 282-288; ICC-01/04-01/07-717, para.380.

<sup>292</sup> ICC-01/04-01/07-717, para. 382.



intentionally directing attacks against persons involved in a peacekeeping mission (2)(a)(b)(6)(e)(iii)

215 The above acts took place in the context of an armed conflict, irrespective of its classification. Specific alleged crimes were committed in the area of the conflict in the places where the fighting between Georgian and Russian armed forces and South Ossetian forces took place during the armed conflict, as well as in the immediate aftermath of the cessation of hostilities while Russian forces maintained their military occupation territory.

216 The nexus between the armed conflict and the further demonstration of the fact that the perpetrators of the alleged crimes were members of the parties to the conflict, while the victims of the alleged crimes were civilians as a matter of course, were entitled to the protection given to civilians and civilian objects. With respect to the alleged crimes against the civilian population, the victims appear to have been targeted in 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 and to achieve full independence. The attacks against personnel and objects of a peacekeeping mission were also committed in the context of the allegations that the Georgian and/or Russian peacekeepers were not entitled to the 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 perpetration of the alleged crimes and the manner in which the crimes were committed. Perpetrators would not have been able to commit these crimes in the absence of the armed conflict. The ensuing operations of the armed conflict were present at the location where the crimes were committed.

## 5. 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. There is a reasonable basis to believe that South Ossetian forces committed the crimes against humanity, including murder (article 7(1)(a)), deportation or forcible transfer (article 7(1)(d)), and persecution against a group or collectivity on ethnic grounds (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 ethnic Georgians from the region. The furtherance of the overall objective of any remaining links with Georgia to secure full independence.

(f) Contextual elements of crimes against humanity

219 The contextual elements of crimes against humanity are: (i) an attack directed against any civilian population or an organised political organisation; (ii) the attack is widespread or systematic; (iii) the widespread or systematic attack; (iv) a nexus between the individual act and the attack; (v) the perpetrator's knowledge of the nature of the current attack; and (vi) the perpetrator's knowledge of the nature of the current attack, bearing in mind that there is presently no evidence before the Court, the last requirement cannot be adequately assessed at this stage, as knowledge is an aspect of the mental element of article 30(3) of the Statute. Prosecution did not rely on the first four elements.

(g) Acts alleged to have been committed by Soufiane Kouyate

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 multiple victims of the act 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 attack.

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

<sup>293</sup> ICC-02/11-14-Corr, para. 29.

<sup>294</sup> 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.

<sup>295</sup> 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.

221 In accordance with article 7(2)(a), a course of conduct consisting of multiple commission of acts, which means more than one incident or acts as referred to in article 7 (h) have occurred.<sup>296</sup> The term is not restricted to a military attack or 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 the armed forces and other combatants. Civilian population must be the primary object of the attack and not just a foreseeable victim. 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 religion. A distinction is only necessary for the finding of persecution pursuant to article 7(1)(h).

223 According to the available evidence, attacks were carried out deliberately against the civilian population of villages and municipalities in the territory of South Ossetia

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

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

<sup>298</sup> 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.

<sup>299</sup> 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.

<sup>300</sup> 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.

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

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

along the administrative boundary between South Ossetia and the rest of Georgia, including within the 20 km wide

224 The attacks systematically targeted the following Georgia: consistent pattern of deliberately killing, beating and torturing civilians, and looting and burning their houses and other property. Selective attacks by FFMG, OSCE, and HRW documented systematic burning and looting of houses belonging to 21 villages.

225 The information available on the nature and manner of commissioning the attacks and the profile of civilians targeted shows that the incidents constituted a campaign or operation carried out against the civilian population. Upon entering the villages on trucks, both Ossetian and Georgian forces reportedly looted the property of ethnic Georgians and set them alight. Witnesses testified that more than 100 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 being destroyed while the perpetrators humiliated them. The alleged crimes that while burning the South Ossetian

<sup>303</sup> Annex E.2.6: IIFMCG, Volume II, GEO-OTP-0002-7801 at 819-8198; Annex E.2.8: OSCE HRAM Report, GEO-OTP-0003-1921 at 1946-1949; Annex E.4.10 HRW, Up in Flames, GEO-OTP-0001-0336 at 047-0472.

<sup>304</sup> 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.

<sup>305</sup> 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 GEO-0006-1341.

<sup>306</sup> Annex E.2.6: IIFMCG, Volume II, GEO-OTP-0002-7801 at 8173.

forces told present ethnic Georgians can get warm near the fire from your houses .

226 It is reported in some villages in Patar, Luabavi valley belonging to ethnic Ossetians where they were not attacked.<sup>308</sup> In other cases, it is alleged that Ossetians guided South Ossetian forces through the villages by houses belonging to ethnic Georgian

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

228 The victims reported included women and elderly who were unable to leave their homes. The described that on 12 August 2008 South Ossetian forces entered her house, dragged husband and bind her to the yard after having beaten them mercilessly, shot them dead and seized their belongings, directed automatic weapons against her house and set the

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

<sup>308</sup> Annex E.4.10: HRW, Up in Flames, GEO-OTP-0001-0336 at 0479.

<sup>309</sup> 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, GEO-OTP-0006-1478; and Annex 72, GEO-OTP-0006-1483.

<sup>310</sup> Annex E.4.10: HRW, Up in Flames, GEO-OTP-0001-0336 at 0481; Annex E.2.3: OSCEHRAM Report, GEO-OTP-0003-1921 at 1957.

<sup>311</sup> Annex E.5.3: Article 15 communication, GEO-OTP-0004-1216 (GEO original), GEO-OTP-0004-1232 (Engl. Translation) at 1235

house on fire.<sup>312</sup> Another witness reported the killing of a 70-year-old man by South Ossetian forces after which they set his home on fire.<sup>313</sup>

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

230 The OSCE/HRAM report<sup>314</sup> indicates that in the period from August to October 2008, primarily in South Ossetia, there were at least 345 arbitrary detentions of civilians, of whom many were held in detention facilities under poor conditions. These detention facilities were under the control of South Ossetian forces in various parts of South Ossetia, including the villages of Tamarasheni, Java, Kekhvi and the city of Tskhinvali. Civilians were detained for up to 16 days after which they were released through the ICRC. The factual information on the circumstances of arrests and detentions however is limited to determine whether there was a causal link between the arbitrary detentions and the attack against the civilian population.

231 The Prosecution also gathered information on other cases of rape related to the armed conflict in Georgia that the Government of Georgia reported.<sup>315</sup>

<sup>312</sup> Annex E.4.10 HRW, Up in Flames, GEOTTP-0001-0336 at 0495-0496.

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

<sup>314</sup> See paragraphs 137-141.

<sup>315</sup> Annex E.2.3: OSCE/HRAM Report, GEOTTP-0003-1921 at 1957-1959.

<sup>316</sup> Annex E.2.3: OSCE/HRAM Report, GEOTTP-0003-1921 at 1957.

Prosecution is mindful that the limited figures could be the result of insecurity and existing social stigmas and a lack of connection to Georgia, which deferred victims from reported alleged violence.<sup>317</sup> The information available on these alleged attacks is however limited, in particular with respect to the attribution, which is insufficient to determine the extent to which the reported cases were committed as part of the attack against the civilian population and whether it was sporadic in nature.

