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PRE-TRIAL CHAMBER I

Before:

**Judge Péter Kovács, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera**

SITUATION IN GEORGIA

Public

Public redacted version of ‘Arrest warrant for David Georgiyevich Sanakoev’

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Karim A. A. Khan
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Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

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**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this warrant of arrest pursuant to article 58 of the Rome Statute (the ‘Statute’) for

David Georgiyevich SANAKOEV,

born on 14 December 1976 in Tskhinvali, Georgia; Presidential Representative for Human Rights of the *de facto* South Ossetian administration, also known as Ombudsman, at the relevant time.¹

I. Procedural history

1. On 10 March 2022, the Office of the Prosecutor (the ‘Prosecutor’) applied for the issuance of a warrant of arrest (the ‘Application’)² for David Georgiyevich Sanakoev (‘Mr Sanakoev’) for the following crimes within the Court’s jurisdiction committed in and around the territory of South Ossetia, Georgia, between 8 and 27 August 2008:

- (i) hostage taking (article 8(2)(a)(viii) of the Statute); and
- (ii) unlawful transfer (article 8(2)(a)(vii)-1 of the Statute).³

II. Jurisdiction and admissibility

2. The Chamber finds that, pursuant to article 19(1), first sentence, of the Statute, on the basis of the materials submitted and without prejudice to future determinations on the matter, the case against Mr Sanakoev falls within the jurisdiction of the Court.⁴

¹ For a photograph, *see* Annex 9c of Prosecutor’s application pursuant to article 58 for warrants of arrest against Mikhail MINDZAEV, Gamlet GUCHMAZOV and David SANAKOEV, ICC-01/15-34-Conf-Exp (confidential, *ex parte*, only available to the Prosecution with public annexes 1-5, 9 and confidential, *ex parte*, annexes 6-8) (public redacted version notified on the same day, ICC-01/15-34-Red).

² Prosecutor’s application pursuant to article 58 for warrants of arrest against Mikhail MINDZAEV, Gamlet GUCHMAZOV and David SANAKOEV, ICC-01/15-34-Conf-Exp (confidential, *ex parte*, only available to the Prosecution with public annexes 1-5, 9 and confidential, *ex parte*, annexes 6-8) (public redacted version notified on the same day, ICC-01/15-34-Red).

³ Application, paras 1-3.

⁴ Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paras 21-22.

The Chamber is satisfied that the incidents described in the Application amount to war crimes that have taken place between 8 and 27 August 2008, in or around South Ossetia, on the territory of Georgia (article 12(2)(a) of the Statute) and were associated with the conflict underlying the decision of the Chamber authorising the opening of an investigation.⁵

3. The Chamber declines, at this stage, to use its discretionary *proprio motu* power pursuant to article 19(1), second sentence, of the Statute to determine the admissibility of the case against Mr Sanakoev as there is no ostensible cause or self-evident factor which impels it to do so.⁶

III. Standard of proof

4. The Chamber's findings of facts, as set out below, are made based on the relevant evidentiary standard, namely 'reasonable grounds to believe', as required by article 58(1)(a) of the Statute. The evidence must only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court. This need not be the only reasonable conclusion that can be drawn from the evidence.⁷

⁵ Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 64 and p. 26.

⁶ See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169, paras 1-2, 52. See e.g. Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1, p. 4; *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para. 9; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Mandat d'arrêt à l'encontre d'Ahmad Al Faqi Al Mahdi, 18 September 2015, ICC-01/12-01/15-1-Red, para. 12.

⁷ Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 3 February 2010, ICC-02/05-01/09-73 (OA), paras 33, 39. See also Pre-Trial Chamber II, *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red (confidential version issued on the same day), para. 19.

IV. Requirements of article 58(1) of the Statute

1. *Whether Mr Sanakoev has committed a crime within the jurisdiction of the Court (Article 58(1)(a) of the Statute)*

(a) The conflict and parties involved and the contextual elements of war crimes

5. The requested warrant of arrest concerns war crimes listed in Article 8(2)(a) and (b) of the Statute. The Prosecutor submits that the contextual elements for the alleged war crimes have been fulfilled throughout the relevant period, namely between 8 to 27 August 2008.⁸ For each of the war crimes alleged, the following two requirements must be established: (i) the conduct took place in the context of and was associated with an international armed conflict; and (ii) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁹

6. The Application discusses Russian occupation of Georgian territory.¹⁰ An occupation does not immediately commence upon the overtaking of territory by the armed forces of the enemy, as the territory has to be ‘actually placed under the authority of the hostile army’.¹¹ However, the Chamber does not need to assess the start of any alleged occupation, because the war crimes alleged do not require the existence of an occupation,¹² but merely the application of international humanitarian law (IHL) for international armed conflicts to the conduct. An international armed conflict exists in case of declared war, in case of resort to armed force between two or more States, or a belligerent occupation.¹³

⁸ Application, para. 23.

