SEPERATE OPINION OF JUDGE PÉTER KOVÁCS

1. I share the view of the Majority that on the basis of the available information presented to the Chamber there is a reasonable basis to proceed with the initiation of an investigation into the situation in Georgia. Yet, I cannot agree with the Majority on the manner in which they approached such an important decision, which may have future implications for the Court. I regret to say that the decision of the Majority (the "Majority Decision" or "Decision") lacks the expected degree of persuasiveness. I shall spare my comments on issues related to presentation, and instead focus on the more significant dimension concerning the substance of the Decision both in terms of facts and law. In this respect, I shall address only those major areas of disagreement in the reasoning of the Majority, which I believe to be fundamental.
2. My major concerns revolve around three main points: first, the scope and *ratio* underlying the article 15 procedure and the envisaged role of the Pre-Trial Chamber; second, the scope of assessment of jurisdiction and in particular, jurisdiction *ratione materiae*; and finally, the scope of the admissibility assessment carried out in the Majority Decision.

I. Scope of Article 15 Procedure

3. Starting with the first point, I believe that in its overall assessment, the Majority may have overlooked the nature of the article 15 procedure and the envisaged role of a Pre-Trial Chamber. In paragraph 3 of the Decision, the Majority acknowledged that the "object and purpose" of the article 15 procedure is to provide "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".[1] The Majority proceeded by saying that the "subjection of *propio motu* investigation by the Prosecutor to the authorisation of the Pre-Trial Chamber serves no other purpose

[1] Majority Decision, para. 3.

than to prevent the abuse of power on the part of the Prosecutor".[2] These references are quite correct. What strikes me, however, is the Majority's conclusion based on these statements that "[i]n 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".[3]

4. I find some difficulty to reconcile these statements. I fail to understand how the Chamber can "prevent the abuse of power on the part of the Prosecutor" if the exercise of its supervisory role is "strictly limited", as suggested by the Majority. Moreover, if the Majority also believes that the "object and purpose" of the article 15 procedure is "providing judicial control over the Prosecutor's exercise" of her *proprio motu* powers "to open an investigation", then it is illogical to conclude that the Chamber's examination "must be strictly limited".

5. Furthermore, it is unclear to me from which part in article 15(4) of the Rome Statute (the "Statute") this (self-imposed) restriction is deduced: to the contrary, in accordance with article 15(4) of the Statute, the Chamber, following examination of the request and the supporting material, has the duty to reach its own conclusion on whether there is a reasonable basis to proceed with an investigation (as evidenced by the wording "If the Pre-Trial Chamber […] *considers* that there is a reasonable basis to proceed with an investigation […]"). This is reinforced by the Prosecutor's duty, under article 15(3) of the Statute, to submit to the scrutiny of the Chamber "any supporting material collected". What would be the logic of such a duty if the Pre-Trial Chamber were to be confined to a "strictly limited" review of the Prosecutor's Request? The depth of the Chamber's scrutiny is further reinforced by rule 50(4) of the Rules of Procedure and Evidence, and the power given therein to the Chamber to request additional information from the Prosecutor or from the victims who made representations.

[2] Majority Decision, para. 3.
[3] Majority Decision, para. 3.

6. I consider that "judicial control", be it at the article 15 stage or a subsequent stage of the proceedings, is not an empty term. Judicial control entails more than automatically agreeing with what the Prosecutor presents. It calls for "an independent judicial inquiry"[4] of the material presented as well as the findings of the Prosecutor that there is a reasonable basis to proceed with the opening of an investigation. This process requires a full and proper examination of the supporting material relied upon by the Prosecutor for the purpose of satisfying the elements of article 15(4) in conjunction with article 53(1)(a)-(c) of the Statute, as well as the victims' representations, which are referred to in article 15(3) of the Statute. To say otherwise means that the Pre-Trial Chamber will not be exercising what the Majority describes as "judicial control". Nor will the Pre-Trial Chamber be acting in a manner which can prevent the abuse of power on the part of the Prosecutor.
7. Unfortunately, the Majority Decision headed in this direction. It is apparent that the Majority opted for an - for me - insufficient examination of law and facts because it seems to disregard indispensable elements of both, as will be described in the paragraphs to follow. By so doing, the Majority Decision leaves the impression that the particularity of the article 15 procedure or its sensitive and unique nature was overlooked.
8. Those who have studied the drafting history of the Court's different triggering mechanisms are well aware that the introduction of a procedural regime providing the Prosecutor of the first permanent international criminal judicial institution with powers to initiate investigations *ex officio* was a very controversial matter in the course of the negotiations.
9. According to my recollection, when the idea of providing the Prosecutor with such power in the absence of a State's complaint was first tabled by one member of the International Law Commission ("ILC") in the course of preparing the 1994 Draft

[4] Cobuild Collins Dictionary (online), available at http://dictionary.reverso.net/english-cobuild/judicial%20control%20of%20general%20terms%20and%20conditions (last visited 24 January 2016).

Statute for an International Criminal Court (the "1994 ILC Draft"), there was a clear resistance by the ILC working group members, as they thought that the international community was not ready to provide a free hand to a world Prosecutor. It was felt that "the investigation and prosecution of the crimes covered by the [1994 draft] statute should not be undertaken in the absence of the support of a State or the Security Council, *at least not at the present stage of development of the international legal system*" (emphasis added).[5]

10. The idea gained some momentum when it was reintroduced a year later in the *Ad hoc* Committee in 1995 in the course of negotiating the different trigger mechanisms and in particular, draft article 25 of the 1994 ILC governing a "Complaint" and the powers of the Prosecutor. But even then, there was a clear division of opinions as to the necessity of expanding the role of the Prosecutor to initiate investigation *ex officio*.[6] Such division continued in the Preparatory Committee and the Rome Conference due to States' fears of politicising the Court by providing the Prosecutor with excessive powers, which might lead to abuse.[7] It was not until Argentina and Germany tabled a proposal in 1998 calling for "judicial control" over the Prosecutor's powers to initiate investigations *proprio motu* that the idea found support. Actually, this proposal was the decisive factor for States agreeing to the present text of article 15 of the Statute.[8] Actually, it must be underlined that an agreement would have never been reached in Rome on article 15 of the Statute without having judicial control *before* the initiation of an investigation. The condition

[5] Yearbook of the International Law Commission (1994), Vol. II, Part Two, commentary on art. 25, p. 46.
[6] Report of the Ad hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras 113-114.
[7] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), paras 149-151; also for the Rome Conference, see UN Doc. A/CONF.183/SR.7, para. 88 (Nigeria); UN Doc. A/CONF.183/C1/SR.9, paras 82-83 (Iran), 92 (Kenya), 98 (Yemen), 99 (Iraq), 103 (Indonesia), 105 (India), 111-112 (Israel), 117 (Libya), 118 (Cuba), 119 (Egypt), 123 (Saudi Arabia), 125-130 (United States), 133 (Russian Federation); UN Doc. A/CONF.183/C1/SR.9, paras 6 (Nigeria), 9 (China), 29 (Tunisia), 30 (Algeria), 37 (Turkey), 38 (Japan), 39(United Arab Emirates), 40 (Pakistan), 47 (Bangladesh); UN Doc. A/CONF.183/C1/SR.9.
[8] Proposal Submitted by Argentina and Germany, article 46, Information Submitted to the Prosecutor, UN Doc. A/AC.249/1998/WG.4/DP.35 (1998).

of imposing judicial control was considered *sine qua non* for adhering to the idea of providing the Prosecutor with *proprio motu* powers. Most of these facts were also acknowledged and elaborated by the Majority of Pre-Trial Chamber II in the Court's first decision of 31 March 2010 authorising the Prosecutor to initiate an investigation in the situation in the Republic of Kenya.[9] These facts were also understood and translated into practical steps by that Chamber by way of exercising a thorough judicial control before authorising the Prosecutor to start an investigation in the Kenya situation.[10] The same approach was also followed by the Majority of Pre-Trial Chamber III in its authorization decision of 3 October 2011. The present Majority Decision clearly deviates from these settled precedents without providing any reasons for such deviation.