Pursuant to or in furtherance of a State or organisational policy

232 Pursuant to article 7(2)(a) of the Statute, the commission of multiple acts under article 7(1) must be committed 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 or organisation that encourages the attack against a civilian population must do so in furtherance of a policy, which has a civilian population as its primary target. The paragraph states a policy, which has a civilian population as its primary target, of the attack would be implemented by official action. Such a policy may, in exceptional circumstances, be a deliberate failure to take action, which is consciously encouraging such attack. The existence of such a policy

<sup>317</sup> 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 B: OSCE-HRAM Report, GE0 OTP-0003-1921 at 1939.

<sup>318</sup> Elements of Crimes, Article 7, Introduction, para. 3. See also OTP-0001-01/11-656-Red, para. 214.



inferred solely from the nature of governmental or organisational action.<sup>319</sup>

234 The Trial Chambers have found that the requirement of organisational policy under article 7 implies that the regular pattern of arm attack which is planned, directed or controlled as opposed to spontaneous and isolated acts is the <sup>320</sup> criterion. However, the policy need not be explicitly defined or adopted by the State or organisation. The Trial Chamber II has expressed the view that the existence of organisational policy may, in most cases, be inferred from the repetition of acts performed according to a common logic, the existence of preparatory activities or collective acts which are orchestrated or coordinated by the State or organisation.<sup>321</sup>

235 With respect to the term 'organisation', the Trial Chamber II has indicated that a group which is not linked to a State may, for the purposes of the Statute, elaborate and implement a policy to commit an attack against a civilian population. The Trial Chambers have indicated that the mere existence of a group which qualifies as an organisation under the Statute must be determined on a case-by-case basis. In this regard, the Trial Chamber II has identified

<sup>319</sup> Elements of Crimes, Article 7(3), footnote 6.

<sup>320</sup> 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.

<sup>321</sup> 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.

<sup>322</sup> 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).

<sup>323</sup> 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 depose Gbagbo in power and that the violence was a planned and coordinated effort of Gbagbo and his inner circle).

<sup>324</sup> ICC-01/09-01/11-373, para. 184.

several factors that may be taken into account in determining whether a group qualifies as an organized armed group under article 7 of the Statute, including: a) whether the group is under a responsible command; b) whether the group possesses an established hierarchy; c) whether the group possesses resources, means, and sufficient capacity (including coordinating and carrying out a widespread or systematic attack against a civilian population); d) whether the group exercises control over part of the territory of the State; e) whether the group directs activities against the civilian population as a primary purpose; and f) whether the group articulates, explicitly or otherwise, an intent to commit or attack a civilian population; and g) whether the group fulfils some or all of the above criteria. However, these factors are not a rigid legal definition, and they need to be exhaustively applied. A 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 capacity to carry out the objective of attacking a civilian population.

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

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

<sup>326</sup> 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 to inform 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).

<sup>327</sup> ICC-01/04-01/07-3436, paras. 1119-1120; ICC-02/11-14-Corr, para. 46, recalling ICC-01/09-19-Corr, paras. 90-93; 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.

<sup>328</sup> 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.

<sup>329</sup> ICC-01/04-01/07-3436, paras. 1119-1121.

for an organization for the purpose of maintaining the existence of a responsible command, hierarchical structure, group's capability to coordinate and carry out a widespread 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 Police, regular militias, and volunteers, all placed under the command 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 a substantial parts of Znamensk district, with the exception of two Georgian municipalities (Avnevi and Nuli) forming part of Tighva municipality and parts of Tskhinvali district, except for the areas of North and North Tskhinvali (Kurta and Eredvi municipalities) and the western Akhalkalaki municipality.

238 The attacks on the civilian population in South Ossetia were not spontaneous acts of violence, but were committed in accordance with the policy of the South Ossetian leadership. Their purpose was the expulsion of ethnic Georgians from South Ossetia and the furtherance of overall objectives remaining with

<sup>330</sup> Also referred to as Kornisi district.

<sup>331</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GE0TP-0006-0003 at 00360037.

Georgia and secure full independence. This campaign was primarily directed against Georgian villages Tbulis, Kurta, Eredvi and Tighva municipalities

239 The South Ossetian leadership acknowledged some policy of expulsion in the months of August 2008, South Ossetia President Eduard Kokoity publicly stated Georgian civilians will not be allowed to go back to because the South Ossetia authorities were in the process returning South Ossetian refugees to<sup>332</sup> Asked about the situation in the Georgian enclaves in South Ossetia, he said: Nothing special. We have in fact flattened every South Ossetia official, the chairman of Parliament Znaur Gasiev, reportedly stated on 22 August 2008: start again. We did a nasty thing, I know. But Georgian return here anymore because we burnt all their houses in the enclave was no other way to stop this war and cut th

240 The periodic publication also a South Ossetian intelligence officer said: We burnt these houses. We want to be sure that they [ethnic Georgians] can't come back, b

<sup>332</sup> Annex E.8.22: Korrespondent.net, "Kokoity: Georgians face no threat of discrimination in South Ossetia" [in Russian], 23 August 2008, GEO-OTP-0003-1728 at 1728 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015)

<sup>333</sup> E.7.8: International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Submissions made, GEO-OTP-0005-0331 (English translation GEO-OTP-0005-0330).

<sup>334</sup> Annex E.8.3: Komsomolskaja Pravda, "They have refused South Ossetia. What do they do next?" [in Russian], 22 August 2008, GEO-OTP-0003-1384 at 1387 (for English translation, see E.9.3: Solemn Declaration II, 13 November 2015)

come back, this will be a Georgian gain and this should happen.<sup>335</sup>

241 The supporting material further indicates that the policy of Georgian residents from South Ossetia was passed down through the 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 property that remained in Kekhvi and Eredvi.<sup>336</sup> On 13 August 2008, Kvezerov stated that ethnic Georgian villages of Dischid and Eredvi and Kakhvi were destroyed. On 19 September 2008, Serzh Bestaev, member of the Civil Detachment of Mugu, acknowledged that there is great grief in Ossetia and that Avnevi and others are razed.<sup>337</sup> At Ocikhen and others are ECHR testified that during his detention by South Ossetian forces in August 2008 at the administrative boarder of Tsamtskhalo and Tamarasheni, a member of South Ossetian forces told him that P. Kokoity said order to physically devastate<sup>339</sup> all Georgian

242 With respect to the irregular militias, the local heads of police stations appear to have received orders and served as a channel

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

<sup>336</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 80, GEO-OTP-0006-0388 at 0388.

<sup>337</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex 63, GEO-OTP-0006-1421 at 1421.

<sup>338</sup> 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 56, Intercepted communication dated 19 September 2008, GEO-OTP-0006-1386.

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

communication between commanders of irregular military units of the South Ossetian military<sup>340</sup> command.

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 allgedly the South Ossetians had said they say would exterminate the whole Georgian ethnicity and everybody<sup>341</sup>. Al recorded that the South Ossetian forces should drive out ethnic Georgians: Get out! We don't want<sup>342</sup> any Georgians.

244 By contrast, the information available 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 be committed either by those members of the Russian armed forces who were involved in the commission of the crimes, or in relation to the crimes allegedly committed by South Ossetian forces.

## ii. Widespread or systematic nature of the attack

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<sup>340</sup> Annex E.7.2: The investigative material submitted by the Government of Georgia on 5 November 2014, GEGOTP-0003-0024; for a summary of the material in English see Annex E.7.2.1: Summary of the Office of the Chief Prosecutor of Georgia (OCPG), Supporting materials, 6 December 2014, •.

<sup>341</sup> 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 501 of a Victim Testimonial, GEGOTP-0006-1358 at 1359.

