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Pénale  
Internationale**



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## PRE-TRIAL CHAMBER I

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

## SITUATION IN GEORGIA

**Public Document with Confidential, *EX PARTE*, Annexes A, B, C, D.2, E.3, E.7, E.9, F, H and Public Annexes 1, D.1, E.1, E.2, E.4, E.5, E.6, E.8, G, I, J**

**Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr**

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## I. Introduction

1. The Prosecutor hereby requests authorisation from the Pre-Trial Chamber I, pursuant to article 15(3) of the Rome Statute, to proceed with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia.
  
2. The Prosecution has been conducting a preliminary examination into the Situation in Georgia since August 2008, in the course of which it has gathered information on alleged crimes attributed to the three parties involved in the armed conflict — the Georgian armed forces, the South Ossetian forces, and the Russian armed forces. As a result 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 triggering its request to the Pre-Trial Chamber I to authorise its investigation:
  - Killings, forcible displacements and persecution of ethnic Georgian civilians, and destruction and pillaging of their property, by South Ossetian forces (with possible participation by Russian forces); and
  
  - Intentionally directing attacks against Georgian peacekeepers by South Ossetian forces; and against Russian peacekeepers by Georgian forces.

3. Information on other crimes allegedly committed by persons associated with the parties to the conflict is also set out in this Application, including on indiscriminate and disproportionate attacks against civilian targets by both Georgian and Russian armed forces. Given the inherent difficulties with determining issues related to the conduct of hostilities in the absence of an investigation, the limited information available has not yet enabled the Prosecution to reach a determination on the requisite standard as to whether war crimes within the jurisdiction of the Court may have been committed. Nonetheless, if the Pre-Trial Chamber authorises an investigation into the Situation, these allegations can be investigated further.
4. Likewise, the Prosecution has gathered information on a limited number of reports of sexual and gender-based violence including rape, although at this stage no clear information has emerged on the alleged perpetrators or the link between these crimes and the armed conflict or 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 this Application its admissibility analysis in relation to the identified 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 this situation.
6. Until recently, it appeared that progress was being made. However, in 2015, national proceedings in Georgia have stalled, with the

Government confirming to the Prosecution that domestic proceedings for the alleged displacement of ethnic Georgians from South Ossetia have been indefinitely suspended. The same is true for its domestic proceedings into allegations of intentional directing attacks against Georgian peacekeepers. On the other hand, in relation to the attack against Russian peacekeepers, Russian domestic investigations appear to be progressing—a matter which will be kept under review should an investigation be authorised.

7. As set out further in this Application, ongoing tensions and sporadic armed clashes between the Georgian army and separatist forces of South Ossetia, a semi-autonomous region within Georgia governed by a breakaway South Ossetian *de facto* administration escalated during 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 Georgian military launched an offensive to retake control of South Ossetia. The armed forces of the Russian Federation intervened on the side of South Ossetia, taking control on 10 August 2008 of localities in South Ossetia and extending control thereafter over a 20 km “buffer zone” established within parts of Georgian territory beyond the boundary of the South Ossetian administrative zone. Although a cease-fire agreement was brokered on 12 August 2008, crimes continued to be committed. In accordance with a subsequent agreement concluded on 8 September 2008, Russian troops withdrew behind the administrative boundary line of South Ossetia by 10 October 2008 at the latest.

8. The Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), established by the Council of the European Union, reported that about 850 persons died as a result of the armed conflict while more than 100,000 civilians fled their homes. The Government of Georgia claimed that 412 persons lost their lives, out of which 228 were civilians, 170 military and 14 policemen, while 1747 persons were wounded, and 10 military and 14 policemen were reported missing. The Russian Federation provided information stipulating that 162 ethnic Ossetian civilians had died and 255 were injured, and that 48 Russian servicemen were killed and a further 162 were injured. The South Ossetian *de facto* authorities reported a total of 365 deaths of both civilians and members of South Ossetian forces.
  
9. The Prosecution has gathered information on alleged crimes attributed to all three parties to the conflict: the Georgian armed forces, the Russian armed forces and South Ossetian forces. The crimes are alleged to have taken place in South Ossetia and areas within the “buffer zone” at least in the period from 7 August until 10 October 2008. The Prosecution requests authorisation to investigate the situation from 1 July 2008 so that it may be in a position to also investigate precursor events that immediately preceded the formal commencement of hostilities and which led to the escalation of violence. This will enable it to determine, in the context of any authorised investigation, whether a sufficient nexus exists between such acts and the required contextual elements for war crimes or crimes against humanity. The end date specified for any authorised investigation is 10 October 2008, the date by which, at the latest,



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

10. In relation to the crimes which are the focus of this Application, the information available to the Prosecution indicates that between 51 to 113 ethnic Georgian civilians were killed in the context of a forcible displacement campaign conducted by South Ossetian forces. A further estimated 13,400 to 18,500 ethnic Georgians were forcibly displaced from South Ossetia and "buffer zone" in areas previously under Georgian administered control, while over 5,000 dwellings belonging to ethnic Georgians were reportedly destroyed. There is a reasonable basis to believe that the war crimes of wilful killing, pillage and destruction of enemy's property, as well as crimes against humanity consisting of acts of murder, forcible transfer of population and persecution were committed against the ethnic Georgian population of South Ossetia and the "buffer zone" by South Ossetian forces. There is conflicting information on the involvement by the Russian armed forces in these crimes, with credible reports indicating that at least some members of the Russian armed forces participated, while in others instances they stood by passively, while in other incidents they intervened to prevent such crimes.

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

under heavy shelling from South Ossetian positions, resulting in two deaths and five injuries and the subsequent withdrawal of the Georgian contingent from the JPKF HQ. During the night from 7 to 8 August 2008 the Georgian armed forces conducted a military operation against JPKF HQ and the base of the Russian Peacekeeping Forces Battalion (RUPKFB) claiming that it had lost its protected status. According to the Russian authorities, 10 peacekeepers belonging to the Russian peacekeeping contingent were killed and a further 30 were wounded as a result. There are conflicting allegations from the parties to the conflict that the Georgian and/or Russian peacekeepers had lost their entitlement to the protection given to civilians and civilian objects at the moment of each respective attack. However, bearing in mind the low threshold applicable at this stage of the procedure, and the presumption of civilian character that governs the application of the law in case of doubt, the Prosecution has concluded that there is a reasonable basis, at this stage, to believe that the war crime of intentionally directing an attack against personnel and objects involved in a peacekeeping mission has been committed with respect to the intentional directing of attacks by South Ossetian forces against Georgian peacekeepers as well as the intentional directing of attacks by the Georgian armed forces against Russian peacekeepers.

12. The Prosecution recalls that crimes identified at the article 15 stage as meeting the reasonable basis standard should be considered as examples of relevant criminality within the situation, in the light of the threshold requirement of determining whether one or more crimes within the jurisdiction of the Court has been committed.<sup>1</sup> Once that threshold is met,

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

the Chamber should authorise an investigation into the situation as a whole and not just the particular acts or incidents brought forward to substantiate that threshold.<sup>2</sup> Accordingly, should an investigation be authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.<sup>3</sup> In this vein, the Prosecution would also be able to investigate allegations relating to indiscriminate and disproportionate attacks against civilians and sexual and gender-based crimes.

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

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

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

<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. 74-75; 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 alleged crimes occurring in the context of the August 2008 armed conflict had been indefinitely suspended. With no foreseeable resumption apparent, and no other investigations in relation to the relevant conduct underway in other State, the Prosecution has assessed that the potential case relating to the forcible transfer of ethnic Georgians as identified in this Application would be admissible, due to State inaction. This potential case would also meet the gravity threshold in light of the nature, scale, manner of commission and impact of the crimes.

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

16. Despite the political tensions that continue to strain relations between Russia and Georgia and the heightened security environment, there are no substantial reasons to believe that the opening of an investigation would not serve the interests of justice, taking into

account the gravity of the crimes and the interests of victims. Indeed, victims continue to call for justice in relation to these events.

## **I. Procedural history**

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

18. On 8 October 2015, the Presidency of the Court assigned the Situation in Georgia to Pre-Trial Chamber I.

19. On 8 October 2015, the Prosecutor submitted a request for extension of the applicable page limit under regulation 38 of the Regulations of the Court. The Pre-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. During the process of gaining its independence from the Soviet Union between 1989 and 1991, Georgia faced internal division from the self-ruling aspirations of South Ossetia, Abkhazia and Adjara, which had gained autonomous status

while Georgia was part of the Soviet Union.<sup>4</sup> According to the last census in South Ossetia conducted in 1989, the population was composed of 98,527 inhabitants, including 28,544 (30%) ethnic Georgians and 65,270 (66%) ethnic Ossetians.<sup>5</sup> Estimates on the ethnic composition of South Ossetia prior to the conflict suggest that the overall number of inhabitants decreased, but the ratio stayed approximately the same, with 22,000-24,000 ethnic Georgians living in South Ossetia in the time prior to the conflict.<sup>6</sup> While both groups are in the majority Orthodox Christians, Ossetians have their own language and alphabet, differing from the Georgian language spoken in the rest of the country. The geographical area of today's *de facto* territory of South Ossetia corresponds with the historic boundaries of the former South Ossetian Autonomous District and borders North

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<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, GEO-OTP-0002-7757 at 7769-7770 ("Volume I"); Annex E.2.36: Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume II, September 2009, GEO-OTP-0002-7801 at 7813-7814 ("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, GEO-OTP-0001-1242 at 1247 ("The Burden of Recognition"); and Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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 Akhlagori district at the time. Annex E.4.10: HRW, "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia", January 2009, GEO-OTP-0001-0336 at 0357 ("Up in Flames"); E.4.13: International Crisis Group, "Georgia's South Ossetia Conflict: Make Haste Slowly", 7 June 2007, GEO-OTP-0001-1276 at 1282 ("Make Haste Slowly"); Annex E.4.12: International Crisis Group, "Georgia: Avoiding War in South Ossetia", 26 November 2004, GEO-OTP-0008-0615 at 0625-0626 ("Avoiding War in South Ossetia"); Annex E.7.9: Government of Georgia, Response of the Republic of Georgia to Preliminary Questions from the Office of the Prosecutor of the International Criminal Court, 10 May 2010, 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 Nine-Point 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.<sup>7</sup> It covers the northern part of Georgia's Shida Kartli region and small parts of the neighbouring regions of Racha-Lechkhumi and Kvemo Svaneti, Imereti and Mtskheta-Mtianeti.<sup>8</sup>

21. Clashes broke out between Ossetians and Georgians at the end of 1989 in Tskhinvali, capital of South Ossetia following a march on the city organised by Georgian nationalists purportedly to protect the Georgian population. In September 1990, South Ossetia declared its sovereignty as a Soviet Democratic Republic within the USSR, which 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 June 1992.<sup>9</sup> Rising tensions and further clashes between Ossetians and Georgians escalated into a non-international armed conflict between 1990 and 1992.<sup>10</sup> During this conflict, the government in Georgia was ousted in January 1992 by a *coup d'état* and South Ossetia declared its independence from Georgia on 29 May 1992.<sup>11</sup>

<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 Akhagori district (now Akhagori municipality) in the Region of Mtskheta-Mtianeti and the Gori district (now Gori municipality and the City of Gori) and Kareli district (now Kareli municipality) both in the Region of Shida Kartli. The communities in South Ossetia under Georgian control at the time and relevant for this Application - Eredvi and Kurta (located in the former Gori district) and Tighva (or Tighvi, located in the former Kareli district) – also received the status of municipalities. The parts of South Ossetia that were not under Georgia's jurisdiction at the time were not considered by the reform. The districts relevant for this Application, i.e. the districts of Tskhinvali, Java and Znauri (also referred to as Kornisi), thus retained their status of "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, 0737-0738.

<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 7881-7900.

<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 1992 with the signing in Sochi of the Agreement on Principles of Settlement of the Georgian-Ossetian Conflict by the Presidents of Georgia and the Russian Federation.<sup>12</sup> The Sochi agreement established a civilian commission, a Joint Control Commission (JCC) and a Joint Peacekeeping Force (JPKF) for South Ossetia. The JPKF was to be commanded by a Russian officer and consisted of three battalions of 500 servicemen each provided by Russia, Georgia and North Ossetia. The Conference for Security and Cooperation in Europe (CSCE)<sup>13</sup> established an observation mission in November 1992 in the context of the South Ossetian conflict, mandated to assist conflicting parties in reaching a peaceful political settlement.<sup>14</sup>

23. At the time, South Ossetia became a semi-autonomous area governed by a South Ossetian *de facto* administration, which was not recognized by the Georgian Government. The post of “President” was created in 1996 and first held by Lyudvig Chibirov, who was regarded as conciliatory and considered a re-integration of South Ossetia into Georgia.<sup>15</sup> In the subsequent 2001 elections in South Ossetia, Eduard Kokoity was elected “President” of South Ossetia and instead

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

<sup>13</sup> In 1993, the CSCE was renamed the Organization for Security and Cooperation in Europe (OSCE), an inter-governmental organisation that encompasses politico-military, 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, GEO-OTP-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 Chairman-in-Office for Georgia”, 6 November 1992, GEO-OTP-0008-0673.

<sup>15</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 4426; Annex E.4.12: ICG, “Avoiding War in South Ossetia”, GEO-OTP-0008-0615 at 0627-0628.



advocated for the integration of South Ossetia into the Russian Federation.<sup>16</sup>

24. From the late 1990s onwards, the Russian Federation conferred citizenship and passports to the vast majority of residents of South Ossetia, thereby also granting them pension, medical and social benefits.<sup>17</sup> This policy ultimately resulted in a visa-free regime for South Ossetian residents following the enforcement of a visa regime between Russia and Georgia in 2000.<sup>18</sup> In 2006, the South Ossetia *de facto* authorities further consolidated this process by adopting their own 'Citizens Act' under which all South Ossetians were entitled to acquire Russian citizenship in addition to their domestic South Ossetian citizenship.<sup>19</sup> Many Russian passport-holders in South Ossetia are understood to have taken part in the 2004 and 2008 Russian Presidential elections as well as in the 2007 Russian Duma election.<sup>20</sup>

25. In 2003, following contested elections in Georgia, the sitting Government of Georgia was ousted in the "Rose Revolution", led by opposition leader Mikheil Saakashvili who won subsequent presidential elections in 2004. President Saakashvili made the

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<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, "Russia-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 and successfully re-established Georgian control over Adjara, another autonomous region.<sup>21</sup> Following armed clashes between Georgian armed forces and South Ossetian forces in August 2004, the Government of Georgia sought to introduce a new peace plan for South Ossetia that offered substantial autonomy.<sup>22</sup> However, South Ossetia's *de facto* President Kokoity rejected the plan in October 2005.<sup>23</sup>

26. The first half of 2006 was marked by a number of steps by *de facto* President Kokoity with a view to advancing the integration of South Ossetia into the Russian Federation, including announcing an application with the Russian Constitutional Court<sup>24</sup> and signing a cooperation agreement with Russia.<sup>25</sup> In parallel, a number of statements by Russian officials suggested a possible unification of South and North Ossetia with the support of Russia.<sup>26</sup>

<sup>21</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801, at 7820-7821.

<sup>22</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 7914-7918.

<sup>23</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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 that 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 *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" [" : - "], 2 June 2006, GEO-OTP-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 aide, 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 re-election of Kokoity for a second term, a referendum was held in areas controlled by the *de facto* authorities in South Ossetia, in which nearly 100% of the voters reportedly supported full “independence” of South Ossetia. In parallel, alternative presidential elections and a referendum were organised in the Georgian-controlled areas of South Ossetia by the newly established political movement “Salvation Union of Ossetia”.<sup>27</sup> Dimitri Sanakoev, an ethnic Ossetian and former *de facto* prime-minister under the pre-Kokoity South Ossetian administration was elected with a majority of 94% of the ballots. In the referendum, 96% of the voters reportedly voted in support of a federal arrangement for South Ossetia and thus Georgia’s territorial integrity.<sup>28</sup> On 10 May 2007, Saakashvili signed a decree creating a temporary territorial-administration within South Ossetia and appointed Sanakoev as Head of the Administration. The Georgian Parliament subsequently approved the decree and provided funds to the Administration from Georgia’s state budget.<sup>29</sup> The area controlled by the Sanakoev Administration included predominantly ethnic Georgian villages in Kurta, Eredvi and Tighva municipalities.<sup>30</sup>

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

<sup>28</sup> Annex E.2.36: IFFMCG, 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-OTP-0008-1040 at 1304; Annex E.8.36: Civil Georgia, “Sanakoev appointed as Head of S. Ossetia Administration”, 10 May 2007, GEO-OTP-0008-0739; E.4.13: ICG, Make Haste Slowly, GEO-OTP-0001-1276 at 1283.

<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 Tamarasheni and the surrounding villages of Kemerti, Dzartsemi and Kheti); Patara Liakhvi valley in Eredvi municipality (northeast of Tskhinvali and including the villages Eredvi, Vanati, Beloti, Satskheneti, Atriskhevi, Argvitsi, Berula, and Disevi as well as the surrounding village of Ksuisi); and Froni valley in Tighva municipality (west of Tskhinvali and including Avnevi, Nuli, and Tighva). See Annex E.7.9: Government of Georgia, 10 May 2010 Report, “Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)”, GEO-OTP-0006-0975 at 0982;

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

29. In the months leading up to the August 2008 armed conflict, both the Georgian and the South Ossetian sides built up forces in their respective areas of control, while armed clashes between them increased. The security situation further deteriorated in early July 2008 when a series of explosions occurred targeting, among others, both local South Ossetian and Georgian military and political leaders in South Ossetia.<sup>32</sup> These incidents triggered sporadic artillery attacks on each other's villages and checkpoints. During the night of 7-8 July 2008, four Georgian armed forces servicemen were detained by the South Ossetian *de facto* authorities and released on 8 July. On the same day, four Russian military aircraft entered Georgian airspace around the zone of the Georgian-Ossetian conflict.<sup>33</sup> From 24 to 28 July 2008, several explosions occurred in the southern environs of Tskhinvali and in the Georgian administered village of Avnevi, close to the post of the Georgian JPKF battalion.<sup>34</sup>

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E.4.13: ICG, Make haste slowly, GEO-OTP-0001-1276 at 1307, 1308; see also Annex E.4.10: HRW, Up in Flames, GEO-OTP-0001-0336 at 0357.

<sup>31</sup> Annex E.2.36: IIFMCG, Volume II, GEO-OTP-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, GEO-OTP-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: IIFMCG, Volume II, GEO-OTP-0002-7801 at 8010-8011.

<sup>34</sup> Annex E.2.36: IIFMCG, Volume II, GEO-OTP-0002-7801 at 8012.

30. Starting in early August 2008, the South Ossetian *de facto* authorities began to evacuate parts of the ethnic Ossetian population to North Ossetia.<sup>35</sup>

31. During the afternoon of 6 August 2008, there was exchange of fire along virtually the entire administrative boundary line, with particular hotspots in the Avnevi-Nuli-Khetagurovo area (west of Tskhinvali) and the Dmenisi-Prisi area (east of Tskhinvali).<sup>36</sup> At around 14h00 on 7 August 2008, the Georgian peacekeeping contingent stationed at Avnevi checkpoint came under heavy shelling from South Ossetian positions. Later that day, Georgian representatives left the JPKF HQ in Tskhinvali. At 19h00 (Tbilisi time), Georgian President Mikheil Saakashvili stated in a televised address that he had just ordered Georgian troops to unilaterally suspend military operations. The cease-fire was also observed by South Ossetian forces and held until 22h00 when the firing reportedly resumed.<sup>37</sup>

32. Shortly before midnight, at 23h50 on 7 August 2008, Georgian artillery units reportedly began firing at targets in South Ossetia, including in the city of Tskhinvali, marking the widely acknowledged beginning of the armed conflict.<sup>38</sup> The Georgian armed forces reportedly used heavy weaponry such as 122mm howitzers, 203mm self-propelled artillery system DANA, tank fire and Grad multiple launch rocket systems

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<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, GEO-OTP-0002-7801 at 8014.

<sup>37</sup> Annex E.7.17: Government of Georgia, Witness statement, GEO-OTP-0008-1793 at 1800-1801; Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8014-8015.

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

(Grad MLRS) during this attack.<sup>39</sup> By the afternoon of 8 August 2008, the Georgian forces managed to seize control of a great part of Tskhinvali and several Ossetian villages. Georgian ground forces entering Tskhinvali met with armed confrontation from South Ossetian forces.<sup>40</sup>

33. Russia began its military response on either 7 or 8 August 2008, the exact date being disputed, when its ground forces moved through the Roki tunnel towards Tskhinvali.<sup>41</sup> On 8 August 2008, Russian artillery and air forces attacked Georgian ground forces in Tskhinvali and other places. On the evening of 8 August 2008, Georgian armed forces withdrew from the centre of Tskhinvali, but maintained their positions in the southern parts of the city. The following afternoon, Georgian armed forces attempted to regain control of their positions in Tskhinvali, but were met with resistance and withdrew.<sup>42</sup>

34. On 10 August 2008, the Government of Georgia declared a unilateral ceasefire and its intention to withdraw its forces from South Ossetia. Russian armed forces and South Ossetian forces however continued their military operations. Most of the Georgian armed forces had withdrawn from South Ossetia by 11 August 2008.<sup>43</sup> They were

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

<sup>40</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8021, 8026-8027 and 8059.

<sup>42</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8016.

<sup>43</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8017.

pursued by Russian troops, who crossed the administrative boundary lines of both South Ossetia and Abkhazia to set up military positions in a number of Georgian administered towns, including Gori, Zugdidi, Senaki and Poti.<sup>44</sup> During the final phase of the hostilities, Abkhaz units supported by Russian forces attacked Georgian positions in the upper Kodori Valley and seized territory which had been abandoned by most of the local ethnic Georgian population and the Georgian armed forces.<sup>45</sup>

35. On 12 August 2008, Russian President Dmitry Medvedev and French President Nicolas Sarkozy, the latter acting on behalf of the European Union (EU), agreed in Moscow on a six-point peace plan providing, inter alia, for the cessation of hostilities and the withdrawal of forces to their positions prior to the armed conflict.<sup>46</sup> Later that day, the plan was approved by Georgian President Saakashvili.<sup>47</sup> Presidents Saakashvili and Medvedev signed the agreement on 15 and 16 August

<sup>44</sup> Annex E.2.35: IFFMCG, Volume I, GEO-OTP-0002-7757 at 7778.

