

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/15**  
Date: **27 January 2016**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN GEORGIA**

**Public**

**Decision on the Prosecutor's request for authorization of an investigation**

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

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**PRE-TRIAL CHAMBER I** of the International Criminal Court issues the present decision on the Prosecutor's request for authorization of an investigation ([ICC-01/15-4-Corr2](#), the "Request"). This decision is taken unanimously; Judge Péter Kovács appends a separate concurring opinion.

1. On 13 October 2015, the Chamber received the Prosecutor's "Request for authorisation of an investigation pursuant to article 15", together with public and confidential *ex parte* annexes appended thereto ([ICC-01/15-4](#)). The Prosecutor requests "authorization 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". On 5 November 2015, the Prosecutor indicated that she does not intend to rely on some "portions of [the] annexes and accordingly wishes to withdraw them" due to either their irrelevance or duplication ([ICC-01/15-5](#), para. 2). On 6 November 2015, the Prosecutor filed *corrigenda* of certain annexes and on 17 November 2015, she filed the second, final *corrigendum* of the Request ([ICC-01/15-4-Corr2](#)). One annex to the Request, hitherto public, was subsequently reclassified as "confidential" upon request of the Prosecutor (ICC-01/15-9-Conf-Exp).

2. On 4 December 2015, the Chamber received the representations by or on behalf of 6,335 victims, collected under article 15(3) of the Rome Statute (the "Statute") ([ICC-01/15-10](#) and annexes) as well as a report of the Registry on the matter ([ICC-01/15-11](#) and annexes).

3. The present decision is taken under article 15 of the Statute. As previously observed by other Chambers, this procedure has the object and purpose of ensuring judicial control over the Prosecutor's exercise of her *proprio motu* power to open an investigation in the absence of a referral by a State Party or

by the Security Council of the United Nations.<sup>1</sup> In light of the procedural stage and the subject matter, the Chamber's examination of the Request and the supporting material provided by the Prosecutor must be strictly limited. Indeed, it has been stated previously that the subjection of *proprio motu* investigation by the Prosecutor to the authorization of the Pre-Trial Chamber serves no other purpose than to prevent the abuse of power on the part of the Prosecutor.<sup>2</sup>

4. The Pre-Trial Chambers have held consistently that the criteria of article 53(1) of the Statute governing the initiation of an investigation by the Prosecutor equally inform the analysis under article 15(3) and (4) of the Statute as they enable first the Prosecutor and then the Chamber to determine whether there is "a reasonable basis to proceed with an investigation".<sup>3</sup>

5. In the following sections, the Chamber lays out the results of its examination of the Request and the supporting material with respect to the three limbs of article 53(1) of the Statute: whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (section I); whether potential cases arising out of the situation would be admissible before the Court under article 17 of the Statute (section II); and whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (section III). The final section provides the main conclusion of the Chamber and sets out the parameters of the authorization granted to the Prosecutor (section IV).

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<sup>1</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", 31 March 2010, [ICC-01/09-19-Corr](#), para. 18 ("Decision Authorizing the Investigation in the Situation in Kenya").

<sup>2</sup> *Id.*; Pre-Trial Chamber III, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 15 November 2011, [ICC-02/11-14-Corr](#), para. 21 ("Decision Authorizing the Investigation in the Situation in Côte d'Ivoire").

<sup>3</sup> [Decision Authorizing the Investigation in the Situation in Kenya](#), paras 20-25; [Decision Authorizing the Investigation in the Situation in Côte d'Ivoire](#), paras 17-18.

## **I. Whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed**

6. Article 53(1) of the Statute, quite logically, requires the analysis to focus on crimes within the jurisdiction of the Court. In this regard, it is sufficient to note that the crimes alleged by the Prosecutor in the Request: (i) are crimes under the Statute, in particular under articles 7 and 8 (jurisdiction *ratione materiae*); (ii) are alleged to have occurred after 1 December 2003, the date of entry into force of the Statute for Georgia (jurisdiction *ratione temporis*); and (iii) are alleged to have been committed on Georgian territory (jurisdiction *ratione loci*). With regard to the latter, the Chamber agrees with the submission of the Prosecutor (Request, para. 54) that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations.

### *The relevant facts*

7. The Prosecutor alleges the commission of: (i) the war crimes of wilful killing (article 8(2)(a)(i)) or murder (article 8(2)(c)(i)), destruction of property (article 8(2)(b)(xiii) or 8(2)(e)(xii)) and pillage (article 8(2)(b)(xvi) or 8(2)(e)(v)), and intentionally directing attacks against peacekeepers (article 8(2)(b)(iii)); and (ii) the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)) and persecution (article 7(1)(h)).

8. The relevant facts alleged by the Prosecutor and supported by the material presented together with the Request can be summarized as follows.

9. In the months leading to the August 2008 conflict, tensions increased in and around South Ossetia between the Georgian and South Ossetian sides.<sup>4</sup> Throughout July 2008, there were reports of armed clashes, detention of Georgian military personnel by South Ossetian forces,<sup>5</sup> shelling and firing on

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<sup>4</sup> Request, para. 29; Annex E.2.36, p. 211; Annex E.4.3, p. 10.