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

245 The reference to a widespread or systematic attack excludes random acts from the concept of crimes against humanity. The attack, and not the alleged individual acts are required to be widespread or systematic. In this regard, the adjective widespread refers to the large scale nature of the attack and 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 scale of the attack and the number of victims. It includes 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 their random occurrence."

<sup>343</sup> 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.

<sup>344</sup> 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.

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

<sup>346</sup> 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.

<sup>347</sup> 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.

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

<sup>349</sup> ICC-02/11-01/11-9-Conf, para. 49.

<sup>350</sup> 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.

"often expressed through patterns of crimes,- in the s  
accidental repetition of similar criminal conduct on a r

248 Although the requirement is phrased in the alternative, based on the available information, there is a real possibility that the attacks were directed against the civilian population in Georgia and systematic.

249 The attacks took place on a large scale and targeted civilian victims. Over the period of South Ossetia, including killings, beatings, forcible displacement, burning of civilian property. The alleged acts of violence resulted in the forcible displacement of 18,400 and 18,500 ethnic Georgian inhabitants of South Ossetia and the buffer zone .

250 National investigators in Georgia estimated that 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 Kakheti and 267 in Gori municipality. According to the Government of Georgia, 13,400 dwellings of the villages of Kurta, Eredvi and other municipalities have been destroyed as a consequence of attacks

<sup>351</sup> 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. 37; ICC-02/05-01/07-1, para. 2; ICC-02/05-01/12-1-Red, para. 19. See also ICC-01/04-02/06-309, para. 24.

<sup>352</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GE-OTP-0006-0003 at 00400042



251 Based on the assessment of UNOSAT HRW satellite imagery that by 22 August 2008 a total of 177 buildings in Tamarasheni were destroyed or severely damaged, 153 Kurta and 115 in the village of<sup>353</sup> Kvemo Achabeti

252 The attack was conducted so a main target was directed against the great majority of ethnic Georgian in South Ossetia in addition to Georgian villages in the municipalities of Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskheneti and Kurta, Kvemo Achabeti, Tamarasheni, Dzaridza, Kurta municipality, Avnevi and Nuli in Highva municipality and the villages of Dvar, Karaleti, Megvrekisi, Tkviavi and Zemo Nikozi in the

253 The Prosecution further submits that the alleged acts of violence were not isolated and random acts, but rather a systematic and 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 previous section. The available shows that the acts in South Ossetia were pre-planned, organized and followed a pattern. As set forth above and detailed in annex A, entering the ethnic Georgian villages in South Ossetia, the forces systematically looted and burned civilian homes, and killed, severely beat and otherwise mistreated the remaining civilian population to prevent them from returning to their villages.

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

254 According to the IFFM act of 1991, it appeared to be well organized as evidenced by the trucks to take the looted goods including the removal of reusable items and materials. OSC-ERAM also found that there was a systematic campaign of arson against homes and other civilian buildings, including villas predominantly by Georgian forces. Further indication of planning is provided by the fact that South Ossetian soldiers allegedly had bottles of gasoline ready for entering villages and houses at night. A victim, for example, reported that HRW the 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.

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 5,600 dwellings belonging to ethnic Georgians were destroyed. As further estimated 13,400 to 18,500 Georgians were forcibly displaced from South Ossetia to the buffer zone created alongside the international divide between South Ossetia and the rest of Georgia.

### iii. Nexus between individual acts and the attack

256 To establish individual criminal responsibility, a causal link must be established between the acts and the attack against a civilian.

<sup>354</sup> Annex E.2.3: IFFMCG, Volume II, GEGOTP-0002-7801 at 8168.

<sup>355</sup> Annex E.2.3: OSCE/HRAM Report, GEGOTP-0003-1921 at 1962.

<sup>356</sup> Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0479

<sup>357</sup> Annex E.4.10: HRW, Up in Flames, GEGOTP-0001-0336 at 0474

population in order for crimes against humanity to be committed. This requires consideration of the characteristics, aims, nature and consequences of the acts. An accused is guilty of a crime against humanity if he or she is shown to have acted on a case basis with regard to each particular act. Nonetheless, in the nature of the crime, the subject of such consideration is the overall situation as a whole, without focusing on specific crimes, and what is necessary for the purpose of procedure.

257 The nexus can, in many instances, be deduced in part from the features of the acts committed (in terms of their character, aims, targets, alleged perpetrators, etc.).

258 For the purpose of the present procedure, where an individual is charged with a crime against humanity, the nexus between the individual criminal acts and the attack can be inferred from: (i) the temporal and spatial overlap between the attack and the criminal acts; (ii) the fact that the perpetrator was responsible for both the attack on the civilian population and individual acts against the victims, or is responsible for the organisation or leadership of the attack; (iii) multiple and recurrent acts of the same nature over a protracted period of time, which demonstrate a consistent pattern of conduct, such as the use of firearms to intimidate ethnic Georgians, accompanied by looting and destruction of their property, in order to force them from the area.

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

<sup>359</sup> ICC-01/05-01/08-424, para. 86.

<sup>360</sup> ICC-01/09-19-Corr, para. 135.

<sup>361</sup> ICC-01/09-19-Corr, para. 135.

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

(h) 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(1)(d); 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 and Abkhazeti committed in the context of the forcible displacement of ethnic Georgians from the areas noted above in paragraph 255. These killings allegedly took place during the systematic campaign of ethnic cleansing of Georgians in South Ossetia and the attendant looting and destruction of property.

<sup>363</sup> 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).

property belonging to ethnic Georgians in South Ossetia zone<sup>364</sup>! It is alleged that the murder victims were shot, burned inside their homes.

ii. Deportation or forcible transfer of population

262 The actus reus of the crime of deportation or<sup>365</sup> forcible transfer of population requires that the perpetrator deported or forcibly transferred, without grounds permitted under international law, persons to another State by expulsion or other coercive means. Such person or persons must have lawfully been present in the area from which they were so deported<sup>366</sup> or transferred.

263 As the Elements of Crimes set forth, it is not restricted to physical force but may include threat of force or coercion that caused by fear of violence, duress, detention, oppression or abuse of power persons to leave their homes or by taking advantage of a coercive environment<sup>367</sup>.

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 to place in two main phases: 1) during the active hostilities

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<sup>364</sup> See paragraphs 12628.

<sup>365</sup> 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.

<sup>366</sup> Elements of Crimes, article 7(1)(d).

<sup>367</sup> Elements of Crimes, article 7(1)(d), ft. 12.

12 August 2008 and 2) after the end of active hostilities, from 2008 onwards

265 Coercive acts that the Ossetians used to create an atmosphere of fear, terrorise the local population and ethnic Georgians to leave their homes reportedly included killings, sexual violence, threats of looting and destruction of property. More than 24 villages of Utrta, Tighva and Eredvi municipalities in the buffer zone were entirely or partly destroyed in order to forcibly expel ethnic Georgians from the villages of Avtisi, Berula, Disevi, Eredvi, Beloti, Ksuis and Vanati in Eredvi municipality, Kekhvi, Kemerti, Kvemo Achabeti, Tamar Dzhetsieba and Kuinta municipalities, Avnuli and Tighva municipalities and the villages of Dvani, Ergneti, Karaleti, Megvrekisi, Tkviavi, Zemo buffer zone.