<sup>45</sup> Annex E.2.35: IFFMCG, Volume I, GEO-OTP-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 pre-conflict positions; awaiting an international mechanism, Russian peacekeeping forces will undertake additional security measures; and (6) opening of international discussion on the modalities of security and stability in Abkhazia and South Ossetia”, Annex E.4.14: ICG, “Russia vs Georgia: The Fallout”, 22 August 2008, GEO-OTP-0001-0953 at 0962; Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8025.

<sup>47</sup> President Sarkozy signed a French version of the six-point plan and President Medvedev signed a Russian version. President Saakashvili signed a French version of the plan that also bears the signature of President Sarkozy. There is no document that bears both, the signature of President Medvedev and President Saakashvili. There is furthermore a Russian version of the six-point plan that is signed by the *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 III, September 2009, GEO-OTP-0002-8247 at 8811, 8812, 8815, and 8816 (“Volume III”). In a letter signed sent to President Saakashvili on 14 August 2008, President Sarkozy refers to President Saakashvili’s 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: IFFMCG, Volume III, GEO-OTP-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 agreement by President Medvedev, Russian and South Ossetian forces reportedly continued their advances for some time after the 12 August 2008 ceasefire agreement.<sup>49</sup>

36. From 15 August 2008 onwards, Russian troops began to withdraw from undisputed Georgian territory but created a 20km wide “buffer zone” in the area adjoining the administrative boundary line of South Ossetia inside Georgian administered territory.<sup>50</sup> The “buffer zone” was established purportedly with the aim of keeping peace and order. Entry and exit of civilians into the zone was regulated by the use of Russian military checkpoints. Georgian security forces were denied access.<sup>51</sup> While most of the Russian troops withdrew from their positions beyond the administrative boundaries of South Ossetia and Abkhazia after 22 August 2008, some of them remained in the “buffer zone” and only withdrew when an implementation agreement was reached on 8 September 2008 in Moscow. According to the agreement, at least 200 EU observers were to be deployed to the conflict zone while Russian armed forces were supposed to withdraw from areas adjacent to the administrative boundary lines of Abkhazia and South Ossetia by midnight on 10 October 2008.<sup>52</sup> On 9 October 2008, the Russian Foreign Ministry officially confirmed the completion of the withdrawal of the Russian forces from the “zones adjacent to South

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

<sup>49</sup> Annex E.2.36: IIFFMCG, 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 for Conflicts* (Oxford University Press, 2012), GEO-OTP-0003-1496 at 1502.

<sup>52</sup> “Mise en œuvre du Plan du 12 août 2008”, in Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8817-8818.



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

37. On 26 August 2008, upon a motion of the State Duma, Russian President Dimitri Medvedev issued a decree recognising South Ossetia as a sovereign and independent State.<sup>55</sup> To date, South Ossetia has been recognised by four United Nations (UN) Member States, namely: 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 examination since 14 August 2008.<sup>57</sup> The Prosecution has been in regular contact with relevant actors, including the Governments of Georgia and of the Russian Federation, in order to gather and verify information on alleged crimes committed and the existence and genuineness of relevant national proceedings. This has included formal requests for information pursuant to article 15(2) of the Rome Statute, the conduct of missions, routine contacts with focal points, and ongoing interaction with relevant organisations and experts.

39. A total of 14 formal requests for information have been made, six to the Government of Georgia, four to the Government of the Russian

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<sup>53</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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, GEO-OTP-0008-0710.

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

<sup>56</sup> Annex E.4.15: ICG, *The Burden of recognition*, GEO-OTP-0001-1242 at 1254.

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

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

40. In 2011, the Prosecution confirmed that it had determined that there was a reasonable basis to believe crimes within the jurisdiction of the Court had been committed in the context of the Situation in Georgia.<sup>58</sup> Since 2011, the Office of the Prosecutor (OTP or the Office) has also issued public reports on its preliminary examination of the Situation in Georgia as part of its annual update on the status of all of its preliminary examinations.<sup>59</sup>

41. The main focus of the preliminary examination has been on the existence and genuineness of relevant national proceedings. Until recently, and as confirmed by the replies to the Office's ongoing requests for information and the missions to both Georgia and Russia, the competent national authorities of both States were engaged in conducting investigations against those who appeared to be most responsible for the most serious crimes alleged. As set out in more detail below, these investigative measures, despite some attendant challenges and delays, appeared to be progressing. This still appears to be the case with respect to the investigation conducted by the

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

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

competent authorities of the Russian Federation into the alleged attack against Russian peacekeepers.

42. Following an apparent lull in national proceedings in Georgia from the end of 2012 until mid-2014, the Prosecution requested on 30 April 2014 the national authorities to provide information on the concrete and progressive steps that are being taken, or are envisaged to be taken, domestically to ascertain the criminal responsibility of those involved in the alleged crimes. On 10 June 2014, the Prosecution further informed the Georgian authorities that short of this information, it would proceed in accordance with the Prosecutor's statutory obligations to submit an application to the Pre-Trial Chamber of the Court, seeking authorisation to open an investigation into the situation in Georgia due to an absence of relevant national proceedings. In its letter dated 17 March 2015, the Government of Georgia informed the Prosecution that national proceedings in relation to the potential case connected with the displacement of ethnic Georgians from South Ossetia, which had until recently significantly progressed, have been indefinitely suspended. With no foreseeable resumption apparent, and no other investigations in relation to such conduct underway in other States, the Prosecution assessed that the potential case of forcible transfer of ethnic Georgians identified in this Application would be admissible, due to State inaction.<sup>60</sup>

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<sup>60</sup> As set out in paragraphs 304-320, although national proceedings in Russia continue, in particular in relation to the alleged attack against Russian peacekeepers, they are not related at this stage to the potential case of the forcible transfer of ethnic Georgians by South Ossetian forces identified in this application. Such national proceedings would, nonetheless, need to be kept under observation should an investigation establish other crimes committed in the context of the Situation.

43. Following a completion of its assessment on gravity and the interests of justice, the Prosecution has therefore been able to determine at this time, in the light of the factor set out in article 53(1)(a)-(c), that there is a reasonable basis to proceed with an investigation.

### III. Examination of the information available

44. The Prosecution has evaluated sources following a consistent methodology based on criteria such as relevance (usefulness of the information to determine the elements of a possible future case), reliability (trustworthiness of the provider of the information as such), credibility (quality of the information in itself, to be evaluated by criteria of *immediacy*, *internal consistency* and *external verification*), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts). Furthermore, it has endeavoured to corroborate the information provided with information available from open and other reliable sources. A comprehensive evaluation of sources used in this Application is provided in Annex J while full references of the sources used are provided in Annexe E.

45. In examining the information available, the Prosecution has borne in mind the nature of the proceedings under article 15, the low threshold applicable, as well as the object and purpose of the authorisation procedure decision.<sup>61</sup> Moreover, the limited powers of the Prosecution at the preliminary examination stage have constrained the scope of the findings set out in this Application. While the Prosecution has been able to determine whether there is a reasonable basis to believe crimes within the

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<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. 24-25.

jurisdiction of the Court have been committed in relation to certain alleged offences, in particular those relating to the alleged forcible displacement of ethnic Georgians by South Ossetian forces, and the alleged intentional directing of attacks against peacekeepers and peacekeeping facilities, the information available is insufficient to enable a determination in relation to 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 which for sake of completeness are also documented in this Application. This relates in particular to conduct of hostilities allegations relating to the launching of indiscriminate and disproportionate attacks. However, the supporting material provides only limited information in relation to the contextual elements and underlying acts of the alleged crimes, despite efforts undertaken by the Prosecution to obtain additional information. In many instances, the information available is derived solely from one party to the conflict, is contradicted by information provided by the other, and no third party has been able to provide corroboration or to come to a relevant determination on the matter. When assessing the information in its possession, the Prosecutor has also taken into account the possible bias and interests from parties to the conflict, and has therefore primarily focused its examination on allegations corroborated by credible third parties.

47. In this regard, the Prosecution observes that, in the circumstances described above, without additional information or evidence that may be gathered during the course of investigations, it is unable to justify at this stage why it would rely on one version of accounts from one party over

another version from another party, considering each party's interest in promoting a particular narrative.

48. Indeed, other international fact-findings bodies have, for similar reasons, been unable to come to a determination on a number of such issues.<sup>62</sup> Notwithstanding the low threshold that is applicable at this stage, neither the Prosecution nor the Chamber should rely on information that is not credible or reliable. This is clear from the statutory requirement of determining whether the information available establishes a reasonable basis to believe that one or more crimes within the jurisdiction of the Court have been committed. Similarly, the Prosecutor, and the Chamber, must analyse and evaluate the seriousness of the information and the reliability of the source.<sup>63</sup> To hold otherwise would require the Court to take any allegation made by any source at face value.

49. The Prosecution further recalls that, in line with the case law before this Court, the information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'"<sup>64</sup> and need not necessarily "point towards only one conclusion"<sup>65</sup>. Nonetheless, a distinction should be drawn between conflicting information allowing two reasonable interpretations (which is resolved in favour of an investigation) and

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<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 accepted for the purpose of a preliminary examination, but whether the Prosecution may reasonably rely on a given piece of information; see *a contrario* ICC-01/13-34, para.35.

<sup>64</sup> ICC-01/09-19-Corr, paras. 27-35; ICC-02/11-14, para. 24; ICC-01/05-01/09 OA, para. 33 (regarding the interpretation of reasonable believe under article 58), holding 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 fact establish a particular interpretation as being reasonable at all, due to its insufficiency or lack of credibility. Accordingly, where the information available is so scant as to prevent a reasonable interpretation, the Prosecution has refrained from entering a determination in relation to those alleged acts. Since this has no bearing on the overall conclusion that an investigation into the situation is warranted, a determination on these alleged crimes may, in any event, be possible in the context of an investigation where additional information and evidence can be gathered.

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

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

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<sup>66</sup> ICC-01/09-19-Corr, paras. 14-15; ICC-02/11-15, para. 32.

<sup>67</sup> ICC-01/09-19-Corr, paras. 74-75.

legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.<sup>68</sup>

#### IV. Jurisdiction

52. Pursuant to regulation 49 of the Regulations of the Court, the Prosecution provides the following information setting out a reference to the crimes believed to have been committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been committed, and a declaration with reasons that 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 which may be identified during the course of an investigation, the Prosecutor declares that there is a reasonable basis to believe that in the context of situation, including but not limited to the time period between 7 August 2008 to 10 October 2008, at a minimum the following conduct has been committed: wilful killing/murder (article 8(2)(a)(i)/8(2)(c)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii)/8(2)(e)(xii)); pillage (article 8(2)(b)(xvi)/8(2)(e)(v)); and intentionally directing attacks against personnel or objects involved in a peacekeeping mission (article 8(2)(b)(iii)/8(2)(e)(iii)) as war crimes; and murder (article 7(1)(a)), deportation or forcible transfer of

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<sup>68</sup> ICC-01/09-19-Corr, paras. 74-75 ; ICC-01/04-01/10-451, paras. 21, 27.



population (article 7(1)(d)) and persecution against an identifiable group or collectivity on ethnic grounds (article 7(1)(h)) as crimes 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 of 29 May 1992 and its subsequent recognition by four UN Member States in 2008 onwards, South Ossetia is generally not considered an independent State and is not a Member State of the United Nations. A number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South Ossetia as a part of Georgia.<sup>69</sup> For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2008. As such, the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed conflict period, irrespective of the nationality of the accused.

55. The main areas where the crimes allegedly occurred include: (i) ethnic Georgian villages of the Kurta municipality located in the north of Tskhinvali; (ii) ethnic Georgian villages of the Eredvi municipality located in the north-east of Tskhinvali; (iii) ethnic Georgian villages in

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<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*” (sometime 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 June 2014), Annex E.2.25: UNGA Resolution A/RES/69/286 (25 June 2015).

the Tighva municipality located in the south-east of Tskhinvali; (iv) villages of the Gori and municipality located in the “buffer zone”. These areas were under Georgian administrated control prior to the armed conflict. A map locating the main incidents is provided in Annex A.2.

56. In relation to the unlawful attacks against peacekeepers, the Georgian peacekeeping contingent stationed at Avnevi checkpoint came under heavy shelling from South Ossetian positions. The Georgian armed forces at a later date carried out an attack against the Russian peacekeepers and peacekeeping facilities at the JPKF HQ based in Nizhniy Gorodok in the central part of Tskhinvali and the RUPKFB headquarters located in Verkhniy Gorodok in the south-western part of Tskhinvali.

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

57. The above alleged crimes fall within the Court’s jurisdiction *ratione temporis*, since Georgia deposited its instrument of ratification of the Rome Statute on 5 September 2003 and the Statute entered into force for Georgia on 1 December 2003 in accordance with article 126(1) of the Statute. In this regard, the Prosecution has requested authorisation to open the situation from 1 July 2008 so that it may be to investigate also precursor events that immediately preceded the formal commencement of hostilities and which led to the escalation of violence. This will enable it to determine, in the context of any future investigation, whether a sufficient nexus exists between such acts and the required contextual elements for war crimes or crimes against

humanity. The end date requested in this Application is 10 October 2008, the date by which, at the latest, Russian armed forces are reported to have withdrawn behind the administrative boundary line of South Ossetia.

58. The first wave of crimes relating to the forcible displacement of the ethnic Georgian population allegedly occurred during the active phase of hostilities on the territory of South Ossetia and along the administrative boundary line with the rest of Georgia, from 7 until 12 August.<sup>70</sup> A second wave of forcible displacement followed after the end of active hostilities, from 12 August 2008 until 10 October 2008, during the period of Russian occupation of Georgian territory in areas that lay beyond the administrative boundary of South Ossetia.
59. According to the IIFFMCG, although a certain number of both ethnic Georgians and ethnic Ossetians left South Ossetia prior to 7 August 2008 as part of the evacuation initiated by the South Ossetian *de facto* authorities,<sup>71</sup> most of ethnic Georgians remained in their villages in South Ossetia when the armed conflict started.<sup>72</sup>
60. On 8 August 2008, the Russian armed forces started aerial bombardments followed by a joint ground offensive carried out by Russian and South Ossetian forces, forcing Georgian military to withdraw from their positions in South Ossetia. Ethnic Georgians who remained in South Ossetia after the bombings started were forced out from

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<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, GEO-OTP-0003-1921 at 1953 ("OSCE-HRAM Report").

<sup>71</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8189.

<sup>72</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8191.

their homes violently or under a threat of violence during the ground offensive by South Ossetian forces.

61. South Ossetian forces reportedly continued to pillage and burn houses of ethnic Georgians in South Ossetia after the active hostilities ended around 12 August 2008. This campaign of intimidating the population with the aim of forcibly expelling the remaining ethnic Georgians or to prevent them from returning to their homes lasted until 10 October 2008 when the Russian armed forces officially withdrew behind the administrative boundary line between South Ossetia and the rest of Georgia.<sup>73</sup>
62. The alleged attacks against both Georgian and Russian peacekeepers were carried out around 7-8 August 2008.

### 3. *Persons or groups involved*

63. The information available indicates that the alleged crimes related to the forcible transfer of ethnic Georgians were committed by South Ossetian forces acting under the command of *de facto* President Eduard Kokoity.<sup>74</sup> These forces appear to have included military units under the South Ossetian *de facto* Ministry of Defence and Emergencies, as well as the Special Purpose Police Squad (OMON - *Otryad Militsii Osobogo Naznacheniya*), several police companies of the South Ossetian

<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 1021-1022.

<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 30-33 of the article 50, the President is the supreme chief of the army who presides the Security Council and nominates persons at high military command posts. See Annex E.8.40: Constitution of South Ossetia, ( ) , 8 April 2001, GEO-OTP-0010-0016 at 0026-0027 (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 *de facto* Committee for State Security (KGB – *Komitet Gosudarstvennoy Bezopasnosti*).<sup>75</sup>

64. The South Ossetian forces appear to have been supported by irregular militias (*Opolchentsy*<sup>76</sup> in Russian, *Dajgupebebi* in Georgian). Militia groups were given names based on locations of their zone of responsibility. For example, the South Ossetian militia group Kokhatelebi operated in the area of Kokhati while Dmeniselebi were responsible for the village of Dmenisi.<sup>77</sup>
65. As set out below, the information available indicates that at least some members of the Russian armed forces participated in the commission of such crimes, while other members of the Russian armed forces acted passively in the face of such crimes, and still others acted to prevent and punish such crimes.
66. The information available also indicates that the South Ossetian forces were involved in carrying out an attack against Georgian peacekeepers.
67. The information available indicates that the Georgian armed forces consisted of nine light infantry and five tank battalions (including the 1st Infantry Brigade HQ Gori, and the Independent Tank Battalion HQ Gori), up to eight artillery battalions (including Artillery Regiment and

<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. AI 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 and units of the Ministry of Interior.<sup>78</sup> Reportedly, the Central Front Command resorted to the Separate Light Infantry Battalion, the Tank Company of the Separate Armoured Battalion, the Independent Ballistic Tank Battalion, the 1<sup>st</sup> and 2<sup>nd</sup> Artillery Brigade supported by the special forces of the Ministry of Interior to carry out an attack against Russian peacekeepers.<sup>79</sup>

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

<sup>78</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8020.

<sup>79</sup> Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-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 the entire period from at least 7 August through to 10 October 2008 should be regulated by the international law applicable in situations of international armed conflict, as a result of Russia's overall control of South Ossetian forces.
71. In particular, with respect to the time period preceding Russia's direct military intervention in Georgia on 8 August, the information available suggests that the Russian authorities were already involved in organising, planning and coordinating South Ossetian forces with a sufficient level of overall control to render the armed conflict between Georgia and the South Ossetian *de facto* authorities international. This provisional finding should be distinguished from the question of effective control for the purpose of attributing individual criminal liability. For example, the information available does not, at this stage, suggest that there was effective control by the Russian authorities over specific military operations of the South Ossetian forces during this time. These hypotheses will need to be tested in the context of any authorised investigation.
72. In relation to the period after the cessation of hostilities, from 12 August until at least 10 October 2008, Russian armed forces continued to occupy portions of Georgian territory both inside South Ossetia and outside of it in the so-called "buffer zone" 20km beyond the administrative boundary of South Ossetia. In particular, the alleged crimes occurred in areas previously under Georgian administered control. The law applicable to the conduct of the South Ossetian forces as an organised armed group in the context of a military occupation is

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

73. Alternatively, if it cannot be established that the Russian authorities exercised overall control over South Ossetian forces during the relevant time period, it would be more appropriate to adopt a fragmented approach to the classification of the armed conflict. This would suggest that a non-international armed conflict took place between Georgian armed forces and South Ossetian forces in the period from 7 through 12 August 2008, while a separate international armed conflict co-existed between Georgian and Russian armed forces in the period from 8 August through 10 October 2008. In relation to the occupation period after 12 August 2008, the alleged crimes attributed to South Ossetian forces would still be regulated by the law applicable to international armed conflict due to the linkage 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 subject-matter jurisdiction over war crimes during the time period described above, there is a reasonable basis to believe that South Ossetian forces committed war crimes of wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), and pillage (article 8(2)(b)(xvi) or article 8(2)(e)(v)). There



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 in the context of 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.<sup>80</sup> 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.<sup>81</sup>
76. A non-international armed conflict is characterised “by the outbreak of armed hostilities to a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a State territory. The hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups.”<sup>82</sup>
77. In order to distinguish an armed conflict from less serious forms of violence, such as internal disturbances and tensions, riots or acts of

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<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 also Bemba Confirmation of Charges Decision, para. 231; Côte D’Ivoire Article 15 Decision, para. 119.

banditry, the armed confrontation must reach a minimum level of intensity<sup>83</sup> and the parties involved in the conflict must show a minimum degree of organisation.<sup>84</sup>

78. Direct intervention by a State's governmental forces, or indirect intervention by a State operating through proxy non-State forces, may internationalise an otherwise non-international armed conflict as long as sovereign nation States are opposed to each other. Direct and indirect intervention, which does not result in two sovereign States opposing each other, will not render a non-international conflict international.<sup>85</sup>
79. As regards the necessary degree of control of another State over non-State forces necessary to establish whether an armed conflict not of an international character became internationalised, the Trial Chamber in the *Lubanga* case concluded that the "overall control" test is the correct approach: "A State may exercise the required degree of control when it has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".<sup>86</sup>

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<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 - a necessity 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, *The Prosecutor v. Gemaïn Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, 7 March 2014, paras. 1183, 1185-1187 ("Katanga Jugement 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 ICTY Appeals Chamber that, depending on the particular actors involved, conflicts taking place on a single territory at the same time may be of a different nature, meaning that international and non-international conflicts may co-exist.<sup>87</sup>
81. As noted above, bearing in mind the early stage of these proceedings, the facts available offer two alternative propositions as to the classification of the armed conflict, which will need to be tested in the context of any authorised investigation: (a) that at all relevant times the international law applicable in situations of international armed conflict is applicable; or (b) that a fragmented approach is warranted due to the co-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 article 8 can be divided into three phases: (i) at least between 7 and 8 August 2008, concerning the exchange of hostilities between the Georgian armed forces and South Ossetia forces, prior to Russia's direct involvement as a party to the armed conflict; (ii) from 8 August 2008 until 12 August, concerning the exchange of hostilities between the armed forces of Georgia and Russia; and (iii) from 12 August until 10 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 requested

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<sup>87</sup> ICC-01/04-01/06-2842, para. 540, recalling *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras.72-77, 84.

authorisation to investigate the situation from 1 July 2008 so that it may be in a position to also investigate a number of precursor events that immediately preceded the formal commencement of the hostilities and which led to the escalation of violence, subject to a finding that they enjoy a sufficient nexus with the contextual elements for war crimes.