<sup>5</sup> Request, para. 31; Annex E.2.36, p. 212; Annex E.4.3, p. 10.

Tskhinvali and southern environs causing several casualties and property damage,<sup>6</sup> an alleged violation of Georgian airspace by four Russian military aircraft<sup>7</sup> and shooting incidents in South Ossetia,<sup>8</sup> a series of explosions which targeted, amongst other, South Ossetian and Georgian military and political leaders.<sup>9</sup> From 24 to 28 July 2008, several explosions occurred in the southern environs of Tskhinvali and the Georgian-administered village of Avnevi, close to the post of the Georgian Joint Peacekeeping Force (JPKF) battalion.<sup>10</sup> From 29 to 31 July 2008, exchanges of fire were reported between the Georgian-administered Sveri village and the South Ossetian-administered Andzisi village, between a South Ossetian militia post and a Georgian police post in Khetagurovo, as well as the targeting of the Joint Monitoring Team of the JPKF.<sup>11</sup>

10. In the night 1-2 August 2008 a series of intense exchanges of fire, including sniper fire and mortar shelling, occurred between Georgian and South Ossetian controlled areas causing casualties.<sup>12</sup> Exchanges of fire continued, albeit to a lesser extent, during the nights of 2-3 and 3-4 August 2008.<sup>13</sup> Georgian peacekeeper positions were reportedly shelled by South Ossetian forces prior to the outbreak of hostilities, such as in Andzisi, Sarabuki, Nuli, Avnevi and the Frone valley.<sup>14</sup> While the Georgian side claims that the attack was conducted by South Ossetian forces, the identity of the perpetrators and the timing of the attack remain contested.<sup>15</sup>

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<sup>6</sup> Request, para. 29, Annex E.2.36, pp. 211-212; Annex E.4.3, p. 10.

<sup>7</sup> Request, para. 31; Annex E.2.36, pp. 212-213; Annex E.4.3, p. 10.

<sup>8</sup> Annex E.4.3, p. 10.

<sup>9</sup> Request, para. 29; Annex E.4.3, p. 10; Annex E.2.36, p. 211.

<sup>10</sup> Request, para. 29; Annex E.2.36, p. 213.

<sup>11</sup> Annex E.2.36, p. 213; Annex E.2.37, p. 21.

<sup>12</sup> Annex E.2.38-Corr, p. 16; Annex E.2.36, pp. 214-215.

<sup>13</sup> Annex E.2.38-Corr, p. 16; Annex E.2.36, p. 215; Annex E.2.37, p. 22.

<sup>14</sup> Request, paras 164-166; Annex E.2.37, p. 24; Annex E.7.9-Conf-Exp, p. 2.

<sup>15</sup> See Request, para. 166, with reference to information provided to the Prosecutor by the Russian authorities on 10 March 2010.

11. In the afternoon of 6 August 2008, firing took place along the entire line of contact between the Georgian and South Ossetian sides<sup>16</sup> and intensified again on 7 August 2008 involving mortars and artillery and reportedly causing human casualties.<sup>17</sup> Despite the televised announcement of a unilateral cease-fire by the President of Georgia in the evening of 7 August 2008,<sup>18</sup> fighting began anew around 22.00 hours.<sup>19</sup> Soon, the fighting involved Russian, South Ossetian and Abkhaz military units and irregular armed elements which developed into a combined inter-state and intra-state conflict opposing Georgian and Russian forces at one level and South Ossetian and Abkhaz fighters, accompanied by irregular armed groups, and Georgian forces at another.<sup>20</sup>

12. On 8 August 2008, Georgian armed forces entered the territory of South Ossetia from the south, while Russian armed forces entered from the north.<sup>21</sup> More precisely, in the morning of 8 August 2008, the Georgian armed forces launched a ground attack against the city of Tskhinvali as well as operations on the left and right flanks of the city.<sup>22</sup> The flank operations seemed to aim at moving northwards with a view to blocking movements of the Russian troops from the north.<sup>23</sup> The supporting material also suggests that Russian peacekeeping forces were deliberately attacked on 8 August 2008 by Georgian armed forces on two locations: (i) the JPKF headquarters in the centre of Tskhinvali; and (ii) the headquarters of the Russian Peacekeeping Forces Battalion (RUPKFB) in Verkhniy Gorodok in the southwestern part of

<sup>16</sup> Request, para. 31; Annex E.2.38-Corr, p. 16; Annex E.2.36, p. 215; Annex E.2.37, p. 25.

<sup>17</sup> Annex E.2.36, p. 215; Annex E.2.37, p. 25.

<sup>18</sup> Request, para. 31; Annex E.2.38-Corr, p. 16; Annex E.2.36, p. 215.

<sup>19</sup> Request, paras 31-32; Annex E.2.35, pp. 12, 13, 21, 25 and 33; Annex E.2.36, p. 216; Annex E.2.38-Corr, p. 16; Annex E.2.36, pp. 215-216; Annex E.2.37, p. 26; Annex E.4.10, p. 9; Annex E.8.24.

<sup>20</sup> Annex E.2.35, pp. 12 and 22.

