**INTRODUCTION**

As you all know, the Office of the Prosecutor at the ICC has announced its intention to investigate war crimes and crimes against humanity potentially committed in Georgia between 1 July 2008 and 10 October 2008. Assuming the PTC authorizes the investigation, Georgia will become the first non-African situation to be formally investigated by the ICC.

In my presentation today, I want to explore various aspects of the OTP’s Request – all 162 pages of it. More specifically, I will do three things **[SLIDE]**:

1. Briefly explain the procedural situation at the ICC – what happens now that the OTP has asked the PTC to authorize a formal investigation.
2. Discuss a number of particularly important legal and evidentiary questions raised by the Request.
3. Address three critical aspects of the principle of complementarity, which will be important for Georgia if the OTP attempts to prosecute a suspect Georgia whom wants to prosecute itself.

**PROCEDURAL SITUATION**

Let me begin by explaining where we are now. Because the Prosecutor has used her *proprio motu* power to initiate the Georgia investigation – as opposed to investigating pursuant to a State or Security Council referral – the PTC has to authorize it. The relevant provision in the Rome Statute is Art. 15(4):

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This “reasonable basis” standard is very low – the lowest standard in the Rome Statute. It is designed, according to the PTC, to prevent *“unwarranted, frivolous, or politically motivated investigations.”*So the OTP does not have to have conclusive or comprehensive information concerning potential crimes. The PTC must simply be satisfied that *“there is a sensible or reasonable justification for a belief that a crime falling within the Court’s jurisdiction has been committed.”*

I am not going to dwell on the specific factors the PTC will consider concerning the “reasonable basis” standard. The OTP has easily satisfied it. Indeed, the OTP’s Request is four times as long as its Request to open an investigation in Kenya, which the PTC ultimately approved. So I think it is very unlikely that the PTC will ask the OTP for more information – much less reject the Request to investigate.

The investigation, then, is almost certainly going to go forward. So what can we learn about the investigation from the Request itself? What are the key legal and evidentiary issues that is raises?

**STATUS OF CONFLICT**

I want to begin with a particularly difficult issue: the legal qualification of the 2008 hostilities. Was the armed conflict between Georgia, South Ossetia, and Russia international? Non-international? Dual status?

This is a complex area of IHL, and one that could have implications for the OTP’s investigation. Far more war crimes can be committed in IAC than can be committed in NIAC.

The OTP begins its analysis by acknowledging that there was no armed conflict of any kind between **July 1** and **August 7**. That’s important, because it means that the OTP could only prosecute actions during that period as crimes against humanity – as you know, war crimes cannot be committed outside of armed conflict.

Taking August 7 as the beginning of the armed conflict, the OTP then divides the conflict into three phases **[SLIDE]**:

1. **August 7-8**, when there were hostilities between Georgia and South Ossetia.
2. **August 8-10**, when there were hostilities between Georgia and South Ossetia and between Georgia and Russia directly.
3. **August 12-October 10**, when there were no active hostilities but Russian forces remained in South Ossetia and parts of Georgia.

The OTP’s primary argument is that all three phases qualified as an IAC. That is obviously correct for the second phase, **August 8-10**, when Georgia and Russia were involved in hostilities. An IAC exists whenever two states used armed force against each other.

I think there is also little question that the third phase qualified as an IAC. The OTP believes that Russia was belligerently occupying parts of Georgia from August 12 on, and all of the major external observers agree – the IIFFM, HRW, AI. Occupations are considered IACs under IHL.

The first phase, however – **August 7-8** – is more complicated. The OTP believes that the first period was an IAC because Russia, though not yet directly involved in hostilities with Georgia, exercised “overall control” of South Ossetia’s forces.

**[SLIDE 3]**

I am not convinced by the OTP’s argument that Russia was in overall control of South Ossetia’s forces by **August 7**. Here is the legal test for overall control:

**[SLIDE]**

We could spend the next couple of hours discussing this issue. Let me simply identify the critical paragraphs in the Request and tell you why I don’t find the OTP’s arguments particularly convincing. Let’s begin with paragraph 93:

**[SLIDE]**

By itself, however, the movement of Russians into and out of South Ossetia’s forces does not tell us very much about overall control. The issue is whether those individuals were taking instructions from Russia at the time they were serving in South Ossetia’s forces. Indeed, the OTP acknowledges as much when it cites the ICTY’s seminal *Tadic* case:

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Nothing in the Request indicates shared Russian/South Ossetian leadership during the conflict. The OTP simply relies on the presence of Russians to suggest overall control. That is not enough – and as I will point out, that argument actually undermines the OTP’s argument concerning the impartiality of the Russian peacekeepers.