⁹ Elements of Crimes, Introduction to Article 8; elements 4 and 5 of article 8(2)(a)(vii)-1 and elements 6 and 7 of article 8(2)(a)(viii).

¹⁰ Application, paras 12, 26. *See also* para. 11 referring to GEO-OTP-0047-6804 (ECHR, *Case of Georgia v. Russia*, Judgment (Grand Chamber), 21 January 2021, Application no. 38263/08). The judgment of the ECHR contains a broad analysis of the events before it, including the legal nature of the occupation.

¹¹ Article 42 of the Hague Regulations of 1907. Determining whether an invasion by hostile armed forces has developed into a situation of occupation ‘is a question of fact’. United States Tribunal at Nuremberg, *Hostages trial*, Law Reports of Trial of War Criminals, Vol. III, UN War Crimes Commission, 1949, London, p. 55; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, para. 173; and ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Judgment, 31 March 2003, IT-98-34-T, para. 211.

¹² *See* the elements of crimes listed in n. 10 above.

¹³ Common Article 2 of the four Geneva Conventions of 1949.

7. For the purposes of the present consideration, it only needs to be noted that Russian and Georgian forces were engaged in hostilities from 8 August 2008 onwards, and that, subsequently, Russian forces remained on the territory of Georgia without Georgian consent.¹⁴ The Chamber is therefore satisfied that the evidence shows, to the requisite standard, that an international armed conflict existed from at least 8 August 2008 onwards and for the duration of the period relevant to this Application.

8. To consider whether a nexus between the alleged conduct and the international armed conflict between Russia, fighting together with South Ossetian forces, on the one hand and Georgia on the other, exists; in other words, whether IHL for international armed conflicts was applicable to the alleged conduct, the Chamber may consider, *inter alia*: (i) the status of the alleged perpetrators and victims, and whether they had a role in the fighting; (ii) whether the act may be said to serve the ultimate goal of a military campaign; and (iii) whether the crime is committed as part of, or in the context of, the perpetrator's official duties.¹⁵

9. The alleged crimes took place during the aforementioned armed conflict, in the South Ossetian part of Georgia. The information provided by the Prosecutor indicates that members of the Russian armed forces and South Ossetian security forces were involved at various stages of the alleged crimes, including the arrests and the exchange of the detainees.¹⁶ The Chamber finds that the arrested civilians were perceived as being part of, or aligned with, Russia's enemy, namely Georgia,¹⁷ and part of them were interrogated on their supposed status as Georgian army reservists.¹⁸ Moreover, the exchange served, in part, to have Russian prisoners of war, and the bodies of Russian soldiers, returned to Russia. The alleged conduct of Mr Sanakoev in relation to the alleged crimes was carried out as part of his official capacity as the Ombudsman of the *de facto* South Ossetian administration. The Chamber is therefore satisfied that there are reasonable grounds to believe that the alleged conduct took place in the

¹⁴ See, e.g. GEO-OTP-0002-7599, GEO-OTP-0002-7736, GEO-OTP-0002-1113.

¹⁵ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-1962, 15 June 2017, para. 68, referring to ICTY, *The Prosecutor v. Kunarac, Kovač, and Vuković*, Appeal Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 59.

¹⁶ See e.g. paras 12, 21 below.

¹⁷ See para. 13 below.

¹⁸ The evidence shows that some of the detainees were interrogated, beaten, or threatened with the purpose of bringing them to admit that they were reservists. Some other detainees were told to [REDACTED]. See [REDACTED]; [REDACTED]; [REDACTED]. See also [REDACTED]. See also [REDACTED].

context of the aforementioned international armed conflict, was also associated with it, and IHL applicable during such conflicts applied to it; and this body of law could thus be violated.