266 Furthermore, OSCE reports from September 2008 of houses in the villages of Tirochisis and Avlekiordi and Ditsi. On 24 November 2008, the village of Disevi which consisted of approximately 300 ethnic Georgians during the conflict, completely abandoned and deserted. The families were reportedly driven out by torching and looting in the

<sup>368</sup> See Annex E.2.3: IFFMCG, Volume II, GEO-OTP-0002-7801 at 819-8197; Annex E.5.1: August Ruins, GEO-OTP-0001-0999 at 1055.

<sup>369</sup> See Annex E.4.10: HRW, Up in Flames, GEO-OTP-0001-0336 at 047-0483; Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 015-0170; Annex E.2.3: OSCE HRAM Report, GEO-OTP-0003-1921 at 196-1966; Annex E.5.1: August Ruins, GEO-OTP-0001-0999 at 1121-1200; Annex E.3.16: GEO-OTP-0005-0937 at 094-0944; GEO-OTP-0005-0953 at 0955, 0956, 0958; GEO-OTP-0005-1017 at 1022. See also Annex A.1, List of Incidents.

<sup>370</sup> Annex E.2.3: OSCE HRAM Report, GEO-OTP-0003-1921 at 1947; Annex E.3.16: OSCE Material, GEO-OTP-0005-0937 at 0940.

<sup>371</sup> Annex E.3.16: OSCE Material, GEO-OTP-0005-0937 at 0942.

<sup>372</sup> Annex E.3.16: GEO-OTP-0005-0937 at 0941.

South Ossetia started around 11 August 2008 and continued through October.<sup>373</sup> The IFFMCG missions conducted March and June 2009 observed that ethnic Georgian villages to the north of Tskhinvali, from Tamarashveni to Kolkheti, were still completely empty.<sup>374</sup>

267 UNOSAT maps of relevant areas also show active fire around Tskhinvali on 12 August 2008, after the ceasefire agreement of 12 August 2008.<sup>375</sup> UNOSAT 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 of ethnic Georgian properties continued after the ceasefire agreement implies an objective of acts of violence was to prevent Georgian troops, but to gain control of the South Ossetian villages and to prevent them from returning.<sup>376</sup> As witnesses testified, South Ossetians told him they would not allow Georgians from the area to leave [the area] and would never be able to come back.<sup>377</sup>

269 By May 2009, UNHCR and the Commissioner for Human Rights of the Council of Europe had reported that the armed conflict caused internal displacement of persons from

<sup>373</sup> Annex E.4.10 HRW, Up in Flames, GO-OTP-0001-0336 at 047-0480.

<sup>374</sup> Annex E.2.3: IFFMCG, Volume II, GEGOTP-0002-7801 at 8192.

<sup>375</sup> Annex E.2.3: UNOSAT, Update 1: Active fire locations for Tskhinvali, South Ossetia, Georgia (7-20 August 2008), dated 20 August 2008, GEGOTP-0008-0614.

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<sup>377</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, Annex Protocol of Victim Testimonial, 21 August 2008, GEGOTP-0006-1365 at 1366.

South Ossetia and another conflict affected Georgia while additional 36,000 fled from South Ossetia to the Russian Federation.<sup>378</sup> 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-Zemchi-Svaneti regions. Georgian authorities continue to restrict their access and 28,800 IDPs who returned to the villages of the former South Ossetia. According to the UNHCR and the Government of Georgia, 30,000 persons remained displaced. Of these 30,000, UNHCR estimated that some 18,500 displaced people from South Ossetia are unlikely to return in the foreseeable future as their village houses had been destroyed or damaged. In addition, the South Ossetian authorities openly opposed their return in public.<sup>381</sup> This number includes 13,400 residents of Kurta, Ereklitso municipal districts 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 majorit

<sup>378</sup> Annex E.2.2: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTP-0010-0055 at 0087; Annex E.2.2: 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, GEOTP-0001-0883 at 0887.

<sup>379</sup> Annex E.2.2: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTP-0010-0055 at 0087; Annex E.3.1: OSCE Material, GEO-OTP-0005-0937; GEOTP-0005-1037; GEOTP-0005-1042; GEOTP-0005-1045; GEOTP-0005-1054; GEOTP-0005-1076.

<sup>380</sup> Annex E.2.2: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTP-0010-0055 at 0087.

<sup>381</sup> Annex E.2.2: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTP-0010-0055 at 0087; Annex E.2.2: 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, GEOTP-0001-0883 at 0887.

<sup>382</sup> 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).

<sup>383</sup> Annex E.2.2: UNHCR, 'Protection of Internally Displaced Persons in Georgia: A Gap Analysis', July 2009, GEOTP-0010-0055 at 0087.

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

<sup>385</sup> Annex E.7.9: Government of Georgia, '10 May 2010 Report', GEOTP-0006-0003 at 0039.



Georgian villages in Tskhinvali which were under the control of the Government of Georgia prior to August 2008, comprise of whom some 13,260 had been internally displaced since September 2008.<sup>382</sup> On December 2014, the Georgian Ministry of Internally Displaced Persons from the Occupied Territories and Refugees reported that around 15,000 persons permanently displaced from South Ossetia as the result of the 2008 armed conflict, including Kurta municipality, 5,242 from Eredvi, Tighva and Tighva municipalities.

270 Since the ethnic Georgian population in the conflict zone is estimated around 20,000 persons, and today, 15,000 persons from Kurta, Eredvi and Tighva municipalities remain permanently displaced, it is submitted that the ethnic Georgian population in the conflict zone has been reduced by at least 25%.

### iii. Persecution

271 In addition to the contextual elements mentioned above, the act of persecution against humanity of persecution is defined by article 7 of the Rome Statute as the intentional deprivation of fundamental rights.

<sup>386</sup> Annex E.23: OCHA, Inter-Agency Humanitarian Assessment Mission to South Ossetia, Mission Report, 1620 September 2008, GEOTP-0001-0846 at 0852.

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

<sup>388</sup> See above paragraph 20 and footnote 6.

<sup>389</sup> The significant decrease of the number of ethnic Georgians in South Ossetia seems to be confirmed by statistics provided on the webpage of the Russian Ministry of Foreign Affairs, the South Ossetian State Department of Statistics. According to these statistics for the year 2012, South Ossetia had a total population of 51,572 out of which 45,950 (89,1%) are ethnic Ossetians and 4,590 (8,9%) ethnic Georgians, Annex E.7.3. Ministry of Foreign Affairs of the Russian Federation, Republic of South Ossetia, 22 May 2014, GEOTP-0008-0684 at 0684 (English translation: Annex E.7.34.1)

contrary to international law by reason of the identity of a particular group or collectivity. Article 7(1)(h) specifies that it must be directed against any identifiable group or collectivity on political, national, ethnic, cultural, religious, gender as defined by international law or other grounds that are universally recognized as grounds under international law, in connection with any act referred to in paragraph 2 or any crime within the jurisdiction of the Court.

272 As previously addressed, there is a reasonable basis to believe that the South Ossetian forces have committed deportation or forcible transfer of population against humanity (under article 7(1)(d)), willful killing, destruction of property and pillage of war victims (pursuant to articles 8(2)(a)(i), 8(2)(b)). These alleged crimes constitute severe deprivations of fundamental rights of the victims contrary to international law, including the right to life and the right to private property. Information available further shows that the 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 South Ossetian forces shouting to the victims to "leave or be exterminated" and set their houses on fire. Forces deliberately killed and injured victims belonging to the Georgian community, threatened

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<sup>390</sup> 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, causing of 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-01/04-02/06, para. 58.