83. During this time period, depending on the classification of the armed conflict, there is a reasonable basis to believe that South Ossetian forces committed the war crimes of wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), destroying the enemy's property/the property of an adversary (article 8(2)(b)(xiii) or article 8(2)(e)(xii)), pillage (article 8(2)(b)(xvi) or article 8(2)(e)(v)), and intentionally directing an attack against personnel and objects involved in a peacekeeping mission (article 8(2)(b)(iii) or article 8(2)(e)(iii)). These crimes took place in the context of and were associated with the armed conflict.
84. While it is clear that an international armed conflict between Georgia and Russia occurred at least over the five days of 8-12 August 2008, the sub-sections below examine in more detail the period directly prior to Russia's military intervention on the territory of Georgia, and the period during which the Russian armed forces extended their occupation of Georgian territory beyond the administrative boundary line of South Ossetia, subsequent to the cessation of hostilities.

i. *The period prior to Russia's direct intervention*

85. The exchange of hostilities between the Georgian armed forces and South Ossetia forces between 7 and 8 August 2008, prior to Russia's direct involvement as a party to the armed conflict, may be classified as either an international or non-international armed conflict depending on whether Russia exercised overall control over the forces of South Ossetia at the relevant time. As this matter rests on finding of fact that can only be made in the course of investigations, the determinations below are provisional and entered in the alternative.
86. The Prosecution recalls that, in line with well-established case-law, *inter alia*, before this Court<sup>88</sup>, an armed conflict, which is otherwise internal, is internationalised if a foreign state exercises 'overall control' over the military forces of one of the parties to that conflict.
87. Under this criterion, 'overall control' by a foreign state must comprise more than the mere provision of financial assistance or military equipment or training. This requirement, however, does not go so far as to include the issuing of specific orders by the State<sup>89</sup>, or its direction

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<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 (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State." The *Tadić* approach has been largely echoed in 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.143-146.

of each individual operation<sup>90</sup>. It may be considered to be met “when a State (...) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”<sup>91</sup>.

88. In *Tadic*, the Appeals Chamber held that the Army of the Federal Republic of Yugoslavia (FRY/VJ) had exercised overall control over the Bosnian Serb forces of the Republika Srpska (VRS) on the basis of the former participation “in the general direction, coordination and supervision of the activities and operations of the VRS”. The appeal judges emphasised the existence of a chain of command between the FRY/VJ and the VRS, encompassing, in the first place, shared leadership, structures and ranks as well as the same sources of payment of officers and commanders<sup>92</sup>.
89. The “overall control” test serves a distinct purpose and has been developed by international courts for the purpose of determining of State control over another entity, and is subject to a lower threshold than the “effective control” test.<sup>93</sup> It is applied here solely for the

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

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

<sup>92</sup> *Prosecutor v. Tadi*, IT-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 United States’ 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 to for the attribution of the acts of the forces to the US, as it was not proved that the latter had effective control of the “military or paramilitary operations in the course of which” the alleged atrocities were committed; “Military and Paramilitary Activities in and against Nicaragua” (*Nicaragua v. United States of America*), Judgement, 27 June 1986, I.C.J. Reports 1986, para.115.

purpose of assisting the classification of the armed conflict, and is without any prejudice to any attribution of individual criminal liability.

90. The information available indicates that already prior to the beginning of the armed conflict, Russia had a role in organising, coordinating or planning the military actions of South Ossetian forces, in addition to providing them with, at a minimum, training and operational support.
91. In particular, the information related to the temporal scope of the situation,<sup>94</sup> including during the post-conflict stage,<sup>95</sup> suggests that the Russian Federation exerted increasing control over the South Ossetian *de facto* authorities over time.
92. Russia has long exercised extensive foreign influence over South Ossetia, which involved a gradually increasing degree of control by Russian State organs over South Ossetia's *de facto* institutions and decision-making process.<sup>96</sup> The IFFMCG defined Russia's indirect influence in the lead-up to the 2008 conflict as being "so decisive and

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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. Tadi*, 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. Tadi*, IT-94-1-A, Judgement, 15 July 1999, para. 157: "An ex post facto confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995 (...)".

<sup>96</sup> See above, Background, paragraphs 20-29. 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 E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 7941: "De facto control of South Ossetia was gradually built up by Moscow. Russian representatives were not 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 South Ossetian leadership was not “effective” on its own.<sup>97</sup>

93. This level of control was reflected in the organisational links between the Russian armed forces and South Ossetian forces at the time. Already before the outbreak of the 2008 armed conflict, the core of the South Ossetian *de facto* military, security and intelligence apparatuses was composed of Russian representatives or ethnic Ossetians of Russian nationality who previously served in similar posts in Russia.<sup>98</sup> The information available indicates that some of these individuals returned and/or were appointed to high-ranking posts in the Russian administration after the conflict.<sup>99</sup>

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

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

<sup>98</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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 that he had held prior to the conflict. See Annex E.8.6: Kommersant, “Perm – Former defender of Tskhinvali led military commission of Perm Krai” [

], 1 April 2009, GEO-OTP-0003-1429 at 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” [

], 1 June 2011, GEO-OTP-0003-1456 at 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” [

], 27 July 2010, GEO-OTP-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<sup>101</sup> and Deputy Head of Russian Minister of Interior in North Ossetia<sup>102</sup>; Vasily Vasilevich Lunev<sup>103</sup>, former Deputy Commander for the military region of Siberia<sup>104</sup> and military commissioner for the [Russian] province of Permsk<sup>105</sup>; Boris Atoev<sup>106</sup>, previously employed at the Russian Federal Security Service (FSB, former KGB) in Kabardino-Balkaria, Moscow and Afghanistan<sup>107</sup>; and Anatoly Barankevich, former Colonel of the Russian Army who served in the Siberian military region and in the Chechnya war of mid-1990<sup>108</sup>.

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appointed new minister of internal affairs” [“  
”], 26 April 2005, GEO-OTP-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, GEO-OTP-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, GEO-OTP-0007-3658 (for English translation, see [E.9.2: Solemn Declaration I, 13 November 2015](#)).

<sup>104</sup> Annex E.8.6: Kommersant, “Perm – the former defender of Tskhinvali headed the military post in the Perm region [ ]”, 1 April 2009, GEO-OTP-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, “Perm – the former defender of Tskhinvali headed the military post in the Perm region [ ]”, 1 April 2009, GEO-OTP-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, GEO-OTP-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, GEO-OTP-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, GEO-OTP-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 [ ], 20 August 2008, GEO-OTP-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, 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.2.37: IIFFMCG, Volume III, GEO-OTP-0002-8247 at 8329.

95. Thus Russia's influence amounting to *de facto* control extended to the different bodies wielding authority over South Ossetia forces, the so-called "High Command of the RSO [Republic of South Ossetia] Armed forces".<sup>109</sup> In his capacity as Minister of Defence, Vasily Vasilevich Lunev had full operational command over South Ossetian forces engaged in the hostilities, including the authority to deploy them to the combat zones.<sup>110</sup> Besides the military chain of command, the primary decision-making authority was vested in the South Ossetian *de facto* Security Council headed by Anatoly Barankevich.<sup>111</sup> Both Lunev<sup>112</sup> and Barankevich<sup>113</sup> are understood to have resumed their services as top-ranking officials within the Russian administration after the hostilities.

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<sup>109</sup> South Ossetia authorities submitted to the IIFMCG 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: IIFMCG, 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 of the fact included the coordination of armed forces of South Ossetia. Thereafter, upon my orders all units were deployed to the combat areas. Reports from the divisions to hold the line came to operational duty at the command post, the chief of staff and me. Upon assessment of the situation, I shall take adequate measures to repel the Georgian aggression" (unofficial translation provided by OTP). See Annex E.7.30: Affidavit of V. Lunev, GEO-OTP-0007-3658 at 3661 (for English translation, see E.9.2: Solemn Declaration I, 13 November 2015). In this respect, the IIFMCG concluded that "the regular armed forces of the South Ossetian *de facto* authorities unquestionably constitute an organised and hierarchically structured group.", Annex E.2.36: IIFMCG, 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, Perm – Former defender of Tskhinvali led military commission of Perm Krai, [ - ], 1 April 2009, GEO-OTP-0003-1429 at 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 [ - ]

[ - ], 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" [ - ], 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 of cooperation and/or coordination of military operations and activities between Russia and South Ossetian *de facto* authorities. For example, prior to the commencement of the 2008 armed conflict, in July 2008, the Russian armed forces helped to coordinate South Ossetian military operations after four Russian military jets entered Georgian airspace in order to prevent an alleged attempt by the Georgian authorities to liberate Georgian servicemen who were detained by the South Ossetian *de facto* authorities.<sup>114</sup>
97. Throughout the conflict and its aftermath, Russian forces were jointly present with South Ossetian forces in different conflict zones, including in the villages of Kekhvi, Kurta, Achabeti, Tamarasheni, Eredvi, Vanati, Avnevi, and Nuli.<sup>115</sup> The available information indicates numerous instances, mostly occurring between August and October 2008, demonstrating military coordination or operational links between Russian armed forces and South Ossetian forces, especially in the context of the attacks reportedly perpetrated by the latter against villages inhabited by ethnic Georgians.<sup>116</sup> Notably, the Russian armed

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<sup>114</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8011-8012.

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

<sup>116</sup> Information on selected incidents is primary based on the accounts of victims and witnesses of the alleged abuses submitted to the ECHR as part of individual applications as well as collected by fact finding missions dispatched to the conflict-hit region, such as HRW, AI, and OSCE-HRAM. 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*, GEO-OTP-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*, GEO-OTP-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*, GEO-OTP-0001-0125 at 0168.

forces appear to have provided operational and logistical support to South Ossetian forces, including by means of aerial bombardment in advance of South Ossetian military operations, as well as transportation.<sup>117</sup>

98. Nonetheless, the information available does not indicate that Russian forces were involved on a routine basis in the tactical and operational planning and/or the conduct of the specific military operations by South Ossetian forces operating village by village. Instead, it appears that in certain locations, including where alleged crimes occurred, the coordination was high, while in other locations Russian armed forces acted passively in the face of crimes, while in other locations they acted positively to prevent and punish the commission of crimes.<sup>118</sup>

99. Several sources indicate that the South Ossetian forces received weapons, such as Grad missiles and other military equipment from Russia, on various occasions, including during the armed conflict.<sup>119</sup> AI reported that Russian military equipment continued to pass through the village of Eredvi via checkpoints controlled by the Russian army as the village was being looted and pillaged seemingly by local militia.<sup>120</sup> In addition, the IFFMCG referred to an influx of irregular forces from the territory of the Russian Federation to South Ossetia in early August

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

<sup>118</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336, at 0428-0429; Annex E.4.3: AI, *Civilians in the line of fire*, GEO-OTP-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, GEO-OTP-0003-1202, Annex 17, GEO-OTP-0003-1372 at 1372-1373; Yury E. Federov, "The Sleep of Reason: The War on Georgia & Russia's Foreign Policy", *Association of International Affairs Research Paper*, 5/2008, GEO-OTP-0008-0795 at 0798; Annex E.8.23: Regnum, "Ministry of Foreign Affairs of Georgia officially accused Russia of 'supplying with arms of separatists'" [

"], 22 September 2005, GEO-OTP-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*, GEO-OTP-0001-0125 at 0168.

2008 as well as the presence of some Russian armed forces in South Ossetia, apart from the Russian peacekeeping battalion, prior to 14h30 on 8 August 2008.<sup>121</sup>

100. The IFFMCG concluded that Russia supported South Ossetian forces in numerous ways, including by training, arming and equipping them.<sup>122</sup> According to the Kremlin<sup>123</sup>, training of South Ossetian forces for the conflict, as well as mobilisation of Russian military equipment and weaponry, was conducted on the basis of a plan drawn up by the Russian Army's General Staff in 2006-2007, and subsequently approved by Russian President Vladimir Putin. Reportedly, the Russian Ministry of Interior was responsible for providing special training to South Ossetian police.<sup>124</sup>

101. Russia's influence in South Ossetia should also be set against the context of the broader spectrum of South Ossetia's political, economic and social affairs. For example, the policy of "passportisation", conferring Russian nationality to ethnic Ossetians since the late 1990

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

<sup>122</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-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 much-needed 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, GEO-OTP-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, GEO-OTP-0001-1314 at 1320 ("Humanitarian consequences of the armed conflict in the South Caucasus").

onwards<sup>125</sup>, resulted in a visa-free regime for South Ossetia as well as in granting South Ossetians, including members of South Ossetian forces, entitlements to Russian pensions<sup>126</sup> and other social benefits.<sup>127</sup> The vast majority<sup>128</sup> of people living in South Ossetia at the time of the conflict were Russian nationals, and as a consequence were subjected, to varying degrees, to the laws of the Russian Federation – for example with respect to voting rights and military service.<sup>129</sup>

102. Russia has also provided substantial financial assistance to South Ossetian *de facto* institutions, subsidised goods and services to the population, and has undertaken major investments in the region's infrastructure.<sup>130</sup> According to the Kremlin, Russian financial aid to South Ossetia between 2008 and 2014 amounted to 43 billion roubles<sup>131</sup>, totalling at times over 90% of South Ossetia's budget.<sup>132</sup> The IIFFMCG indicated that in 2007, Russia had allocated 100 million rubles to South Ossetia.<sup>133</sup>

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<sup>125</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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, GEO-OTP-0003-1575 at 1580.

<sup>127</sup> Annex E.2.35: IIFFMCG, Volume I, GEO-OTP-0002-7757 at 7787; See also Annex E.8.21: Associated Press, "Russia launches passport offensive", 22 February 2009, GEO-OTP-0003-1583 at 1583-1585; Annex E.8.24: Der Spiegel, "Russia Marches into South Ossetia", 8 August 2008, GEO-OTP-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.8.26: Today.Az, "Vasili Istratov: 'Russian passports were issued to South Ossetian residents based on Russian legislation'", 13 August 2008, GEO-OTP-0003-1749 at 1749.

<sup>129</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-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, GEO-OTP-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, GEO-OTP-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 discussions" [

], 30 April 2010, GEO-OTP-0003-1754 at 1755 (for English translation, see [E.9.3: Solemn Declaration II, 13 November 2015](#)).

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

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

104. As noted above, the above determination is provisional, bearing in mind the early stage of these proceedings, and can only be properly determined during the course of investigations. Should it emerge that the evidence does not support this determination, it may be more appropriate to adopt a fragmented approach to the classification of the armed conflict. This would suggest that a non-international armed conflict took place between Georgian armed forces and South Ossetian forces in the period from at least 7 through 12 August 2008, while a separate international armed conflict co-existed between Georgian and Russian armed forces in the period from 8 August through 10 October 2008.

105. As described in more detail in the “Background” section above, Georgia and the *de facto* authorities in South Ossetia built up forces in their respective areas of control, in the period leading to the August 2008 armed conflict. Armed clashes increased throughout July 2008, leading to a deterioration of the security situation.<sup>134</sup> A unilateral ceasefire announced by Georgian President Mikheil Saakashvili on 7 August 2008 held only three hours before fighting reportedly resumed at 22h00.<sup>135</sup> Shortly before midnight, at 23h50, Georgian artillery units reportedly

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<sup>134</sup> Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 0133; Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8010-8012.

<sup>135</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8014-8015.

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

106. In terms of organisation, the South Ossetian forces acted under the command of the South Ossetian leadership. Eduard Kokoity was the Head of the *de facto* South Ossetian leadership and Commander-in-Chief of the South Ossetian security forces.<sup>137</sup> Next in the military chain of command was the Minister of Defence and Emergencies at the time Vasily Vasilevich Lunev, then the Chief of General Staff Sergey Sarmatov, and commanders of battalions.<sup>138</sup> The principle decision making body was the *de facto* South Ossetian Security Council headed by Anatoly Konstantinovich Barankevich.<sup>139</sup>

107. The South Ossetian forces consisted primarily of light rifle battalions with seconded artillery units and armoured vehicles. These forces were composed of members of the South Ossetian *de facto* Ministry of Interior, the Committee for State Security, the Board Guard Service, the Special Purpose Police Squad OMON, irregular militias and volunteers.<sup>140</sup> According to the available information, during the August 2008 events

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

<sup>137</sup> See Annex E.8.40: Constitution of South Ossetia, ( ) , 8 April 2001, Article 50, GEO-OTP-0010-0016 at 0026-0028 (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 Tolik GOIAEV), Government of Georgia, 10 May 2010 Report, Annex 80, GEO-OTP-0006-0388 at 0388; the mountain battalion (Commander Bala 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, GEO-OTP-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 enforcement and military agencies did not exceed 3,500 persons.<sup>141</sup>

108. The composition and structure of the Georgian armed forces and South Ossetian forces under the command of the South Ossetian leadership, the prolonged nature and overall intensity of the fighting between these forces, especially in Tskhinvali, Avnevi-Nuli-Khetagurovo area (west of Tskhinvali), and the Dmenisi-Prisi area, the fact that heavy military arms were used, as well as the fact that the South Ossetian forces controlled parts of the territory of Georgia support the conclusion that an armed conflict existed between the Government of Georgia and the *de facto* South Ossetian authorities during the relevant period of time.<sup>142</sup> Thus, the armed confrontation between South Ossetian forces and the Georgian armed forces had, by 7 August at the latest, reached a sufficient the level of intensity, and occurred between parties showing the necessary degree of organisation, to trigger, at a minimum, the law applicable to non-international armed conflicts.

ii. *The period subsequent to the cessation of hostilities*

109. The issue of the applicable law of armed conflict also arises with respect to the period subsequent to the cessation of hostilities, during which the Russian armed forces continued, from 12 August until 10 October 2008 at the latest, to occupy portions of Georgian territory both inside South Ossetia and outside of it in the so-called “buffer zone” 20km beyond the administrative boundary line of South Ossetia. As described below, during this period South Ossetian forces allegedly

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

<sup>142</sup> See ICC-01/04-01/06-2842, paras. 537-538

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

110. The law of international armed conflict applies in situations of military occupation.<sup>143</sup> A military occupation exists whenever the territory “is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”, even if the occupation encountered no armed resistance.<sup>144</sup> Thus the occupation of a territory by hostile state forces would exist whenever that hostile state asserts effective control over the area in question.<sup>145</sup>
111. In its judgement in the *Naletilić & Martinović* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) provided the following guidelines to assist in the determination of whether the occupying power has effectively established its authority in the territory in question:

“(i) the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; (ii) the enemy’s forces have surrendered, been defeated or withdrawn.

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<sup>143</sup> ICC-01/04-01/07-3436, para. 1179. See generally fn.34 Elements of Crimes; article 42-43, 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*), Judgement, 19 December 2005, I.C.J. Reports 2005, paras. 172, 175-176; ECHR, *Cyprus v. Turkey*, Appl. no. 25781/94, “Judgement”, 10 May 2001, paras. 76-77; *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgement, 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 as occupied territory. However, sporadic local resistance, even successful, 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 has been established over the territory; (v) the occupying power has issued and enforced directions to the civilian population.”<sup>146</sup>

112. In the *Lubanga* judgment, the Trial Chamber further examined the issue of military occupation in situations where conflicts of a different nature take place on a single territory, in order to determine whether the criminal acts under consideration had a nexus with such an occupation. The Trial Chamber found that although the Ugandan Armed Forces were in occupation of Bunia Airport and the surrounding environs, the separate non-international armed conflict between the *Union des Patriotes Congolais* (UPC) and other non-State armed groups was occurring a long distance away from the occupied area and could not be said to be related to the Ugandan occupation.<sup>147</sup>

113. The information available indicates that Russian armed forces deployed in South Ossetia continued to advance beyond the

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<sup>146</sup> See *Prosecutor v. Naletili & Martinovi*, 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 the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.” Thus the determining factor for the test of occupation is degree and extent of the control by the intervening troops, “Case Concerning Armed Activities on the Territory of the Congo” (*Democratic Republic of the Congo v. Uganda*), 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 other parts of Georgia after 12 August 2008 and established 34 military posts, and only withdrew from the buffer zone by 10 October 2008, in particular into areas previously under Georgian administered control. According to OSCE reports, in the period from mid-August 2008 through October 2008, the Russian armed forces were able to control access to the cities of Gori, Karleti, Variani, Nabakhtevi, and the Akhalkgori area through checkpoints established in the east and west of the village of Igoeti and Eastern Natsreti, Nabakhtevi village, Dzvari village, Kvenakotsa, Variani, Karaleti, Megvrekisi, Odzisi.<sup>148</sup> Russian troops therefore had control over the areas in which they were deployed in until at least 10 October 2008.

114. There is no question that the law of international armed conflict applied to the military occupation by Russian forces. The law applicable to the conduct of an organised armed group in the context of a military occupation is determined by the relationship between the organised armed group and the occupying power and/or the nexus of that conduct to the armed conflict.
115. If, for example, Russia exercised overall control over South Ossetian forces during the occupation period, this would render the framework applicable to South Ossetian forces the law of international armed conflict. If the requisite level of overall control by Russian forces is established, South Ossetian forces would effectively 'belong to a Party

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<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 conflict'<sup>149</sup> and so the conduct of the South Ossetians would be regulated by the law applicable to international armed conflict. As discussed above, the information available indicates that Russia continued to exert a high degree of influence over South Ossetian institutions and its military forces, as is evident from military coordination and operational links between Russian armed forces and South Ossetian forces.<sup>150</sup>

116. Nonetheless, even if it cannot be established that Russian forces exercised overall control of South Ossetian forces, the alleged crimes attributed to South Ossetian forces would in any event be regulated by the law of international armed conflict if it can be demonstrated that there was a sufficient link between such conduct and the occupation.
117. The requirement of overall control by a foreign State of an organised armed group to 'internationalise' an otherwise non-international armed conflict is not the same test as that required to regulate the conduct of an organised armed group in the context of an existing international armed conflict. Rather, the requisite test is whether the crimes attributed to the South Ossetian forces had the necessary nexus to the international armed conflict – that is, whether they 'took place in the context of and [were] associated with'<sup>151</sup> the international armed conflict between Russia and Georgia.

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

<sup>150</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0463, 0474; Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1965; Annex E.4.3: AI, *Civilians in the line of fire*, GEO-OTP-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". See: *Prosecutor v. Tadi* , IT-94-1-T, Judgment, 7 May 1997, para. 573.