<sup>21</sup> Request, para. 33, footnote 41; Annex E.2.38-Corr, p. 16; Annex E.2.35, p. 22; Annex E.2.36, pp. 222, 223, 227-228, and 259-260; Annex E.2.37, p. 28; Annex E.4.10, p. 62.

<sup>22</sup> Annex E.4.3, p. 26.

<sup>23</sup> Annex E.2.36, p. 216.

Tskhinvali.<sup>24</sup> Whether the Russian peacekeeping force was at that time directly participating in the hostilities and whether the Georgian forces initiated the attack or were instead responding to an attack is contested.<sup>25</sup> Between 8 and 10 August 2008, the Georgian armed units allegedly attacked also other observation posts of the RUPKFB from the JPKF in Eredvi, Vanati, Kekhvi, Pauk, Prisi, Avnevi, Tsunaristba, Kverneti, Andzisi, Artsevi, and Megvrekisi.<sup>26</sup>

13. However, the Georgian forces encountered significant armed opposition from South Ossetian forces,<sup>27</sup> supported by Russian armed forces.<sup>28</sup> In the morning of 8 August 2008, the Russian air forces reportedly attacked locations in central Georgia, including Variani and Gori, and gradually extended their attacks to other parts of Georgia, including Tbilisi.<sup>29</sup> The Russian forces were joined by South Ossetian militias.<sup>30</sup>

14. Experiencing resistance, the Georgian forces withdrew from the centre of Tskhinvali in the evening of 8 August 2008.<sup>31</sup> On 10 August 2008, the Georgian government declared its intention to observe a unilateral ceasefire and move its forces out of South Ossetia;<sup>32</sup> by midnight, most Georgian troops had left the South Ossetian territory in the direction of Gori.<sup>33</sup> On 11 August 2008, the Georgian armed forces withdrew from Gori to Mtskheta with a view to preparing a defensive line for protection of the capital of Tbilisi.<sup>34</sup>

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<sup>24</sup> Annex E.7.7-Conf-Exp-Corr; Annex E.7.24-Conf-Exp.

<sup>25</sup> Annex E.7.7-Conf-Exp-Corr; Annex E.7.24-Conf-Exp.

<sup>26</sup> Annex E.7.33, p. 6.

<sup>27</sup> Request, para. 32; Annex E.2.36, pp. 216-217.

<sup>28</sup> Request, para. 33; Annex E.2.35, p. 12.

<sup>29</sup> Annex E.2.35, p. 22; Annex E.2.36, pp. 217, 223; Annex E.2.37, p. 28.

<sup>30</sup> Annex E.2.38-Corr, p. 36.

<sup>31</sup> Request, para. 33; Annex E.2.36, p. 217.

<sup>32</sup> Request, para. 34; Annex E.2.35, p. 23; Annex E.2.36, p. 218.

<sup>33</sup> Request, para. 34; Annex E.2.35, p. 23; Annex E.2.36, p. 218; Annex E.2.37, p. 32; Annex E.4.10, pp. 10 and 24.

<sup>34</sup> Annex E.2.36, p. 218.

15. The Georgian armed forces were pursued by Russian and South Ossetian troops who moved beyond the administrative boundary of South Ossetia and occupied adjacent areas, including the town of Gori, on 12 August 2008.<sup>35</sup> They set up military positions in a number of Georgian-administered towns, including Gori.<sup>36</sup>

16. Following the adoption of a six-point peace plan dated 12 August 2008, agreed in talks between the Russian President and the French President, acting on behalf of the European Union,<sup>37</sup> exchanges of hostilities between Georgian and Russian forces were said to have ceased. The Presidents of Georgia and Russia signed a ceasefire agreement on 15 and 16 August 2008 respectively.<sup>38</sup> Despite public confirmation of the peace plan by the Russian President on 12 August 2008,<sup>39</sup> Russian and South Ossetian forces reportedly continued their advances for some time thereafter and occupied additional locations, including Akhagori/Leningori on 16 August 2008, which had previously been under Georgian control and administration.<sup>40</sup>

17. As of 15 August 2008, Russian troops withdrew from undisputed Georgian territory but created a 20km “buffer zone” in the area adjoining the administrative boundary line of South Ossetia inside Georgian-administered territory.<sup>41</sup> Most Russian troops withdrew from their positions beyond the administrative boundaries of South Ossetia after 22 August 2008, some other

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<sup>35</sup> Request, para. 34; Annex E.2.36, p. 218; Annex E.2.37, p. 34; Annex E.2.38-Corr, p. 16.

<sup>36</sup> Request, para. 34; Annex E.2.35, p. 23; Annex E.2.38-Corr, p. 16.

<sup>37</sup> Request, para. 35; Annex E.2.35, pp. 13 and 24; Annex E.2.36, p. 226; Annex E.2.38-Corr, p. 16.

<sup>38</sup> Request, para. 35; Annex E.8.25, p. 2; Annex E.4.10, p. 25.

<sup>39</sup> Annex E.2.36, p. 226; Annex E.2.37, p. 34.

<sup>40</sup> Request, para. 35, Annex E.2.35, p. 24; Annex E.2.36, p. 226; Annex E.2.37, p. 40; Annex E.2.38-Corr, p. 16.