11. The degree of seriousness of the Pre-Trial Chamber's examination should not depend on the stage of the proceedings as the Majority Decision suggests. Being at the early stages of the proceedings does not justify a marginal assessment. It just means that the assessment should be carried out against a *low procedural standard* ("reasonable basis to proceed") and a *low evidentiary standard* ("reasonable basis to believe") on the basis of the request, the available material and the victims' representations. Still such an assessment should be carried out *thoroughly* and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber. Certainly, due to the low evidentiary threshold, such an examination would not lead to conclusive findings meaning that in the context of the Prosecutor's

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[9] Pre-Trial Chamber II, Decision to open an investigation into the Situation in Kenya ("*Kenya* Authorisation Decision"), 31 March 2010, ICC-01/09-19-Corr, paras 17-18; see also Pre-Trial Chamber III, Corrigendum to "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" ("*Côte d'Ivoire* Authorisation Decision"), 15 November 2011, ICC-02/11-14-Corr, para. 21 and accompanying footnote 26 (noting the underlying purpose of article 15 procedure, namely "to prevent unwarranted, frivolous or politically motivated investigations").

[10] Even the then dissenting Judge Hans-Peter Kaul adhered to the idea of exercising a proper judicial control in ruling on the Prosecutor's request under article 15 of the Statute as demonstrated by the fact that he was of the view that the Prosecutor's request to be authorised to open an investigation in the situation in the Republic of Kenya had to be denied for lack of jurisdiction *ratione materiae*, see Pre-Trial Chamber II, *Kenya* Authorisation Decision, pp. 84-163.

Request, the material provided "need not point towards only one conclusion",[11] nor does it have to be conclusive.[12] This means in practical terms that in case facts are difficult to establish or unclear, or accounts are conflicting, an investigation should be opened to verify these accounts and not *vice versa*.[13]

12. In conclusion, I do not believe that the role of the Pre-Trial Chamber at the article 15 stage is merely to make an *overall prima facie* finding or a marginal assessment as the reasoning of the Majority suggests. Rather, I consider that the role of the Pre-Trial Chamber is more than that. Aside from conducting a thorough assessment, the Pre-Trial Chamber should provide a clear and well-reasoned decision,[14] which presents a full account of the relevant facts and law in order to reveal transparency of the judicial process and guarantee a considerable degree of persuasiveness. Regrettably, the Majority Decision does not share this approach.

II. Scope of assessment of jurisdiction ratione materiae

13. Before turning to my second point of concern in the Majority's reasoning, namely the scope of assessment of jurisdiction *ratione materiae*, I wish to briefly lay out my understanding of the historical-political context of this conflict which provides the necessary background to the discussion at hand and explains the far reaching effect that such a decision may have on the cooperation of the States directly involved.

The tragic events of the 2008 armed conflict erupted on the territory of a State which, after having been part of a bigger conglomerate, namely the tsarist Russian Empire

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[11] *Kenya* Authorisation Decision, ICC-01/09-19-Corr, para. 34.

[12] *Côte d'Ivoire* Authorisation Decision, ICC-02/11-14-Corr, para. 24.

[13] 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 ("*Comoros* Decision"), 16 July 2015, ICC-01/13-34, para. 13.

[14] See *inter alia,* Appeals Chamber, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 49; *ibid.*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824 (OA7), para. 124.

succeeded by the Soviet Union over the last century, regained its independence.[15] During the Soviet rule, a complex constitutional system was established, composed of theoretically "sovereign" member States of the Soviet Union, all entitled "Soviet Socialist Republic" ("SSR"), "autonomous Republics" and "autonomous territories" in several SSRs. This seemingly decentralized system was, however, "counterbalanced" by the special position of the communist party within the Soviet regime. The "autonomous" entities disposed of "quasi-state" structures, including an administrative apparatus and external representations. In the Georgian SSR such "autonomous" entities were Abkhazia, Adjaria and also South-Ossetia.[16]

14. With the dissolution of the Soviet Union, the newly-independent States often faced the problem of legal continuity and validity of the existing autonomies. As far as South Ossetia is concerned, its demand for the enlargement of its competences was refused. Moreover, the autonomous structure was abolished. South Ossetia reacted by secession,[17] which was neither recognized by Georgia nor the vast majority of the United Nations. However, among the very few States, which recognised South Ossetia, we find Russia.[18]

15. Following the eruption of violent clashes in Georgia in the 1990ies, Russian military forces intervened and the international community also felt the need to assume its responsibility. The Organization for Security and Co-operation in Europe ("OSCE") entered the field by trying to secure a *modus vivendi* and by deploying fact finding missions as well as monitoring the special joint peacekeeping force already existing on the basis of the Sochi agreement of 1992[19] signed between Georgia and Russia.

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[15] See also Independent International Fact-Finding Mission on the Conflict in Georgia Report, Volume I ("IIFFMCG Volume I"), Annex E.2.35, paras 4-7. For ease of reference, all page numbers quoted from official Court's documents are those reflected in the stamp on the top of each page. Moreover, all annexes referred to in this separate opinion without the full document number are those appended to the Prosecutor's Request of 17 November 2015, ICC-01/15-4-Corr2.

[16] See also Independent International Fact-Finding Mission on the Conflict in Georgia Report, Volume II ("IIFFMCG Volume II), Annex E.2.36, p. 15.

[17] See also Human Rights Watch Report, Annex E.4.10, pp. 23-24.

[18] See also Amnesty International Report, Annex E.4.3, p. 9.

[19] IIFFMCG Volume I, Annex E.2.35, para. 6.

16. The summary of the above events and historical, constitutional and political elements are however useful in order to understand why the *de jure* competent Georgia does not enjoy a *de facto* power over South Ossetia and why the Georgian investigations could be hampered at the South-Ossetian "border". Also, it may help to understand why Russian investigations were met with obstacles in Georgian territory effectively controlled and ruled by the Georgian Government, and why the *de facto* power of South Ossetia and the *de jure* power of Georgia did not cooperate on matters regarding criminal prosecution. It is also significant to realize that during the situation *sub judice* there were Russian military units, which formed parts of the joint peacekeeping force, but there were other involved Russian units that did not belong thereto. The same can be said on the Georgian military units; some of them were within the joint peacekeeping force, while some only belonged to the Georgian army.
17. Turning to the assessment of jurisdiction *ratione materiae*, I agree with the conclusion of the Majority that crimes against humanity, such as murder, forcible transfer of population and persecution, pursuant to articles 7(1)(a), (d) and (h) of the Statute, and war crimes, such as wilful killing, intentionally directing attacks against peacekeepers, destruction of property and pillaging, pursuant to articles 8(2)(a)(i), 8(2)(b)(iii), 8(2)(b)(xiii) and 8(2)(b)(xvi) of the Statute, appear to have been committed in the situation in Georgia. Yet, I would have preferred if the Majority, as other pre-trial chambers before it,[20] had set out with greater clarity the facts which underpinned the Chamber's conclusion in relation to those crimes.
18. I regret the Majority did not, for example, describe where and by whom property was destructed and valuable goods looted.[21] It is my view that these details are critical as I obtained a more nuanced picture about the targeted population and the

[20] See the comprehensive analysis of Pre-Trial Chamber II in the *Kenya* situation and that of Pre-Trial Chamber III in the *Côte d'Ivoire* situation.