118. The post-World War II case law relating to spoliation and plunder of private property in territories occupied by Germany, for example, demonstrates that conduct even by private persons or corporations can be sufficiently related to a military occupation to qualify as war crimes. In particular, the judgments in the so-called 'Industrialists Trials' – the *Flick Case*, the *IG Farben Case* and the *Krupp Case* - all support this proposition. In the *I.G. Farben Case*, the *United States Nuremberg Military Tribunal* stated that:

[w]here *private individuals* [...] proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.<sup>152</sup>

119. In the *Krupp Case*, the acts of *private* persons “authorised and actively supported by certain German governmental and military agencies or persons”<sup>153</sup> constituted war crimes because they were sufficiently connected to the international armed conflict Germany was then 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 nexus to the armed conflict requirement applied consistently by the ICC and all other contemporary international criminal courts and tribunals. It is not necessary to establish that the initiative to commit the crimes in

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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 and even less is it necessary that the conduct reflected the overall policy of the Russian government or of the Russian military leadership to persecute the ethnic Georgian civilians living in South Ossetia and other areas under Russian occupation.

121. The information available at this stage indicates that South Ossetian forces would not have been able to carry out a campaign to forcibly expel the remaining ethnic Georgians civilian population inside South Ossetia and the “buffer zone” but for the occupation of Georgian territory by Russian armed forces and the military advances that preceded the occupation. Before the armed conflict, the expulsion of ethnic Georgians inside South Ossetia, particularly in areas under the protection of Georgian forces, could not have taken place without the threat of a significant military response from the Georgian authorities: a threat that was neutralised after the deployment and military advances of Russian armed forces throughout South Ossetia. The movement of South Ossetian forces and their military operations were also facilitated through the establishment of check points that were jointly manned by South Ossetian forces with Russian armed forces. South Ossetian forces and Russian armed forces were also jointly deployed in the villages of Kekhvi, Kurta, Achabeti, T’amarasheni, Eredvi, Vanati, Avnevi, and Nuli.<sup>154</sup> Similarly, the area inside the 20km “buffer zone” established by the Russian armed forces, which comprised areas previously under the control of the Georgian authorities, could not have been subject to attacks by South Ossetian forces against the ethnic Georgian civilian population

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<sup>154</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0469; Annex E.5.2: Memorial and Demos, *Humanitarian consequences of the armed conflict in the South Caucasus*, GEO-OTP-0001-1314 at 1315; Annex E.4.3: AI, *Civilians in the line of fire*, GEO-OTP-0001-0125 at 0167-0168. See also Annex D.2: *Map of Military Operations*.

but for the creation and existence of the zone of occupation by the Russian armed forces.

122. The information available further indicates a direct relation between the alleged conduct of South Ossetian forces and the situation of occupation by Russian armed forces. This is demonstrated from the fact that the commission of crimes against ethnic Georgians by South Ossetian forces decreased and eventually ceased as the Georgian authorities regained control over previously occupied areas inside 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 Georgians*

123. The information available provides a reasonable basis to believe the South Ossetian forces forcibly displaced between 13,400 and 18,500 ethnic Georgians from South Ossetia and the “buffer zone”. The information available further indicates that during this course of conduct, South Ossetian forces deliberately killed between 51 and 113 ethnic Georgian civilians and destroyed or heavily damaged over 5,000 dwellings belonging to ethnic Georgians.
124. Based on the information available at this stage, the Prosecution finds that there is a reasonable basis to believe that between at least 7 August and 10 October 2008, the South Ossetian forces have committed at the minimum the following war crimes in the context of an armed conflict: war crimes of wilful killing/murder (article 8(2)(a)(i) or article

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<sup>155</sup> Annex E.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-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)), and pillage (article 8(2)(b)(xvi) or article 8(2)(e)(v)).

125. While this section of the Application focuses on the alleged crimes that may constitute war crimes, section V (B.2. paragraphs 218-273) finds that there is a reasonable basis to believe that these alleged crimes also amounted to crimes against humanity under the Statute, namely murder under article 7(1)(a); deportation or forcible transfer of population under article 7(1)(d); and persecution under article 7(1)(h).

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, and such person or persons were protected under one or more of the Geneva Conventions of 1949.<sup>156</sup>

127. During the military operations launched against the Georgian armed forces to gain control over the Georgian administered areas in South Ossetia, the South Ossetian forces allegedly killed unarmed civilians with automatic weapons in particular in the city of Gori and in the villages of Megvrekisi, Tirdznisi, Ergneti, and Karaleti.<sup>157</sup> The South Ossetian forces would arrive in ethnic Georgian villages, by then inhabited mostly by women, children and elderly and ordered them to leave. Civilians who resisted these orders

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

<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 killed.<sup>158</sup> In some cases, persons were beaten and killed deliberately in front of the local population in order to instil fear and coerce the remaining population to leave the area.<sup>159</sup> Witnesses told Georgian NGOs that on 11 August 2008 South Ossetian forces killed an ethnic Georgian because he refused to kiss the South Ossetian flag and leave the village of Dvani.<sup>160</sup> This killing was confirmed by a witness in a statement given to the Georgian authorities in the course of the national investigation. These forces, according to this witness, threatened to kill all Georgians who would not leave South Ossetia.<sup>161</sup>

128. The Prosecution analysed the information on alleged killings gathered from available sources, including the Government of Georgia, OSCE, international and local NGOs, for the period from 7 August until 10 October 2008 for the purposes of establishing the scale of the alleged crime.<sup>162</sup> The examination of these multiple sources provides a reasonable basis to believe an estimated range of 51 to 113 ethnic Georgians were killed<sup>163</sup>, including 49 persons killed in the Eredvi

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

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

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

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

<sup>162</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921; Annex E.3.16: OSCE Material, GEO-OTP-0005-0763 through GEO-OTP-0005-0774; International NGOs (Annex E.4.9: HRW, "Russia-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, GEO-OTP-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 Russian-Georgian war 2008, GEO-OTP-0004-0106 through GEO-OTP-0004-1806; Annex E.5.1: August Ruins, GEO-OTP-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)(xiii) or article 8(2)(e)(xii) and pillage pursuant to article 8(2)(b)(xvi) or article 8(2)(e)(v)*

129. The *actus reus* of the crime of destroying or seizing the enemy's property pursuant to article (8)(2)(b)(xiii) or article 8(2)(e)(xii) requires that the perpetrator destroyed or seized certain property of a hostile party that was protected from the destruction or seizure under the international law of armed conflict.<sup>164</sup>

130. The *actus reus* of the crime of pillaging pursuant to article 8(2)(b)(xvi) or article 8(2)(e)(v) requires that the perpetrator appropriated certain property for private or personal use without the consent of the owner.<sup>165</sup>

131. Open source reports<sup>166</sup> as well as the material submitted by ethnic Georgian victims<sup>167</sup> and the Government of Georgia<sup>168</sup> indicate that the South Ossetian forces extensively and systematically pillaged and destroyed the property of ethnic Georgian civilians in several of the

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<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)(xvi) and Article 8(2)(e)(v).

<sup>166</sup> Annex E.2.36: IIFMCG, Volume II, GEO-OTP-0002-7801; Annex E.2.4: OCHA, UN Inter-Agency Humanitarian Assessment Mission to South Ossetia, "Mission Report", 16-20 September 2008, GEO-OTP-0001-0846 ("OCHA Mission Report"); Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921; Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336; Annex E.4.3: AI, *Civilians in the line of fire*, GEO-OTP-0001-0125; Annex E.5.1: *August Ruins*, GEO-OTP-0001-0999; Annex E.5.2: *Memorial and Demos*, Humanitarian consequences of the armed conflict in the South Caucasus, GEO-OTP-0001-1314.

<sup>167</sup> Annex E.5.3: 93 Applications of the Victims of the August 2008 armed conflict, GEO-OTP-0004-0106 through GEO-OTP-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)", GEO-OTP-0006-0975 through GEO-OTP-0006-1051; Annexes to "Evidence of ethnic cleansing of Georgians in South Ossetia and adjacent areas (Appendix 3)": Volume 1, GEO-OTP-0006-1052 through GEO-OTP-0006-1306, Volume 2, GEO-OTP-0006-1307 through GEO-OTP-0006-1574.

settlements inhabited mostly by ethnic Georgians in South Ossetia and in the “buffer zone”. There is no information available to suggest that the destruction and seizure of the protected property was justified by the military necessity at the time of the commission of the alleged crimes. Instead, the information available shows that the South Ossetian forces destroyed and seized the property protected under international law with the aim of forcibly removing ethnic Georgians from the territory of South Ossetia. These settlements included the villages of Argvitsi, Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskheneti and Vanati in Eredvi municipality, Kekhvi, Kemerti, Kheiti, Kurta, Kvemo Achabeti, Zemo Achabeti, Tamarasheni and Dzartsemi in Kurta municipality, Avnevi and Nuli in Tighva municipality and the villages of Dvani, Ergneti, Karaleti, Megvrekisi, Tkviavi and Zemo Nikozi in the “buffer zone”.<sup>169</sup>

132. The OSCE observed that the homes appeared to have been looted of valuable items prior to having been set on fire, as evidenced by the absence of remains of major items such as appliances or televisions.<sup>170</sup> Several witnesses told HRAM and HRW that South Ossetian forces used “a flammable red substance” or gasoline as fire accelerants.<sup>171</sup> NGOs that documented alleged crimes, including HRW, noted that forensic evidence points to the fact that houses were deliberately burnt and not destroyed during battles, shelling or other types of bombardments.<sup>172</sup>

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

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

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

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

133. An eye-witness, stated in his declaration to the Georgian investigators that on 8 and 9 August 2008 the South Ossetian forces burnt around 10 houses in the village of Vanati. These forces entered the village during the day and set ethnic Georgian houses on fire one by one.<sup>173</sup>
134. A victim of looting stated that on 9 and 10 August 2008 South Ossetian forces took all valuable belongings from her and neighbouring houses in the village of Beloti, including money and furniture and subsequently set the houses on fire.<sup>174</sup> An ethnic Georgian villager of Nuli, submitted in his witness statement to the Georgian investigative authorities, that he witnessed an extensive and organised destruction of ethnic Georgian houses in the village that took place for three days between 10 and 12 August 2008. According to the witness, houses were burnt on a selective basis, mainly those that belonged to authoritative people of the village.<sup>175</sup>
135. Also on 13 August 2008, OSCE observers reported that 45 houses were burnt in Tseronisi and in Avlevi as well as other houses in Karaleti and nearby villages.<sup>176</sup> 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 source, the villages of the

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<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-OTP-0004-0106 through GEO-OTP-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-OTP-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 and burning of houses.<sup>178</sup>

136. On 6 September 2008, HRW found that all houses in the village of Vanati were destroyed except the houses that belonged to ethnic Ossetians.<sup>179</sup> AI also reported that houses in the villages of Avnevi and Nuli that belonged to ethnic Ossetians were spared from the destruction that was meted out to the houses of ethnic Georgians.<sup>180</sup>

iii. *Alleged involvement of Russian armed forces in the commission of crimes attributed to South Ossetian forces*

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

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<sup>178</sup> 300 to 500 houses were burned and about 2000 were damaged, Annex E.2.38: 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 villages and arresting the suspects.<sup>183</sup>

138. Nonetheless, numerous witness accounts are consistent in portraying the Russian armed forces as bystanders to crimes committed by others, failing to take action to prevent attacks by South Ossetians or to protect ethnic Georgians.<sup>184</sup> The OSCE-HRAM also referred to repeated and consistent accounts of displaced persons from multiple ethnic Georgian villages recounting similar experiences of deliberate destruction by ethnic Ossetians following the arrival of the Russian armed forces.<sup>185</sup> In a number of cases, South Ossetian forces had entered villages together with Russian military personnel or in the wake of Russian ground forces or aerial attacks.<sup>186</sup>

139. The IIFFMCG conducted interviews that also provided different accounts “ranging from active intervention to stop violations, to passive observation, and even involvement.”<sup>187</sup> The IIFFMCG stated that while it appeared difficult to conclude that Russian forces systematically participated in or tolerated the conduct of South Ossetian forces, there seemed to be “credible and converging reports” indicating that in a

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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: IIFFMCG, Volume II, GEO-OTP-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 Russians troops were accompanying Ossetians and helping to set the fires, Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1962-1963.

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

<sup>187</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8157-8158.

number of instances Russian forces did not act to prevent or stop South Ossetian forces from committing crimes.<sup>188</sup>

140. With respect to the present case, the Prosecution notes that there are consistent and repeated accounts of the presence of Russian troops at, or in the vicinity of, a particular location where alleged crimes were reportedly committed by the South Ossetian forces. The information available indicates that at least some members of the Russian armed forces participated in the commission of the alleged crimes while other members acted passively, and still others acted to prevent and punish such crimes.

141. The question of overall control for the purpose of conflict classification has been discussed above. The issue of whether additionally individual criminal responsibility may be attached to members of the Russian armed forces for acts allegedly committed by South Ossetian forces will depend on the evidence collected during the course of any authorised investigation and an examination of the full range of forms of liability under the Statute. As described above, at least in some instances, the Russian armed forces appear to have been able to prevent and punish such acts consistent with the duties of an occupying power.

*(c) Alleged attack against peacekeepers*

142. The *actus reus* of the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

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<sup>188</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8157.



requires that the perpetrator directed an attack of which the object was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the UN, and that the perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack. It is further required that such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.<sup>189</sup>

143. Due to the lack of definition of “attack” in the Statute and the Elements of Crime, based on article 8(2)(e) and 21(1)(b) of the Statute, Pre-Trial Chamber I defines “attack” as “acts of violence against the adversary, whether in offence or in defence” in accordance with Article 49 of the Additional Protocol I to the Geneva Conventions of 12 August 1949 and article 13(2) of Additional Protocol II.<sup>190</sup> There is no requirement for material result or any harmful impact on the attacked personnel or objects in issue.<sup>191</sup> There has to be however a “causal connection between the perpetrator and the attack” which means “a causal link between the perpetrator’s conduct and the consequence is necessary, so that the concrete consequence, the attack in this case, can be seen as having been caused by the perpetrator.”<sup>192</sup>

iv. *Status of the Joint Peacekeeping Forces*

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

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

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

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

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

- a) First, whether the peacekeeping mission under the Sochi agreement was established “in accordance with the Charter of the UN”?
- b) Second, whether the personnel, installations, materials, units and vehicles of the JPKF was entitled, at the time of the attack, to the protection afforded to civilians and civilian objects?

*Whether the peacekeeping mission under the Sochi agreement was a peacekeeping mission established in accordance with the UN Charter*

145. Pre-Trial Chamber I established that “peacekeeping” is derived from practical experience and not defined under the UN Charter.<sup>193</sup> Instead, “peacekeeping missions are not static and (...) their features may vary depending, *inter alia*, on the context in which they operate”.<sup>194</sup> Three basic principles are relevant for determining the constitution of a peacekeeping mission: (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence.”<sup>195</sup>

*Consent of the parties*

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<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 host State to be stationed on the territory, such consent is necessary.<sup>196</sup> Regarding consent of the main parties to the conflict, Pre-Trial Chamber I referred to the Special Court for Sierra Leone's jurisprudence, that in non-international armed conflicts "consent is obtained from the warring parties, not out of legal obligation, but rather to ensure the effectiveness of the peacekeeping operation."<sup>197</sup>

147. As described in the background section, following a two-year conflict, on 24 June 1992 the Sochi Agreement on Principles of Settlement of the Georgian-Ossetian Conflict by the Presidents of Georgia and the Russian Federation was signed.<sup>198</sup> As part of the agreement, the JPKF were deployed in the Georgian-Ossetian conflict zone, together with the JCC, a coordinating body composed of Georgian, Russian, South and North Ossetian representatives. The mandate of the JPKF and JCC was to supervise the implementation of the Sochi Agreement.<sup>199</sup>

148. The JPKF consisted of members of armed forces from the parties to the conflict organised in three peacekeeping battalions: a Russian battalion,

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<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, GEO-OTP-0002-7801 at 7901.

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

"1. In order to exercise control over the implementation of cease-fire, withdrawal of armed formations, disband 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 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. Each battalion was manned by approximately 500 soldiers.<sup>200</sup> Battalions operated under a joint command coordinated by the JPKF commander<sup>201</sup> who was nominated by the Russian Defence Ministry and appointed by the JCC.<sup>202</sup>

149. The UN Security Council made multiple supportive references to the agreement, without formerly endorsing it.<sup>203</sup> The OSCE, a regional arrangement in the sense of Chapter VIII of the UN Charter, held observer status at the JCC.

150. The Government of Georgia informed the Prosecution that the Georgian authorities persistently objected to the presence of the Russian peacekeepers in the region during the couple of years prior to the 2008 armed conflict and demanded from the international community the replacement of the JPKF with an internationalised peacekeeping mission

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<sup>200</sup> Response of the Government of Georgia to the questionnaire of the IIFFMCG, Annex E.2.37: 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 activity of the Joint Forces.”, Annex E.8.33: Annex No. 1 to the Decision Concerning the Basic Principles of Operation of the Military Contingents and of the Military Observers Designated for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict, 6 December 1994, GEO-OTP-0008-0683.

<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 certain measures to address the problem before different international forums. In September 2006, in his speech before the UN General Assembly, the then Georgian President Saakashvili stated that the Russian Federation should withdraw its peacekeepers from South Ossetia.<sup>205</sup> The Georgian diplomatic mission also sent a number of *note verbales* to different countries objecting to the support of Russian peacekeeping forces for South Ossetian *de facto* authorities.<sup>206</sup> Yet, the Georgians authorities admitted that the Sochi Agreement “formally remained in force for Georgia until the official revocation was completed”. Therefore at the time of the attack, the JPKF, including the RUPKFB, were deployed with the consent of the parties, even though “tainted consent” as far as Georgia was concerned.<sup>207</sup>

### *Impartiality*

151. The Pre-Trial Chamber I referred to the UN Peacekeeping Principles and Guidelines to establish that “impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. UN peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in their execution of their mandate.”<sup>208</sup>

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<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 several international sources to argue that Russia, including the Russian peacekeeping forces deployed in Georgia, were not impartial, but were constantly supporting the South Ossetian *de facto* authorities.<sup>209</sup> For instance, on 29 November 2007, referring to the situation in both Abkhazia and South Ossetia, the European Parliament adopted a resolution noting that “the Russian troops have lost their status of neutral, impartial peacekeepers” and that “the Moscow authorities’ decision to grant Russian passports to the people living in those parts of Georgian territory is further destabilising the situation”.<sup>210</sup>

153. The Georgian authorities further argued that the JPKF’s impartiality was violated because the North Ossetian contingent of the JPKF was manned by South Ossetians contrary to the Sochi agreement that the JPKF should not have included South Ossetian forces.<sup>211</sup>

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

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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 also 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 contingent 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 administered village Sveri.<sup>212</sup> On 8 August 2008, the JPKF and the OSCE military observers registered ceasefire violations and reported that the exchange of fire between Georgian and South Ossetian forces was initiated from the area of the South Ossetian positions.<sup>213</sup>

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

*The non-use of force except in self-defence*

156. Peacekeeping missions which may only use force in self-defence are protected from attack under article 8 of the Rome Statute while peace-enforcement missions established by the UN Security Council under Chapter VII of the UN Charter, which are permitted to use force beyond self-defence in order to achieve their objectives, are protected by international humanitarian law.<sup>214</sup>

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

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<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 0843-0844.

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

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

158. The JPKF were the only armed forces that were allowed to remain in the region of South Ossetia. Peacekeepers were allowed to fulfil duties that were listed in protocols adopted on the basis of the Sochi agreement: checking of persons, prohibition of import and export of military technology, prevention of clashes between different groups and activities of illegal armed units, barring the entry in the conflict zone of armed groups; impeding the transit in the conflict zone of weapons or armaments.<sup>216</sup> The activities of the Peacekeeping Forces were also governed by the Regulations on the Joint Forces to Establish Peace and Maintain Law and Order in the Conflict Zone, which were confirmed under Protocol No. 3 at the meeting of the JCC held on 12 July 1992.

159. Although some of its tasks amounted to robust peacekeeping, the JPKF was not allowed to use force except in self-defense; instead peacekeepers had to monitor violations of the ceasefire agreement and report them to the JCC. In return, the JCC was required to investigate such violations.

### *Conclusion*

160. Despite some ambiguities that increased over time, the information available indicates that the JPKF fulfilled the criteria of a peacekeeping

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

<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-Ossetian Conflict, GEO-OTP-0008-0560 at 0560-0563.



mission in accordance with the UN Charter and so was entitled to protected civilian status.

*Status of protection of peacekeepers, installations, materials and vehicles involved in the peacekeeping mission at the time of the attack*

161. Peacekeeping forces are entitled to the protection afforded to civilians defined in the Additional Protocol I to the 1949 Geneva Conventions negatively, as “any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of 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 protected under IHL “unless and for such time as they take a direct part in hostilities”. Thus, personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities. Examples of direct participation in hostilities include: “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations”.<sup>217</sup> The requirement ‘for such time’ indicates that the timing

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

of the attack is critical. Nevertheless, they do not lose such protection if they use armed force only for the purpose of self-defence.<sup>218</sup>

163. Installations, material, units or vehicles involved in a peacekeeping mission are also entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture and neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>219</sup>

ii. *Alleged attack against Georgian peacekeepers*

164. According to Georgian authorities, South Ossetian Forces repeatedly attacked Georgian peacekeepers' positions prior to the active phase of hostilities. Georgian peacekeepers locations were reportedly shelled by South Ossetian forces in Andzisi<sup>220</sup> on 29 July 2008; in Sarabuki on 29 July<sup>221</sup>, 4 August<sup>222</sup>, 5 August (2 Georgian peacekeepers wounded)<sup>223</sup> and 6 August 2008<sup>224</sup> (3 Georgian peacekeepers wounded); in Nuli and Avnevi on 7 August 2008<sup>225</sup>, and Avnevi and Frone valley starting from 20h30 on 7 August 2008.<sup>226</sup>

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<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-OTP-0008-1812 at 1814.

<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-OTP-0008-1793 at 1798.

<sup>225</sup> Meeting with Georgian authorities on 22-24 June 2010 in Tbilisi, Georgia.

<sup>226</sup> Annex E.2.37: IFFMCG, Volume III, GEO-OTP-0002-8247 at 8310; Annex E.7.9: Government of Georgia, Chronology of the August 2008 events, Appendix 2; GEO-OTP-0006-0539 at 0550; Annex E.7.19: Government of Georgia, Witness Statement, GEO-OTP-0008-1812 at 1815.

