Pre-trial decision on investigation in *Situation in Georgia*, ICC

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Author of the decision: International Criminal Court

Summary of the decision: The ICC found that 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. Judge Kovács disagrees on this point and finds that automatically following a too rigid approach might result in some absurd conclusions, proposing a case-by-case analysis about the locus standi of de facto entities for the limited purpose of exercising criminal jurisdiction.

Cited international law materials: Rome Statute of the International Criminal Court

Key words: non-recognised courts, international war crimes, functional judicial system, ne bis in idem, South Ossetia

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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

remained, however, in the "buffer zone" until the beginning of September 2008.[42]

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.[43] The Georgian police returned to the "buffer zone" on 10 October 2008.[44]

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,[45] 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.[46]

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.[47] Valuable items were removed from houses or farms before they were set on fire.[48]

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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[42] 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.
[43] Request, para. 36; Annex E.2.38-Corr, p. 17; Annex A.2.36, p. 226; Annex E.4.3, p. 10.
[44] Annex E.2.38-Corr, p. 23.
[45] Annex E.4.3, pp. 36 and 41.
[46] Annex E.4.3, p. 43.
[47] 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.
[48] 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.[49] 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.[50] It has been reported that irregular armed groups answered, if only loosely, to the South Ossetian chain of command.[51]

22. The attack against the civilian population resulted in between 51 and 113 cases of deliberate killings of ethnic Georgians[52] and the displacement of between 13,400 and 18,500 ethnic Georgian inhabitants from villages and cities in South Ossetia and the "buffer zone".[53] 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.[54]

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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[49] 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).
[50] Request, para. 241; Annex E.7.9-Conf-Exp, pp. 83-84.
[51] Annex E.4.3, p. 41.
[52] 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.
[53] Annex E.7.9-Conf-Exp.
[54] Request, para. 265; Annex E.2.38-Corr, pp. 22, 34; Annex E.4.10, p. 10.

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'".[64] In the view of the Chamber, this letter is dispositive of the matter: there is, at present, a situation of inactivity on the

[64] Annex G.

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.

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.

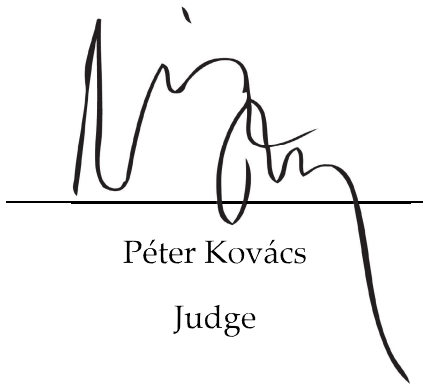
66. The issue becomes more problematic when entities as such carry out genuine investigation, prosecution and trial proceedings against a particular person and those proceedings are disregarded or the person may be barred from lodging a *ne bis in idem* challenge under article 19(2)(a) of the Statute 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.