[21] In paragraph 20 of its Decision, the Majority makes a catch-all reference to "systematic destruction of Georgian houses, the use of trucks to remove looted goods, and the use of local guides to identify specific targets", without describing the situation, as it emerges from the supporting material.

purported involvement of the various actors at the time.[22] Moreover, the Majority confined the destruction of property to civilian houses, while the material indicates that also a number of educational institutions, historic monuments and hospitals were destroyed by both the Georgian and Russian armed forces.[23] This differentiation is important as these objects are protected under article 8(2)(b)(ix) of the Statute, and could have been properly characterised accordingly.[24] Finally, I also wish the Majority (i) would have been more precise in describing the facts involving the alleged attacks of Georgian and Russian peacekeeping forces, as the issue of whether or not these forces had lost their protected status at the time of the attack is highly contested by the accounts and documentation provided; and (ii) would have reasoned why it considered the peacekeeping mission under the 1992 Sochi agreement to be a peacekeeping mission "in accordance with the Charter of the United Nations" within the meaning of article 8(2)(b)(iii) of the Statute. Notably, this latter fact I do not contest, but it is not forcibly evident for the reader.

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[22] For example, reports indicate that South Ossetians were also targeted in communities where Ossetians and Georgians lived side-by-side, or in mixed-marriage households, see Human Rights Watch Report, Annex E.4.10, pp. 150-154. Also, in relation to reported instances of destroying property and looting by Russian forces, accounts of witnesses vary significantly, as adumbrated by the Majority in paragraph 23 of its Decision.

[23] For example, it is reported that the South Ossetian Central Republican Hospital in Tskhinvali was severely hit by Grad rockets during the attack on that city by Georgian forces between 7 and 9 August 2008, see Human Rights Watch Report, Annex E.4.10, p. 49. Information is also available that Russian armed forces targeted the military hospital in Gori on 13 August 2008 whose roof was clearly marked with a red cross, see Human Rights Watch Report, Annex E.4.10, p. 102; IIFFMCG Volume II, Annex E.2.36, p. 336. Furthermore, the destruction of cultural monuments is reported both by the Georgian and Russian side, such as unique monuments in the South Ossetian communities, and churches in the Shida Kartli region, see IIFFMCG Volume II, Annex E.2.36, pp. 341-343 ; Report of the Human Rights Assessment Mission ("HRAM") of the OSCE Office for Democratic Institutions and Human Rights ("OSCE Report"), Annex E.2.38-Corr, p. 43. These properties are protected under the specific provision of article 8(2)(b)(ix) of the Statute, and should have been properly legally characterised as such.

[24] I am mindful of the references in the submitted material that the extent of the damage and the facts relating to the circumstances of the military operations during which these protected objects were attacked must be ascertained, see IIFFMCG Volume II, Annex E.2.36, p. 343 ; OSCE Report, Annex E.2.38-Corr, p. 43 (cautioning that claims of the destruction of 14th century cultural monuments in Disevi could not be verified). However, given the nature of the present proceedings and the low evidentiary threshold applicable at this stage, in addition to the fact that at least the hospital destroyed was clearly marked as protected building, I find the supporting material sufficient to reasonably conclude that the war crime of attacking protected objects under article 8(2)(b)(ix) of the Statute was committed in the context of an international armed conflict.

19. But the issue goes further than a truncated presentation of facts and law. As I mentioned at the outset, the issue *sub judice* stems from the Majority's understanding of its statutory responsibilities under the article 15 procedure. This entails an independent and objective assessment of the facts available in the supporting material, read together with the victims' representations,[25] in order for the Chamber to reach its *own* conclusions with regard to the Request presented by the Prosecutor. This is all the more vital, given that the Prosecutor's methodology in assessing the facts sometimes lacks consistency and objectivity.
20. The Majority responded by stating "[they] ha[ve] not sought to rectify the Prosecutor's assessment under article 15(3) of the Statute as "doing so would go beyond the scope of the Chamber's mandate under article 15(4) of the Statute". The Majority considers it even "unnecessary and inappropriate" to "go beyond the submissions in the request in an attempt to correct any possible error on the part of the Prosecutor".[26] Contrary to what my colleagues conclude, it is not only 'necessary' but also 'appropriate' to go beyond the submissions of the Prosecutor, lest the Chamber automatically agrees with the conclusions of the Prosecutor. I am of the view that the article 15 procedure imposes a duty on the Chamber to reach its own conclusions on whether an investigation is warranted or not, and not merely examine the Prosecutor's conclusions. Also, it is the responsibility of the Chamber, even at this early stage of judicial proceedings, to describe a situation which corresponds as much as possible to the "reality" on the ground.
21. To be more concrete, this approach of self-imposed restriction reaches a critical point when the Majority assesses the Prosecutor's conclusions regarding the crimes of indiscriminate or disproportionate attacks and rape/sexual violence.[27] Referring to

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[25] Article 15(3), second sentence, of the Statute.

[26] Majority Decision, para. 35.

[27] In this context, I note that the Prosecutor addresses instances of arbitrary detention when discussing the contextual element of the "attack" within the meaning of article 7(2)(a) of the Statute, but states to refrain from taking a position as the information is too limited to establish the nexus between such acts and the context of crimes against humanity, see Request, para. 230. The Majority in its Decision does not further discuss this conclusion. As I will explain further below, I consider the information

"inherent difficulties", "limited information", contradictions and lack of corroboration by credible third parties, the Prosecutor concluded that she cannot reach a determination against the requisite standard.[28] The Majority, having the supporting material and victims' representations before it, identifies that "it appears that the Prosecutor has indeed acted too restrictively" but refrains from correcting this position by arguing that it cannot "rectify the Prosecutor's assessment".[29]

22. I have difficulties following the Majority's approach for the following two reasons: first, I note the Prosecutor's inconsistent methodology in assessing some of the relevant facts. I recall that, when faced with similar difficulties in the context of attacks against peacekeeping forces,[30] the Prosecutor did not refrain from drawing conclusions on the commission of war crimes. I do not find an explanation as to why the same approach could not be followed in relation to the crimes of indiscriminate attacks and rape/sexual violence (or deprivation of physical liberty for that matter).

23. It is significant to ensure that the threshold provided for in articles 15 and 53 of the Statute is *equally* applied to all crimes under the jurisdiction of the Court, irrespective of the nature of the alleged crimes at stake. If the information at this pre-investigative stage – which should not be "clear, univocal and not contradictory" allows for reasonable inferences as to the commission of a crime under the jurisdiction of the Court, the Prosecutor shall open an investigation with a view to

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sufficient to reasonably conclude that instances of deprivation of physical liberty or unlawful confinement appear to have occurred.

[28] In relation to the crimes of indiscriminate or disproportionate attack, the Prosecutor is of the view that due to the insufficiency of the information available, she is unable to determine, at this stage, whether the Georgian army or the Russian armed forces conducted indiscriminate and disproportionate attacks, see Request, paras 197 and 208. In relation to reported instances of rape/sexual violence, the Prosecutor maintains that the information available on sexual violence is "too limited, in particular with respect to 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 acts", see Request, para. 231. In relation to reported instances of arbitrary detention, the Prosecutor argues that "the factual information on the circumstances of arrests and detentions […] is limited at this stage to determine the nexus between the individual cases of arbitrary detention and the attack against the civilian population", see Request, para. 230.

[29] Majority Decision, para. 35.

[30] The Prosecutor had argued that the facts regarding alleged attacks against peacekeepers were contested between the parties to the conflict and fraught with "ambiguities that increased over time", see Request, paras 152-153 and 160.

overcoming any insufficiencies and doubts.[31] The complexity of the crimes makes it even more compelling to commence an investigation to establish whether or not the elements of the offence are fulfilled. The Majority did not react to these problems.

24. Second, given the fact that the supporting material and victims' representations were submitted to the Chamber with a view to examining the respective determinations in the Prosecutor's Request, I find it only logical and essential that the Chamber should not be prevented from presenting a different reading of the material, in particular if the Prosecutor admittedly "imposed requirements on the material that cannot reasonably be met in the absence of an investigation".[32]

25. Be it as it may, I shall present my findings in relation to those crimes for which the Prosecutor was allegedly unable to make a determination. I shall also present my findings on other crimes that emanate from the supporting material and victims' representations.