10. Given the standard of analysis, the Chamber need not consider, for the purposes of the present decision, whether the situation in addition qualified as an occupation by Russia, or whether a non-international armed conflict existed alongside the aforementioned international armed conflict; and whether the alleged conduct, or part thereof, also or instead took place in the context of a non-international armed conflict.

11. As the alleged conduct took place during the height of the 2008 conflict, and given the position of the perpetrators on the ground and of Mr Sanakoev, the Chamber is satisfied that there are reasonable grounds to believe that the suspect was aware of the factual circumstances that established the existence of the aforementioned conflict.

(b) The crimes

(i) *Hostage taking (article 8(2)(a)(viii) of the Statute)*

12. Based on the evidence,¹⁹ the Chamber finds reasonable grounds to believe that, between 10 and 12 August 2008, several villagers *perceived* as ethnic Georgians ('ethnic Georgians')²⁰ or from mixed marriages, and who had not yet fled, were arrested in the Tskhinvali area, randomly in the streets or at home, by persons described as ethnic Ossetians dressed as policemen, in military uniforms, or in plain clothes, sometimes together with Russians or members of the Russian armed forces. Those arrests generally took place in a context of looting and/or the burning of houses by Ossetian militias and were conducted with a certain degree of violence, from discriminatory insults (such as 'Georgian pigs') to severe beatings. The persons

¹⁹ P-0259, GEO-OTP-0041-0003; P-0246, GEO-OTP-0044-1085; P-0093, GEO-OTP-0020-1150; P-0161, GEO-OTP-0039-1003; P-0153, GEO-OTP-0028-0507; P-0213, GEO-OTP-0038-0281; GEO-OTP-0028-0507; P-0209, GEO-OTP-0039-0007; P-0211, GEO-OTP-0045-0348; P-0235, GEO-OTP-0039-0457; P-0266, GEO-OTP-0051-1033; P-0194, GEO-OTP-0032-1209; P-0354, GEO-OTP-0046-1589; P-0152, GEO-OTP-0028-0345; P-0194, GEO-OTP-0032-1209; P-0329, GEO-OTP-0044-1150; P-0333, GEO-OTP-0050-0002; P-0222, GEO-OTP-0039-0286; P-0208, GEO-OTP-0037-0102; P-0253, GEO-OTP-0050-0059; P-0285, GEO-OTP-0041-0991; GEO-OTP-0002-7736.

²⁰ When using the term 'ethnic Georgians' or 'ethnic Ossetians' in the present decision, the Chamber refers to the way those persons are perceived by others, and will not be referring to an ethnicity that would exist *per se*.

arrested were brought to the preliminary detention facility in Tskhinvali (the ‘KPZ’ or the ‘Isolator’).

13. The Chamber finds that there are reasonable grounds to believe that approximately 170 persons were arrested and subsequently detained at the Isolator, and that the majority of them were civilians, amongst which many women and elderly persons, who found themselves in the hands of a party to the armed conflict²¹ opposite to the party they were perceived to be aligned with (the Georgian Government),²² because of their perceived ethnic background. Therefore there are reasonable grounds to believe that the majority of the aforementioned persons were protected persons under the Fourth Geneva Convention of 1949²³ (the ‘Fourth Geneva Convention’).

14. The Chamber also finds that those 170 persons remained in confinement at the Isolator between five to 18 days,²⁴ and at least 110 of them were transferred and handed over to the Georgian authorities between 21 and 27 August 2008, as described below.²⁵

15. The evidence²⁶ further shows that, starting around 12 August 2008, prior to this transfer, negotiations took place in Gori, between Georgian representatives, the Russian representative General Borisov, and the South Ossetian *de facto* authorities, represented by Mr Sanakoev. They discussed the release and ‘exchange’ of prisoners

²¹ GEO-OTP-0041-0263; GEO-OTP-0041-0268; GEO-OTP-0041-0272; GEO-OTP-0041-0279; GEO-OTP-0044-1051; GEO-OTP-0002-7736, para. 25; P-0235, GEO-OTP-0039-0457, paras 49, 54; P-0282, GEO-OTP-0043-1622, paras 91, 99; P-0354, GEO-OTP-0046-1589, paras 37, 143, 155; Application, Annex 8.