<sup>41</sup> Request, para. 36; Annex E.4.10, p. 25.

remained, however, in the “buffer zone” until the beginning of September 2008.<sup>42</sup>

18. Following the agreement reached in Moscow on 8 September 2008, Russian forces withdrew from most parts of the “buffer zone” on 8-9 October 2008.<sup>43</sup> The Georgian police returned to the “buffer zone” on 10 October 2008.<sup>44</sup>

19. During the same period, the civilian population, in particular ethnic Georgian civilians, was attacked by South Ossetian forces, including an array of irregular militias,<sup>45</sup> in Georgian-administered villages in South Ossetia and Georgian villages in the “buffer zone”. The attack commenced subsequent to the intervention and in the course of the advancement of the Russian forces, and continued in the weeks that followed the cessation of active hostilities on 12 August 2008.<sup>46</sup>

20. The attack targeted mainly ethnic Georgians following a consistent pattern of deliberate killing, beating and threatening civilians, detention, looting properties and burning houses. The level of organization of the attack is apparent from the systematic destruction of Georgian houses, the use of trucks to remove looted goods, and the use of local guides to identify specific targets.<sup>47</sup> Valuable items were removed from houses or farms before they were set on fire.<sup>48</sup>

21. These acts were reportedly committed with a view to forcibly expelling ethnic Georgians from the territory of South Ossetia in furtherance of the

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<sup>42</sup> Request, para. 36; Annex E.2.35, p. 24; Annex A.2.36, p. 226; Annex E.2.37, pp. 42-43; Annex E.4.10, p. 25.

<sup>43</sup> Request, para. 36; Annex E.2.38-Corr, p. 17; Annex A.2.36, p. 226; Annex E.4.3, p. 10.

<sup>44</sup> Annex E.2.38-Corr, p. 23.

<sup>45</sup> Annex E.4.3, pp. 36 and 41.

<sup>46</sup> Annex E.4.3, p. 43.

<sup>47</sup> Request, paras 224, 226; Annex E.2.36, p. 398; Annex E.2.38-Corr, pp. 28-30; 42-47; Annex E.4.3, p. 43; Annex E.7.9-Conf-Exp, p. 278; Annex E.4.10, pp.137-138, 145, 147.

<sup>48</sup> Annex E.2.38-Corr, pp. 28, 45; Annex E.7.9-Conf-Exp, p. 39.

overall objective to change the ethnic composition of the territory, sever any remaining links with Georgia and secure independence. The *de facto* leadership of South Ossetia reportedly acknowledged some aspects of the policy of expulsion, in particular the deliberate destruction of civilian homes in order to prevent the return of the ethnic Georgian population.<sup>49</sup> The supporting material further suggests that the policy to expel was passed from the highest echelons of the South Ossetian leadership to the South Ossetian forces.<sup>50</sup> It has been reported that irregular armed groups answered, if only loosely, to the South Ossetian chain of command.<sup>51</sup>

22. The attack against the civilian population resulted in between 51 and 113 cases of deliberate killings of ethnic Georgians<sup>52</sup> and the displacement of between 13,400 and 18,500 ethnic Georgian inhabitants from villages and cities in South Ossetia and the “buffer zone”.<sup>53</sup> Coercive acts used by South Ossetian forces to create an atmosphere of fear and terror thus forcing ethnic Georgians to leave their place of residence reportedly included killings, severe beatings, insults, threats and intimidation, detention, looting and destruction of property.<sup>54</sup>

23. Accounts vary as regards the conduct of Russian armed forces or the Russian Federation in relation to the acts allegedly committed either by members of the Russian forces or in relation to the acts allegedly committed by South Ossetian forces. The information indicates that some members of the Russian forces actively participated while others remained passive. For

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<sup>49</sup> Annex E.2.38-Corr, p. 44; Annex E.5.1, p. 127 (quoting the Chairman of the *de facto* parliament); Human Rights Watch Report, Annex E.4.10, p. 158 (quoting the *de facto* president); Annex E.8.30, p. 5 (quoting a South Ossetian intelligence officer); Annex E.7.9-Conf-Exp, pp. 243-244 (quoting a member of the Civil Detachment of Muguti).

<sup>50</sup> Request, para. 241; Annex E.7.9-Conf-Exp, pp. 83-84.

<sup>51</sup> Annex E.4.3, p. 41.

<sup>52</sup> Annex E.2.38-Corr; Annex E.4.3; Annex E.4.9; Annex E.5.1; Annex E.5.3-Conf; Annex E.7.1-Conf-Exp-Corr; Annex E.7.9-Conf-Exp.

<sup>53</sup> Annex E.7.9-Conf-Exp.

<sup>54</sup> Request, para. 265; Annex E.2.38-Corr, pp. 22, 34; Annex E.4.10, p. 10.

example, when asked why the Russian forces do not intervene to extinguish the fires, one Russian army officer is quoted to have said that this is the policy.<sup>55</sup> The Chamber, however, also notes a series of instances where members of the Russian forces purportedly intervened to protect and assist civilian victims.<sup>56</sup>

### *Conclusions of the Chamber*

24. At this point, the Chamber provides its conclusions on the question of whether, in light of the facts alleged by the Prosecutor as supported by the material presented together with the Request, there is a reasonable basis to believe that a crime within jurisdiction of the Court has been committed.