1. Indiscriminate or Disproportionate Attacks

26. Information in the supporting material suggests that during the massive offensive against Tskhinvali on 7-9 August 2008 and surrounding villages, such as Nizhnii Gudjabauri, Khetagurovo, Tbeti, Novyi Tbeti, Sarabuki, Dmenisi and Muguti, the Georgian armed forces carried out indiscriminate and disproportionate attacks against civilians and civilian objects, such as civilian homes causing death and considerable damage.[33] The Georgian army purportedly used 122mm howitzers, 203mm self-propelled artillery system DANA, tank fire and Grad multiple launch rocket systems.[34] It has been reported that in particular the use of the GRAD multiple rocket launching systems and cluster munitions[35] used by the Georgian armed forces

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[31] *Comoros* Decision, para. 13.
[32] Majority Decision, para. 35.
[33] Amnesty International Report, Annex E.4.3, pp. 25, 28-29; Human Rights Watch Report, Annex E.4.10, pp. 10, 48-53; OSCE Report, Annex E.2.38-Corr, p. 42.
[34] Human Rights Watch Report, Annex E.4.10, p. 48; Amnesty International Report, Annex E.4.3, p. 28.
[35] The use of cluster munitions causing injuries and death was reported in locations such as along the Dzara road and in villages of the Gori district; however, it remains unclear whether the Georgian forces targeted civilians and civilian objects with such ammunition, Human Rights Watch Report, Annex E.4.10, pp. 71-76.

are types of weaponry which are considered particularly dangerous for non-combatants because of their indiscriminate deadly effects.[36] Residents of Tskhinvali reported that Georgian forces fired "unguided rockets" at densely populated areas of the city on 7-9 August 2008.[37] There are numerous reports about the destruction of civilian houses and casualties as a result of the shelling.[38] It is also alleged that some of those civilian buildings were used as defense positions or other posts by the South Ossetian forces, including irregular militias.[39]

27. There are also indications in the supporting material that Russian forces during the military offensive between on or about 8 and 12 August 2008 carried out indiscriminate and disproportionate attacks with aerial, artillery and tank fire strikes against civilians and civilian objects, such as civilian homes, causing death and considerable damage.[40] Russian aircrafts bombed locations and civilian vehicles, thereby destroying homes and wounding or killing civilians. For example, on 12 August 2008, a Russian aircraft fired S-8 rockets on Tortiza, a village near Gori, killing allegedly 3 civilians, injuring dozens and damaging nearly every house in the village.[41] The locations purportedly attacked from the air by Russian forces were, for example, Tskhinvali, Kekhvi, Eredvi, Kvemo Achabeti, Kheiti, Karbi, the Gori city and surrounding villages.[42] The Russian forces are also believed to have used cluster

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[36] IIFFMCG Volume I, Annex E.2.35, p. 30; IIFFMCG Volume II, Annex E.2.36, p. 346; Human Rights Watch Report, Annex E.4.10, p. 10.

[37] OSCE Report, Annex E.2.38-Corr, p. 35.

[38] OSCE Report, Annex E.2.38-Corr, p. 36; Human Rights Watch Report, Annex E.4.10, pp. 50-57.

[39] Human Rights Watch Report, Annex E.4.10, pp. 48, 57-58; IIFFMCG Volume II, Annex E.2.36, pp. 333-334.

[40] Human Rights Watch Report, Annex E.4.10, pp. 94-109 and 121; A Caucasian Journey", *The Economist*, Annex E.8.30, p. 3.

[41] Human Rights Watch Report, Annex E.4.10, pp. 104-107. In October a demining organisation purportedly cleared 148 S-8 rockets in that village, many of them unexploded

[42] Request, paras 201-202; IIFFMCG Volume I, Annex E.2.35, p. 30; Human Rights Report, Annex E.4.10, pp. 94-109; OSCE Report, Annex E.2.38-Corr, p. 42; see also the representations made by the victims in ICC-01/15-10-Conf-Anx24; ICC-01/15-10-Anx28; ICC-01/15-10-Conf-Anx 29; ICC-01/15-10-Conf-Anx31; ICC-01/15-10-Conf-Anx35; ICC-01/15-10-Conf-Anx36; ICC-01/15-10-Conf-Anx41; ICC-01/15-10-Conf-Anx45 and ICC-01/15-10-Conf-Anx62. The present separate opinion sometimes refers to confidential or confidential *ex parte* material for the purpose of proper judicial reasoning and to retain the principle of publicity. However, the references to the content of these documents have been kept to a minimum so as to maintain the reasons underlying their level of classification.

munitions in populated areas, such as Gori city, Ruisi and Variani, a weapon which is considered to lack the capacity to be dirigible at specific fighters or weapons.[43] For example, in the morning of 12 August 2008, at least 6-12 persons were reported killed and 20-30 persons injured on the Gori main square during a cluster munition attack.[44] Information varies as to whether military targets in the vicinity turned the civilian objects into legitimate targets.[45] While some accounts confirm the presence of military targets in the vicinity, others attest to their absence.[46]

28. In light of the foregoing and based on the supporting material and victims' representations, I find a reasonable basis to believe that civilians and civilian objects, which were not military objectives, were indiscriminately and disproportionally attacked by both Georgian armed forces and Russian armed forces in the context of an international armed conflict. This may constitute war crimes pursuant to articles 8(2)(b)(i), (ii) and (iv) of the Statute.

2. Rape

29. The material available also contains accounts of rapes of ethnic Georgian women by South Ossetian forces or militia, purportedly wearing uniform and white armbands. A number of rapes, including gang-rapes, took place in, for example, Prizi, Tskhinvali, Meghvrekisi and Gori.[47] The material also suggests that rape may not have occurred frequently;[48] however, a survey assessing the interviews of 1,144 interviewees came to the conclusion that at least 70 persons had information related to sexual and gender violence within the context of the August 2008 conflict.[49]

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[43] Human Rights Watch Report, Annex E.4.10, pp. 110-120.
[44] Request, para. 204; Human Rights Watch Report, Annex E.4.10, pp. 118-120; Amnesty International Report, Annex E.4.3, pp. 31-32; Application under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of the Court, Annex E.3.9-Conf-Exp, pp. 26-29; IIFFMCG Volume II, Annex E.2.36, pp. 348-349.
[45] Human Rights Watch Report, Annex E.4.10, p. 96; IIFFMCG Volume II, Annex E.2.36, pp. 334-336.
[46] Amnesty International Report, Annex E.4.3, p. 31; Human Rights Watch Report, Annex 4.10, pp. 101-102; OSCE Report, Annex E.2.38-Corr, p. 43.
[47] IFFMCG Volume II, Annex E.2.36, pp. 362-363; Human Rights Watch Report, Annex E.4.10, pp. 166-169; OSCE Report, Annex E.2.38-Corr, pp. 25-26 and 38;"August Ruins" Report, Annex E.5.1, p. 223.
[48] IFFMCG Volume II, Annex E.2.36, p. 362; OSCE Report, Annex E.2.38-Corr, p. 26.
[49] IFFMCG Volume II, Annex E.2.36, p. 363.

30. As I explained above, considering the nature of these proceedings and the requisite evidentiary threshold, I believe that the supporting material and the victims' representations[50] support that there is a reasonable basis to believe that rapes occurred in the context of the attack taking into consideration first, that the alleged offences took place in localities affected by the attack and, second, the available information concerning the alleged perpetrators. I also bear in mind that due to the sensitive nature of the offence and the victims' fear of social ostracisation, rape may have been underreported.[51] I consider accordingly, that there is a reasonable basis to believe that rapes occurred as part of a widespread and systematic attack against the civilian population, thus constituting crimes against humanity, pursuant to article 7(1)(g) of the Statute. I also consider that rapes constituting a war crime occurred in the context of an international armed conflict, pursuant to article 8(2)(b)(xxii) of the Statute.