Moving on:

**[SLIDE]**

The latter consideration, as the OTP’s own definition of overall control makes clear, is not enough. And although the FFM did make the former statement, it is misleading to suggest that the FFM shares the OTP’s belief that Russia was in overall control of South Ossetia’s forces. On the contrary, not only did the FFM fail to reach a conclusion on that issue, it strongly suggested that the case for overall control was much weaker in South Ossetia than in Abkhazia:

Finally, there is paragraph 97:

**[SLIDE]**

These facts suggest that Russia was a co-belligerent of South Ossetia – not that it was in overall control of South Ossetia’s forces. The problem with the OTP’s argument is the term “coordination.” There is a difference between two independent armed forces coordinating attacks and one armed force coordinating the actions of another armed force. Overall control requires the second form of coordination – and paragraphs 97 and 98 suggest the first form.

To reiterate, my skepticism of the OTP’s position is tentative. Additional investigation may strengthen the OTP’s argument. For now, though, it seems that the best qualification of the August 7 to August 12 period is what we call a **dual-status armed conflict**:

1. From **August 7-12**, there was NIAC between Georgia and South Ossetia.
2. From **August 8-12**, there was a simultaneous IAC between Georgia and Russia.

That may seem like a technical difference. But it matters – as we will see when we discuss Georgia’s allegedly disproportionate attacks.

**STATUS OF PEACEKEEPERS**

Attacks on peacekeepers – both Russian and Georgian – are at the heart of the OTP’s proposed investigation. Here is Art. 8(2)(b)(ii) of the Rome Statute, the war crime in question:

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This war crime presumes, of course, that the attacked Russian and Georgian soldiers actually qualified as peacekeepers. If they did not, they were combatants and lawful targets.

To qualify as peacekeepers, a contingent of soldiers must satisfy three conditions **[SLIDE]**:

1. They must operate with the consent of the parties.
2. They must act impartially.
3. They must not use force except in self-defence.

The OTP believes that the JPKF satisfied all three conditions. I’m less confident.

I don’t think there is any issue about the JPKF’s mandate. Although its peacekeeping was “robust” – to quote the OTP – JPKF soldiers could use force only to defend themselves.

There is also probably no issue with consent. As the OTP notes, although the Georgian government consistently objected to the presence of Russian peacekeepers on Georgian territory, it never formally withdrew its consent to the JPKF. Georgia admitted as much to the OTP.

The real issue, then, is impartiality – particularly concerning the Russian JPKF battalion. Georgia has claimed on numerous occasions that the Russian battalion consistently supported South Ossetia’s forces during the conflict.

* At least until now, Russia has not claimed that the Georgian peacekeepers lacked impartiality.

The annex containing Georgia’s allegations is not public, so it is impossible to reach a definitive conclusion concerning the Russian battalion’s impartiality during the conflict. But there are significant reasons to question the OTP’s claim – defended in a mere two paragraphs – that they did not forfeit their peacekeeping status.

**First**, there is the 29 November 2007 resolution of the European Parliament, which states categorically that the Russian battalion lost its status as neutral, impartial peacekeepers.That resolution is neither definitive nor legally binding – but it’s also not irrelevant, given that many of the leading states in the European Parliament are also leading states in the OSCE.

**Second**, the OTP acknowledges that North Ossetia’s peacekeeping battalion included a number of South Ossetian soldiers – a clear violation of the Sochi agreement. Indeed, ICG goes further, concluding that *“the [North] Ossetian battalion is, except for a few officers, manned by South Ossetians and the biggest employer in South Ossetia.”*

* As an aside, recall that the OTP cites the presence of Russians as one of the key reasons to believe Russia had overall control of South Ossetian forces. The OTP never explains why the same argument does not apply to South Ossetians in North Ossetia’s peacekeeping battalion. It can’t have it both ways.