²² The Chamber notes that according to article 4 of the Geneva Convention IV, ‘protected persons’ are ‘persons [...] who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. The Chamber adopts the interpretation of this provision made in the consistent jurisprudence of the ICTY, according to which ‘protected persons should not be defined by the strict requirement of nationality, as opposed to more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity’. See ICTY, *Prosecutor v. Brđanin*, Judgment, 1 September 2004, IT-99-36-T, para. 125. See also *Prosecutor v. Tadić*, Appeal Judgment, 15 July 1999, IT-94-1-A, paras 164-168; ICTY, *Prosecutor v. Aleksovski*, Judgment, 24 March 2000, IT-95-14/1-A, para. 152; *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Appeal Judgment, 20 February 2001, IT-96-21-A, paras 82-83; *Prosecutor v. Naletilić and Martinović*, Judgment, 31 March 2003, IT-98-34-T, paras 206-207. See also Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras 289-292.

²³ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 United Nations Treaty Series 973.

²⁴ See n. 19 above.

²⁵ See para. 21 below.

²⁶ [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

of war, corpses of deceased soldiers, but also of detained civilians. On the Russian/South Ossetian side, General Borisov was leading the negotiations. The Russian/South Ossetian side primary request concerned the release of Russian pilots, then other prisoners of war, and third South Ossetian militants or ‘*boyeviks*’; but also of General Dumbadze, detained for reasons other than the 2008 conflict, and South Ossetian persons convicted by the Georgian courts for serious crimes and serving their prison terms in Georgia, including the persons found responsible for an attack on a police building in Gori in 2005.

16. The Georgian side did not immediately agree to release General Dumbadze and the convicted persons, in particular those convicted for terrorist acts under Georgian domestic law before the 2008 conflict. In this context General Borisov²⁷ and Mr Sanakoev²⁸ leveraged the detention of the protected persons by threatening to continue to detain them in order to compel Georgian authorities to release convicted criminals as a condition for their release. The information provided by the Prosecutor clearly indicates that General Borisov was in charge and had the leading role,²⁹ and that Mr Sanakoev played also a part in the negotiations, even if the degree of influence and authority among both was different.³⁰

17. In particular, on 21 August 2008, Mr Sanakoev participated in the handover of 59 women and elderly persons to the Georgian authorities and promised to release 100 more civilians, while presenting a list of 50 Ossetian convicts who served their prison term in Georgian prisons.³¹ Mr Sanakoev appears on a video dated 22 August 2008 during the release of 60 detainees, stating in front of a camera that ‘there are still one hundred persons, we will negotiate to exchange them for Ossetians who are in Georgia’.³²

18. The Georgian side requested time to check the list and to consider applying presidential pardons, and Mr Sanakoev made clear that during that time (until the release of the convicted persons), the promised 100 civilians would not be released

²⁷ [REDACTED]; [REDACTED].

²⁸ [REDACTED].

²⁹ See in this regard [REDACTED].

³⁰ See in this regard [REDACTED].

³¹ [REDACTED]; [REDACTED].

³² GEO-OTP-0044-1051 (non-official translation) (*‘il reste encore une centaine de personnes, nous allons négocier pour les échanger contre les Ossètes qui sont en Géorgie’*). See also [REDACTED].

and that it would be Georgia's fault if they die in the Isolator.³³ This is also when Mr Sanakoev stated that he could not come back to the Ossetian side with 'empty hands' and 'needed to bring these people [the convicted persons] back'.³⁴ Partly because they were worried about the faith of the civilian detainees, the Georgian side eventually agreed to release General Dumbadze and Ossetian convicts and at least nine of them were exchanged on 27 August 2008 on the basis of presidential pardons or plea agreements.³⁵

19. Based on the foregoing, the Chamber finds that there are reasonable grounds to believe that the detainees were used as a bargaining tool in the negotiations. In addition, the Chamber also finds reasonable grounds to believe that the intention to hold civilian prisoners in order to use them for exchanges already seems to have been present at the moment of the arrests.³⁶

20. The Chamber finds that there are reasonable grounds to believe that detaining and threatening to continue to detain the protected persons in order to compel the Georgian authorities to release Ossetian convicts amounts to the crime of hostage taking pursuant to article 8(2)(a)(viii) of the Statute.

³³ [REDACTED].

³⁴ [REDACTED]; [REDACTED]; [REDACTED].