3. Physical Deprivation of Liberty and Unlawful Confinement

31. There are numerous reports about civilians being arbitrarily detained, some for a lengthy period, primarily by armed Ossetian forces, in places of detention in Tskhinvali,[52] Tamarasheni, Java, and Kekhvi,[53] and the "buffer zone" such as Megvrekisi, Zemo Nikozi and Zemo Khviti.[54] The supporting material also reflects claims that the Georgian authorities detained a number of South Ossetian civilians in Georgia, even though their status is contested by the Georgian government.[55]

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[50] See in this respect the Registry Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute (hereinafter: "Registry Report"), 4 December 2015, ICC-01/15-11, para. 26; see also the representations made by victims in ICC-01/15-10-Conf-Anx28 (reporting on the gang-rape by South Ossetian forces, and another incident of rape while the victim was detained by South Ossetian forces in Tskhinvali); ICC-01/15-10-Conf-Anx36 and ICC-01/15-10-Conf-Anx62 (reporting on the rape of a 14 year-old girl by "paramilitary Ossetians"). One case of rape is also described in the Abkhazia region, see ICC-01/15-10-Conf-Anx37.

[51] Human Rights Watch Report, Annex E.4.10, p. 166; OSCE Report, Annex E.2.38-Corr, p. 20.

[52] OSCE Report, Annex E.2.38-Corr, p. 39; Human Rights Watch Report, Annex E.4.10, p. 127; Government of Georgia: Chronology of the August 2008 event, Annex E.7.9-Conf-Exp, p. 196.

[53] Request, para. 230; Government of Georgia: Chronology of the August 2008 event, Annex E.7.9-Conf-Exp, p. 216.

[54] OSCE Report, Annex E.2.38-Corr, p. 26.

[55] OSCE Report, Annex E.2.38-Corr, p. 40; Human Rights Watch Report, E.4.10, pp. 86-91.

Information is also available that 14 Ossetians, including two teenagers, were detained by the Georgian police following the Russian withdrawal from the "buffer zone" and held incommunicado.[56] The available information as well as the victims' representations[57] suggest that arbitrary detentions continued after October 2008.

32. Whereas the Prosecutor was "unable" to determine the nexus between instances of arbitrary detention and the context of the attack against the civilian population, I consider that such nexus may be established at this stage, bearing in mind that arbitrary detentions have been reported for the period of August until (at least) October 2008 during which a number of Georgian civilians were detained by South Ossetian or Russian forces[58]. On the basis of the supporting material and the victims' representations,[59] I consider that there is a reasonable basis to believe that instances of imprisonment or other sever deprivation of physical liberty occurred in the context of the widespread and systematic attack against the civilian population, pursuant to article 7(1)(e) of the Statute. Similarly, I also find a reasonable basis to believe that Georgian authorities may have committed the crime of unlawful confinement of South Ossetians in the context of an international armed conflict, pursuant to article 8(2)(a)(vii) of the Statute. I accept the fact that the status of these persons remains controversial. However, considering the low evidentiary threshold applicable at this stage, I find it more appropriate to resolve this controversy in the course of the investigation to be authorized. Again, the Majority remained silent on this issue.

4. Other Crimes Emanating from the Supporting Material

33. The supporting material provides further information on other crimes that appear to have been committed in the course of the 2008 conflict. While I do not intend to

[56] OSCE Report, Annex E.2.38-Corr, p. 26.

[57] See in this respect the Registry Report, ICC-01/15-11, para. 24; see also the representations made by the victims in ICC-01/15-10-Conf-Anx28.

[58] See in this respect the representations made by the victims in ICC-01/15-10-Conf-Anx30.

[59] See in this respect the Registry Report, ICC-01/15-11, para. 26; see also the representations made by the victims in ICC-01/15-10-Conf-Anx20; ICC-01/15-10-Conf-Anx28; ICC-01/15-10-Conf-Anx30; ICC-01/15-10-Conf-Anx31; ICC-01/15-10-Conf-Anx34; ICC-01/15-10-Conf-Anx36 and ICC-01/15-10-Conf-Anx62.

exhaustively "map out" the situation, I consider it important to also refer to at least two crimes which emerge from reading the supporting material and which were referred to by the victims in this situation.

34. The Chamber was furnished with information that during the conflict, a number of civilians were ill-treated and suffered serious bodily harm by South Ossetian forces and militias affiliated with them or by Russian forces, in particular in the villages of Avenevi, Nuli, Kekhvi, Disevi, Atsriskhevi, Zemo and Kvemo Achabeti, Berula, Kheiti and Gugutiantkari.[60] Reports were also made about 50 cases of conflict-related torture.[61] Numerous incidents of ill-treatment of civilian detainees (severe beatings and mock executions) especially in Tskhinvali, were also reported.[62] Additionally, the supporting material suggests that Georgian prisoners of war suffered torture[63] and severe beating[64] when detained by South Ossetian armed forces. I also note allegations of ill-treatment of South Ossetians during their detention by the Georgian military.[65]

35. Thus, in view of the supporting material and victims' representations,[66] I find a reasonable basis to believe that the crimes of torture and inhumane acts occurred as part of the widespread and systematic attack, constituting crimes against humanity, pursuant to articles 7(1)(f) and (k) of the Statute. I also find a reasonable basis to believe that the crimes of torture, inhuman treatment and wilfully causing great

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[60] "August Ruins" Report, Annex E.5.1, pp. 146, 147, 153, 165, 166, 167, 169, 171, 173, 187, 189 and 191; Amnesty International Report, Annex E.4.3, p. 39.

[61] OSCE Report, Annex E.2.38-Corr, p. 25.

[62] "August Ruins" Report, Annex E.5.1, pp. 210-213.

[63] For example, mention is made to incidents where the "index fingers of their right hands had been burned to the bone", "August Ruins" Report, Annex E.5.1, pp. 227 and 235; Amnesty International Report, Annex E.4.3, p. 48; see also the representations made by the victims in ICC-01/15-10-Conf-Anx32 (reporting that "victims' fingers were scorched and their bodies burnt with cigarettes").

[64] "August Ruins" Report, Annex E.5.1, pp. 227, 230-231 and 235; Amnesty International Report, Annex E.4.3, p. 48; Human Rights Watch Report, Annex E.4.10, pp. 193-195.

[65] Human Rights Watch Report, E.4.10, pp. 86-91.

[66] See in this respect the Registry Report, ICC-01/15-11, para. 26; see also the representations made by the victims in ICC-01/15-10-Conf-Anx20; ICC-01/15-10-Conf-Anx28; ICC-01/15-10-Conf-Anx30; ICC-01/15-10-Conf-Anx31; ICC-01/15-10-Conf-Anx32; ICC-01/15-10-Conf-Anx34; ICC-01/15-10-Conf-Anx36; ICC-01/15-10-Conf-Anx40; ICC-01/15-10-Conf-Anx51; ICC-01/15-10-Conf-Anx59 and ICC-01/15-10-Conf-Anx62 (reporting a case of poisoning a well with chemicals from which people were forced thereafter to drink its water).

suffering have been committed by South Ossetian forces as part of an international armed conflict, thus constituting war crimes, pursuant to articles 8(2)(a)(ii) and (iii) of the Statute. Moreover, I also find reasonable basis to believe that these war crimes have been committed in relation to captured Georgian prisoners of war by South Ossetian forces. I am also of the view that the same war crimes have been committed by Georgian forces against South Ossetian detainees in the context of an international armed conflict. Although the status of these detainees is contested, this does not deny the fact that they enjoy the protection provided under articles 8(2)(a)(ii) and (iii) of the Statute.

36. The information available also indicates numerous instances of ethnic Georgian civilians being either abducted or taken as hostages by South Ossetian forces.[67] There are reports of kidnapping of villagers who were held for ransom. For instance, a family of four was kidnaped in Gogeti; the wife and two children were released and asked to bring money in exchange for the husband.[68] This practice seems to have been continuing even after the withdrawal of the Russian forces and can be attributed to both Georgian and South Ossetian forces.[69] Thus, I consider that there is a reasonable basis to believe that the war crime of taking hostages occurred in the context of an international armed conflict, pursuant to article 8(2)(a)(viii) of the Statute.