25. It has been observed previously by other Chambers acting under article 15 of the Statute that in order to satisfy the requirements, the material provided by the Prosecutor “certainly need not point towards only one conclusion”,<sup>57</sup> nor does it have to be conclusive.<sup>58</sup> All that is required is that there “exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.<sup>59</sup> In a different procedural context, this Chamber has also recently observed that “it is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor’s assessment under this provision for her to disregard available information other than when that information is manifestly false”.<sup>60</sup>

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<sup>55</sup> Annex E.4.3, p. 45.

<sup>56</sup> Annex E.2.38-Corr, p. 37.

<sup>57</sup> [Decision Authorizing the Investigation in the Situation in Kenya](#), para. 34.

<sup>58</sup> [Decision Authorizing the Investigation in the Situation in Côte d’Ivoire](#), para. 24.

<sup>59</sup> [Decision Authorizing the Investigation in the Situation in Kenya](#), para. 35; [Decision Authorizing the Investigation in the Situation in Côte d’Ivoire](#), para. 24.

<sup>60</sup> Pre-Trial Chamber I, “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, 16 July 2015, [ICC-01/13-34](#), para. 35.

26. The Chamber is of the view, at this stage, that the requisite elements of both the alleged war crimes as well as the alleged crimes against humanity are met.

27. With respect to the war crimes, the Chamber considers first that the information reasonably indicates that an international armed conflict existed between Georgia and the Russian Federation between 1 July 2008 and 10 October 2008. The existence of such international armed conflict is rather uncontroversial as concerns the period of armed hostilities between Georgian and Russian armed forces between 8 and 12 August 2008 and the period of Russian occupation of parts of Georgian territory, in particular the “buffer zone”, until at least 10 October 2018. In addition, the Chamber considers, at this stage, that there is sufficient indication that the Russian Federation exercised overall control over the South Ossetian forces,<sup>61</sup> meaning that also the period before the direct intervention of Russian forces may be seen as an international armed conflict (see above paras 9-11).

28. The Chamber observes, at the same time, that this last point is actually irrelevant at the present stage, as, as correctly pointed out also by the Prosecutor (Request, para. 81), the war crimes under consideration exist equally in international and non-international armed conflicts.

29. Having said that, the Chamber considers that the information provided by the Prosecutor, and summarised above, establishes also the specific elements of the war crimes of wilful killing under article 8(2)(a)(i) of the Statute by South Ossetian forces against ethnic Georgians (see paragraph 20 and 22 above), destruction of property under article 8(2)(b)(xiii) of the Statute by South Ossetian forces of property belonging to ethnic Georgians (see paragraphs 20 and 22 above), pillaging under article 8(2)(b)(xvi) of the Statute

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<sup>61</sup> Annex E.2.35; Annex E.2.36; Annex E.2.37; Annex E.7.9-Conf-Exp; Annex E.8.6; Annex E.8.9; Annex E.8.12.

by South Ossetian forces of property belonging to ethnic Georgians (see paragraphs 20 and 22 above), and intentionally directing attacks against peacekeepers under article 8(2)(b)(iii) of the Statute, both by South Ossetian forces against Georgian peacekeepers and by Georgian forces against Russian peacekeepers (see paragraphs 10 and 12 above). The Chamber also observes that the forces involved, time, location and context of the crimes indicate that the requisite nexus with the armed conflict exists. With regard to the crime of intentionally directing attacks against peacekeepers, the Chamber notes that a number of questions remain open, such as the protected status of both Georgian and Russian peacekeeping forces as part of the JPKF deployed pursuant to the Sochi Agreement of 1992 and the possible loss of any protected status as a result of direct involvement of hostilities, but considers, as submitted by the Prosecutor (Request, paras 169, 189), that these open questions should not preclude an investigation but should indeed be resolved as part of it.

30. With respect to crimes against humanity, the Chamber is of the view that the campaign of violence against ethnic Georgians by South Ossetian forces as described above (see paragraphs 19 to 22 above) constitutes an attack against the civilian population within the meaning of article 7(2)(a) of the Statute.

31. Moreover, the Chamber is satisfied that the specific requirements of the crimes against humanity of murder (see paragraphs 20 and 22 above), deportation or forcible transfer of population (see paragraphs 21 to 22 above) and persecution (see paragraphs 19 to 22 above) under, respectively, article 7(1)(a), (d) and (h) are met and that these crimes were committed as part of the attack.

32. In sum, the Chamber considers that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed.

33. Finally, having reached this conclusion, the Chamber considers it appropriate to briefly address the arguments of the Prosecutor in relation to the analysis of the requirement of article 53(1)(a) of the Statute.

34. The Chamber notes that with respect to the question whether indiscriminate or disproportionate attacks against civilian targets were committed by Georgian and Russian armed forces, the Prosecutor, while acknowledging the existence of information supporting an affirmative answer, nonetheless states that “[g]iven the inherent difficulties with determining issues related to the conduct of hostilities in the absence of investigation, the limited information available has not yet enabled the Prosecution to reach a determination on the requisite standard [...]” (Request, para. 3). At paragraph 46 of the Request, the Prosecutor specifies that such conclusion could not be reached because “[i]n 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”. The Prosecutor goes as far as saying that “[w]hen assessing the information in its possession, the Prosecutor has 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”. Similarly, the Prosecutor states that she “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 conflict” (Request, para. 4).