<sup>391</sup> Annex E.5.1: August Ruins, GEOTP-0001-0999 at 1180.

them to leave their homes in South Ossetia and looted their houses and the users' industry acts of resulted in estimated 113 cases of deliberate killings of Georgians and destruction of over 5,000 killings belonging to ethnic Georgians.

## V. Admissibility

274. Article 53(1)(b) 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

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

276. Accordingly, the Prosecution has identified no confidential parts, annexes. Annex A.1 presents an indicative list of crimes within the jurisdiction of the Court allegedly committed in the most serious incidents situated in the available information. Annex B.1 presents a preliminary list of persons

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

that appear to be the most responsible for the most serious crimes, and to provide an indication of their specific role.

277 For the reasons set out above, the Chamber's identification of incidents or groups of persons that are likely to shape the proceedings is preliminary in nature and should be subject to a preliminary admissibility assessment. <sup>393</sup> Should an investigation be authorised, the Prosecution should be permitted to expand or modify its scope with respect to these or other alleged acts, incidents, and/or adopt different legal qualifications, so long as the acts and incidents forwarded for prosecution are sufficiently different from the situation.

### C. Complementarity

278 As the Appeals Chamber has stated, <sup>394</sup> (a) in order to determine whether a case is admissible, the Chamber must first determine whether the State is genuinely investigating or prosecuting the case at the national level (first limb), and if not, whether the State is genuinely unwilling or unable to carry out such investigations or prosecutions (second limb). <sup>395</sup> Inaction by a State renders a case inadmissible before the Court, subject to an assessment under article 17 <sup>396</sup> (a) set out above, this assessment is carried out in accordance with the following criteria:

<sup>393</sup> ICC-01/09-19-Corr, para. 60.

<sup>394</sup> ICC-01/09-19-Corr, paras. 7475; ICC-01/04-01/10-451, paras. 21, 27.

<sup>395</sup> ICC-01/04-01/07-1497, paras. 1 and 789; ICC-01/11-01/11-466-Red, para. 26; ICC-01/11-01/11-239, para. 6; ICC-01/05-01/08962-Corr, paras. 10709.

<sup>396</sup> ICC-01/04-01/07-1497, para. 78.

relation to the potential areas likely to be the focus of the investigation by the Prosecution

## 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 in a case 0740883979.

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 in January 2012; 3) the most recent activities during the period from January 2014 to date.

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

282 The investigation covered the time period from 8 August 2008, the date of Russia's withdrawal from South Ossetia. The crime scene was established to two

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<sup>397</sup> Meeting with Georgian authorities on 23 September 2013 in Tbilisi, Georgia

Eastern section included the Tskhinvali region/South Ossetia and adjacent municipalities Gori and Kareli; and (ii) the Western section that included the Kodori Gorge as well as district bordering Abkhazia.

283. Immediately following the outbreak of hostilities in 12 August 2008, the Georgian government launched preliminary investigations into the alleged crimes against Georgian civilians committed in South Ossetia.

284. The first investigation was opened on 14 August 2008 in relation to crimes under article 407 (grave breaches of international humanitarian law in 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 defined in 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 Division of the OCPG for 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 unlawful.

<sup>398</sup> 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.

<sup>399</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report GEO-OTP-0006-0003 at 0012.

286 The OCPG divided the investigation into five lines of inquiry, called clusters: 1) ethnic cleansing, including the forcible displacement of ethnic Georgians; 2) a unlawful attacks on civilian population by Russian armed forces; 3) attacks on peacekeepers and the attack against the Russian peacekeepers by Georgian armed forces; 4) enforced disappearance and torture incidents committed by Russian and Georgian forces; and 5) non-organized acts of war crimes and allegations to be isolated and sporadic in nature.

287 The line inquiry into alleged crimes of forcible transfer of Georgians from South Ossetia includes incidents of destruction, 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 investigation, the OCPG reported to have interviewed over 7000 witnesses in 30 affected areas, including the Gori and Kakheti districts. Various forensic experts were used to conduct forensic analysis to assess damage to property which resulted in 43 expert

<sup>400</sup> 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 004-0005. (November 2014 Update Report)

<sup>401</sup> Annex E.7.1: November 2014 Update Report, GEOTP-0003-0003 at 0005

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

<sup>403</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, GEOTP-0003-1169 at 116.

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.

covering a number of damaged objects and telephone intercepts, public statements made by Ossetian authorities, media reports, intelligence reports, and satellite imagery collected by the OCPG through consultations with the UN Institute for Training and Research (UNITAR) to identify destroyed property in South Ossetia.<sup>404</sup>

289 The investigative teams also took into consideration monitoring missions from the Council of Europe, UN and as well as international and governmental organizations such as Human Rights Watch, Georgian Civil Society, Russian Memorial and the OCPG received applications from Ossetian claimants submitted to the ECHR through the Georgian State Representative alleging violations of human rights by the Georgian Government. Investigative teams also reviewed the investigation case files.

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

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<sup>404</sup> The Government of Georgia submitted 10 telephone intercepts (with transcripts) between representatives of the North Ossetian peacekeeping battalion and Ossetian 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: 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, the Annex to the 1<sup>st</sup> Memorandum, GEO-OTP-0006-0219 at 0220

<sup>405</sup> Annex E.7.7: December 2011 Update Report, GEO-0003-1836 at 1843-1844, 1874-1875.



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. The Government initiated the process of accessing the satellite imagery from open sources where unavailable through open sources. The Government approached private companies in order to retain relevant satellite imagery.<sup>407</sup> This process also took considerable time and was often conducted by NGOs such as HRW, AI and the Coalition for Georgian NGOs.

292 Second, the Georgian Government attempted to bring victims and witnesses before the ECtHR in order to hear testimonies regarding the alleged human rights violations committed by Georgian nationals. Since only a few cases were successful, the ECtHR requested assistance from the EU Fundamental Rights Agency Incident Prevention and Response Mechanism, where such requests are still pending. The ECtHR approached legal counsel for victims located in the region of South Ossetia to undertake the necessary legal and security arrangements and reimburse the expenses.<sup>408</sup>

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<sup>406</sup> 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 the Georgian investigators, GEO-OTP-0005-0600 through GEO-OTP-0005-0601; Annex E.7.40: Government of Georgia, Annex 18, Google Maps satellite imagery of the Zemo Nikozidash surrounding areas, GEO-OTP-0005-0602 through GEO-OTP-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, GEO-OTP-0005-0604 through GEO-OTP-0005-0605; Annex E.7.42: Government of Georgia, Annex 23, Google Maps satellite imagery of the HQ location of the Georgian peacekeeping forces, GEO-OTP-0005-0637 through GEO-OTP-0005-0638.

<sup>407</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1873.

<sup>408</sup> Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836 at 1873. See Annex E.7.43: 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 the formal interview, GEO-OTP-0005-0728 through GEO-OTP-0005-0729 (English translation: Annex E.7.43.1)

293 The OCPG also sought, without success, information questioning the number of reported judicial witnesses of a Russian nationality through judicial assistance requests for service by authorities.

294 Finally, the OCPG obtained some of the material that the Russian investigation could not access in individual applications for the ECtHR, alleging violations by the Georgian authorities of the rights of the applicant, Shmiganovskaya v. Georgia, before the ECtHR.<sup>411</sup>

295 Although the national investigation by the competent authorities did not have sufficient evidence to identify suspects by 2010, in December 2010 the OCPG informed the Prosecution that it did not have sufficient evidence and corroborations for some fragments of allegations without indicating the process would be finished.