III. Admissibility

37. Turning to my third point of controversy regarding the scope of admissibility assessment in the Majority Decision, I do not have a problem with the actual legal test set out by the Majority in paragraphs 36-38 of the Decision. My main problem

[67] IIFFMCG Volume II, Annex E.2.36, pp. 367-368; Human Rights Watch Report, Annex E.4.10, pp. 169-170; IIFFMCG Volume I, Annex E.2.35, p. 29; see also in this regard the representations made by the victims in ICC-01/15-10-Conf-Anx31 and ICC-01/15-10-Conf-Anx62.

[68] OSCE Report, Annex E.2.38-Corr, p. 40.

[69] South Ossetia: The Burden of Recognition Report, Annex E.4.15, p. 22; Report on Human Rights Issues Following the August 2008 Armed Conflict Report, Annex E.2.26, paras 37-40; see also in this regard the representations made by the victims in ICC-01/15-10-Conf-Anx28 and ICC-01/15-10-Conf-Anx38.

lies in the assessment of complementarity against the backdrop of this test and the available facts. Accordingly, I shall confine my examination only to this part of the admissibility test.

38. I consider that part of the problem (but not all) lies once more in the manner in which the Majority understands the scope of judicial control required in the course of the article 15 procedure. This prompted the Majority to excise a lot of relevant facts, which I deem necessary for an accurate admissibility assessment, judicial reasoning, and more importantly transparency to the public and the interested States directly affected by the Georgia situation. The remaining part of the problem derives from the apparent disagreement regarding the manner in which the complementarity provisions operate.

39. One need to realize that complementarity is not a static notion, but rather a dynamic one, which operates depending on the circumstances of the domestic process. Article 17 of the Statute is designed to capture the different circumstances in the domestic process which the national judicial systems may face. As such, a proper presentation of the facts which reveal the detailed steps of the national process is indispensable for an accurate assessment of admissibility. Such required detail at least not only assists in identifying the applicable sub-paragraph of article 17 on the existing facts, but also identifies and indicates to the States directly involved the lacunas, if any, in their domestic process, with an aim to remedy any such deficiency in future proceedings.

40. In this regard, I do not fully share the Majority's reasoning and some of its findings in relation to Georgia's national proceedings. In paragraph 41 of the Decision, the Majority, citing the relevant paragraphs from the Prosecutor's Request, mentions in passing that the "Georgian authorities carried out some investigative activities in relation to the 2008 conflict from August 2008 until November 2014", and that "no proceedings have been completed". Referring to a letter dated 17 March 2015 submitted by the Georgian authorities indicating that "further progress of relevant national proceedings […] is prevented by 'a fragile security situation'", the Majority

concluded that this letter is "dispositive of the matter", and that accordingly, there is "a situation of inactivity".

41. I have some concerns in relation to the short-cut approach followed by the Majority. I still believe that it would have been more convincing to lay down the full facts in order to justify the Chamber's conclusions. Moreover, by omitting significant parts of the facts, the Majority failed to explain the nature of the investigative steps allegedly carried out by the Georgians and the flaws related thereto, which in my view is decisive for an accurate article 17 admissibility determination. Also relying merely on the letter of 17 March 2015 for the Chamber's assessment and considering it as "dispositive of the matter", can be misleading. The 17 March 2015 letter only refers to the suspension of "further progress of the relevant national proceedings". As such, it neither shows the current state of proceedings (investigation, prosecution or trial also for the purposes of satisfying the different sub-paragraphs of article 17 of the Statute), nor reveals the progress carried out by the Georgian authorities until sending this letter. These factual omissions led me to reach slightly different conclusions on the facts than what appears from the Majority's admissibility assessment in relation to the Georgian side.

42. Based on the available information, I consider that one may identify a number of flaws in the Georgian national proceedings which are worth mentioning. It is apparent that the preliminary investigation carried out by the Georgian authorities focused on the two-month period of hostilities between 8 August 2008 and 10 October 2008, the date when the Russian Federation withdrew from the areas "adjacent to South Ossetia".[70] According to the Georgian authorities, the investigation also covered the period between 29 July and 8 August 2008 when the attacks against the civilian population of the Georgian villages and Georgian peacekeepers occurred.[71] Thus, the investigation extended to cover all crimes

[70] Request, para. 282; Response of the Republic of Georgia to preliminary questions from the office of the Prosecutor of the International Criminal Court, Annex E.7.9 (confidential *ex parte*), pp. 10-11.
[71] Annex E.7.9, p. 9, fn. 3.

committed by all parties in so far as it was committed on "Georgian territorial jurisdiction".[72]

43. Two preliminary investigations were commenced at the outbreak of hostilities, as documented in the 10 May 2010 report, submitted by the Georgian government. The first preliminary investigation commenced on 9 August 2008, and covered alleged crimes of genocide, intentional violation of the norms of humanitarian law in the context of internal and international armed conflicts as proscribed in the Georgian penal code.[73] A second preliminary investigation was initiated on 11 August 2008 by focusing on the war crime of looting as proscribed under article 413(a) of the Georgian penal code.[74] The genocide allegations against ethnic Ossetians were found to be "groundless", and instead, it was decided that the "context of widespread and systematic persecution of Georgians due to their ethnicity" would be the subject of an investigation as a crime against humanity.[75]

44. Apparently the Georgian investigators faced difficulties to have access to some parts of the territory under Russian and South Ossetian control and had to resort to alternative means to obtain the necessary evidence.[76] The complexity of the conflict which allegedly required detailed analysis of "thousands of separate incidents" resulted in that the preliminary investigation fell short of identifying "specific incidents", as this level of detail would have required "additional time".[77] The supporting material also reveals that the Georgian Prosecutor was not "prepared [at the time] to file charges against specific individuals".[78] It follows that during the period of this May 2010 report, the investigation fell short of both the *required incidents* and *alleged persons who bear the greatest responsibility* for the purpose of satisfying article 17(1) of the Statute.

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[72] Annex E.7.9, p. 11.
[73] Annex E.7.9, p. 10; See also Letter from the Ministry of Justice of Georgia, Annex E.7.43.1, Annex E.7.43.1 (confidential *ex parte*).
[74] Annex E.7.9, p. 10; see also, Annex E.7.43.1.
[75] Annex E.7.9, p. 10.
[76] Annex E.7.9, pp. 12-13.
[77] Annex E.7.9, p. 15.
[78] Annex E.7.9, p. 15.

45. Such considerable flaw in the national process prompted the ICC Prosecutor to request further updated reports, particularly focusing on the "Ethnic Cleansing Case", which is the subject of the Court's potential cases. Two subsequent reports have been submitted to the Prosecutor, the most important of which is the one received on 5 November 2014 covering the Georgian national proceedings from December 2011 until 30 October 2014. According to this report, the Office of the Chief Prosecutor of Georgia indicated that the preliminary investigation in the 2008 conflict aimed at covering five clusters: (1) ethnic cleansing; (2) unlawful attacks on civilian population; (3) attacks on peacekeeping forces; (4) enforced disappearances and torture incidents; and (5) non-organized acts of war crimes and other allegations.[79]
46. The most relevant alleged investigation for the purposes of satisfying the potential case test before the Court is the one concerning ethnic cleansing, including the forcible displacement of ethnic Georgian residents from South Ossetia. The available material reveals that the Georgian investigation was expected to cover the areas of Eredvi, Kurtaand Tigva municipalities and the adjacent areas. Over 500 incidents had allegedly been investigated. Yet, these incidents did not include incidents involving, *inter alia*, the crimes of murder, deportation, torture, persecution and other inhumane acts.[80] Also the investigations faced "serious difficulties" partly due to the difficulty in the identification of physical perpetrators or suspects. Also among the impeding factors was the "fragile security situation along the administrative border between the mainland Georgia and the breakaway Tskhinvali region".[81] Further the majority of victims as well as witnesses living near the administrative borders were reluctant to cooperate with the investigative team.[82]

[79] "Concerning the National Criminal Proceedings of Georgia over the Crimes against Humanity and War Crimes related to the August 2008 Armed Conflict", Update Report, Annex E.7.1-Corr, pp. 3-4.
[80] Annex E.7.1-Corr, p. 4.
[81] Annex E.7.1-Corr, pp. 4-5.
[82] Annex E.7.1-Corr, p. 5.