35. Having been provided with references to the supporting information that the Prosecutor has identified, the Chamber considers that it appears that the Prosecutor has indeed acted too restrictively and has imposed requirements

on the material that cannot reasonably be met in the absence of an investigation, the initiation of which is precisely the issue at stake. In any case, given that by virtue of the present decision authorization to investigate is granted as requested, and that therefore, as correctly observed by the Prosecutor, the allegations of indiscriminate and disproportionate attacks and of sexual and gender-based violence can be investigated, the Chamber has not sought to rectify the Prosecutor's assessment under article 53(1) of the Statute. In the view of the Chamber, doing so would go beyond the scope of the Chamber's mandate under article 15(4) of the Statute, which is to determine, "upon examination of the request and the supporting material", whether there is a "reasonable basis to proceed with an investigation". If the Chamber establishes, on the basis of the arguments of the Prosecutor that this requirement is met, as is indeed the case in the present instance, it is unnecessary and inappropriate for the Chamber to go beyond the submissions in the request in an attempt to correct any possible error on the part of the Prosecutor. Rather, the Chamber considers this brief clarification sufficient.

## **II. Whether potential cases arising out of the situation would be admissible under article 17 of the Statute**

36. The second criterion for the opening of an investigation is, in accordance with article 53(1)(b) of the Statute, that "[t]he case is or would be admissible under article 17". An admissibility assessment at the stage of authorization of an investigation cannot be conducted against the backdrop of a concrete case, as prior to the start of an actual investigation it is not possible to define the exact parameters of the case(s) in terms of conduct and identified suspects for the purpose of prosecution. Accordingly, as held previously,<sup>62</sup> the

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<sup>62</sup> [Decision Authorizing the Investigation in the Situation in Kenya](#), para. 50; [Decision Authorizing the Investigation in the Situation in Côte d'Ivoire](#), para. 190.

determination of admissibility at this stage must be undertaken with respect to “potential cases” which the Prosecutor may bring as a result of the investigation as they appear from the information available at this stage and in light of the Prosecutor’s submissions in this regard. In particular, for the purposes of the present analysis, the Chamber is assisted by the “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” and the “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”, which the Prosecutor attaches to her Request as Annex A.1 and B.1, respectively.

37. In this regard, the Chamber observes that, indeed, the defining criteria of a “potential case” within the context of a situation include: (i) the persons or groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s) before the Court; and (ii) the crimes falling within the jurisdiction of the Court committed in the course of one or more incidents that are likely to shape the future case(s). However, it must be borne in mind that the selection of persons or perpetrators as well as certain incidents which are likely to shape the Prosecutor’s future case(s) at this stage is preliminary, and as such, this may change as a result of the investigation.<sup>63</sup>

38. In the following paragraphs, the Chamber will address in turn the two component parts of admissibility of cases before the Court pursuant to article 17: complementarity and gravity.

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<sup>63</sup> [Decision Authorizing the Investigation in the Situation in Kenya](#), para. 50; [Decision Authorizing the Investigation in the Situation in Côte d’Ivoire](#), para. 191.

### *Complementarity*

39. The Chamber considers that, at this stage, the complementarity examination requires an assessment of whether any State is conducting or has conducted national proceedings in relation to the persons or groups of persons as well as the crimes which appear to have been committed on the basis of the information available at this stage, which together would be the subject of investigations and likely to form the potential case(s) before the Court. If (some of) those potential cases are not investigated or prosecuted by national authorities, the criterion provided for in article 53(1)(b) of the Statute, with respect to complementarity, is satisfied.

40. In her Request, the Prosecutor presents the progress of national proceedings in Georgia and the Russian Federation, and informs the Chamber that no other State has undertaken national proceedings with respect to the relevant crimes. The Chamber agrees with the Prosecutor's submission at paragraph 322 of the Request, that any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognized State.

41. With respect to Georgia, according to the Prosecutor, the Georgian authorities carried out some investigative activities in relation to the 2008 conflict from August 2008 until November 2014 (Request, paras 279-301). However, no proceedings have been completed and the Georgian authorities informed the Prosecutor in a letter dated 17 March 2015 that "further progress of relevant national proceedings related to the alleged crimes subject to this Application is prevented by 'a fragile security situation in the occupied territories in Georgia and the areas adjacent thereto, where violence against civilians is still widespread'".<sup>64</sup> In the view of the Chamber, this letter is dispositive of the matter: there is, at present, a situation of inactivity on the

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<sup>64</sup> Annex G.

part of the Georgian competent authorities and no national proceedings have rendered any potential cases arising out of the situation inadmissible.

42. With respect to national proceedings in the Russian Federation, the Prosecutor presents in the Request the results of her assessment of the potential cases related to: (i) the forcible displacement campaign to expel ethnic Georgians from South Ossetia and the “buffer zone”; and (ii) the attack on Russian peacekeepers (Request, paras 305-320).