**Third**, there is the evident fact that the CIS-created Russian peacekeeping force in Abkhazia was anything but impartial. The Abkhazian peacekeepers routinely violated their mandate, basically allowing the rebels to deploy at will. The Abkhazian and JPKF peacekeeping forces were, of course, formally independent. But the actions of the Russians in Abkhazia still counsel skepticism toward claims of Russian impartiality in South Ossetia. It is difficult to believe that two Russian peacekeeping forces would take fundamentally different approaches to their duty of impartiality.

It is difficult to overstate the importance of the impartiality issue. If the Russian JPKF battalion was not impartial, they did not qualify as peacekeepers under international law. And if they did not qualify as peacekeepers, it was perfectly lawful for Georgian forces to attack them. It is not a war crime to intentionally target combatants.

**DISPROPORTIONATE AND INDISCRIMINATE ATTACKS**

The OTP’s Request also discusses the possibility that both Georgian and Russian forces launched **disproportionate** and **indiscriminate** attacks during the conflict:

* In terms of Georgia, the OTP focuses on the use of tanks, Grad rocket systems, and cluster munitions to attack military objects located very close to civilians and civilian property in South Ossetia.
* In terms of Russia, the OTP focuses on the use of Grad rocket systems and cluster munitions near Georgian schools, hospitals, and civilian houses.

The Request emphasizes two things:

1. That such weapons may well be incapable of distinguishing between military objective and civilian objects in such situations.
2. That even when the weapons were used in a discriminate manner, they may well have caused disproportionate civilian damage.

Ultimately, however, the OTP concludes that at this point in time there is simply not enough information to reach a definitive conclusion.

The OTP could, of course, change its mind the investigation develops. So I want to offer a few comments on the law governing indiscriminate and disproportionate attacks.

**A. Conflict Qualification**

To begin with, it is important to note that the war crime of launching a disproportionate attack, Art. 8(2)(b)(iv) in the Rome Statute, applies only in IAC. The war crime simply does not apply in NIAC.

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That’s important. Recall that the conflict between Georgia and South Ossetia can be qualified as an IAC only if Russia did, in fact, have overall control of South Ossetia’s forces. If it did not have overall control, then the Georgia/South Ossetia conflict was a NIAC, not an IAC – and Georgian soldiers could not be charged with launching disproportionate attacks against South Ossetian military objectives. Such attacks would simply not violate the Rome Statute.

Perhaps ironically, though, Russia’s overall control of South Ossetia’s forces is irrelevant to whether Russian soldiers could be charged with launching disproportionate attacks. Regardless of the status of the conflict between Georgia and South Ossetia, the conflict between Russia and Georgia was an IAC – as I noted earlier, an IAC exists whenever one state uses force against another state. Russian soldiers, therefore, could legitimately be charged violating Art. 8(2)(b)(iv) of the Rome Statute.

**B. Does Indiscriminate = Intentional?**

Finally, let me turn to indiscriminate attacks. The first thing to note is that launching an indiscriminate attack is not itself a war crime under the Rome Statute. That’s why the OTP discusses Art. 8(2)(b)(ii) instead, the war crime of *“[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives.”*

**[SLIDE]**

But this raises a difficult question: is launching an indiscriminate attack – one that relies on a weapon system that cannot distinguish between military objectives and civilian objects – the same as “intentionally directing attacks against civilian objects”? The OTP believes that it is – but I’m not so sure. Nothing in the OTP’s discussion of indiscriminate attacks indicates that either Russia or Georgia deliberately targeted civilian objects. The suspicion is that Russia and Georgia correctly targeted military objectives but used weapon systems – Grad rockets, cluster munitions – that were not precise enough to avoid also hitting civilian objects. That does not seem like an intentional attack on civilian objects.

Indeed, the Elements of Crimes – a document adopted at the first Assembly of States Parties to help the ICC’s judges interpret the crimes in the Rome Statute – supports precisely that analysis. Here are the three substantive elements of Art. 8(2)(b)(ii):

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Element 3 makes clear that it is not enough for a perpetrator to accidentally strike non-military objectives because he is using an indiscriminate weapon; to be responsible for the war crime of “intentionally directing attacks against civilian objects,” the perpetrator must launch the attack subjectively desiring to strike non-military objectives.