296 The investigation was delayed at the end of 2012 and during the first half of 2013 following the appointment of a new Chief Prosecutor on 25 October 2012 who required restructuring and organizing the work of his office. In a

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<sup>409</sup> 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.

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

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

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

restructuring his office, the new Chief Prosecutor prioritized the investigation of financial crimes allegedly committed by government officials and addressed human rights complaints against the government administration.

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

298. In September 2013, the OCPG informed the Prosecution about the process of verifying allegations received directly 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 with respect to specific cases was to be submitted to the Prosecution in 2013.

299. Between November 2013 and January 2014 the position of Chief Prosecutor changed twice which created a vacuum in the investigation making process and postponed the submission of the report.

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<sup>413</sup> 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.

addition, the three different Chief Prosecutors in the different policies with respect to the cooperation with investigation into August 2008 events.

300 Following the resignation of Chief Prosecutor Archil November 2013, the new Chief Prosecutor, Otar Part office in late November 2013ed two months later

301 On 20 January 2014, the Prime Minister of Georgia a Chief Prosecutor, Giorgi In Batgasashvili. On June 2014, the Prosecution requested the OCPG to inform and to provide the national proceedings in Georgia no later than October by concrete, tangible and verifiable that genuine national investigations or prosecutions have been ongoing and appear to bear the greatest responsibility for the mortality arising from the armed conflict of August 2008. The Prosecutor informed OCPG that short of this information, proceed in accordance with the Prosecutor's statutory obligation application to the IP Chamber of the Court, seeking authority to open an investigation into the situation in Georgia of relevant national proceedings. This process of consultations between the OCPG and the Prosecution submitted an update report on national proceedings 2014 and relevant supporting material on 14 December

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

<sup>415</sup> 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-OTP-0003-0003.

<sup>416</sup> Annex E.7.2: Office of the Chief Prosecutor of Georgia (OCPG), Supporting materials, 6 December 2014, GEGOTP-0003-0024 through GEGOTP-0003-1150 for a summary of the material in English

update provided information on the investigative steps that carried out until November 2014 of identifying and prosecuting alleged perpetrators.

302 However, in its letter of 17 March 2015, the Government of Georgia informed the Prosecution that further progress of related proceedings related to the alleged crimes subject of the report is prevented by a fragile security situation in the occupied areas of Georgia and in the areas adjacent to the occupied areas. Against this background, the Government of Georgia referred to 393 cases of abductions of civilians in the period from 2008 to 2014. Georgia authorities commented on the lack of progress of prosecution of crimes related to the 2008 armed conflict triggered by aggressive and unlawful reactions by the occupying forces and the lack of prompt certain backing from the groups engaged in the violence. In this context, the Government of Georgia stated that the security and safety of witnesses of alleged crimes committed in the 2008 armed conflict is of particular concern, as these witnesses are located close to South Ossetia and are at high risk of being subjected to arbitrary detentions by South Ossetian authorities. According to Georgia authorities, such detentions took place in the Tskhinvali region on 9 December 2008, 14 March 2011, 17 March 2015 and on 19 October 2015. Georgia authorities stated that there is no prospect of further progress of domestic criminal cases related to the 2008 armed conflict. It is apparent that further clarification sought from the Georgian authorities

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see Annex E.7.2.1: Summary of Office of the Chief Prosecutor of Georgia (OCPG), Supporting materials, 6 December 2014, . . .

<sup>417</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, OIG-0003-1169 at 1170.

<sup>418</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, OIG-0003-1169 at 1170.

Prosecution, this suspension of domestic proceedings of forcible transfer and persecution of the ethnic Georgians of South Ossetia in the buffer zone by South Ossetian forces, including acts of killing/murder, pillage and destruction of enemy's property; as well as South Ossetian force against the Georgian peacekeepers.

303 Accordingly, the Prosecution submits that intermittent progress made over a number of years, proceedings have come to a standstill, that national authorities are currently inactive. Moreover, further concrete and progressive 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 by national authorities domestic proceedings falling within the scope of article 17(1) indefinitely suspended. It is noted by the Trial Chamber that there is no prospect of further progress domestically until they disappear. In line with the case law of this Court, the Prosecution submits that admissibility must be determined on the basis as they exist at the time of the determination and conditioning of national proceedings on future and hypothetical factors that are external to the control of competent national authorities is too abstract and remote to constitute a bar to the admissibility of the case.

<sup>419</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, GDP-0003-1169 at 1170.

<sup>420</sup> 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. 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 changes of circumstances would be tantamount to engaging in hypothetical judicial determination, ICC

## 2. National proceedings in the Russian Federation

304 The Russian authorities initiated an investigation related to the armed conflict on 8 August 2008. The investigation falls exclusively under the mandate of the Investigative Committee of the Russian Federation.

(a) National proceedings in relation to the alleged forcible

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 that in the course of the investigation, from 2010-2014, it verified allegations against Russian security services and Georgian NGOs had submitted 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, attempted murder, destruction of property, and pillage.

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02/04-01/05-377, para. 51. In the *Banda & Jerbocase*, Trial Chamber IV also rejected a defence request for a temporary stay of proceedings 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 the accused person's rights were too hypothetical and abstract to warrant the remedy sought, ICJ/02/05-03/09-410, paras. 7, 158.

<sup>421</sup> 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, '«СФЕД» и «СЭ»', *Pravda*, 27 September 2010, GEP-0010-0009 at 0009 (for English translation, see [E.9.3: Solemn Declaration I, 13 November 2015](#)).

<sup>422</sup> Meeting with the Russian authorities on 24 January 2014 in Moscow, Russia.

<sup>423</sup> Meeting with the Russian authorities on 24 January 2014 in Moscow, Russia.

306 The Investigative Committee informed the Prosecution that it found no evidence of the involvement of Russian soldiers in the commission of alleged crimes committed in the context of the 2008 armed conflict in particular. The Investigative Committee stated that the investigation has established that the command and control forces of the Russian Federation had taken exhaustive measures to prevent pillage, violence, indiscriminate use of force and other crimes during the entire period of the Russian military control in South Ossetia during the armed conflict.<sup>424</sup>

307 This conclusion was based on more than 2000 Russian military service records from 50 Russian military units deployed during the 2008 armed conflict, members of South Ossetia forces as well as Georgian civilian witnesses. The Investigative Committee also compared satellite imagery of the territory of South Ossetia from before 7 August 2008 to after 31 August 2008 in order to identify destruction of civilian buildings. Investigators working in the conflict zone documented in detail the destruction of buildings, installations, and infrastructure, and that ethnic Georgian villages were indeed not destroyed as a consequence of shelling or other type of bombardment.<sup>426</sup>

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<sup>424</sup> 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.

<sup>425</sup> 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.

<sup>426</sup> Annex E.7.31: Government of the Russian Federation, Memorandum on materials of criminal case no. 201/3741008, 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 (English translation: Annex E.7.33 GEO-OTP-0008-0575) (€March 2010 Memorandum•)



308As described earlier, these findings that the Russian authorities failed to prevent or punish war crimes were partially confirmed by information that has been deemed credible by the Prosecutor General's Office, which information suggests that Russian soldiers either participated in or were passive in the face of, crimes committed by South Ossetian forces. The verification process by the Russian investigative authorities was reportedly hampered by inability to access Georgian victims' statements. The Russian Investigative Committee has reportedly explored with representatives of Georgian victims the possibility of receiving victims' statements in the territory of third States.