43. In relation to the campaign to forcibly expel ethnic Georgians from South Ossetia and the “buffer zone”, the Prosecutor provides information based on bilateral meetings conducted with the Russian authorities on 3 February 2011 and 23-24 January 2014 as well as on written communications. According to the information provided, the Investigative Committee of the Russian Federation, in the course of its investigation between 2010 and 2014, considered 575 allegations made by Georgian victims against Russian servicemen.<sup>65</sup> These allegations referred to murder or attempted murder, destruction of property and pillaging.<sup>66</sup>

44. In a letter addressed to the Prosecutor and dated 18 June 2012, the Russian authorities stated that in an effort to verify these allegations and “collect additional evidence” they requested several times legal assistance from the Georgian authorities, which was not obtained.<sup>67</sup> Nevertheless, more than 2,000 Russian servicemen were questioned as witnesses and more than 50 Russian military units provided documents as part of the investigation.<sup>68</sup> The letter of 18 June 2012 concludes that the “investigation has established that the command of the Armed Forces [...] had taken exhaustive measures to prevent

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<sup>65</sup> See Request, para. 305, with reference to information provided to the Prosecutor by the Russian authorities on 24 January 2014.

<sup>66</sup> See Request, para. 305, with reference to information provided to the Prosecutor by the Russian authorities on 24 January 2014.

<sup>67</sup> Annex E.7.22, p. 3.

<sup>68</sup> Annex E.7.22, p. 3.

pillage, violence, indiscriminate use of force against civilians during the entire period of the Russian military contingent's presence in the territory of Georgia and South Ossetia [and that] the investigation has been unable to confirm involvement of the Russian servicemen in the commission of the crimes in the territory of Georgia and South Ossetia".<sup>69</sup>

45. The Prosecutor notes in this context that "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" (Request, para. 308). Taking into account all the information, the Prosecutor concludes 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 cases(s) identified in this Application" (Request, para. 312).

46. Having before it the available information, the Chamber finds itself unable to determine that the national proceedings in Russia are inadequate under article 17(1)(b) of the Statute. While the Chamber does not consider significant for the purposes of a determination under article 17(1)(b) of the Statute the Prosecutor's submission to be in possession of evidence contradicting the conclusion of the Russian judicial authorities, reasonable doubts, however, remain as to whether the Russian authorities' inability to access crucial evidence, *i.e.* to interview Georgian witnesses, constitutes inability within the meaning of article 17 of the Statute. In any case, the Chamber finds it unwarranted to attempt to conclusively resolve this question in the present decision, considering that there exist other potential cases that would be admissible. The national proceedings in question only cover a portion of the

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<sup>69</sup> Annex E.7.22, p. 4.

potential cases arising out of the situation, *i.e.* the possible participation of members of the Russian forces in the forcible displacement campaign otherwise conducted by South Ossetian forces (see above, para. 23). It is therefore more appropriate to allow the Prosecutor to conduct her investigation, which will naturally extend to issues of admissibility, and for the question to be authoritatively resolved at a later stage if needed.

47. As to the proceedings conducted by the Russian authorities concerning the attack against Russian peacekeepers, according to the available information it appears that investigation began on 8 August 2008 focusing on the murder of military personnel of the Russian Federation's Peacekeeping Battalion from the Joint Peacekeeping Forces by the Georgian armed forces (case no. 14/00/0051-08d).<sup>70</sup>

48. The criminal investigation also established that the attacks conducted by unidentified Georgian soldiers were against "persons and institutions which were entitled to international protection, *i.e.* the military personnel of the Peacekeeping Battalion from the Russian Federation in the Joint Peacekeeping Forces, stationed at Tskhinvali".<sup>71</sup> According to the available material, over 3,000 items and documents were collected as evidence and over 1,000 incident scenes were examined including, *inter alia*, "the position of the battalion peacekeeping forces stationed in Tskhinvali and other settlements in South Ossetia".<sup>72</sup>

49. Recently, investigative activities have continued. In particular, the available information indicates that the Russian Federation Investigative Committee has been conducting forensic analysis and re-interviewing eye-witnesses as well as victims of the attack against the peacekeepers. According

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<sup>70</sup> Request, paras 313-320; Annex E.7.33, p. 2.

<sup>71</sup> Annex E.7.33, p. 3.

<sup>72</sup> Annex E.7.33, p. 4.

to the Prosecutor, such activities required an extension of the national investigation until 8 February 2016 (Request, para. 319).

50. In view of the above, the Chamber concurs with the Prosecutor that the ongoing national proceedings carried out so far by the Russian authorities reveal neither unwillingness nor inability on the part of the State. Therefore, the potential case in relation to the attack against Russian peacekeepers could be inadmissible and the Chamber approves the statement of the Prosecutor that she will “keep this assessment under review in the context of [the] authorized investigation” (Request, para. 320).

### *Gravity*

51. The remaining part of the admissibility assessment requires the Chamber to assess whether any potential cases resulting from the requested investigation would also be of “sufficient gravity to justify further action by the Court”. The Chamber recalls that: (i) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and (ii) gravity must be assessed from both a quantitative and qualitative viewpoint and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims are indicators of the gravity of a given case.<sup>73</sup>

52. Based on the information provided by the Prosecutor (Annex B.1 to the Request), it is apparent that the investigation could capture those who may bear the greatest responsibility for the crimes.