165. The most serious incident allegedly happened at around 14h00 on 7 August 2008 in Avnevi where South Ossetian forces attacked Georgian peacekeepers who manned a checkpoint.<sup>227</sup> The checkpoint was reportedly heavily shelled with 100mm and 120mm artillery by South Ossetian forces unit located in the village of Khetagurovo. It is alleged that as a result of the attack, two Georgian peacekeepers were killed, five peacekeepers were wounded, and that the Georgian peacekeeping unit's armoured vehicle was destroyed, followed by the return of fire by the Georgian peacekeepers.<sup>228</sup>
166. According to the JPKF Commander at the time, General Kulahmetov, this attack occurred on 2 August 2008 and it was impossible to determine who started the attack at the time.<sup>229</sup>
167. The exact timing of this event and the precise circumstance surrounding the conduct alleged will require verification in the context of any authorised investigation. The event appears at the minimum to have preceded the formal commencement of the armed conflict at 23h50 on 7 August 2008. However, given the temporal proximity of the events and their close connections to a number of precursor acts which escalated the level of violence, any authorised investigation will need to establish on the basis of the evidence collected that there was a sufficient nexus between the killing of the Georgian peacekeepers and the contextual elements for war crimes or crimes against humanity. The available information at this stage suggests that such a nexus exists.

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

<sup>228</sup> Annex E.2.37: IFFMCG, Volume III, GEO-OTP-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, hostilities between Georgian armed forces and the highly organised South Ossetian forces were sufficiently intense to constitute a non-international armed conflict. Because the attack against the Georgian peacekeepers occurs 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 can be established that the Russian armed forces in fact exercised overall control over South Ossetian forces at the time of this incident, the armed conflict would have been rendered international and the relevant conduct would give rise to the application of the law of international armed conflict, providing criminal jurisdiction pursuant to article 8(2)(b)(iii).
169. Despite the limited information available on the precise circumstances of the attack, the fact that peacekeepers were attacked is not disputed by any party. The allegation that the Georgian peacekeepers may have initiated the attack does bring into question whether at the time of the attack they had lost their entitlement to the protection given to civilians and civilian objects. However, bearing in mind the low threshold applicable at this stage of the procedure, and the presumption of civilian character that governs the application of the law in case of doubt,<sup>230</sup> the Prosecution has concluded that there is a reasonable basis to believe that South Ossetian forces committed the war crime of intentional directing an attack against personnel and objects involved in

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<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, *The Prosecutor v. Stanislav Galic*, Trial Chamber Judgment, 5 December 2003, case No. IT-98-29-T, para. 51. See also article 52(3) of API.

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

iii. *Alleged attack against Russian peacekeepers*

170. The JPKF had two bases in Tskhinvali: the JPKF headquarters were based in Nizhniy Gorodok in the central part of Tskhinvali (JPKF HQ) and the Russian Peacekeeping Forces Battalion headquarters were located in Verkhniy Gorodok in the south-western part of Tskhinvali (RUPKFB HQ).<sup>231</sup> The RUPKFB HQ counted 528 servicemen of the Russian Federation's Peacekeeping Battalion from the JPKF under the command of Lt Col K.A. Timerman. At the time of the exchange of fire on 8 August 2008, the battalion had 296 servicemen at its immediate disposal at the RUPKFB HQ while the JPKF HQ was composed of 77 Russian peacekeepers under the command of Major General M.M. Kulakhmetov.<sup>232</sup> In addition, there were 162 Russian servicemen on duty at 12 peacekeeping observation posts.<sup>233</sup>

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

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<sup>231</sup> Annex E.8.31: Order No. 27, GEO-OTP-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, GEO-OTP-0008-1793 at 1801; Annex E.2.37: IFFMCG, Volume III, GEO-OTP-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, GEO-OTP-0008-0584.

available is derived solely from one party to the conflict, is contradicted by information provided by the other, and no third party has been able to provide corroboration or to come to a relevant determination on the matter. The IFFMCG, AI and HRW were similarly unable to corroborate claims by either side as they could not assess whether, at the time of the offensive, the peacekeepers had lost their protection by virtue of having taken direct part in the hostilities.<sup>234</sup> The conclusions reached by the Prosecution are therefore provisional in nature.

172. While the fact that an exchange of fire in and around the RUPKFB HQ occurred on 8 August 2008 is not contested, the two main contentious issues that arise from the submitted accounts are: (i) whether the Russian peacekeeping contingent RUPKFB HQ were at the time directly participating in the hostilities and/or that their infrastructure was being used to make an effective contribution to the military action of a party to a conflict, and were thus rendered a legitimate military target; and (ii) whether the Georgian armed forces initiated the attack or instead responded to live fire coming from the direction of RUPKFB HQ. The attack on the RUPKFB HQ on 8 August 2008 resulted in the death of ten Russian peacekeepers<sup>235</sup> while 30 others were wounded.<sup>236</sup>

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

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<sup>234</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8131.

<sup>235</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8130.

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

allegations that the Georgian armed forces deliberately attacked the JPKF HQ in the centre of Tshkinvali and the RUPKFB HQ base “Verkhniy Gorodok” located on the south-western outskirts of Tshkinvali at a time when the Russian peacekeepers and their property were entitled to protected status.

174. The supporting material submitted by the Russian authorities indicates that the attack against the Russian peacekeeping forces started at 00h01<sup>237</sup> on 8 August 2008, when the Georgian armed forces opened fire at the Tamarasheni observation post of the RUPKFB using small arms, mortar, artillery, Grad rocket launchers, single-rockets, T-72 tanks, SU-25 airplanes, and BMP-2.<sup>238</sup> Two minutes later, at 00h03, the Georgian armed forces reportedly carried out a mortar attack against the JPKF HQ in Tshkinvali, followed by a second attack with Grad MLRS at 04h08. The JPKF HQ allegedly came under Georgian fire again at around 08h15-09h05 when the JPKF commander Major General Kulahmetov ordered the destruction of confidential documents and electronic data storage equipment.<sup>239</sup>

175. According to information provided by the Russian authorities, at around 06h35 on 8 August 2008 a Georgian tank, located on the road leading from Zemo-Nikozi to Tskhinvali, fired at the Glaz observation post, located on the roof of the RUPKFB HQ barracks, wounding Jun Sgt I.Ya. Lotfullin.<sup>240</sup> Following this attack on the RUPKFB HQ, Georgian armed forces carried out a larger attack on the RUPKFB HQ using small arms, mortars, artillery and tank guns. The attack lasted around 20

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

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

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

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

minutes. At approximately 07h00, Georgian tanks moving towards Tskhinvali allegedly fired on and destroyed an infantry fighting vehicle (type BMP-1, hull number 619) and an armoured patrol car (type BRDM) that had been placed on the Tshkinvali road to separate the opposing sides. Two peacekeepers on duty are alleged to have been killed. The Georgian armed forces allegedly reopened fire on the RUPKFB HQ at 07h40 and 8h00, killing another two Russian peacekeepers. In the course of the attack on the RUPKFB HQ, the Georgian armed forces also allegedly targeted a medical aid post and ambulances which were located inside the compound and appropriately marked with Red Cross symbols.<sup>241</sup> The shelling of the RUPKFB HQ is said to have continued through the day until 9 August 2008.

176. In the period between 8 and 10 August 2008, the Georgian armed units allegedly attacked also other observation posts of the Russian Peacekeeping Battalions from the JPKF in Eredvi, Vanati, Kekhvi, Pauk, Prisi, Avnevi, Tsunaristba, Kverneti, Andzisi, Artsevi, and Megvrekisi.<sup>242</sup>

177. In support of its claim that the attack was premeditated and prepared well in advance, the Russian authorities submitted two CDs that were allegedly seized by Russians armed forces in South Ossetia after the withdrawal of Georgian armed forces. These two CDs were dated between 2005 and 2007 and are reported to contain targets for future military operations, including RUPKFB HQ.<sup>243</sup>

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

<sup>242</sup> Annex E.8.31: Order No. 27, GEO-OTP-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 authorities, the Georgian JPKF contingent left JPKF HQ at 14h43 on 7 August 2008, indicating that these forces knew that the JPKF HQ was about to be attacked. It is alleged that shortly after their departure, the Georgian side started firing from the side of Avnevi in the direction of Khetaguro using artillery, tanks and armoured personnel carriers (APCs).<sup>244</sup> The commander of the Georgian peacekeeping battalion at the time, Mamuka Kurashvili, explained that he ordered officers of the Georgian peacekeeping battalion to leave the JPKF HQ in Tskhinvali at around 17h00 on 7 August after the JPKF Commander refused to give additional security guarantees to Georgian peacekeepers stationed in Tskhinvali.<sup>245</sup> These guarantees were sought after the earlier described incident in which the Georgian peacekeeping contingent stationed at Avnevi checkpoint came under heavy shelling from South Ossetian positions, which occurred at around 14h00 that same day.

179. Further, according to the narrative and timeline provided by the Georgian authorities, between 5h15 - 5h30 on 8 August 2008, the Georgian Central Front forces encountered heavy shelling in the northern area of Zemo Nikozi as they were about to move towards Tskhinvali. Georgian military servicemen deployed at the time gave statements to Georgian investigative organs stating that reconnaissance as well as other intelligence sources confirmed that the shelling originated from the outskirts of the RUPKFB HQ Verkhniy Gorodok.<sup>246</sup>

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

<sup>245</sup> Annex E.7.17: Government of Georgia, Witness statement, GEO-OTP-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 employed for shelling against the Georgian positions. However, this witness did not directly see the artillerists launching

Most of the hostile positions were identified as being located on the higher ground of RUPKFB HQ firing downwards towards the Georgian armed forces as they moved along the road to Tskhinvali.

180. The Georgian timeline indicates that at around 05h50-6h00 on 8 August 2008, Georgian armed forces located 300-400 meters away from the east side of the RUPKFB HQ on their way towards Tskhinvali came under fire from snipers, machine guns, rocket-propelled grenades and armoured vehicle guns from a direction of the RUPKFB HQ.<sup>247</sup> As a result, it is alleged that three Georgian soldiers were killed and one was injured, and several Georgian tanks damaged.<sup>248</sup> The Georgian armed forces are said to have refrained from returning fire for at least ten minutes while they waited for approval from their superiors. At 06h10, the Georgian armed forces apparently instructed the infantry forces to return fire and employ tank support for the first time.<sup>249</sup> The Georgian artillery of the First Infantry Brigade Artillery Battalion carried out the next attack on RUPKFB HQ at or about 6h30. According to the Georgian authorities, single-rockets, automatic rifles, and light artillery fire were 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-OTP-0006-0539 at 0551-0552; 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 that it was the Georgian troops that were first fired at from the RUPKFB HQ, the Georgian authorities have also alleged that the Russian peacekeepers had lost their protected status because they took direct part in hostilities as of 22h30 on 7 August 2008.<sup>251</sup> It is alleged that the Russian peacekeepers contributed to the military advantage of the South Ossetian forces by providing them with the coordinates of Georgian troops and by making the infrastructure of the RUPKFB HQ available for South Ossetian military positions.<sup>252</sup>

182. In support of the above, the Georgian authorities have submitted a transcript of a 23 second telephone conversation between the Commander of the JPKF, General Kulakhmetov and the Head of the Georgian peacekeeping contingent, General Kurashvili, at 00h23 on 8 August 2008 in which the former is said to have admitted that Russian peacekeepers were providing coordinates for artillery shelling to South Ossetian forces.<sup>253</sup>

183. According to the Russian authorities, this telephone conversation took place but added that its content was taken out of context.<sup>254</sup> In particular, it is claimed that the peacekeepers were constantly reporting on the movements of tanks and artillery firing on the ground as part of their mandate. The communication lines of the JPKF, including the

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<sup>251</sup> Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-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: Miniurovich, your people are giving coordinates. Kulakhmetov: Of course they are giving [coordinates]. Why did you think that we would not? You are pounding here and you think that we should do 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-OTP-0006-0219.

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

Russian peacekeepers, were said to have been deliberately left open for transparency purposes. Under the Sochi agreement and applicable protocols, a degree of coordination between peacekeepers and parties to the conflict was allowed.<sup>255</sup> Whether the provision of coordinates was therefore permitted within the applicable legal framework remains contentious at this stage.

184. The Georgian authorities have further claimed that at the time of the attack a South Ossetian sniper, Oleg Galavanov, was on the roof of the main building of the RUPKFB HQ<sup>256</sup> to correct the South Ossetian artillery fire against Georgian units and to transmit Georgian coordinates.<sup>257</sup> By contrast, the Russian authorities claim that Galavanov was located on the roof of the university building next to the HQ when he was wounded by Georgian tank fire and that Russian peacekeepers transported him to the medical facility within the peacekeeping compound where he was killed due to the destruction of the facility by a subsequent Georgian attack.<sup>258</sup> According to the Georgian account, any transfer of Galavanov to the medical facility inside the base was highly unlikely given the state of hostilities at the time.<sup>259</sup>

185. In addition to the alleged presence of the South Ossetian sniper, the Georgian authorities have argued that the Russian peacekeeping forces

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<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 Georgian-Ossetian Conflict, 6 December 1994, GEO-OTP-0008-0683. For full text see above, footnote 201.

<sup>256</sup> Annex E.2.37: IIFFMCG, Volume III, GEO-OTP-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 them access to the RUPKFB HQ facilities and infrastructure.<sup>260</sup>

186. For instance, Anatoly Barankevich, the Security Council Chairman of the South Ossetian *de facto* authority, acknowledged in an interview that he decided to go towards the RUPKFB HQ in order to secure the roads leading to the JPKF HQ and, for that purpose, ordered the South Ossetian forces to occupy the surrounding houses and block the nearby crossroads. He stated that it was from those positions that South Ossetian forces ambushed and attacked Georgian police and military moving through the town.<sup>261</sup>

187. Reportedly, however, the peacekeeping mission was strictly forbidden to host members of the South Ossetian forces. South Ossetian citizens were also not allowed in the compound, except those who needed medical care and were admitted to the medical unit. Furthermore, the activities of the Russian peacekeepers were subject to the close scrutiny of relevant stakeholders and the presence of South Ossetian fighters at the RUPKFB HQ would have been easily known.<sup>262</sup>

188. The Prosecution recalls that the presence of a member of an adverse party would not, in and of itself, remove the protection owed to civilian persons or objects, assuming they were entitled to such protection. As such, examination of this particular allegation relates to the broader

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

<sup>261</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).

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

question of whether the Russian peacekeepers at RUPKFB HQ were at the time directly participating in the hostilities. If they were not, the issue concerns consideration as to the proportionality of the Georgian fire in response to the activities of Oleg Galavanov, which appears to have been directed to other parts of the RUPKFB HQ compound and not just the building Galavanov was allegedly located at. Depending on the indiscriminate nature of such fire, such conduct may also constitute the crime of internationally directing of attacks against peacekeeping personnel and objects.

189. The information available remains indeterminate in relation to a number of issues related to whether the Russian peacekeeping contingent RUPKFB HQ had at the time of the attack lost their entitlement to the protection given to civilians and civilian objects. Included in this context is information on the location and role of Oleg Galavanov, and whether the Georgian armed forces initiated their attack in response to live fire coming from the direction of RUPKFB HQ. The precise chain of events and the conduct alleged will require verification in the context of any authorised investigation. However, bearing in mind the low threshold applicable at this stage of the procedure, and the presumption of civilian character that governs the application of the law in case of doubt,<sup>263</sup> the Prosecution has concluded that there is a reasonable basis, at this stage, to believe that the war crime of intentionally directing an attack against personnel and objects involved in a peacekeeping mission has been committed with respect to the intentional directing of attacks by the Georgian armed forces against

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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 No. IT-98-29-T, para. 51. See also Article 52(3) of API.

Russian peacekeepers personnel and installation at the JPKF HQ and the RUPKFB base during the night of 7 to 8 August 2008, pursuant to article 8(2)(b)(iii).

*(d) Alleged Indiscriminate and Disproportionate Attacks*

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

*i. Alleged Indiscriminate and Disproportionate Attacks by Georgian armed forces*

191. The Georgian armed forces deployed in South Ossetia consisted of nine light infantry brigades, five tank battalions, eight artillery battalions, Special Forces units, and members of the Ministry of Interior. The President of Georgia was Commander-in-Chief at the time.<sup>264</sup>

192. The Prosecution has examined allegations that the Georgian armed forces carried out indiscriminate and disproportionate attacks against civilians and civilian property during their air and ground military offensive against the city of Tskhinvali and surrounding villages that started on the night of 7 August 2008 until 12 August 2008. The article 15 communications received on behalf of victims through the Russian embassy in The Hague also contain allegations that in the course of the

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<sup>264</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8020.

Georgian military offensive on the city of Tskhinvali and surrounding villages in South Ossetia on 7-9 August, the armed forces carried out indiscriminate and disproportionate attacks against civilian targets in South Ossetia.

193. These attacks reportedly resulted in civilian deaths and injuries and considerable damage to civilian objects or buildings dedicated to education, including schools, hospitals and civilian residences.<sup>265</sup> HRW, for example, documented an 18 hour rocket attack allegedly carried out by Georgian armed forces on the city of Tskhinvali between 7 and 8 August 2008, during which the South Ossetian Central Republican Hospital may have been targeted.<sup>266</sup>

194. According to HRW, during aerial and ground offensives the Georgian armed forces used weapons that lacked sufficient precision to be accurately used against military targets in close physical proximity to civilians and civilian property. This included the use of tanks, Grad MLRS and cluster munitions.<sup>267</sup> Similarly, according to AI, on 7 August 2008 Georgian Air Force SU-25 type aircraft are alleged to have dropped bombs on residential areas in the villages of Nogkau, Khetagurovo, and Khetagurovo, resulting in a number of civilian deaths and scores of injury,<sup>268</sup> while over 100 civilian houses were estimated to have been hit

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

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

<sup>267</sup> Annex E.4.10: HRW, Up in Flames, GEO-OTP-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, GEO-OTP-0003-1196 at 1198-1199; Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 0149-0150.



in Tskhinvali, many of which were occupied at the time according to eye-witness accounts.<sup>269</sup>

195. The information available with regard to the nature of targets, circumstances of attacks, and scale of the damage caused is limited at this stage. The IIFFMCG, for example, found that South Ossetian forces were responsible for firing at Georgian forces from locations close to civilian areas, or for setting up defensive positions or headquarters in civilian infrastructure.<sup>270</sup> In response to these attacks, Georgian armed forces appear to have attacked military objectives that were located near densely populated areas in Tskhinvali and surrounding villages, causing the destruction of civilian objects.<sup>271</sup>

196. The type of weaponry used in each incident also remains unclear. For example, the IIFFMCG records that Grad MLRS were used in the south and south-west of Tskhinvali. By their nature, the use of Grad MLRS in urban areas renders them incapable of striking solely military objectives or of avoiding extensive damage to civilian property within the radius of 100-150m from the intended target.<sup>272</sup> As such, their use in civilian areas could amount to the launching of indiscriminate attacks, depending on the facts whether the attack was unlawful within the meaning of article 8(2)(b)(i)-(ii) or disproportionate within the meaning of article 8(2)(b)(iv). However, this would require an assessment of the

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<sup>269</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, 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.2.37: IIFFMCG, 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-OTP-0001-0558.

<sup>270</sup> Annex E.2.36: IIFFMCG, 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.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1954.

<sup>272</sup> Annex E.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8145.

exact nature and scale of the used weapons and their effects, the known area of 'spread' of sub-munitions, the character of the targeted area and the physical proximity of residential civilian areas to military objectives, or the availability of alternative weapons, which is unavailable at this stage.

197. Thus, owing to the insufficiency of the information available, the Prosecution is unable at this stage to determine whether there is a reasonable basis to believe that the alleged unlawful attacks by the Georgia armed forces amount to a war crime within the jurisdiction of the Court. This conclusion should be without prejudice to other possible findings that may be made during the course of investigations. In particular, an in-depth assessment of these allegations<sup>273</sup> requires further evidence on the context of the attacks to determine whether deaths, 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 active in Georgia consisted of five regimental tactical groups (reinforced motorized-rifle regiments) from the 19th (North Ossetia) and 42nd (Chechnya) Motorized-Rifle Divisions, deployed under the command and control of the Planning Staff of the North Caucasus Military District during combat operations in South Ossetia. These forces were also supported by five Battalions of the Russian 58th Army (HQ Vladikavkaz) and the Russian 76th Airborne

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

Division. The President of Russia was the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation at the time.<sup>274</sup>

199. The Prosecution has reviewed allegations relating to alleged unlawful attacks by the Russian armed forces against civilians and civilian property during the air and ground operations between 8 and 12 August 2008. These attacks reportedly resulted in civilian deaths and injuries and considerable damage to civilian objects, including schools, hospitals and civilian dwellings.<sup>275</sup>

200. The information available on these alleged attacks, in particular with respect to the circumstances and planning, intended targets, as well as the scale of collateral damage, is insufficient at this stage to provide a reasonable basis to believe that members of the Russian armed forces bear criminal responsibility for the commission of these crimes.

201. The Russian armed forces are alleged to have carried out indiscriminate and disproportionate attacks against civilians and civilian property with weapons that cannot be accurately used against military targets in civilian areas, such as the use of Grad MLRS and cluster munitions. These attacks reportedly resulted in civilian deaths and injuries and considerable damage to civilian objects, including schools, hospitals and civilian dwellings.<sup>276</sup>

202. The information available indicates that Russian armed forces reportedly carried out air attacks in the areas of Tskhinvali and Eredvi

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<sup>274</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8021.

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

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

in South Ossetia and around Tqviavi and Variani in the Gori municipality. The town of Gori was subject to aerial bombardments in four or five different areas 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 both military and civilian targets in Gori, Kareli and the Georgian administrative villages of Prisi and Tamarasheni.<sup>278</sup> According to the OSCE spot report, on 11 August 2008, Georgian officials reported that although it appeared that attacks by Russian military targeted mainly military installations, they resulted in the destruction of civilian objects in Ajara and Gori.<sup>279</sup>

204. On the morning of 12 August, for example, the Russian armed forces reportedly carried out a rocket attack on the main square in front of the Gori Municipality Administration building. As a result of the attack, at least eight civilians were killed and some 23-30 injured. Victims of the attack described that they saw numerous small explosions within seconds of each other, suggesting the use of cluster munitions. Although the Russian military initially denied that it used cluster munitions in Gori, Foreign Minister Sergei Lavrov confirmed on 13 August 2008 that Russian forces were active in the area. Eyewitnesses interviewed attested to the absence of military targets in the immediate vicinity.<sup>280</sup>

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<sup>277</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8132-8148.