310According to Russian authorities, the Investigative Committee submitted six requests for legal assistance to Georgia's authorities requesting access to 570 individuals who submitted allegations against Russian servicemen as well as access to information regarding all perpetrators and evidence collected by the Georgian investigative authorities.

311The Russian investigative authorities did not address allegations against South Ossetian forces. Russia's recognition of South Ossetia as an independent State in August 2008 and the South Ossetian authorities as the competent authorities to investigate crimes committed by South Ossetian forces in South Ossetia and the Russian authorities, South Ossetian judicial authorities, including law enforcement agencies and prosecutive

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<sup>427</sup> Meetings with Russian authorities on 23 and 24 January 2014 in Moscow, Russia.

<sup>428</sup> Meetings with Russian authorities on 3 February 2011 and 23 January 2014 in Moscow, Russia.

responsible conducting investigations and legation  
committed South Ossetia

312 Accordingly, the Prosecution has determined that, despite  
reported verification efforts, and progressive steps  
been taken to ascertain the criminal responsibility  
involved in the alleged crimes the potential case(s) identified  
in this Application, as described in Annexes A.1

(b) national proceedings initiated against Russian  
peacekeepers

313 The investigation had initially started two lines of inquiry  
part of the national investigation in relation to alleged  
Georgian armed forces. The line of inquiry was opened on  
August 2008 (criminal case no. -04/001/05) in relation to the killing of  
Russian peacekeepers by Georgian armed forces under  
murder pursuant to article 105 of the Criminal Code of  
Russia. The investigation 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 G

<sup>429</sup> Meetings with Russian authorities on 23 January 2014 in Moscow, Russia.

<sup>430</sup> 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 by 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. Annex E.7.37: Article 105 of the Criminal Code of the Russian Federation- English translation, GEOTP-00094948.

<sup>431</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEO-00080485 (English translation: Annex E.7.31 GEO-OTP-00080575).

In addition, on 12 August 2008, Russian authorities further  
case (criminal case no. 2008/13741) on the charge of genocide  
crimes allegedly committed by the Georgian military based on the  
information gathered during initial Soviet investigations.

314 The investigative authorities have collected 400 volumes of  
material in relation to the alleged crimes. Since August 2008, the  
investigative authorities have identified over 100 items as material evidence  
and examined over 100 incident scenes in civilian residences,  
office buildings, factories, communication facilities,  
infrastructure, the positions of the peacekeeping battalions  
in Tskhinvali in South Ossetia, and witnesses who were  
identified as victims of the alleged attacks against  
Russian national and international peacekeepers were interviewed in re-  
lation to the alleged crimes. The investigation further conducted  
forensic examinations of samples, satellite imagery,  
military equipment and medical records.

315 The information available indicates that the Georgian military  
offensive against the Russian peacekeepers has been the  
national investigation and considerable investigative  
work made to collect comprehensive evidence of the  
since August 2008. The investigation will be continued and  
submitted to the Prosecution 28 volumes of material  
peacekeeping incidents. The volumes indicate that the Russian  
investigative authorities have vast amounts of documentary

<sup>432</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEOTP-0008-0485 (English translation: Annex E.7.31-GEOTP-0008-0575).

<sup>433</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEOTP-0008-0485 (English translation: Annex E.7.31-GEOTP-0008-0575).

material, including witness statements, photo and forensic evidence, expert report

316 Based on the gathered evidence, the Investigative Committee is unable to identify potential alleged perpetrators 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 difficulties in their investigation.

317 On 18 October 2012, the Russian Federation informed the Prosecutor that the lack of cooperation of the Government of Georgia and the immunity enjoyed by senior officials of foreign states in Georgia were obstacles to genuine advancements in the investigation. On 18 June 2012, a letter of clarification was sought to ascertain whether national proceedings had been suspended, consisting of State inaction, or if the work of the Prosecutor's Committee had been rendered genuinely ineffective. The Russian authorities specified that refusal of Georgia to provide information on the 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.

<sup>434</sup> Meetings with Russian authorities on 23 January 2014 in Moscow, Russia.

<sup>435</sup> 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.

<sup>436</sup> 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.

318 On 23 January 2014 following the change of government in Georgia, the Russian authorities have informed the Prosecution that that 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 on Russian peacekeepers, (i) eyewitnesses and victims of the attack have been interviewed; (ii) additional expertise in relation to the attack such as forensic analysis has been assigned to the teams. Prosecution has been informed that activities of the Investigation Committee have been extended February 12, 2015.

320 The Prosecution notes that according to the Russian authorities the incident is still the subject of investigation and that the national investigation information available does not indicate that the proceedings are being undertaken for the purpose of shielding the person(s) concerned from criminal responsibility. The Prosecution is inconsistent with an intent to shield the person(s) concerned from justice due to unjustified delay of independence of impartiality that may have made 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

3.2.1 The available information does not indicate any national proceedings in any other States with jurisdiction in relation to crimes that have been committed in the context of the Situation.

3.2.2 In this regard, the Prosecution observes that it considers South Ossetia to be part of the territory of Georgia and not a State within the meaning of article 6. Since article 17 is premised on national investigations and prosecutions by a State which has jurisdiction, the Prosecution does not consider that the South Ossetian authorities would have standing before this Court to lodge an admissibility challenge under article 19. Nonetheless, for the sake of completeness, the Prosecution observes that information available only from proceedings conducted by South Ossetian authorities in relation to the period under consideration concerns 186 individuals for whom 46 suspects received administrative penalties and similar criminal charges the rest were reportedly awaiting trial. Information available indicates that individuals have faced criminal proceedings in South Ossetia which constitute a violation of the Statute within the jurisdiction of the Court.

### 4. Conclusion on complementarity

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<sup>437</sup> Annex E.2.3: OSCE/HRAM Report, GEGOTP-0003-1921 at 1994.

323. In the light of the indefinite suspension of national Georgian, the Prosecution has concluded that a forcible transfer of ethnic Georgians would be currently inadmissible. The 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 constituting State inaction to the attack against R peacekeepers, the competent Russian authorities are progress with their domestic investigations. It does not appear vitiated at this stage by a lack of willingness to do so genuinely. This assessment will be kept under investigation be a continuation to other alleged crimes for which has been unable to arrive at a 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 necessary. Investigation, should an investigation into the situation

324. The Prosecution has communicated its position on admission of the Georgian and Russian authorities with a view to justice caused by the opening of investigations under 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 its admissibility as it proceeds.

## D. Gravity

325 The gravity assessment under article 7(1)(c) is conducted against the backdrop of a potential like case to arise from investigation into the situation.

326 The assessment of gravity involves 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

327 As set out earlier, the Prosecution has attached two confidential annexes presenting an indicative list within the jurisdiction of the Court allegedly committed most serious incidents within the situation based on information (Annex A) a 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, the potential cases arise from an investigation into the situation are of sufficient gravity to justify further action by the Court

329 With respect to crimes allegedly committed within the investigation are likely to be the object of the Prosecution's investigation

<sup>438</sup> ICC-01/09-19-Corr, paras. 50, 58 and 188; ICC-02/11-14, para. 202.

<sup>439</sup> 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.