³⁵ [REDACTED]; [REDACTED]; [REDACTED]. Compare Exchange Protocol dated 27 August 2008: GEO-OTP-0040-0078 (translation at GEO-OTP-0041-0278) with Presidential Decree to grant pardon to convicts GEO-OTP-0047-4386; GEO-OTP-0047-4399; GEO-OTP-0047-4403; GEO-OTP-0047-4393; GEO-OTP-0047-4397; GEO-OTP-0047-4407; GEO-OTP-0047-9968 GEO-OTP-0047-4411.

³⁶ The evidence shows that some persons were told, already at the time of the arrest, that they were captured in order to be exchanged ([REDACTED]), or overheard conversations between the persons arresting them that the arrested persons should stay alive because they could be 'useful' ([REDACTED]. See also [REDACTED]). Others were told during their detention that they were detained in order to be exchanged ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]).

(ii) *Unlawful transfer (article 8(2)(a)(vii) of the Statute)*

21. The evidence³⁷ shows a reasonable basis to believe that between 21 and 27 August 2008 at least 110 persons,³⁸ amongst them protected persons,³⁹ were transferred from the Isolator to the Georgian authorities: on 21, 22, 24, and 27 August 2008. They were put in ‘Ossetian’ or ‘Russian’ buses, escorted by police officers and members of the Russian armed forces, taken to Gori and Karaleti, where they were handed over there to the Georgian authorities, who would take them to Tbilisi in Georgian buses. On the South Ossetian side, the exchanges were organised and decided by Mr Borisov and Mr Sanakoev, and implemented by members of the Russian armed forces, South Ossetian police officers, and Ossetians in plain clothes.

22. The Elements of Crimes require a perpetrator to have transferred one or more protected persons to another location, and to be ‘unlawful’, the said transfer must be made in violation of IHL. Article 8(2)(a)(vii)-1 of the Statute is based on the prohibition laid down in article 49 of the Fourth Geneva Convention.⁴⁰ Therefore, to interpret the unlawfulness component of the war crime, the Chamber must have regard to the aforementioned provision of the Fourth Geneva Convention. Article 49 prohibits individual or mass forcible transfers of civilians, although a total or partial evacuation is permitted ‘if the security of the population or imperative military reasons so demand’. However, the handover of the civilians to the Georgian authorities cannot qualify as such an evacuation given that they were detained prior to the handover, and since no hostilities were taking place in the relevant area at the relevant time.⁴¹ The Chamber notes that it is clear from the evidence that the present transfers did not relate

³⁷ See the following exchange protocols: GEO-OTP-0040-0066 (translation GEO-OTP-0041-0263); GEO-OTP-0040-0070 (translation GEO-OTP-0041-0268); GEO-OTP-0041-0273 (translation GEO-OTP-0041-0272); GEO-OTP-0041-0278 (translation GEO-OTP-0041-0279). See also P-0246, GEO-OTP-0044-1085; P-0231, GEO-OTP-0044-1355; P-0153, GEO-OTP-0028-0507; P-0161, GEO-OTP-0039-1003; P-0208, GEO-OTP-0037-0102; P-0359, GEO-OTP-0048-0017; P-0093, GEO-OTP-0047-9072; P-0209, GEO-OTP-0039-0007; P-0235, GEO-OTP-0039-0457; P-0266, GEO-OTP-0051-1033; P-0282, GEO-OTP-0043-1622; P-0354, GEO-OTP-0046-1589; P-0223, GEO-OTP-0037-0006; GEO-OTP-0002-7736, para. 97; GEO-OTP-0002-7736.

³⁸ See Application, para. 94.

³⁹ See para. 13 above.

⁴⁰ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2002), pp. 106-109.