<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.4.810: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0452-0454; Annex E.4.3: AI, *Civilians in the line of fire*, GEO-OTP-0001-0125 at 0154-0155; Annex E.4.4: AI, "Georgia Russia

205. The IIFFMCG could not reach a definite conclusion on the legality of the attacks carried out by the Russian armed forces on administrative, public and residential civilian buildings, and other civilian property in Tskhinvali and surrounding villages as well as in relation to the attacks against cultural property, owing to insufficient information on the facts relating to the circumstances of the military operations in question.<sup>281</sup>
206. HRW documented the attack against the military hospital in Gori by Russian armed forces on 13 August 2008.<sup>282</sup> According to this source, a Russian military helicopter fired a rocket at hospital staff members in the hospital yard.<sup>283</sup>
207. The information available, however, indicates that most of the Russian air attacks appeared to have targeted Georgian military positions outside built up areas. The proximity of these targets to civilian objects varied. In some cases, the military targets were within meters of civilians and civilian residences. According to HRW, Russian armed forces targeted Georgian military located in the city of Gori, including the military base and the artillery brigade concentrated in the city since mid-July 2008.<sup>284</sup> In addition, some civilian objects hit by Russian armed forces were reportedly used for military purposes by Georgian armed

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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.4.8: 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.2.36: IIFFMCG, 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.2.36: IIFFMCG, 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 them legitimate military targets. For instance, HRW reported that the Russian air forces carried out several attacks on and near School No. 7 in Gori at the moment when around 100 members of the Georgian armed forces were present in the yard of the school.<sup>285</sup>

208. As such, the information available at his stage remains insufficient to enable a determination whether there is a reasonable basis to believe that the attacks by Russian armed forces amounted to the war crimes of 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 would cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated under article 8(2)(b)(iv), or the intentionally directing attacks against hospitals under article 8(2)(b)(ix).

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 sufficient information on the nature of targets, circumstances of attacks, and scale of the damage caused relevant to establishing whether the object of the attack were civilians and/or civilian objects and whether the perpetrator intended such civilians and/or civilian objects to be the object of the attack, as required under the Rome Statute.<sup>286</sup>

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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.2.36: IIFFMCG, Volume II, GEO-OTP-0002-7801 at 8134 (The IIFFMCG concluded that “the Mission has no information indicating that schools not 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 death, injury, or damage, the elements of the crime require that the perpetrator was aware that the attack would cause incidental death, injury, or damage of such an extent as to be clearly excessive in relation to the concrete and direct military advantage anticipated.<sup>287</sup> The information available at this stage in relation to the planning of the attacks in areas where damage occurred, the number and nature of military targets (e.g. barracks, positions of artillery, location of enemy combatants and the scale of collateral damage that the alleged attacks caused) is insufficient to assess the elements of the required proportionality test, and in particular what concrete and direct military advantage was anticipated and 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 particular, an in-depth assessment of these allegations<sup>288</sup> requires further evidence on the context of the attacks to determine whether deaths, injuries or property damage amounted to a war crime within the jurisdiction of the Court.

*(e) Nexus between the individual acts 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 ICTY”, *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 the context of and was associated with an armed conflict of an international character.”<sup>289</sup> 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 ability to commit the crime, and the manner in which the crime was committed.<sup>290</sup> Nonetheless, “the armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of the battle.”<sup>291</sup>

213. In determining whether or not the act in question is sufficiently related to the armed conflict, the Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.<sup>292</sup>

214. The Prosecution has focussed its analysis in this part on the crimes for which it found a reasonable basis to believe occurred, namely the war crimes of wilful killing/murder (articles 8(2)(a)(i)/8(2)(c)(i)), destroying the enemy’s property/the property of an adversary (articles 8(2)(b)(xiii)/8(2)(e)(xii)), and pillage (articles 8(2)(b)(xvi)/8(2)(e)(v)); and

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<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; ICC-02/11-14-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. 287-288; ICC-01/04-01/07-717, para. 380.

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



intentionally directing attacks against personnel or objects involved in a peacekeeping mission (articles 8(2)(b)(iii)/8(2)(e)(iii)).

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

216. The *nexus* between the armed conflict and the crimes is further demonstrated by 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 associated with an enemy party or were entitled to the protection given to civilians and civilian objects at the time. With respect to the alleged crimes against the ethnic Georgian population, the victims appear to have been targeted in pursuance of a policy of the South Ossetian *de facto* authorities to forcibly expel ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to sever any remaining links with Georgia and secure full independence. The attacks against personnel and object involved in a peacekeeping mission were launched in the context of allegations that the Georgian and/or Russian peacekeepers had, at the time of each relevant attack, lost their entitlement to protected status.

217. On the basis of the above, it appears that the armed conflict played a substantial role in the perpetrators' decisions to commit the alleged crimes. Moreover, the armed conflict played a substantial role in the perpetrators' ability to commit the alleged crimes and the manner in which the crimes were committed. Indeed, the perpetrators would not have been able to commit such crimes in the absence of the armed conflict and the ensuing occupation. Because of the armed conflict, the perpetrators 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. In particular, there is a reasonable basis to believe that South Ossetian forces committed the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)), and persecution against any identifiable group or collectivity on ethnic grounds (article 7(1)(h)). These crimes were allegedly committed as part of a widespread and/or systematic attack against ethnic Georgian civilians in South Ossetia, involving the multiple commission of the above mentioned acts against the ethnic Georgian civilian population in South Ossetia and the surrounding "buffer zone" and in pursuance of a policy of the South Ossetian *de facto* authorities to forcibly expel ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to sever any remaining links with Georgia and secure full independence.

*(f) Contextual elements of crimes against humanity*

219. The contextual elements of crimes against humanity require: (i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) the widespread or systematic nature of the attack; (iv) a nexus between the individual act and the attack; and (v) knowledge of the attack.<sup>293</sup> In light of the nature of the current stage of the proceedings, and bearing in mind that there is presently no suspect before the Court, the last requirement cannot be adequately addressed at this stage, as knowledge is an aspect of the mental element under article 30(3) of the Statute.<sup>294</sup> Thus, the Prosecution limited its analysis to the first four elements.

*(g) Acts allegedly committed by South Ossetian forces*

*i. Attack directed against any civilian population*

220. Article 7(2)(a) defines an attack directed against any civilian population as a course of conduct involving the multiple commission of the acts referred to in article 7(1) of the Statute against a civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.<sup>295</sup>

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

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<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 entails the “multiple commission of acts”, which means “more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred.”<sup>296</sup> The term is not restricted to a military attack<sup>297</sup>, but refers to a campaign or operation carried out against the civilian population.<sup>298</sup>

222. In the context of an armed conflict, the term “civilian population” refers to persons who are civilians, as opposed to members of the armed forces and other combatants.<sup>299</sup> The civilian population must be the primary object of the attack and not just an incidental victim;<sup>300</sup> however, the presence of certain non-civilians does not necessarily deprive the population of its civilian character.<sup>301</sup> It is also not necessary for the potential civilian victims of a crime under article 7 of the Statute to constitute a group distinguished by nationality, ethnicity or other distinguishing features. Such a distinction is only necessary for a finding of persecution pursuant to article 7(1)(h).<sup>302</sup>

223. According to the available information, South Ossetian forces carried out attacks deliberately targeted at the ethnic Georgian population of villages and entire municipalities in the territory of South Ossetia and

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<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 line between South Ossetia and the rest of Georgia, including within the 20km wide “buffer zone”.

224. The attacks systematically targeted ethnic Georgians following a consistent pattern of deliberately killing, beating and threatening civilians, and looting and burning their houses and other property on a selective basis. The IFFMG, OSCE-HRAM, and HRW documented systematic burning and looting of houses belonging to ethnic Georgians in over 21 villages.<sup>303</sup>

225. The information available on the nature and manner of commission of the attacks and the profile of civilians targeted shows that these incidents constituted “a campaign or operation carried out against the civilian population”<sup>304</sup>. Upon entering the villages on foot, in cars and trucks, the South Ossetian forces would reportedly loot the property of ethnic Georgians before setting them alight. One witness testified that more than 100 South Ossetian forces entered the village of Achabeli shouting “burn all these houses!” and “don’t leave anything!”<sup>305</sup> Some of the remaining inhabitants were forced to watch their houses burning while the perpetrators humiliated them.<sup>306</sup> A direct witness of the alleged crimes said that while burning their houses, South Ossetian

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<sup>303</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8197-8198; Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1946-1949; Annex E.4.10: HRW, Up in Flames, GEO-OTP-0001-0336 at 0471-0472.

<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-OTP-0006-1341.

<sup>306</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8173.

forces told the present ethnic Georgians: “you can get warm near the fire from your houses”.<sup>307</sup>

226. It is reported that in some villages in Patara Liakhvi valley, houses belonging to ethnic Ossetians were marked off so that they were not attacked.<sup>308</sup> In other cases, it is alleged that local South Ossetians guided South Ossetian forces through the villages to identify the houses belonging to ethnic Georgians.<sup>309</sup>

227. During the pillage and destruction campaign, HRW and OSCE-HRAM also documented several witness accounts describing summary executions, severe beatings and injury of ethnic Georgians by members of the South Ossetian forces, while civilians were generally threatened to leave on pain of punishment or death.<sup>310</sup> Another witness recounts that members of the South Ossetian forces shouted that they would kill all Georgians and ordered all residents to leave.<sup>311</sup>

228. The victims reportedly included women and the elderly who were unable to leave their homes in time. A victim described to HRW that on 12 August 2008 South Ossetian forces entered her house, dragged her husband and brother-in-law to the yard and after having beaten them “mercilessly”, shot them dead. These forces also looted her belongings, directed automatic weapon fire against her house and tried to set the

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<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.2.38: OSCE-HRAM 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 eye-witness also reported the killing of 70-year-old man by South Ossetian forces, after which they set his house alight.<sup>313</sup>

229. As described above, there is also information indicating 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 acted to prevent and punish such crimes.<sup>314</sup>

230. The OSCE-HRAM reported that in the period from August through October 2008, primarily South Ossetian forces arbitrarily detained around 345 civilians, of whom many were held in detention facilities in poor conditions.<sup>315</sup> These detention facilities were under the control of South Ossetian forces in various locations in South Ossetia, including the villages of Tamarasheni, Java, Kekhvi and the city of Tskinali. Civilians were detained for the duration of 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 at this stage to determine the nexus between the individual cases of arbitrary detention and the attack against the civilian population.

231. The Prosecution also gathered information on a limited number of cases of rape related to the armed conflict, including four or five cases that the Government of Georgia reported to the OSCE-HRAM.<sup>316</sup> The

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

<sup>313</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0484.

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

<sup>315</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1957-1959.

<sup>316</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1957.

Prosecution is mindful that the limited figures could be the result of insecurity and existing social stigma attached to sexual violence in Georgia, which deferred victims from reported alleged crimes of sexual violence.<sup>317</sup> The information available on these alleged crimes is however too limited, in particular with respect to the attribution, and insufficient to determine whether the reported cases were committed as part of the attack against the civilian population; or were isolated and 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 course of conduct involving multiple commission of acts under article 7(1) must be carried out “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 “policy to commit such attack” requires that the State or organisation actively promote or encourage the attack against a civilian population.<sup>318</sup> The footnote to the paragraph states “a policy, which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be

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<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 E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1939.

<sup>318</sup> Elements of Crimes, Article 7, Introduction, para. 3. See also ICC-02/11-01/11-656-Red, para. 214.



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

234. The Pre-Trial Chambers have found that the requirement of a State or organisational policy under article 7 “implies that the attack follows a regular pattern”.<sup>320</sup> An attack which is planned, directed or organised – as opposed to spontaneous acts of violence – will satisfy this criterion.<sup>321</sup> However, the policy need not be explicitly defined or formalised by the State or organisational group.<sup>322</sup> The Trial Chamber II has expressed that the existence of a State or organisational policy may, in most cases, be inferred from the repetition of acts performed according to the same logic, the existence of preparatory activities or collective mobilization orchestrated or coordinated by the State or organisation.<sup>323</sup>

235. With respect to the term “organisational”, “organisations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population.”<sup>324</sup> Pre-Trial Chambers have indicated that the determination of whether a group qualifies as an “organisation” under the Statute must be made on a case-by-case basis. In this regard, the Chambers of this Court have identified

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

<sup>320</sup> ICC-01/09-19-Corr, paras. 85-86; 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. 85-86; 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. 85-86; 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 keep 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 ‘organisation’ under article 7 of the Statute, including: a) whether the group is under a responsible command, or has an established hierarchy;<sup>325</sup> b) whether the group possesses the resources, means, and sufficient capacity (including to act and coordinate) to carry out a widespread or systematic attack against a civilian population;<sup>326</sup> c) whether the group exercises control over part of the territory of the State; d) whether the group directed its criminal activities against the civilian population as a primary purpose; e) whether the group articulates, explicitly or otherwise, an intention to attack a civilian population; and f) whether the group is part of a larger group, which fulfils some or all of the above-mentioned criteria.<sup>327</sup> However, these factors are not a rigid legal definition, and they do not need to be exhaustively fulfilled.<sup>328</sup> According to Trial Chamber II, the group does not necessarily have to have an elaborate structure (such as that of a State) nor does it have to have the features of a quasi-State but instead what is essential is that it possesses the capacity to realize its objective of attacking a civilian population.<sup>329</sup>

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

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<sup>325</sup> See also ICC-01/04-02/06-309, paras. 14-15, 18.

<sup>326</sup> See also ICC-01/04-02/06-309, paras. 16-17 (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 organisation for the purpose of article 7. This includes the existence of a responsible command, hierarchical structure, and the group's capability to coordinate and carry out a widespread and systematic attack. The South Ossetian *de facto* administration was organised in State-like institutions and reflected a structure of a quasi-State with a President, parliament, government and a judiciary. This administration was in command of around 3,500 members of the South Ossetian *de facto* Ministry of Defence, the South Ossetian *de facto* Ministry of Interior, the Special Purpose Police Squad OMON, irregular militias, and volunteers, all placed under the responsible command of the South Ossetian *de facto* President. The South Ossetian forces were equipped with light armoured vehicles, tanks, automatic weapon, and grenades.

237. By August 2008, the South Ossetian *de facto* authorities controlled parts of the territory in South Ossetia, including Java district, substantial parts of Znauri district<sup>330</sup>, with the exception of two Georgian villages (Avnevi and Nuli) forming part of Tighva municipality, substantial parts of Tskhinvali district, except for the areas North and North East of Tskhinvali (i.e. Kurta and Eredvi municipalities) and the western part of Akhalgori municipality.<sup>331</sup>

238. The attacks on the civilian population in South Ossetia were not isolated or spontaneous acts of violence, but were committed pursuant to the policy of the South Ossetian leadership. This policy entailed the forcible expulsion of ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to sever any remaining links with

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

<sup>331</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0003 at 0036-0037.

Georgia and secure full independence. Specifically, this campaign was primarily directed against the ethnic Georgian villages under Tbilisi's control in the Kurta, Eredvi and Tighva municipalities.

239. The South Ossetian leadership acknowledged some aspects of this policy of expulsion in their public statements. On 15 August 2008, the South Ossetian *de facto* President Eduard Kokoity publicly stated that Georgian civilians will not be allowed to go back to South Ossetia, because the South Ossetian *de facto* authorities were in the process of returning South Ossetian refugees to the region.<sup>332</sup> Asked about the situation in the Georgian enclaves in South Ossetia, Kokoity reportedly said: "Nothing special. We have in fact flattened everything there."<sup>333</sup> Another South Ossetian official, the *de facto* Chairman of Parliament, Znaur Gasiev, reportedly stated on 22 August 2008: "The war will not start again... We did a nasty thing, I know. But Georgians will not return here anymore – we burnt all their houses in the enclaves. There was no other way to stop this war and cut the knot."<sup>334</sup>

240. The periodic publication *The Economist* quoted also a South Ossetian intelligence officer as stating: "We burnt these houses. We want to make sure that they [ethnic Georgians] can't come back, because if they do

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<sup>332</sup> Annex E.8.22: Korrespondent.net, "Kokoity: Georgians face no threat of discrimination in South Ossetia [ : ]", 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: Komsomolskaia Pravda, "They have refused South Ossetia. What will it do next?" [ : ?]”, 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 enclave again and this should not happen.”<sup>335</sup>

241. The supporting material further indicates that the policy to expel ethnic Georgian residents from South Ossetia was passed from the highest echelons of the South Ossetian leadership to the South Ossetian forces through the chain of command. On 22 August 2008, the Deputy Head of the South Ossetian 7<sup>th</sup> Battalion of the Ministry of Defence, Arsen Kvezerov, reportedly received an order to set fire to all the property that remained in Kekhvi and Eredvi villages.<sup>336</sup> On 13 August 2008, reportedly Kvezerov stated that the ethnic Georgian villages of Disevi, Eredvi and Koshi had been set on fire.<sup>337</sup> On 19 September 2008, Serzhik Bestaev, member of the Civil Detachment of Muguti, allegedly acknowledged that “there is not a single Georgian left in Ossetia” and that “Avnevi and others are razed to the ground”.<sup>338</sup> A claimant before ECHR testified that during his detention by South Ossetian forces in August 2008 at the administrative boarder of Tskhinvali and Tamarasheni, a member of South Ossetian forces told him that President Kokoity issued an order “to physically devastate all Georgians”.<sup>339</sup>

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

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<sup>335</sup> Annex E.8.30: The Economist, “The war in Georgia: A Caucasian journal”, 21 August 2008, GEO-OTP-0003-1775.

<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 militias and the South Ossetian military command.<sup>340</sup>

243. The policy of expulsion can be also inferred from the pattern of attacks against Georgian villages, reflected in 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. A witness allegedly heard the South Ossetian forces say that they would “exterminate the whole Georgian ethnicity and kill everybody.”<sup>341</sup> AI recorded that the South Ossetian forces shouted at ethnic Georgians: “Get out! We don’t want any Georgians here”.<sup>342</sup>

244. By contrast, the information available at this stage does not indicate the existence of a State or organisational policy of the Russian armed forces or the Russian Federation in relation to the crimes allegedly committed either by those members of the Russian armed forces who participated in the commission of crimes by South Ossetians forces, or in relation to the crimes allegedly committed by South Ossetian forces themselves.

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, GEO-OTP-0003-0024; for a summary of the material in English see Annex E.7.2.1: “Summary of ‘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 50, Protocol of a Victim Testimonial, GEO-OTP-0006-1358 at 1359.

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

245. The reference to a widespread or systematic attack excludes isolated or random acts from the concept of crimes against humanity.<sup>343</sup> Only the attack, and not the alleged individual acts are required to be “widespread” or “systematic”.<sup>344</sup> In this regard, the adjective “widespread” refers to “the large scale nature of the attack and the number of victims”.<sup>345</sup>

246. The term “widespread” encompasses “the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”<sup>346</sup> and refers both to the large-scale nature of the attack and the number of victims,<sup>347</sup> including “an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians.”<sup>348</sup> A widespread attack could also be the “cumulative effect of a series of inhumane acts or the singular effect of an inhuman act of extraordinary magnitude.”<sup>349</sup>

247. The term “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”<sup>350</sup> and can

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<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 be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis."<sup>351</sup>

248. Although the requirement is phrased in the alternative, based on the available information, there is a reasonable basis to believe that the attack directed against the civilian population in Georgia was both widespread *and* systematic.

249. The attacks took place on a large scale and targeted a large number of civilian victims. Over a period of two months, South Ossetian forces perpetrated large scale crimes against the civilian population of South Ossetia, including killings, beatings, forcible displacement, looting and burning of civilian property. The alleged acts of violence resulted in the forcible displacement of between 13,400 and 18,500 ethnic Georgian inhabitants from South Ossetia and the "buffer zone".

250. National investigations in Georgia estimated that over 5,000 dwellings belonging to ethnic Georgians were destroyed, including approximately 3,050 dwellings in Kurta municipality, 1,373 dwellings in Eredvi municipality, and 482 dwellings in Tighva municipality. In the "buffer zone", 270 dwellings were destroyed in Kareli municipality and 267 in Gori municipality.<sup>352</sup> According to the Government of Georgia, a total of 13,400 residents of the villages of Kurta, Eredvi and Tighva municipalities had their dwellings destroyed as a consequence of the attacks.

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<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. 397; ICC-02/05-01/07-1, para. 62; ICC-02/05-01/12-1-Red, para. 19. See also ICC-01/04-02/06-309, para. 24.

<sup>352</sup> Annex E.7.9: Government of Georgia, 10 May 2010 Report, GEO-OTP-0006-0003 at 0040-0042.



251. Based on the assessment of UNOSAT satellite imagery, HRW reported that by 22 August 2008 a total of 177 buildings in the village of Tamarasheni were destroyed or severely damaged, 153 in Kekhvi, 144 in Kurta and 115 in the village of Kvemo Achabeti.<sup>353</sup>
252. The attack was conducted on a large-scale since it was directed against the great majority of ethnic Georgian villages in South Ossetia in addition to Georgian villages in the “buffer zone”, including Argvitsi, Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskheneti and Vanati in Eredvi municipality, Kekhvi, Kemerti, Kheiti, Kurta, Kvemo Achabeti, Zemo Achabeti, Tamarasheni and Dzartsemi in Kurta municipality, Avnevi and Nuli in Tighva municipality and the villages of Dvani, Ergneti, Karaleti, Megvrekisi, Tkviavi and Zemo Nikozi in the “buffer zone”.
253. The Prosecution further submits that the alleged acts of violence were not isolated or random acts; instead the attack was systematic in nature since it was launched pursuant to the policy of South Ossetian leadership to forcibly displace ethnic Georgians from the territory of South Ossetia, as noted in the previous section. The information available shows that the acts of South Ossetian forces were well planned, organised and followed a pattern of occurrence. As noted above and detailed in annex A.1, upon entering the ethnic Georgian villages, the South Ossetian forces systematically pillaged and burned civilian homes, and killed, severely beat and otherwise threatened the remaining civilian population to force them to leave their villages.