47. The most notable flaw in the investigation lies in the fact that apparently the Georgian authorities aimed at prosecuting the lowest rank perpetrators as well as the "least meaningful incidents earliest", given that the Georgian criminal justice sector had never dealt with cases of such scale.[83] The report presented suggests that at least during the period between December 2011 and 30 October 2014, the Georgian authorities were not investigating the serious incidents which are of concern to the ICC Prosecutor. Nor does this report reveal whether those low level perpetrators referred to belong to those most responsible for the commission of the crimes in the course of the 2008 conflict. As such, said investigations do not fulfil the required admissibility test before the Court. Moreover, notably at this stage of the Georgian investigation, no charge had been presented against any perpetrator, be it a low or high ranking one. In this regard, a six year investigation without any charge being presented against a single perpetrator raises serious doubts as to the seriousness of such an investigation. To meet the admissibility test, a national investigation should not be confined to simply "collect evidence" but should aim at prosecutions. Therefore, the Prosecutor could have reached the conclusion that the admissibility test was not met way before October 2015.
48. In a supplementary submission dated December 2014,[84] the Georgian authorities presented a charging decree against one of those who bear the greatest responsibility shaping one of the potential cases before the Court, as indicated by the Prosecutor.[85] The decree charged that person in the course of the evolution of the conflict in the Tskhinvali region and the attacks against ethnic Georgian population in South Ossetia and adjacent areas, for the crimes of deportation, persecution on ethnic ground, and other inhumane acts as crimes against humanity, as well as other forms of unlawful expulsion of protected persons as deliberate breach of norms of international humanitarian law during an international armed conflict, destruction

[83] Annex E.7.1-Corr, pp. 6-7.
[84] OTP internal summaries and translations of discrete portions of Annex E.7.2, AnxE.7.2.1 (confidential *ex parte*), p. 7.
[85] Indicative list of alleged most responsible perpetrators, Annex B.1-Corr (confidential *ex parte*), p. 7.

and appropriation of property as deliberate breach of norms of international humanitarian law during an international armed conflict and participation in the illegal armed group.[86] Although the submission apparently reveals that the Georgian authorities have actually investigated the potential case involving the ethnic cleansing of the Georgians, the decree presented was "unsigned and undated". As such, the Majority should have pointed out this decree and decided that it does not carry any probative value.

49. Other flaws in the Georgian investigations which have been omitted by the Majority were also apparent in relation to another significant cluster referred to in the 5 November 2014 report namely, the investigative activities related to the unlawful attacks on civilian population and civilian objects. The report also reveals that the investigation was "yet inconclusive over the incidents […] given the extensive military expertise required for the fact finding".[87] The same holds true with respect to the cluster covering attacks against Georgian peacekeepers, where it was reported that the "investigation over these incidents [was] not completed", and that the Georgian authorities "undert[ook] to come back to the questionnaire points [sent by the ICC Prosecutor] as well as other substantive results of the investigation in its next report or earlier as the progress allows".[88]

50. In view of the shortages of national proceedings, the Georgian government committed to submit a further report by August 2015 showing that it had completed investigation "at least on some of the incidents involving unlawful attacks on civilians and civilian objects", and providing updates on the "prosecutions relating to the ethnic cleansing".[89] The proposed report was also expected to focus on the "investigation" relating the attack on peacekeeping forces.[90]

[86] Annex B.1, pp. 6-7.
[87] Annex E.7.1-Corr, p. 11.
[88] Annex E.7.1-Corr, p. 12.
[89] Annex E.7.1-Corr, p. 14.
[90] Annex E.7.1-Corr, p. 14.

51. A letter dated 17 March 2015 was received by the Prosecutor and referred to by the Majority indicating the existence of security concerns. The letter also noted that the "persons implicated in the commission of the crimes subject to Georgia's domestic proceedings […] might be directly involved or affiliated with the ongoing violence".[91] Further, many of the victims and witnesses involved in the criminal proceedings "live in the close proximity with the occupied territories" and due to the existing threats and insecurity, they "could be prone to avoiding further examinations and/or changing testimonies given previously".[92] Accordingly, the Georgian authorities "*had doubts that an advance to the prosecution stage in the given proceedings might have prompted certain backlash from the groups engaged in the violence across the conflict line*" (emphasis added).[93]
52. Based on the latter part of the letter, which was not mentioned by the Majority, it became clear that the Georgian proceedings have not reached the *prosecution stage* – a finding which was omitted by the Majority. This suggests two alternatives: (1) either the Georgian authorities may have completed the investigation and decided not to prosecute; in this case, the Chamber's findings should have been based on article 17(1)((b) of the Statute; or (2) the Georgian authorities still remain within the investigation stage, and accordingly, the assessment should be carried out under article 17(1)(a) of the Statute.
53. Furthermore, the situation presented by the Georgian authorities in the letter of 17 March 2015 could also resemble a situation of inability on the part of the government to carry out the national proceedings within the meaning of articles 17(1)(a), second part, together with article 17(3) of the Statute. Although Georgia is neither facing a total or substantial collapse, the situation as it stands could also reveal a situation of temporary unavailability of its national justice system to properly respond to or address the crimes committed in the 2008 conflict. The

[91] Annex G, Letter from the Ministry of Justice of Georgia, Annex G, p. 3.
[92] Annex G, p. 3.
[93] Annex G, p. 3.

Majority did not also address this possibility which is a reasonable conclusion to be deduced from the 17 March 2015 letter.

54. Be that as it may, my reading of this letter in view of the facts presented in the previous paragraphs, indicates that there could be a situation of inactivity in the sense that Georgia is not/and has not investigated the same potential case(s) before the Court either due to lack of proof of investigating the serious incidents required or due to the failure to identify those who bear the greatest responsibility.[94] Since admissibility should be examined on the basis of the facts as they exist at the time of the assessment, I consider that the potential case(s) selected by the Prosecutor are admissible, in so far as the Georgian proceedings are concerned. Although the Majority also found that there is a situation of inactivity, they failed to explain why and how they have arrived at this conclusion on the basis of the existing facts.

55. Turning to the national proceedings in the Russian Federation, the Prosecutor conducted an assessment of the potential cases related to: (1) forcible displacement campaign to expel ethnic Georgians from South Ossetia and the "buffer zone"; and (2) attack on Russian peacekeepers.[95]

56. My problem here is not that much the narrative, rather the Majority's assessment of the facts as well as the findings resulting from such assessment. According to the Majority, the available information including particularly the letter dated 18 June 2012 referred to in paragraph 44 of the Majority Decision makes the Chamber "unable to determine that the national proceedings in Russia are inadequate under article 17(1)(b) of the Statute".[96]

57. I do not adhere to the Majority's conclusion. First, it is not clear how the Majority invokes article 17(1)(b) of the Statute when the decision lacks any explanation and any concrete finding regarding the existence of a prior genuine investigation either

[94] In this sense, I am of the view that the Prosecutor did not need to wait for a confirmation letter by the Georgian authorities that they were not in a position to proceed to the prosecution stage as she could have made an admissibility determination in favour of the Court's intervention earlier.
[95] Request, paras 305-320.
[96] Majority Decision, para. 46.

in accordance with article 17(1)(a) or (b), first sentence, which is indispensable for applying sub-paragraph (b).