⁴¹ The present transfers took place between 21 and 27 August 2008, so days after a ceasefire agreement was signed on 12 August 2008 and after the cessation of armed hostilities.

to any of those two specific cases.⁴² Indeed, while there is a reasonable basis to believe that one of the goals of the exchange was to obtain the release of ethnic Ossetians detained in Georgia,⁴³ there is also a reasonable basis to believe that a further aim was to permanently remove perceived ethnic Georgians from the territory of South Ossetia.⁴⁴

23. Additionally, the Chamber notes that, in order to constitute a violation of article 49 of the Fourth Geneva Convention, and thus amount to unlawful transfer, the transfer needs to be either (i) ‘forced’, or; (ii) based on a decision by the transferred person, which, given the circumstances, was not genuine.⁴⁵ In respect of (i), the evidence shows that in the present case the transferred persons were not asked whether they agreed to be transferred,⁴⁶ but rather simply forced to leave irrespective of their intentions.⁴⁷ In respect of (ii), whereas some of the detainees accepted to sign a document stating that they agreed to be handed over to the Georgian authorities, the Chamber is of the view that the circumstances prevailing at the moment of the transfer,⁴⁸ coupled with the fact that the detainees were not offered any genuine

⁴² The Chamber notes that the assistance of humanitarian organisations in the transfer have no bearing on the lawfulness or unlawfulness of the transfer. See ICTY, *Prosecutor v. Stakić*, Judgment, 31 July 2003, IT-97-24-T, para. 683.

⁴³ See para. 15 above. P-0266, GEO-OTP-0051-1033; P-0208, GEO-OTP-0037-0102, para. 111; P-0253, GEO-OTP-0050-0059, para. 82; P-0485, GEO-OTP-0047-6110, para. 151; P-0093, GEO-OTP-0047-9072, paras 12-17; P-0161, GEO-OTP-0039-1003, para. 124; P-0223, GEO-OTP-0037-0600, paras 101, 122.

⁴⁴ When President Eduard Kokoity, the then President of *de facto* South Ossetia authorities, was asked on 26 August 2008 if Georgian civilians will be allowed to return, he declared publicly ‘we do not intend to let anybody in here anymore. More than 18000 Ossetian refugees from Georgia are currently in North Ossetia. They are to be returned to South Ossetia’ (the translation from original Russian to French is even more explicit ‘*Nous n’avons pas l’intention de laisser rentrer qui que ce soit.*’). GEO-OTP-0005-0100, p. 0102. See also P-0354, GEO-OTP-0046-1589, paras 177-183; P-0077, GEO-OTP-0017-0572, paras. 132-134; P-0139, GEO-OTP-0022-2002, para. 211; GEO-OTP-0043-1118.

⁴⁵ See e.g. ICTY, *Prosecutor v. Krstić*, Judgment, 2 August 2001, 98-33-T, paras 528-530.

⁴⁶ P-0093, GEO-OTP-0047-9072, para. 15; P-0208, GEO-OTP-0037-0102, para. 111; P-0253, GEO-OTP-0050-0059, paras 80-82; P-0246, GEO-OTP-0044-1085, para. 259; P-0209, GEO-OTP-0039-0007, para. 136; P-0228, GEO-OTP-0046-1679, para. 160; P-0223, GEO-OTP-0037-0006, para. 101.

⁴⁷ P-0231, GEO-OTP-0044-1355, paras 110-111.

⁴⁸ For example, one witness explained later to the Prosecution that, due to the conditions in which he was detained and the fact that he felt that his life was threatened, at the time, he would have signed ‘any paper’ in order to be released. See P-0194, GEO-OTP-0047-9627, paras 40, 41. In this regard, the Chamber finds reasonable grounds to believe that some of the detainees, in particular the younger male detainees, were beaten several times, insulted, threatened, humiliated or otherwise mistreated during their confinement at the Isolator. (See, for example, [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. See also [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) The evidence also shows that the conditions in which the detainees were held were poor, the cells were overcrowded, sanitary facilities were either inexistent or did not allow for privacy, and medical attention for those who required treatment was limited. (See P-0312, GEO-OTP-0044-0540, para. 132; P-0201, GEO-OTP-0046-0002, para. 108;

that resulted from those negotiations,⁵¹ which were reportedly overseen by Mr Chochiev, who ‘represented the South Ossetian government’.⁵²

26. The Prosecutor alleges that Mr Sanakoev is responsible for the crimes of unlawful transfer of civilians and hostage taking under article 25(3)(d)(i) of the Statute as a contributor to a common purpose encompassing the crimes of unlawful transfer and hostage taking, or, alternatively, under article 25(3)(c) of the Statute for the crime of unlawful transfer.