Annex A. These include the war crimes/ crimes against humanity of killing articles 8(2)(a)(i) as well as crimes against humanity of murder, forcible displacement of civilian population under article 7(1)(d) and 7(1)(f) offences, together with attendant crimes of destruction of and pillaging of property articles 8(2)(b)(i) and 8(2)(b)(ii)(e), (were committed on a large scale as part of a policy to expel ethnic Georgian from the territory in South

330 The crimes committed by South Ossetians caused a high number of direct and indirect victims estimated at 5,000 persons killed over 5,000 dwellings deliberately destroyed somewhere in the range of 18,500, 40,000 ethnic Georgian displaced in South Ossetian buffer zone

331 The information available suggests that the crimes were committed with particular cruelty and in a particularly heinous manner, evidenced by patterns of close range killings and the infliction of serious bodily injuries together with widespread and systematic destruction and looting of ethnic Georgian property. Victims were typically intimidated and forced to watch their homes being razed to the ground.

332 The expulsion campaign had a severe impact on a large number of direct victims whose homes and way of life has been destroyed who suffered injuries and loss of family members. The information available suggests that the victims were

and traumatized by their experience during the conflict of this campaign of violence, the civilian population in South Ossetia substantially.<sup>440</sup> As noted above, Prosecution estimates that the ethnic Georgian population in the conflict zone was reduced by at least 75%.

333 The victims remain displaced due to the destruction of their homes and administrative buildings in South Ossetia. The authorities prevent them from returning to face a fragile security situation.<sup>441</sup>

334 With respect to the potential for the intentional direct attacks against peacekeepers and peacekeeping facilities, both against Georgian peacekeepers by South Ossetian forces and against Russian peacekeepers by Georgian armed forces would meet the gravity threshold. According to Georgian authorities, Georgian peacekeepers who were present in Avnevi were heavily shelled from South Ossetian positions, resulting in the death of two Georgian peacekeepers and the injury of three others and the destruction of vehicles involved in an ambush. According to the Russian authorities 10 Russian peacekeepers were killed and 12 others were wounded as a result of the attack, while the RUPKFB compound was destroyed, including a number of peacekeepers' armoured vehicles.<sup>442</sup>

<sup>440</sup> Annex E.2.3: OSCE HRAM Report, GEOOTP-0003-1921 at 1927

<sup>441</sup> 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 (8.9% of the total population in South Ossetia) of ethnic Georgians in South Ossetia recorded in 2012.

<sup>442</sup> See paragraph 270.

<sup>443</sup> Meeting with the Georgian authorities on 27 March 2013 in Tbilisi, Georgia.

served as a separation line between the Georgian military and Ossetian civilians.

335 The Trial Chamber I has 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 of life depended on the implementation of the mission.<sup>444</sup>

336 Since the JPKF tasks included the implementation of the ceasefire agreement and maintenance of the regime of security in the area, the alleged attack on their personnel and premises had a grave impact both on victims of the attack and their families on the local 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 include political or command positions, their alleged involvement in the violence, ordering, facilitating or otherwise contributing to the commission of alleged crimes.

## VI. Interests of justice

338 Under article 15(1) of the Statute, the jurisdiction and admissibility requirements are positive requirements that must be satisfied. The fact that there is a potential countervailing consideration that may prevent the Prosecution from proceeding is a potential countervailing consideration that may prevent the Prosecution from proceeding. As such, the Prosecutor is not required to proceed.

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<sup>444</sup> ICC-02/05-02/09-243-Red, paras. 334.

an investigation is in the interests of justice, but rather are specific circumstances which provide substantial reasons why it is not in the interests of justice to conduct an investigation at this time.<sup>445</sup>

339 Victims of alleged crimes within the context of the conflict have manifested their interests in seeking justice. 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 South Ossetia or Gori and in Karabakh. These communications were submitted to the 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 416 such applications to the ICC.

341 Georgian human rights organisations representing victims have provided consultative communications to the Prosecution and its reports repeatedly stressed the desire of victims who were affected by the August 2008 conflict to request a justice letter to the

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<sup>445</sup> Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 67-71.

<sup>446</sup> Annex E.5.3 Article 15 communication, dated 21 November 2011, [GOTP-0004-0090](#) at 0090.

<sup>447</sup> See for example Annex E.5.1: August Ruins, [GOTP-0001-0999](#) at 1007.

Prosecutor, dated 24 April 2012, seven Georgian and human rights organisations manifested that they believe victims of the Georgian war deserve to see justice done and that these serious crimes do not go unpunished and that impunity [&] , stressing the undeniable role the ICC is playing in ensuring that justice is delivered to victims .

342. In meetings with the Office of the Public Defender/Ombudsman in Georgia the need for an independent investigation into 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 called for independent investigations into allegations of war crimes and international human rights and human rights violations whose Rapporteurs for Georgia and Russia have expressed support for an international investigation into crimes committed in the context of 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 organisations representing victims knowledgeable of the interests of victims. Prosecution received views that the

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<sup>448</sup> 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).

<sup>449</sup> Meetings at the Office of the Public Defender on 27 March 2013 in Tbilisi, Georgia and on 12 June 2015 at the ICC.

<sup>450</sup> 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.

justice would not be served by an investigation into Georgia.

344. The Prosecution notes the ongoing tense relationship and the Russian Federation, and has considered the raised by the Georgian authorities with regard to national proceedings. However, while a tense security environment might pose a challenge to a Georgia investigation in light of the mandate of the Prosecution, as object and purpose of the Statute, and taking into account the crimes and the interests of victims, based on available information, the Prosecution is not persuaded that the opening of an investigation into the situation would not be in the interests of justice.

## VII. Procedural issues

345. The Prosecution informs the Court, in compliance with rule 50 on 31 October 2015, Prosecution provided notice to victims or their legal representatives in order to request a hearing and informed them that pursuant to rule 50(1) of the Regulations of the Court, they have 30 days to present objections to the Chamber.

346. The Prosecution will publish a notice pursuant to rule 50(1) in both Georgian and Russian languages on ICC website, and sent to ICC's contact database of about 4,000 worldwide, including about 70 Georgian and Russian media outlets, equally divided between them. These include national television and radio stations, news agencies, news sites, online

which it is anticipated will make prominent reference  
publish in its entirety by 14 October editions. Additionally  
notice will be sent to about 50 individual recipients (Georgian  
Russian civil society actors, NGOs and senders of at  
15 communications) together with a 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 regarding the  
victims' representations pursuant to article 15(3) of  
the Statute be applied in Georgia to ensure that  
proceedings are carried out in an expeditious manner  
for victims who inter-acted with intermediaries assisting the victims  
in their activities of the Court then order that the victims  
representations received by the Court in relation to  
Request for authorisation of an investigation were  
forthwith to the Victims Participation and Reparation Section (VPRS)  
the Registry and (ii) the VPRS provide a single, consolidated  
report on the collective and individual representations  
submitted to the Chamber<sup>452</sup> in due time.

348. The Prosecution also informs that it will provide the  
foreseeable article 18(1) of the Statute upon a decision of the  
Chamber to authorise an investigation into the situation in Georgia.

<sup>451</sup> Full lists of recipients and samples of media coverage are provided in Annex H.2.

<sup>452</sup> 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, 02/06,  
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.

in article 18(1), such notification can only be made after  
determination of the Chamber on Appeal by the Prosecutors

#### VIII. Relief requested

349 For the reasons set out above and on the basis of  
presented and the supporting material, the Prosecutors  
request authorisation of the Pre-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  
humanity allegedly committed in and around South Oss

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Fatou Bensouda, Prosecutor

Dated 17<sup>th</sup> November 2015

At The Hague, The Netherlands