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

254. According to the IFFMCG, the acts of looting appeared to be well organised, as evidenced by the use of trucks to take the looted goods, including the removal of reusable items such as windows and doors.<sup>354</sup> OSCE-HRAM also found that there was “a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians.”<sup>355</sup> Further indication of planning is provided by the fact that South Ossetian forces allegedly had bottles of gasoline ready before entering villages to set the houses alight.<sup>356</sup> A victim, for example, reported to HRW that South Ossetian forces were carrying gasoline with them when entering the village of Zemo Achabeti on 11 August 2008, and having looted his and his neighbours’ houses, they their houses alight.<sup>357</sup>

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

iii. *Nexus between individual acts and the attack*

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

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<sup>354</sup> Annex E.2.36: IFFMCG, Volume II, GEO-OTP-0002-7801 at 8168.

<sup>355</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1962.

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

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

population in order for crimes against humanity to be established.<sup>358</sup> This requires consideration as to the characteristics, aims, nature or consequences of the act in question.<sup>359</sup> Accordingly, this analysis needs to be carried out on a case-by-case basis with regard to each particular act.<sup>360</sup> Nonetheless, given the nature of article 15 proceedings, the object of such consideration should be directed towards the situation as a whole without focusing on specific criminal acts beyond what is necessary for the purpose of present procedure.<sup>361</sup>

257. The nexus can, in many instances, be deduced in part from the common features of the acts committed (in terms of their characteristics, nature, aims, targets, alleged perpetrators, and times and locations).<sup>362</sup>

258. For the purpose of the present proceedings, a *nexus* between individual criminal acts and the attack can be inferred from: (i) the geographical and temporal overlap between the attack and the crimes; (ii) the fact that the same perpetrators were responsible for both the attack against the civilian population and individual criminal acts; (iii) the ethnicity of the victims, which corresponds with the organisational policy described above; (iv) the multiple and recurrent occurrence of the prohibited acts over a protracted period of time, which demonstrates a consistent pattern of conduct, constituting the use of firearms to kill, maim and intimidate ethnic Georgians, accompanied by looting and destruction of their property, in order to forcibly expel them from the area.

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<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, the Prosecution submits that there is a reasonable basis to believe that the following 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 any 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 killed one or more persons.<sup>363</sup>

261. To date, the Prosecution received information on between 51 and 113 cases of deliberate killings of ethnic Georgians in South Ossetia and areas along the administrative boundary line committed in the context of the forcible displacement of ethnic Georgians from South Ossetia. As noted above in paragraphs 223-255, these killings allegedly took place during the systematic campaign of expulsion of ethnic Georgians by South Ossetian forces and the attendant looting and destruction of

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<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 and the “buffer zone”.<sup>364</sup> It is alleged that the murder victims were shot, beaten and/or burned inside their homes.

ii. *Deportation or forcible transfer of population*

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

263. As the Elements of Crimes set out, “[t]he term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>367</sup>

264. From 7 August 2008 onwards, South Ossetian forces intentionally targeted and deported lawful residents of ethnic Georgian origin from South Ossetia and the “buffer zone”. The forcible displacement took place in two main phases: 1) during the active hostilities phase from 7-

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<sup>364</sup> See paragraphs 126-128.

<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 12 August 2008 onwards.

265. Coercive acts that the South Ossetian forces used to create an atmosphere of fear, terrorise the local population and force the ethnic Georgians to leave their homes reportedly included killings, severe beatings, insults, threats, looting and destruction of property.<sup>368</sup> More than 24 villages of the Kurta, Tighva and Eredvi municipalities in South Ossetia as well in the Gori municipality in the “buffer zone” were reportedly entirely or partly destroyed in order to forcibly expel ethnic Georgians, including the villages of Argvitsi, Berula, Disevi, Eredvi, Beloti, Ksuisi, Satskheneti and Vanati in Eredvi municipality, Kekhvi, Kemerti, Kheiti, Kurta, Kvemo Achabeti, Zemo Achabeti, Tamarasheni and Dzartsemi in Kurta municipality, Avnevi and Nuli in Tighva municipality and the villages of Dvani, Ergneti, Karaleti, Megvrekisi, Tkviavi, Zemo Nikozi in the “buffer zone”.<sup>369</sup>

266. Furthermore, the OSCE reported in September 2008 the burning of houses in the villages of Tirdznisi<sup>370</sup>, Tseronisi and Avlevi<sup>371</sup> and Kordi and Ditsi.<sup>372</sup> On 24 November 2008, HRW found the village of Disevi, which consisted of approximately 300 ethnic Georgian families before the conflict, completely destroyed and deserted. The families were reportedly driven out by the torching and looting campaign that the

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<sup>368</sup> See Annex E.2.36: IIFMCG, Volume II, GEO-OTP-0002-7801 at 8196-8197; 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 0472-0483; Annex E.4.3: AI, Civilians in the line of fire, GEO-OTP-0001-0125 at 0159-0170; Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1961-1966; Annex E.5.1: August Ruins, GEO-OTP-0001-0999 at 1121-1200; Annex E.3.16: GEO-OTP-0005-0937 at 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.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 19471; 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 Ossetian forces started around 11 August 2008 and continued throughout October.<sup>373</sup> The IIFMCG field missions conducted in March and June 2009 also observed that ethnic Georgian villages to the north of Tskhinvali, from Tamarasheni to Kekhvi, were still completely empty.<sup>374</sup>

267. UNOSAT maps of relevant areas also show active fires in the villages around Tskhinvali on 12, 13, 17, and 19 August 2008, after the ceasefire agreement of 12 August 2008.<sup>375</sup> Thus, this satellite imagery indicates that the destruction occurred as a result of a deliberate policy to torch these villages, rather than from the exchange of hostilities.

268. The fact that the destruction and looting of ethnic Georgians property continued after the signing of the ceasefire agreement implies that the objective of acts of violence was not only to halt Georgian troops, but to gain control of the South Ossetian villages and to expel ethnic Georgians or to prevent them from returning to their homes.<sup>376</sup> A witness testified that South Ossetian forces told him they would “root out Georgians from the area so that we [the Georgians] would never be able to come back again”.<sup>377</sup>

269. By May 2009, the UNHCR and the Commissioner for Human Rights of the Council of Europe reported that the armed conflict caused the internal displacement of approximately 138,000 persons who fled from

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<sup>373</sup> Annex E.4.10: HRW, *Up in Flames*, GEO-OTP-0001-0336 at 0479-0480.

<sup>374</sup> Annex E.2.36: IIFMCG, *Volume II*, GEO-OTP-0002-7801 at 8192.

<sup>375</sup> Annex E.2.13: UNOSAT, *Update 1: Active fire locations for Tskhinvali, South Ossetia, Georgia (7-20 August 2008)*, dated 20 August 2008, GEO-OTP-0008-0614.

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<sup>377</sup> Annex E.7.9: Government of Georgia, *10 May 2010 Report, Annex 51: Protocol of Victim Testimonial*, 21 August 2008, GEO-OTP-0006-1365 at 1366.

South Ossetia and other conflict affected areas within Georgia while additional 36,000 persons fled from South Ossetia to the Russian Federation.<sup>378</sup> The UNHCR further reported that over 100,000 out of an estimated 138,000 internally displaced persons (IDPs) had been able to return to their homes in the Shida Kartli region, including in Gori, Senaki, Kareli, Kaspi, and Samegrelo-Zemo Svaneti regions as the Georgian authorities regained control over these areas.<sup>379</sup> This includes 28,800 IDPs who returned to the villages of the former “buffer zone”.<sup>380</sup> According to the UNHCR and the Government of Georgia, some 30,000 persons remained displaced at the time.<sup>381</sup> Of these 30,000, UNHCR estimated that some 18,500 displaced people from South Ossetia were unlikely to return in the short term,<sup>382</sup> because their villages and houses had been destroyed or damaged.<sup>383</sup> In addition, the South Ossetian *de facto* authorities openly opposed their return in public declarations.<sup>384</sup> This number includes 13,400 residents of Kurta, Eredvi and Tighva municipalities, whose houses were destroyed to prevent their return.<sup>385</sup> According to OCHA, Georgia’s Ministry of Foreign Affairs reported in September 2008 that the total population in some 21 majority ethnic-

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<sup>378</sup> Annex E.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-0010-0055 at 0087; Annex E.2.26: 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, GEO-OTP-0001-0883 at 0887.

<sup>379</sup> Annex E.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-0010-0055 at 0087; Annex E.3.16: OSCE Material, GEO-OTP-0005-0937; GEO-OTP-0005-1037; GEO-OTP-0005-1042; GEO-OTP-0005-1045; GEO-OTP-0005-1054; GEO-OTP-0005-1076.

<sup>380</sup> Annex E.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-0010-0055 at 0087.

<sup>381</sup> Annex E.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-0010-0055 at 0087; Annex E.2.26: 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, GEO-OTP-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.2.20: UNHCR, “Protection of Internally Displaced Persons in Georgia: A Gap Analysis”, July 2009, GEO-OTP-0010-0055 at 0087.

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

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



Georgian villages in the area of Tskhinvali which were under the control of the Government of Georgia prior to August 2008, comprised 14,500 persons, of whom some 13,260 had been registered as internally displaced by 8 September 2008.<sup>386</sup> In December 2014, the Georgian Ministry of Internally Displaced Persons from the Occupied Territories and Refugees reported that around 15,000 persons remain permanently displaced from South Ossetia as the result of the 2008 armed conflict, including 7,676 persons from Kurta municipality, 5,242 from Eredvi municipality, and 2,059 from Tighva municipality.<sup>387</sup>

270. Since the ethnic Georgian population in South Ossetia prior to the conflict can be estimated around 20,000 person (excluding Akhagori municipality<sup>388</sup>), and today, 15,000 persons from Kurta, Eredvi and Tighva municipalities remain permanently displaced, the Prosecution submits that the ethnic Georgian population living in the conflict zone has been reduced by at least 75 per cent.<sup>389</sup>

iii. *Persecution*

271. In addition to the contextual elements mentioned above, the crime against humanity of persecution is defined by article 7(2)(g) of the Statute as “the intentional and severe deprivation of fundamental rights

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<sup>386</sup> Annex E.2.3: OCHA, Inter-Agency Humanitarian Assessment Mission to South Ossetia, “Mission Report”, 16-20 September 2008, GEO-OTP-0001-0846 at 0852.

<sup>387</sup> Numbers reported in: Annex E.7.4: Government of Georgia, 13 March 2015 Report, GEO-OTP-0003-1172 at 1177. This excludes displaced from Akhagori 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 citing the South Ossetian State Department of Statistics. According to these statistics for the year 2012, South Ossetia had a total population of 51,572 out of which 45,950 (89,1%) are ethnic Ossetians and 4,590 (8,9%) ethnic Georgians, Annex E.7.34: Ministry of Foreign Affairs of the Russian Federation, “Republic of South Ossetia”, 22 May 2014, GEO-OTP-0008-0684 at 0684 (English translation: Annex E.7.34.1).

contrary to international law by reason of the identity of the group or collectivity”.<sup>390</sup> Article 7(1)(h) specifies that it must be committed against “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined by paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

272. As previously addressed, there is a reasonable basis to believe that South Ossetian forces have committed acts of murder, deportation or forcible transfer of population as a crime against humanity (under articles 7(1)(a), 7(1)(d)) and wilful killing, destruction of property and pillage as war crimes (pursuant to articles 8(2)(a)(i), 8(2)(b)(xiii), 8(2)(b)(xvi)). 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. The information available further shows that South Ossetian forces targeted the victims of these acts by reason of their identity as ethnic Georgians, within the meaning of article 7(1)(h) of the Statute.

273. As noted above, direct witnesses of these crimes heard South Ossetian forces shouting to the victims that they would exterminate all Georgians and set their houses on fire.<sup>391</sup> These forces deliberately killed and injured victims belonging to the Georgian ethnic group, 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, Pre-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, GEO-OTP-0001-0999 at 1180.

them to leave their homes in South Ossetia, and systematically burnt and looted their houses and households. These persecutory acts of resulted in an estimated 51 to 113 cases of deliberate killings of ethnic Georgians and a destruction of over 5,000 dwellings 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 17”.

275. Previous decisions on article 15 applications have held that admissibility at the article 15 stage should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).<sup>392</sup>

276. Accordingly, the Prosecution has attached to this Application two confidential, *ex-parte*, annexes. Annex A.1 presents an indicative list of crimes within the jurisdiction of the Court allegedly committed during the most serious incidents within the situation based on the available information. Annex B.1 presents a preliminary list of persons or groups

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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, with an indication of their specific role.

277. For the reasons set out above, the Prosecution's identification of the incidents or groups of persons that are likely to shape future case(s) is preliminary in nature and should not be considered binding for future admissibility assessments.<sup>393</sup> Should an investigation be authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.<sup>394</sup>

### *C. Complementarity*

278. As the Appeals Chamber has set out, article 17(1)(a) and (b) involves a twofold test: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an on-going investigation or prosecution of the case at the national level (first limb); and, if this is answered in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigations or prosecutions (second limb).<sup>395</sup> Inaction by a State under the first limb renders a case admissible before the Court, subject to an assessment of gravity under article 17(1)(d).<sup>396</sup> As set out above, this assessment is carried out in

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

<sup>394</sup> ICC-01/09-19-Corr, paras. 74-75 ; ICC-01/04-01/10-451, paras. 21, 27.

<sup>395</sup> ICC-01/04-01/07-1497, paras. 1 and 75-79; ICC-01/11-01/11-466-Red, para. 26; ICC-01/11—01/11-239, para. 6; ICC-01/05/01/08-962-Corr, paras. 107-109.

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

relation to the potential cases that are likely to be the focus of an investigation by the Prosecution.

*1. National proceedings in Georgia*

279. The Office of the Chief Prosecutor of Georgia (OCPG) has been the principle body responsible for conducting the investigation into alleged crimes arising from the 2008 conflict, under the criminal case no. 074088079.<sup>397</sup>

280. The investigative activities of the OCPG can be divided into three different periods: 1) activities carried out as of the commencement of the investigation in August 2008 until December 2011; 2) activities conducted around the change of government in Georgia and the subsequent restructuring of the OCPG in the period from January 2012-January 2014; and 3) the most recent activities conducted during the period from January 2014 to date.

281. While the investigative steps taken in 2008-2011 were related to identifying crime-base evidence, mainly through witness statements and forensic examination, the 2014 investigative activities were focused on identifying individuals allegedly responsible for the destruction and pillaging of protected property belonging to ethnic Georgians.

282. The investigation covered the time period from 8 August 2008 to 10 October 2008, the date of Russia's withdrawal from areas adjacent to South Ossetia. The crime scene was divided into two areas: (i) the

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

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

283. Immediately following the break-up of hostilities in 12 August 2008, the Georgian government launched two preliminary investigations<sup>398</sup> into the alleged crimes against Georgian civilians committed in west Georgia and in South Ossetia.

284. The first investigation was opened on 9 August 2008 in relation to crimes under article 407 (genocide) and article 411(1)-(2) (intentional violation of the norms of humanitarian law in the course of 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).<sup>399</sup>

285. At the instruction of the Chief Prosecutor of Georgia, by 2009 the two preliminary investigations were transmitted to the Investigative Division of the OCPG, for consolidation into a unified investigation with respect to all crimes alleged to have been committed during the August 2008 armed conflict and its aftermath. The part of the investigation relating to genocide was dropped because it appeared manifestly ill-founded.

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<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 the 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 or so-called “clusters”: 1) “ethnic cleansing” encompassing the forcible displacement of ethnic Georgians from South Ossetia; 2) “unlawful attacks on civilian population” attributed to both Georgian and Russian armed forces; 3) “attacks on peacekeeping forces”, including the alleged attack against the Russian peacekeepers carried out by Georgian armed forces; 4) “enforced disappearance and torture incidents” allegedly committed by Russian, South Ossetian and Georgian forces; and 5) “non-organized acts of war crimes and other allegations” that appear to be isolated and sporadic in nature.<sup>400</sup>

287. The line of inquiry into alleged crimes of forcible transfer of ethnic Georgians from South Ossetia included incidents of destruction, burning and pillaging of protected property belonging to ethnic Georgians, as well as aerial bombardment, shelling and killing of ethnic Georgian civilians during the August 2008 armed conflict.<sup>401</sup>

288. In the course of the investigation, the OCPG reported to have interviewed over 7000 witnesses;<sup>402</sup> led on-site investigations in over 30 affected areas, including the villages of Gori and Kareli districts;<sup>403</sup> conducted various forensic expertise and reached over 200 conclusions of forensic medical expertise, and undertook a forensic analysis to assess damage to property which resulted in 43 expert reports, each

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<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, GEO-OTP-0003-0003 at 0004--0005. (“November 2014 Update Report”)

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

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

<sup>403</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, GEO-OTP-0003-1169 at 1169. These include: Gori, Poti, Region of Samegrelo, Ganmukhuri, Kaspi District, Kakheti District, Arkevani Village in Bolnisi District, Kharagauli District, and the City of Oni, Annex E.7.7: Government of Georgia, December 2011 Update Report, GEO-OTP-0003-1836.

covering a number of damaged objects; and collected telephone intercepts<sup>404</sup>, public statements made by the South Ossetian *de facto* authorities, media reports, intelligence reports, and satellite images. The OCPG also sought to access the satellite imagery published by the UNOSAT in consultations with the UN Institute for Training and Research (UNITAR) with the aim of identifying destroyed property in South Ossetia.<sup>405</sup>

289. The investigative teams also took into consideration reports of monitoring missions from the Council of Europe, UN and OSCE-ODIHR as well as international and local non-governmental organisations such as the HRW, AI, Georgian civil society and Russian NGO *Memorial*. In addition, the OCPG received applications that South Ossetian claimants submitted to the ECtHR through the Georgian State Representative, alleging violations of human rights by the Georgian armed forces. Georgian investigators reviewed this material and included it in the investigation case files.

290. Since its commencement, however, the national investigation appears to have faced two main obstacles, (i) the lack of access to the territory of South Ossetia, and (ii) the reported absence of cooperation from the 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 *de facto* authorities as well as a telephone intercept (with transcript) between Senior Commander of Georgian Peacekeepers Mamuka Kurashvili and the Commander of JPKF Marat Kulakhmetov, dated 8 August 2008, Annex E.7.9: 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-OTP-0003-1836 at 1843-1844, 1874-1875.



291. Until December 2011, the Georgian authorities appeared to have attempted to overcome the lack of access to the territory of South Ossetia and fill in the gaps in the investigation. First, the OCPG initiated the process of accessing the satellite imagery analyses available from open sources<sup>406</sup> and, where unavailable through open sources, approached private companies in order to retain relevant satellite imagery.<sup>407</sup> This process also took into consideration the fact-finding work conducted by NGOs such as HRW, AI and the Coalition of Georgian NGOs.

292. Second, the Georgian Government attempted to bring victims and witnesses before the OCPG in order to hear testimonies regarding allegations committed by Georgian nationals. Since only a few cases were successful, the OCPG requested assistance from the EU facilitated Incident Prevention and Response Mechanism, where a number of requests are still pending. Moreover, the OCPG approached the legal counsels of victims located in the region of South Ossetia to invite these victims to undertake formal questioning under legal and security guarantees and reimbursement for their 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 Nikozi and 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, E-mail 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, to summon for questioning a number of reportedly crucial witnesses who have Russian nationality through judicial assistance requests for service by the Russian authorities.<sup>409</sup>
294. Finally, the OCPG obtained some of the material generated by the Russian investigation through access to individual applications before the ECtHR, alleging violations by the Georgian military.<sup>410</sup> Particularly, Georgian authorities have obtained access to the *Shmiganovskaya v. Georgia* case before the ECtHR.<sup>411</sup>
295. Although the national investigation had reportedly collected sufficient evidence to identify suspects by 2010, in December 2011 the OCPG informed the Prosecution that it “still require[d] certain verifications and corroborations for some fragments of allegations to attain charges”<sup>412</sup> without indicating a timeframe when this process would be finished.
296. The investigation was however delayed at the end of 2012 and during the first half of 2013 following the appointment of Archil Kbilashvili as new Chief Prosecutor on 25 October 2012 who required time for restructuring and reorganizing the work of his office. In addition to

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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 reportedly prioritized the investigation of financial crimes allegedly committed by former government officials and addressed over 18,000 human rights complaints against the former government administration.

297. In March 2013, the OCPG started reviewing files comprising approximately 150 volumes of documents related to alleged crimes committed in the context of the August 2012 conflict. This included over 7,000 witness statements, as well as forensic and medical reports. On 10 May 2013 the Chief Prosecutor set up an eight-member investigative group with the aim of expediting the investigation process and move cases towards prosecution. Five days later, on 15 May 2013, the Chief Prosecutor publicly announced the re-launching of investigations into the alleged crimes committed during the August 2008 armed conflict.<sup>413</sup>

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

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

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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, GEO-OTP-0003-1389 at 1389.

addition, the three different Chief Prosecutors in that period applied different policies with respect to the cooperation with the Court and the investigation into August 2008 events.

300. Following the resignation of Chief Prosecutor Archil Kbilashvili on 7 November 2013, the new Chief Prosecutor, Otar Partskhaladze, took office in late November 2013 but resigned two months later.