If the Elements of Crimes are right, the OTP would have a very difficult time proving a violation of Art. 8(2)(b)(ii). As I noted, the OTP has not claimed that either Russians or Georgians subjectively desired to attack civilian objects.

**WHAT’S NEXT?**

So those are some of the key legal and evidentiary issues raised by the OTP’s Request. The issues are not critical now, at the pre-investigative stage. But they will become critical if and when the OTP brings charges against actual suspects.

It is difficult to predict at this point whom the OTP may charge and what the charges may be. The OTP’s list of suspects and what it considers the most serious incidents during the conflict is – for obvious reasons – confidential.

It is safe to say, though, that the OTP faces a fundamental dilemma. In terms of feasibility of investigation, Georgia’s attacks on Russian peacekeepers are the obvious starting point. The OTP can probably expect at least some cooperation from the Georgian government, given the new regime and Georgia’s obligations under the Rome Statute.

But those are precisely the war crimes the OTP says Russia is genuinely investigating – at least as of now. So unless that changes, the OTP would be unlikely to prioritize Georgia’s attacks on peacekeepers.

The most likely OTP target, therefore, is almost certainly South Ossetia’s forcible transfer of ethnic Georgians, which the OTP says neither Russia nor Georgia is genuinely investigating. But the OTP will have a very difficult time investigating that crime, just as Georgia has:

1. It is unlikely to gain access to South Ossetian territory.
2. Russia will be very unlikely to cooperate with any attempt to investigate forcible transfer, especially given the OTP’s emphasis on its overall control of South Ossetian forces. And Russia, unlike Georgia, has no obligation to cooperate with the Court, because it has not ratified the Rome Statute.

We will have to wait and see how the OTP resolves that tension. Nevertheless, it is quite likely that at some point Georgia and the ICC will want to prosecute the same suspect – most likely a Georgian, but perhaps a South Ossetian or Russian. What happens then?

This question turns on the **principle of complementarity** – the idea that states, not the ICC, should have the first opportunity to prosecute a suspect accused of an international crime. Under the right circumstances, the ICC would have to defer to a Georgian prosecution. So let me offer three final thoughts on how Georgia could best ensure that it, not the ICC, would win any complementarity battle.

First, Georgia would need to prosecute *“substantially the same conduct”* as the ICC. The Appeals Chamber made clear in the *Gaddafi* admissibility decision that a case will be admissible at the ICC – that the ICC can take a prosecution away from a state – unless the national investigation generally mirrors the OTP’s investigation.

* **Example**: Assume that the ICC has charged a suspect with killing civilians in Gori. If Georgia charged that same suspect with committing rape in Gori, the ICC would be entitled to take the case away. Indeed, the ICC might be entitled to take the case away even if Georgia investigated the suspect for killing civilians in Eredvi instead of in Gori.

I have consistently criticized this “same conduct” test for giving the ICC too much power over domestic prosecutors. In my view, as long as a state is pursuing charges that are no less serious than the ICC’s charges, it should not matter whether the state focuses on different conduct. Unfortunately, the Appeals Chamber disagrees with me!

This consideration would obviously limit the flexibility of Georgian prosecutors. The **second** consideration, by contrast, would work in favour of Georgia: as long as a State prosecutes substantially the same conduct as the ICC, it does not have to charge a suspect with an international crime; a serious domestic crime will suffice.

* **Example**: if the ICC is investigating a suspect for the war crime of murder, Georgia could prosecute the suspect for “ordinary” murder instead.

The PTC made this clear in the *Gaddafi* case:

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**Third**, and finally, it is very important to note that the ICC could not take a case away from Georgia simply because it believed the suspect would not receive a fair trial. The failure of a domestic criminal-justice system to live up to international standards of due process does not make a case admissible at the ICC. The Appeals Chamber made that quite clear in the *al-Senussi* case:

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Human-rights groups don’t like this position, but it is absolutely correct given the text, context, and drafting history of the Rome Statute. States specifically refused to adopt an Italian proposal for Art. 17 that would have permitted a national prosecution to proceed only if *“the said investigations or proceedings… were or are conducted with full respect for the fundamental rights of the accused.”*