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<sup>73</sup> [Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation](#), para. 21; see also [Decision Authorizing the Investigation in the Situation in Kenya](#), paras 60-62; [Decision Authorizing the Investigation in the Situation in Côte d’Ivoire](#), paras 203-205.

53. As for the nature of the crimes, the Chamber refers to the above analysis which demonstrates that the potential cases could encompass an array of war crimes and crimes against humanity.

54. The Chamber notes that the crimes committed against ethnic Georgians by South Ossetian forces, which are to be seen as one potential case, resulted in 51-113 killings, the destruction of over 5,000 dwellings and the forced displacement of 13,400 – 18,500 persons constituting, in the estimation of the Prosecutor, a 75 % decrease in the ethnically Georgian population in South Ossetia. This information indicates that both the scale and the impact of the crimes were considerable. The Chamber also recalls that according to the available information, expulsion of civilians was sought by brutal means (see above, para. 20-22).

55. With respect to the attacks against peacekeepers, the Chamber notes that beyond the immediate casualties or extent of immediate damage, the impact of such crimes also encompasses the detriment to their ability to execute their mission.<sup>74</sup>

56. In light of the above, the Chamber considers that the potential cases are of sufficient gravity to justify further action by the Court.

57. In sum, the Chamber concludes that the potential cases arising from the situation would be largely admissible.

### **III. Whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice**

58. Finally, the Chamber is required to examine, pursuant to article 53(1)(c) of the Statute, whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that

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<sup>74</sup> Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, 8 February 2010, [ICC-02/05-02/09-243-Red](http://www.legal-tools.org/doc/a3d07e/), para. 33.

an investigation would not serve the interests of justice". Contrary to sub-paragraphs (a) and (b), which require a positive finding, sub-paragraph (c) does not require the Prosecutor to demonstrate that initiating an investigation is in the interests of justice. Since the Prosecutor has not determined that initiating an investigation in the Georgia situation "would not serve the interests of justice" and also taking into account the representations of victims, received under article 15(3) of the Statute, which overwhelmingly speak in favour of the opening of an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice.

#### **IV. Conclusion**

59. All the requirements of article 53(1) of the Statute being met, the Chamber considers that there is a reasonable basis to proceed with an investigation. Authorization must therefore be granted.

60. At this point, the Chamber finds it appropriate to provide some clarification with respect to the parameters of the authorized investigation, in particular in light of certain arguments raised in the Request.

61. In the Request, the Prosecutor seeks authorization 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 committed in and around South Ossetia" (paras 1 and 349).

62. At the same time, the Prosecutor at various points in the Request requests the Chamber to "be permitted to expand or modify [her] 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" (Request, paras 12, 51, 277).

63. In the view of the Chamber, the Prosecutor's position is well founded. Indeed, for the procedure of article 15 of the Statute to be effective it is not necessary to limit the Prosecutor's investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation. To impose such limitation would be also illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information. It is precisely the purpose of the investigation to discover proper evidence to enable a determination which crimes, if any, may be prosecuted. Binding the Prosecutor to the crimes mentioned in the decision authorizing investigation would also conflict with her duty to investigate objectively, in order to establish the truth (cf. article 54(1) of the Statute).

64. Therefore, an authorization to investigate, given by the Pre-Trial Chamber, extends to all crimes within the jurisdiction of the Court. It is only limited by the parameters of the situation, which in this case can be summarized as events related to the conflict in and around South Ossetia between 1 July and 10 October 2008. Therefore, in principle, events which did not occur in or around South Ossetia or which occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto and, obviously, fall within the Court's jurisdiction.

65. Finally, the Chamber notes that under rule 50 of the Rules, it shall give notice of the present decision to the victims who have made representations. It is therefore appropriate to instruct the Registrar to provide such notice.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**AUTHORIZES** the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008; and

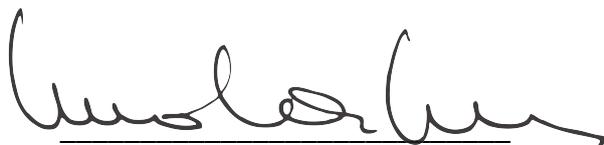
**INSTRUCTS** the Registrar to provide notice of the present decision to the victims who have made representations.

Judge Péter Kovács appends a separate concurring opinion.

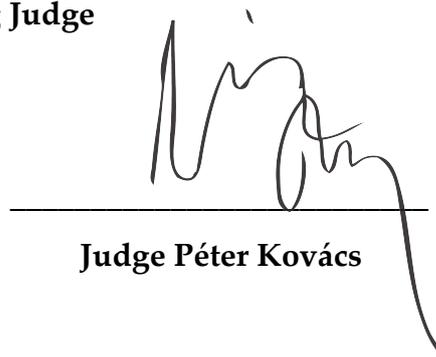
Done in both English and French, the English version being authoritative.



**Judge Joyce Aluoch**  
**Presiding Judge**



**Judge Cuno Tarfusser**



**Judge Péter Kovács**

Dated this 27 January 2016

At The Hague, The Netherlands