301. On 20 January 2014, the Prime Minister of Georgia appointed a new Chief Prosecutor, Giorgi Bagashvili. In its letter of 10 June 2014, the Prosecution requested the OCPG to provide updated information on the national proceedings in Georgia no later than October 2014, supported by concrete, tangible and pertinent evidence that genuine national investigations or prosecutions have been ongoing against those who appear to bear the greatest responsibility for the most serious crimes arising from the armed conflict of August 2008. The Prosecution further informed the OCPG that short of this information, it would proceed in accordance with the Prosecutor's statutory obligations to submit an application to the Pre-Trial Chamber of the Court, seeking authorisation to open an investigation into the situation in Georgia due to an absence of relevant national proceedings.<sup>414</sup> Following this process of consultations between the OCPG and the Prosecution, the OCPG submitted an update report on national proceedings on 5 November 2014<sup>415</sup> and relevant supporting material on 8 December 2014.<sup>416</sup> This

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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, GEO-OTP-0003-0024 through GEO-OTP-0003-1150; for a summary of the material in English

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

302. However, in its letter dated 17 March 2015, the Government of Georgia informed the Prosecution that further progress of relevant national proceedings related to the alleged crimes subject of this Application is prevented by “a fragile security situation in the occupied territories in Georgia and in the areas adjacent thereto, where violence against civilians is still widespread”. As an example, the Government of Georgia referred to 393 cases of abductions of civilians across the conflict lines in the period from 2012 through 2014. According to the Georgian authorities, a commencement of prosecutions of crimes related to the 2008 armed conflict could trigger “aggressive and unlawful reactions by the occupying forces” and would “prompt certain backlash from the groups engaged in the violence across the conflict lines”. The security and safety of witnesses of alleged crimes committed during the 2008 armed conflict was also stated to be of a particular concern, since these witnesses are said to be located close to South Ossetia and are at high risk of being subjected to threats and arbitrary detention by the South Ossetian *de facto* authorities. According to the Georgian authorities, 27 such detentions took place in the Tskhinvali region from 9 December 2014 to 13 March 2015.<sup>417</sup> The 17 March 2015 letter goes on to state that there is no prospect of further progress domestically on the cases related to the 2008 armed conflict “until the threats disappear”.<sup>418</sup> Further to clarification sought from the Georgian authorities by the

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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, GEO-OTP-0003-1169 at 1170.

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

Prosecution, this suspension of domestic proceedings relates to both: (i) the forcible transfer and persecution of the ethnic Georgian population of South Ossetia and the “buffer zone” by South Ossetian forces, including acts of wilful killing/murder, pillage and destruction of enemy’s property; as well as (ii) the attack by South Ossetian forces against the Georgian peacekeepers stationed at Avnevi checkpoint.

303. Accordingly, the Prosecution submits that, despite the intermittent progress made over a number of years, the domestic proceedings have come to a standstill, meaning that the national authorities are currently inactive. Moreover, no further concrete and progressive steps are being taken, or are envisaged to being taken, domestically to ascertain the criminal responsibility of those involved in the alleged crimes. The Prosecution emphasises that no decision within the meaning of article 17(1)(b) has been taken by the national authorities – rather, domestic proceedings falling within the scope of article 17(1)(a) have been indefinitely suspended, as denoted by their communication that there is no prospect of further progress domestically “until the threats disappear”.<sup>419</sup> In line with the case law of this Court, the Prosecution submits that admissibility must be determined on the basis of the facts as they exist at the time of the determination, and that the conditioning of national proceedings on future and hypothetical factors, in particular those that are external to the control of competent authorities, would be too abstract and remote to control the outcome of this Application.<sup>420</sup>

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<sup>419</sup> Annex G: Government of Georgia, Letter dated 17 March 2015, GEO-OTP-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, ICC-01/04-01/07-1497, para. 56. Pre-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 of alleged crimes related to the armed conflict on 8 August 2008. The national investigation falls exclusively under the mandate of the Investigative Committee of the Russian Federation.<sup>421</sup>

### (a) National proceedings in relation to the alleged forcible displacement campaign

305. In relation to the potential case identified in this Application related to the campaign to forcibly expel ethnic Georgians from South Ossetia and the “buffer zone”, the Investigative Committee informed the Prosecution that in the course of the investigation, mainly in the period 2010-2014, it verified allegations against Russian servicemen that Georgian NGOs had submitted to Russian authorities on behalf of Georgian victims. The submissions included 88 complaints containing 575 allegations brought by 600 Georgian victims through the Georgian Young Lawyers Association (GYLA).<sup>422</sup> The allegations included murder and attempted murder, destruction of property, and pillage.<sup>423</sup>

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02/04-01/05-377, para. 51. In the *Banda & Jerbo* case, Trial Chamber IV also rejected a defence request for a temporary stay of proceeding for an indefinite period due to “the current security situation and the active obstruction of the GoS”, holding, *inter alia*, that the alleged infringement on accused person’s rights were too hypothetical and abstract to warrant the remedy sought, ICC-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, , 27 September 2010, GEO-OTP-0010-0009 at 0009 (for English translation, see E.9.3: Solemn Declaration II, 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 repeatedly that it found no evidence of the involvement of Russian servicemen in the commission of alleged crimes committed in the context of the August 2008 armed conflict. In particular, the Investigative Committee stated that “the investigation has established that the command of the Armed Forces of the Russian Federation had taken exhaustive measures to prevent pillage, violence, indiscriminate use of force against civilians during the entire period of the Russian military contingent’s presence” during the armed conflict.<sup>424</sup>

307. This conclusion was based on interviews with more than 2000 Russian servicemen from 50 Russian military units deployed during the August 2008 armed conflict<sup>425</sup>, members of South Ossetia forces as well as ethnic Georgian civilians. The Investigative Committee also compared satellite imagery of the territory of South Ossetia from before 7 August 2008 and after 31 August 2008 in order to assess the alleged destruction of civilian buildings. Investigators working in the conflict zone documented in detail the destruction of buildings, installations, and homes, and found that ethnic Georgian villages were indeed set on fire, but were not destroyed as a consequence of shelling or other types 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. 201/374108-08, For presentation in the Ministry of Foreign Affairs of Russia in accordance with questions prepared by representatives of the International Criminal Court”, 8-10 March 2010, GEO-OTP-0008-0485 (English translation: Annex E.7.33, GEO-OTP-0008-0575) (“March 2010 Memorandum”).



308. As described earlier, these findings that the Russian armed forces acted to prevent or punish crimes were partially confirmed by information that has been deemed credible by the Prosecution, while other credible information suggests that Russian soldiers either participated in, or were passive in the face of, crimes committed by South Ossetian forces.
309. The verification process by the Russian investigative authorities was reportedly hampered by its inability to access Georgian victims for statement taking. The Investigative Committee, however, has reportedly explored with representatives of Georgians victims the possibility of receiving victims' statements in the territory of third States.
310. According to the Russian authorities, the Investigative Committee has submitted six requests for legal assistance to the Georgian authorities requesting access to 570 individuals who submitted allegations against Russian servicemen, as well as to access information on alleged perpetrators and the evidence collected by the Georgian investigative authorities.<sup>427</sup>
311. The Russian investigative team did not address allegations against South Ossetian forces. Russia recognised South Ossetia as an independent State in August 2008 and considers the South Ossetian *de facto* authorities as the competent authorities to investigate alleged crimes committed by South Ossetians in South Ossetia.<sup>428</sup> According to the Russian authorities, South Ossetia has its own judicial authorities, including law enforcement agencies, judiciary and prosecution service

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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 for conducting investigations into crimes allegedly committed in South Ossetia.<sup>429</sup>

312. Accordingly, the Prosecution has determined that, despite a number of reported verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in this Application, as further described in Annexes A.1 and B.1.

*(b) National proceedings in relation to the alleged attack against Russian peacekeepers*

313. The Investigative Committee had initially started two lines of inquiry as part of the national investigation in relation to allegations against Georgian armed forces. The first line of inquiry was opened on 8 August 2008 (criminal case no. 14/00/0051-08d) related to the killing of Russian peacekeepers by Georgian armed forces under the crime of murder pursuant to article 105 of the Criminal Code.<sup>430</sup> The second case was opened on 9 August 2008 in relation to charges of attempted murder and murder of civilians who were nationals of the Russian Federation residing in South Ossetia, committed by Georgian forces.<sup>431</sup>

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<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 “1. 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, GEO-OTP-0009-4948.

<sup>431</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEO-OTP-0008-0485 (English translation: Annex E.7.33, GEO-OTP-0008-0575).

In addition, on 12 August 2008, Russian authorities opened a further case (criminal case no. 201/374108-08) under the charge of genocide for crimes allegedly committed by the Georgian military based on the information gathered during initial investigations in South Ossetia.<sup>432</sup>

314. The investigative authorities have reportedly collected 400 volumes of material in relation to the alleged crimes since August 2008. The investigation reportedly identified over 3,000 items as material evidence and examined over 1,000 incident scenes such as civilian residences, office buildings, power facilities, communications and social infrastructure, and the positions of the peacekeeping battalion stationed in Tskhinvali in South Ossetia. More than 1,000 witnesses who were identified as victims of the alleged attack against civilians holding Russian nationality and peacekeepers were interviewed in relation to the alleged crimes.<sup>433</sup> The investigation further conducted around 900 forensic examinations of handwriting samples, satellite imagery, military equipment and medical records.

315. The information available indicates that the alleged Georgian military offensive against the Russian peacekeepers has been a main focus of the national investigation and considerable investigative efforts have been made to collect comprehensive evidence with respect to this incident since August 2008. The Investigative Committee collected and submitted to the Prosecution 28 volumes of material relevant to the peacekeeping incident. These volumes indicated that the Russian investigative authorities collected a vast amount of evidentiary

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<sup>432</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEO-OTP-0008-0485 (English translation: Annex E.7.33, GEO-OTP-0008-0575).

<sup>433</sup> Annex E.7.31: Government of the Russian Federation, March 2010 Memorandum, GEO-OTP-0008-0485 (English translation: Annex E.7.33, GEO-OTP-0008-0575).

material, including witness statements, photo and video material, forensic evidence, expert reports, etc.

316. Based on the gathered evidence, the Investigative Committee has been able to identify potential suspects allegedly responsible for the attack against the Russian peacekeepers on 7 and 8 August 2008. The Russian authorities, however, informed the Prosecution that the prospects of further national proceedings were hampered by certain obstacles that the Russian authorities encountered in the course of their investigation.<sup>434</sup>

317. On 18 October 2011, the Russian Federation informed the Prosecution that the lack of cooperation of the Government of Georgia and the immunity enjoyed by senior officials of foreign states including those of Georgia were an obstacle to genuine advancements in the national investigation.<sup>435</sup> On 18 June 2012, however, after clarification was sought to ascertain whether national proceedings had been effectively suspended, consisting State inaction, or if the work of the Investigative Committee had been rendered genuinely unable to proceed, the Russian authorities specified that “refusal of Georgia to provide legal assistance and immunity of senior officials of foreign States, do not – in accordance with the rules of criminal procedure of the Russian Federation – constitute grounds for termination of the said criminal case. Thus, the national proceedings with respect to this criminal case are carried on.”<sup>436</sup>

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<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/150911/PM-er of 15 September 2011, 18 October 2011, GEO-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, GEO-OTP-0001-1332.

318. On 23 January 2014, following the change of government in Georgia, the Russian authorities further informed the Prosecution that these obstacles ceased to exist and no longer hamper the progress of the national investigation.
319. Since then, the Investigative Committee has been conducting a twofold work with respect to the attack against the Russian peacekeepers: (i) eye-witnesses and victims of the attack are being re-interviewed; (ii) additional expertise in relation to the circumstances of the attack such as forensic analysis has been assigned to the investigative teams. The Prosecution has been informed that the activities of the Investigative Committee have been extended until at least 8 February 2016.
320. The Prosecution notes that according to the Russian authorities this incident is still the subject of on-going investigative activities at the national level. At this stage, the information available does not indicate that the proceedings have been or are being undertaken for the purpose of shielding the person(s) concerned from criminal responsibility, or are conducted in a manner that is inconsistent with an intent to bring the person(s) concerned to justice, whether due to unjustified delay or lack of independence of impartiality. Further, the factors that may have made the Russian authorities unable to obtain the accused or the necessary evidence do not appear to constitute a bar to domestic proceedings. The Prosecution intends to keep this assessment under review in the context of any authorised investigation.

### *3. National proceedings in third States*

321. The available information does not indicate any national proceedings in any other States with jurisdiction in relation to crimes alleged to have been committed in the context of the Situation.

322. 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 17. Since article 17 is premised on national investigations or prosecutions “by a State which has jurisdiction”, the Prosecution does not consider that the South Ossetian *de facto* authorities would have standing before this Court to lodge an admissibility challenge pursuant to article 19(2)(b). Nonetheless, for sake of completeness, the Prosecution observes that according to the information available, the only proceedings conducted by the South Ossetian *de facto* authorities in relation to the period under consideration concerns the arrested of 86 individuals for the charge of looting, out of which 46 suspects received administrative penalties or fines for insult, petty theft and similar non-criminal charges while the rest were reportedly awaiting trial.<sup>437</sup> The information available indicates that no individuals have faced criminal proceedings in South Ossetia for conduct which constitutes a crime within the jurisdiction of the Court.

### *4. Conclusion on complementarity*

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<sup>437</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1994.

323. In the light of the indefinite suspension of national proceedings in Georgia, the Prosecution has concluded that the potential case of the forcible transfer of ethnic Georgians identified in this Application would be currently admissible. The potential case relating to the intentional directing of attacks against peacekeepers and peacekeeping facilities would be partially admissible at this stage. In relation to the attack against Georgian peacekeepers, the Georgian authorities have similarly indefinitely suspended their domestic proceedings, constituting State inaction. In relation to the attack against Russian peacekeepers, the competent Russian authorities are continuing to progress with their domestic investigations and these investigations do not appear vitiated at this stage by a lack of willingness or inability to do so genuinely. This assessment will be kept under review should an investigation be authorised. In relation to other alleged crimes for which it has been unable to arrive at a determination due to the insufficiency of the information available, the Prosecution will continue to assess the existence and genuineness of relevant national proceedings relating to such alleged conduct for as long as the situation remains under investigation, should an investigation into the situation be authorised.

324. The Prosecution has communicated its position on admissibility to both the Georgian and Russian authorities. No prejudice to either State is caused by the opening of investigations since both may, under article 18 or article 19, bring forward any change in circumstance. The Prosecution will also seek the cooperation of the competent authorities of the Russian Federation and Georgia and will be able to continually assess admissibility as it proceeds.

#### *D. Gravity*

325. The gravity assessment under article 17(1)(d) has been conducted against the backdrop of a potential case that are likely to arise from an investigation into the situation.<sup>438</sup>

326. The assessment of gravity includes both quantitative and qualitative considerations based on the prevailing facts and circumstances. The non-exhaustive factors that guide this assessment include the scale, nature, manner of commission of the crimes, and their impact.<sup>439</sup>

327. As set out earlier, the Prosecution has attached to this Application two confidential, *ex-parte*, annexes presenting an indicative list of crimes within the jurisdiction of the Court allegedly committed during the most serious incidents within the situation based on the available information (Annex A.1) and a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of their specific role (Annex B.1).

328. Based on the information available, the potential cases that are likely to arise from an investigation into the situation would be of sufficient gravity to justify further action by the Court.

329. With respect to the crimes allegedly committed within the incidents that are likely to be the object of the Prosecution's investigation, as listed in

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<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.1, these include the war crimes of wilful killing/murder under articles 8(2)(a)(i) or 8(2)(c)(i), as well as the crimes against humanity of murder, forcible displacement of civilian population and persecution under articles 7(1)(a), 7(1)(d) and 7(1)(h). These offences, together attendant crimes of destruction of civilian property and pillaging under articles 8(2)(b)(xiii) or 8(2)(e)(xii) and 8(2)(b)(xvi) or 8(2)(e)(v), were committed on a large scale as part of a plan and in furtherance of a policy to expel ethnic Georgian from the territory in South Ossetia.

330. The crimes allegedly committed by South Ossetian forces caused a high number of direct and indirect victims, with an estimated 51 to 113 persons killed, over 5,000 dwellings deliberately destroyed, and somewhere in the range of 13,400 - 18,500 ethnic Georgians forcibly displaced from South Ossetia and the "buffer zone".

331. The information available suggests that the crimes were committed with particular cruelty and on discriminatory grounds, as evidenced by patterns of close range killings and executions as well as the infliction of serious bodily injuries, together with the widespread and systematic destruction and looting of ethnic Georgian property. The victims were typically intimidated and humiliated, and forced to watch their homes being razed to the ground.

332. The expulsion campaign had a severe impact on the large number of direct victims whose homes and way of life has been destroyed, those who suffered injuries, and on those who have lost family members. The information available suggests that the victims were "deeply affected

and traumatized by their experience during the conflict".<sup>440</sup> As a result of this campaign of violence, the civilian population of ethnic Georgians in South Ossetia was substantially reduced.<sup>441</sup> As noted above, the Prosecution estimates that the ethnic Georgian population living in the conflict zone was reduced by at least 75%.<sup>442</sup>

333. The victims remain displaced to this date due to the destruction of their homes and administrative measures taken by the South Ossetian *de facto* authorities to prevent their return and continue to face a fragile security situation.<sup>443</sup>

334. With respect to the potential case relating to the intentional directing of attacks against peacekeepers and peacekeeping facilities, both the attack against the Georgian peacekeepers by South Ossetian forces and the attack against Russian peacekeepers by Georgian armed forces would meet the gravity threshold. According to Georgian authorities, Georgian peacekeepers who manned a checkpoint in Avnevi were heavily shelled from South Ossetian positions, resulting in the killing of two Georgian peacekeepers and the injury of five to eight others, and the destruction of vehicles involved in a peacekeeping mission. According to the Russian authorities 10 Russian peacekeepers were killed while 30 of them were wounded as a result of the attack against their facility, while the RUPKFB compound was destroyed, including a medical facility within the compound and peacekeepers armoured vehicles which

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<sup>440</sup> Annex E.2.38: OSCE-HRAM Report, GEO-OTP-0003-1921 at 1927.

<sup>441</sup> Based on the demographic data published by the South Ossetian *de facto* 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 South Ossetian civilians.

335. The Pre-Trial Chamber I in the *Abu Garda* case established that the attack on peacekeepers had a grave impact on members of the peacekeeping mission as victims of the attack as well as on their families. Moreover, the attack had a grave impact on 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 South Ossetia, the alleged attack on their personnel and premises could have had a grave impact both on victims of the attack and their families as well as on the local civilian population of South Ossetia.

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

## **VI. Interests of justice**

338. Under article 53(1) of the statute, while jurisdiction and admissibility are positive requirements that must be satisfied, the 'interests of justice' is a potential countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that

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<sup>444</sup> ICC-02/05-02/09-243-Red, paras. 33-34.

an investigation is in the interests of justice, but rather, whether there are specific circumstances which provide substantial reasons to believe 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 situation have manifested their interests in seeing justice done in various ways. The Prosecution has sought to ascertain the interests of victims, through direct consultations with organisations representing victims in Georgia as well as through an examination of communications and publicly available information.

340. For instance, the Prosecution received 93 individual communications from ethnic Georgians who allege to be victims of, and/or witness to, forcible displacement and inhumane treatment committed in South Ossetia or Gori and Kareli municipalities. These communications were submitted by an NGO that was approached by persons claiming to be victims of torture and inhuman, degrading treatment and ethnic cleansing in the context of the August 2008 conflict and agreed to submit applications to the ICC.<sup>446</sup>

341. Georgian human rights organisations representing victims have in consultations with, communications to the Prosecution and public reports repeatedly stressed the desire of victims who have survived the August 2008 conflict to restore justice.<sup>447</sup> In an open 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, GEO-OTP-0004-0090 at 0090.

<sup>447</sup> See for example Annex E.5.1: August Ruins, GEO-OTP-0001-0999 at 1007.

Prosecutor, dated 24 April 2012, seven Georgian and international human rights organisations manifested that they “believe that the victims of the Georgian-Russian war deserve to see justice done, that these serious crimes do not go unpunished, and that there should be no impunity [...]”, stressing the “undeniable role” the ICC has to play in ensuring that “justice is delivered to victims”.<sup>448</sup>

342. In meetings with the Office of the Public Defender/Ombudsman of Georgia the need for an independent investigation by the ICC into the August 2008 conflict was repeatedly stressed and the high public demand for justice confirmed.<sup>449</sup> The Prosecution took furthermore into consideration views expressed by the Parliamentary Assembly of the Council of Europe, which has recurrently called for independent investigations into allegations of war crimes and violations of international human rights and humanitarian law in its resolutions and whose Co-Rapporteurs for Georgia and Russia have expressed support for an international investigation crimes committed in the context of the August 2008 conflict which would be in the basic interest of the people if conducted in a transparent manner.<sup>450</sup>

343. Neither in communications from victims nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims, the Prosecution received views that the interests of

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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-OTP-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 “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 the situation in Georgia.

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

## **VII. Procedural issues**

345. The Prosecution informs the Chamber that, in compliance with rule 50, on 13 October 2015, the Prosecutor will provide notice to victims or their legal representatives of her intention to request authorisation and informed them that pursuant to regulation 50(1) of the Regulations of the Court, they have 30 days to make representations to the Chamber.
346. The Prosecution will publicise a notice pursuant to regulation 50(1) in both Georgian and Russian language. It will be posted on ICC website, and sent to ICC's media contact database of about 4,000 entries worldwide, including about 70 Georgian and Russian media outlets, equally divided between them. These include the main national TV and radio stations, news agencies, news sites, online and print media,

which it is anticipated will make prominent reference to the notice or publish in its entirety in their 13 or 14 October editions. Additionally, a notice will be sent to about 50 individual recipients (Georgian and Russian civil society actors, NGO representatives and senders of article 15 communications) together with a summary of the Prosecution's Application in Georgian and Russian languages.<sup>451</sup>

347. The Prosecution respectfully suggests that the procedure that Pre-Trial Chamber III established in the Côte d'Ivoire situation concerning the victims' representations pursuant to article 15(3) of the Statute could be applied in the situation in Georgia in order to ensure that proceedings are carried out in an expeditious manner and that the victims who intend to make representations pursuant to rule 50(3) or intermediaries assisting the victims are not at risk on account of the activities of the Court. PTC III then ordered that: (i) all the victims' representations received by the Court in relation to the Prosecution's Request for authorisation of an investigation were to be provided forthwith to the Victim Participation and Reparation Section (VPRS) of the Registry, and (ii) the VPRS would provide a single, consolidated reported on the collective and individual representations, to be submitted to the Chamber in due time.<sup>452</sup>

348. The Prosecution also informs the Chamber that it will provide the notice foreseen in article 18(1) of the Statute upon a decision of the Chamber to authorise an investigation into the situation in Georgia. As provided for

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<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-02/11-6, 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. 177-179.

in article 18(1), such notification can only occur after an affirmative determination of the Chamber on the Prosecutor's Application.

### **VIII. Relief requested**

349. For the reasons set out above and on the basis of the information presented and the supporting material, the Prosecution respectfully requests authorisation from the Pre-Trial Chamber I to proceed with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia.



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**Fatou Bensouda, Prosecutor**

Dated this 17<sup>th</sup> November 2015

At The Hague, The Netherlands