27. Regarding the crime of hostage taking, the Chamber finds that there are reasonable grounds to believe that a group acting with a common purpose existed, aimed at securing the release of South Ossetians held by the Georgian authorities by threatening the continued detention of the detainees in the KPZ, and at transferring these perceived ethnic Georgians out of the territory of South Ossetia into Undisputed Georgian Territory, as part of the exchange. The Chamber also finds that the implementation of this common purpose involved the commission of criminal acts, namely the crimes of hostage taking and unlawful transfer of civilians (protected persons). The Chamber finds that the *de facto* President Mr Kokoity,⁵³ Mr Borisov and Mr Sanakoev⁵⁴ were part of the group of persons sharing this common purpose and the intent to use criminal means (hostage taking and unlawful transfers) to achieve it.⁵⁵

28. The Chamber has established above the role played by Mr Sanakoev during the negotiations and in bargaining the release of the detained protected persons.⁵⁶ The Chamber considers that by doing so, Mr Sanakoev in any other way contributed to the commission of the crime with the aim of furthering the criminal activity (article

⁵¹ See paras 15-17, 21 above.

⁵² [REDACTED].

⁵³ GEO-OTP-0005-0100, p. 0102; GEO-OTP-0028-0187.

⁵⁴ See para. 15 above.

⁵⁵ The Chamber finds that the information put before the Chamber does not allow it to make a finding that Mr Boris Chochiev or Mr Taymuraz Khugayev were part of the group. As regards Mr Boris Chochiev, see Application, para. 111, n. 295 referring to [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. See in particular [REDACTED], [REDACTED]. [REDACTED] and [REDACTED] show that he was present at different points in time at the KPZ detention facilities or that he wanted the Ossetian convicts brought back to Ossetia, but do not show that he shared the intent to use criminal means to reach such a purpose. As regards Mr Taymuraz Khugayev, see Application, para. 111, n. 296 and evidence referred therein.

⁵⁶ See paras 15-18 above.

25(3)(d)(i) of the Statute). The Chamber finds reasonable grounds to believe that Mr Sanakoev was aware that many of the detained persons were protected persons.

29. Regarding the crime of unlawful transfer of civilians, the Chamber recalls again its finding that Mr Sanakoev was representing the Ossetian side during the negotiations and the exchanges of detainees that resulted from those negotiations.⁵⁷ Mr Sanakoev was present at least on five occasions during exchanges of detainees, and he signed,⁵⁸ on behalf of the *de facto* South Ossetian administration, the five exchange protocols.⁵⁹ He was present when the *de facto* South Ossetian authorities handed over 81 civilians detained at the police local station in Tskhinvali to the Georgian authorities on the 27th of August 2008⁶⁰ and he personally distributed to the detained persons a document stating that they ‘were voluntarily leaving the facility and that [they] had no complaints about [their] treatment’ and requested them to sign it.⁶¹ In this particular instance, he appears to have been present at the moment when the civilian detainees were getting in the bus, and to have ‘escorted’ them.⁶²

30. The Chamber considers that by doing so, Mr Sanakoev aided the commission of the crime as set out in article 25(3)(c) of the Statute, and alternatively, contributed in any other way as set out in article 25(3)(d)(i) of the Statute. The Chamber finds that Mr Sanakoev was aware that some of the transferred persons were civilians.

31. The Chamber is further satisfied that Mr Sanakoev acted with the required intent and knowledge for the specific crimes set forth in this decision, and that he was aware of the factual circumstances that established the existence of the international armed conflict.

32. Accordingly, the Chamber finds that there are reasonable grounds to believe that Mr Sanakoev is responsible for the crimes of: (i) hostage taking (article 8(2)(a)(viii) of the Statute) under article 25(3)(d)(i) of the Statute; and (ii) unlawful transfer of civilians (article 8(2)(a)(vii) of the Statute) under article 25(3)(c) of the Statute, and alternatively under article 25(3)(d)(i) of the Statute.

⁵⁷ See paras 15-18, 21 above.

⁵⁸ See [REDACTED].

⁵⁹ GEO-OTP-0041-0263; GEO-OTP-0041-0268; GEO-OTP-0041-0272; GEO-OTP-0041-0279; GEO-OTP-0041-0275. See also P-0282, GEO-OTP-0043-1622, para. 180; GEO-OTP-0002-7736, para. 97.

⁶⁰ P-0354, GEO-OTP-0046-1589, para. 159; P-00073, GEO-OTP-0047-6577, p. 6591.