58. Second, in paragraph 46 of the Decision, the Majority finds it "unwarranted to attempt to conclusively resolve this question [of admissibility determination] in the present decision". I think it is a legal error to make such a pronouncement. Article 17 of the Statute is drafted in a manner where the relevant Chamber is duty bound to make a determination on the basis of facts as they exist. This is clear from the chapeau of article 17 which stipulates that: "[…] the Court *shall* determine that a case is inadmissible where […]". The facts may change depending on the circumstances of each situation/case. Depending on the change of circumstance, a new admissibility determination may be entered at a later stage by the relevant Chamber. Thus, an admissibility determination at this stage of the proceedings is also *mandatory* and must be conducted on the basis of the facts available at the time of making the assessment contrary to what the Majority suggests. Moreover, the fact that there are other potential cases that would be admissible does not *per se* exempt the Chamber from exercising its supervisory role properly by way of scrutinizing all the initial findings of the Prosecutor in relation to the potential cases identified by her Office and set out in the Request. This also does not exempt the Chamber from indicating to the Prosecutor that on the basis of the available material, there may be other potential cases that warrant attention in the course of her investigation.

59. Third, on the basis of the available information and specifically the 18 June 2012 letter, I am inclined to reach a different conclusion on the facts than that of the Majority. In this regard, the Russian authorities claimed that an investigation into allegations against Russian servicemen in the course of the 2008 conflict was ongoing under criminal case No. 201/374108-08. Nevertheless, in order to "verify" these allegations and "collect additional evidence", the Russian Investigative Committee requested four times legal assistance from the Georgian authorities which was

denied.[97] Towards the end of the letter, the Russian authorities *surprisingly* stated that the "investigation has established that the command of the Armed Forces […] 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 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".[98]

60. Thus, these statements are clearly contradictory, because if the Russian authorities initially claimed that they still need to "verify" the allegations against their servicemen and collect additional evidence; it is not logical that they finally conclude that the "investigation has established that the command of Armed Forces had taken exhaustive measures to prevent" the crimes and that the "investigation has been unable to confirm involvement of the Russian servicemen". This suggests that the Russian alleged investigation was very limited and contradictory, and as such, it lacked the required degree of seriousness and completeness for the purposes of satisfying the test under article 17(1)(a) or (b) of the Statute. This conclusion is confirmed by the Prosecutor's statement that the Russians conclusions "were partially confirmed" and that some credible information suggests that "Russian soldiers either participated in, or were passive in the face of, crimes committed by South Ossetian forces".[99]

61. It follows that there is, at the minimum, a situation of inactivity with respect to these potential case(s) if not unwillingness on the part of the Russian authorities to genuinely carry out the investigation in accordance with article 17(1)(a) and 2(a) of the Statute. Thus, it should not be claimed that the Chamber is "unable" to enter an admissibility determination on the basis of the available facts. Nor should it be

[97] Letter from the Ambassador of the Russian Federation to the Kingdom of Netherlands, Annex E.7.22 (confidential *ex parte*), p. 3. The Russian authorities informed the Office of the Prosecutor in a meeting in Russia on 23 and 24 January 2014 that they submitted six requests for legal assistance, *see* Request, para. 310.

[98] Annex E.7.22 (confidential *ex parte*), p. 4.

[99] Request, para. 308.

claimed that "it [is] unwarranted to attempt to conclusively resolve [the relevant admissibility question in the present decision]", as the Majority asserts.

62. Finally, I have two last points to add in relation to the findings of the Majority in paragraphs 6 and 40 of the Decision.

63. First, the Majority refers to paragraph 322 of the Prosecutor's Request, which "informs the Chamber that no other State has undertaken national proceedings with respect to the relevant crimes".[100] The Majority proceeds by agreeing with the Prosecutor that any proceedings undertaken by South Ossetia should not be considered. I miss in this part an explicit ruling on the part of the Majority regarding the question of whether or not there are or have been actually national proceedings by any third State. The Majority refers to one paragraph in the Prosecutor's Request but neither examines the available material nor makes a clear finding on this question. Instead, the Majority deviates from the discussion and focuses only on a small part of the question, namely, whether proceedings conducted by South Ossetia can be considered or not as South Ossetia is not a recognised State. This latter question is actually the subject of the second following point.

64. Second, according to the Majority, South Ossetia is part of Georgia and "any proceedings undertaken by the *de facto* authorities [of the former] are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognised State".[101]

65. The Majority seems to concur with the Prosecutor in paragraph 40 of the Decision, although in fact it goes beyond more than she even suggests, without explaining why they consider that this is the correct approach.[102] I believe that the Majority oversimplifies the issue at stake. The question of recognition of certain acts of entities under general international law is much more complex. Within the context of the Rome Statute, I find that automatically following a too rigid approach might result

[100] Majority Decision, para. 40.
[101] Majority Decision, para. 40.
[102] Majority Decision, para. 40.

in some absurd conclusions. For instance, there may be some entities whose status is contested, yet they still enjoy an undisputed control over the territory and have the capacity to exercise criminal jurisdiction. Taiwan is a good example of such entity,[103] and the issue can be even more complicated in case of a *nasciturus* State, if the entity is able to set up a genuine rule of law mechanism. Perhaps depriving all of these entities from having a *locus standi* for the limited purpose of exercising criminal jurisdiction and thereafter lodging admissibility challenges before this Court might result in an increase in the impunity gap. A too categorical standpoint could lead to a policy running against the basic philosophy of the ICC, namely to put an end to impunity because it could suggest *nolens-volens* that, even if you punish, it will not be taken into consideration.

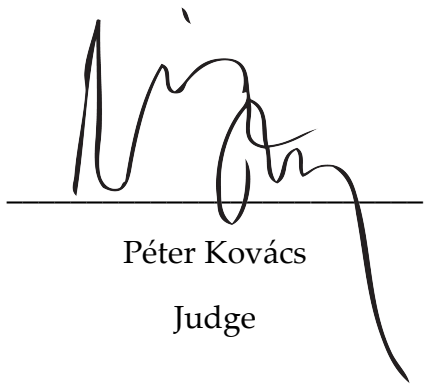
66. The issue becomes more problematic when entities as such carry out genuine investigation, prosecution and trial proceedings against a particular person and those proceedings are disregarded or the person may be barred from lodging a *ne bis in idem* challenge under article 19(2)(a) of the Statute because domestic proceedings have not been conducted by a "State". I cannot exclude, therefore, that if a *de facto* regime passed a proper sentence following the principles of due process of law against an accused person for one or more of the crimes falling within the jurisdiction of the Court, this could furnish a sufficient basis for an admissibility challenge under article 19(2)(a) together with articles 17(1)(c) and 20(3) of the Statute. I consider that this matter requires a *case-by-case* assessment without having an automatic effect on the legal status of the non-recognized entity.

67. With respect to the question of national proceedings in third States, the available supporting material does not reveal that any other State with jurisdiction is or has investigated the potential case(s) arising out of the Georgia conflict.[104] Even assuming *arguendo* that South Ossetia may be considered as a third "State" for the

[103] See for example, James Crawford, *The Creation of States in International Law*, 2nd ed., (OUP, 2006), p. 248.
[104] Request, para. 321.

purposes of admissibility proceedings, the available information shows that the South Ossetian *de facto* authorities have not investigated any of the crimes falling within the jurisdiction of the Court. Instead, 86 persons were detained, some of whom awaiting trial for alleged looting, while 38 decisions of the Tskhinvali regional court regarding cases of looting received administrative penalties for misdemeanors (petty theft).[105] The supporting material also reveals that "not a single conflict-related case has been sent to a Gori-based court, as perpetrators could not be identified".[106] Since no third State with jurisdiction is conducting or has conducted national proceedings with respect to the potential cases identified in the Request, the Majority should have considered that there is a situation of inactivity. Therefore, there is no admissibility obstacle in making an affirmative finding under article 53(1)(b) of the Statute, subject to meeting the gravity threshold.

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



Péter Kovács

Judge

Dated this Wednesday, 27 January 2016

At The Hague, The Netherlands

[105] OSCE Report, Annex E.2.38-Corr, p. 75.

[106] OSCE Report, Annex E.2.38-Corr, p. 75.