⁶¹ [REDACTED]; [REDACTED].

⁶² GEO-OTP-0044-1051. See also [REDACTED].

2. *Whether the arrest of Mr Sanakoev appears necessary (Article 58(1)(b) of the Statute)*

33. The Prosecutor submits that the arrest of Mr Sanakoev is necessary to ensure his appearance before the Court. He submits that ‘the deliberate and callous nature of the crimes, their use as an instrument of policy, and their commission under the auspices of authority in South Ossetia leads to the reasonable conclusion that [Mr Sanakoev is] unlikely to cooperate with a summons to appear’.⁶³

34. The Chamber notes that it was not provided with an early notice of the intention of the Prosecutor to request the issuance of a warrant of arrest against the suspect and stresses the importance of providing such notice.⁶⁴ The Chamber also notes that the request was made public.

35. After evaluating the information submitted by the Prosecutor, including public statements made by high level officials of the Russian Federation and Georgia,⁶⁵ the Chamber is satisfied that the arrest of Mr Sanakoev is necessary within the meaning of article 58(1)(b)(i) of the Statute to ensure his appearance before the Court.

⁶³ Application, para. 134.

⁶⁴ See Regulation 53(2) of the Regulations of the Office of the Prosecutor.

⁶⁵ Application, para. 135.

FOR THESE REASONS, THE CHAMBER HEREBY

ISSUES a warrant of arrest for **Mr David Georgiyevich SANAKOEV**, referred to as a national of the *de facto* South Ossetian administration and presumably of Georgia, born on 14 December 1976 in Tskhinvali, Georgia, for his alleged criminal responsibility pursuant to article 25(3)(d)(i) of the Statute, for hostage taking (article 8(2)(a)(viii) of the Statute) and pursuant to article 25(3)(c) of the Statute or alternatively pursuant to article 25(3)(d)(i) of the Statute for unlawful transfer of civilians (article 8(2)(a)(vii) of the Statute), as war crimes committed between 8 and 27 August 2008, in whole or in part, on the territory of Georgia, as set forth in this warrant of arrest;

DIRECTS the Registrar to prepare a Russian and Georgian translation of the present warrant and transmit it to the Russian and Georgian embassies at the seat of the Court;

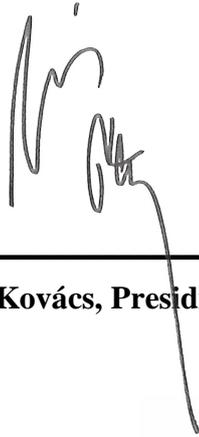
DECIDES that the Registrar shall, if at the indication of the Prosecutor a situation arises warranting to do so: (i) prepare a request for cooperation seeking the arrest and surrender of Mr Sanakoev and containing the information and documents required by articles 89(1) and 91 of the Statute and rule 187 of the Rules of Procedure and Evidence; (ii) transmit, in consultation and coordination with the Prosecutor, the request to the competent authorities of any relevant State, or to any international organisation, in accordance with article 87 of the Statute, to cooperate with the Court for the purpose of executing the request for arrest and surrender of Mr Sanakoev; and (iii) submit a progress report on the status of the execution of the request for cooperation no later than 15 days after the request is made;

DIRECTS the Registrar to prepare and transmit to any relevant State, in consultation and coordination with the Prosecutor, any request for transit pursuant to article 89(3) of the Statute or any request for provisional arrest pursuant to article 92 of the Statute which may be necessary for the surrender of Mr Sanakoev to the Court;

ORDERS the Office of the Prosecutor to transmit to the Registry all information available to it that may be of assistance in the execution of the request for arrest and surrender as well as any information of relevance to assessing any risks to victims and witnesses associated with the transmission of the request for arrest and surrender;

DIRECTS the Registrar to register the present decision in the record of the situation and to open a case record and transfer first the Application with all its annexes from the situation record into the case record once the suspect has made a voluntarily appearance, has surrendered, or has been arrested.

Done in English. Russian, Georgian, and French translations will follow. The English version remains authoritative.



Judge Péter Kovács, Presiding Judge



**Judge Reine Adélaïde Sophie
Alapini-Gansou**



**Judge María del Socorro
Flores Liera**

Dated this Thursday, 30 June 2022

At The Hague, The Netherlands