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INTERNATIONAL CRIMINAL COURT AND INVESTIGATION INTO THE SITUATION IN GEORGIA

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ABSTRACT

Over three years have passed since the Pre-Trial Chamber of the International Criminal Court (ICC) has authorized Prosecutor Fatou Bensouda to open investigation into crimes allegedly committed during the 2008 conflict between Georgia and Russia. The matter had already been subject to a preliminary examination by the ICC Office of the Prosecutor (OTP) since 2008.

In the meantime, human rights defenders have carried out numerous efforts to seek justice for the victims. However, these efforts turned out mostly ineffective as national investigations in Georgia and Russia failed due to political unwillingness and inability to prosecute potential perpetrators. In addition, no progress had been made in regional human rights courts despite hundreds of complaints lodged to the European Court of Human Rights on behalf of thousands of victims from all sides.

The 2008 conflict appeared to be an issue that was too big and serious to be confronted at the local or even regional, level. Consequently, the ICC investigation had become the only viable option for the victims to seek justice. After almost eight years of waiting, the ICC investigation has brought a hope for victims that justice would prevail. It was perhaps a pivotal moment for the court as well because this was the first time the ICC was going to investigate a situation outside Africa. It was also the first time the court was going to deal with an international armed conflict involving a powerful UN Security Council member state, which is not a party to the Rome Statute.

Over three years have passed since the opening of the investigation. During this time the ICC has not been able to issue an arrest warrant against any individual from either side. This is a considerable delay compared to any previous situation that the court has dealt with.

Last year, the international community celebrated the 20th anniversary of the Rome Statute, marking a significant achievement of establishing a permanent institution to deal with the world's most horrendous crimes. At the same time, the victims of the 2008 conflict commemorated 10 years since the violence occurred. Throughout the last decade, many victims have passed away, thousands of displaced people are living in dire conditions, and civilians are living in fear. Families of the lost ones and the remaining victims are losing hope that they will ever get justice.

The following article aims to shed light on the ICC investigation of the Georgia Situation. It will entail discussion on the legal basis and scope of the investigation, unique nature of the process, accompanying challenges, progress made and the most recent developments. By doing so, hopefully it can help to raise awareness amongst the international community and to bring the much-needed attention to the situation, while there is still time to make the ICC investigation meaningful for those who are supposed to be in the center of the process.

INTRODUCTION

In October 2015, the Prosecutor Fatou Bensouda of the International Criminal Court (ICC) submitted a request¹, pursuant to article 15(3) of the Rome Statute, to the Pre-Trial Chamber I for authorization to open investigation into the Situation of Georgia.

The ICC investigation stems from crimes that allegedly occurred during the 2008 conflict in South Ossetia – a region of Georgia that had been under the control of pro-Russian separatists since the early 1990s. A fresh outbreak of hostilities between South Ossetian separatists and Georgian forces led to Russian military intervention in August 2008, with Georgian troops forced to retreat after a week of fighting. During the conflict, hundreds of people were killed and both sides were accused of using disproportionate force that endangered civilians. Human rights groups reported that ethnic Georgians living in South Ossetia were deliberately pushed out of their homes by a campaign of terror that included scores of murders and around 27,000 have been unable to return since. Georgian forces were also accused of attacking Russian troops who had been deployed in the region as peacekeepers under an earlier peace agreement with the separatists.

ICC's Office of the Prosecutor (OTP) has been conducting a preliminary examination into the Situation since August 14th of 2008. On the basis of the gathered information, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Georgia in the context of the armed conflict. One of the latest phases of the

OTP's assessment examined whether effective national investigations were taking place in Georgia and Russia. The OTP has concluded that obstacles and delays hampered investigations in both countries and that an ICC investigation was necessary as national proceedings in Georgia have stalled.

The OTP's request to the PTC contains 9 confidential, ex parte and 11 public annexes, including the letter² of Georgia's Minister of Justice, dated 17 March 2015. The Prosecutor cited this letter as a confirmation of the Government of Georgia that the domestic proceedings have indefinitely suspended and that there is no prospect of further progress domestically "until the threats disappear". The latter refers to the Government's claim that there is "a fragile security situation in the occupied territories in Georgia and in the areas adjacent thereto, where violence against civilians is still widespread"³. According to the Prosecutor, conditioning of national proceedings on future and hypothetical factors, in particular those that are external to the control of competent authorities, would be too abstract and remote⁴. Consequently, the Prosecutor has interpreted Georgia's response as indefinite suspension of national proceedings and addressed the Pre-Trial Chamber to authorize her office open investigation into the Situation.

Following the request, the Prosecutor has in compliance with rule 50, on 13 October 2015, provided a notice⁵ to victims of alleged war crimes and crimes against humanity committed in Georgia from the period of 7 August 2008 until 10 October 2008 that she has requested authorization from the Pre-Trial Chamber to open investigation into such alleged crimes and that pursuant to regulation 50(1) of the Regulations of the Court, they have 30 days to make representations to the Chamber.

By the end of 2015, the ICC had received representations by and/or on behalf of over 6000 victims from all three sides, including Georgia, Russia, and South Ossetia. The victims supported the prosecutor's decision and some have requested widening the scope of investigation to include additional crimes within the court's jurisdiction.

On January 27, 2016, Pre-Trial Chamber I authorized⁶ the prosecutor to open investigation and expanded the scope of the investigation to include additional crimes allegedly committed within the jurisdiction of the ICC.

The pre-trial chamber's decision signifies a very important first step in recognizing the harm suffered by the victims and the fight against impunity for the crimes committed in relation to the 2008 conflict. According to the PTC decision, such crimes include: a) the crimes against humanity of murder, forcible transfer of population, and persecution, and b) war crimes, including attacks against the civilian population, willful killing, intentionally directing attacks against peacekeepers, destruction of property, and pillaging allegedly committed in the context of the conflict between July 1 and October 10, 2008.

In addition, the chamber has taken into consideration the Georgian victims groups' request to broaden the scope of investigation. As a result, it decided not to limit investigation to the aforementioned crimes, but to allow the prosecutor to examine all crimes allegedly committed within the jurisdiction of the ICC, including sexual violence, arbitrary detention of civilians, and torture of prisoners of war.

A UNIQUE INVESTIGATION

This is the first time that the court has launched a full-scale investigation of crimes emerging from a conflict outside the African continent. For almost thirteen years the ICC has been operating in eight African countries, thus acquiring a certain level of expertise in the region. However, the ICC has been strongly criticized for opening investigations only in Africa. While the trend has now been broken, this new development also brings up a big question: what happens next?

It is hard to compare the situation of Georgia to others with an aim to predict the outcome of the investigation. Of the eleven ongoing investigations, five relate to member state referrals in the context of internal armed conflicts between the government and rebel groups. The two referrals from the UN Security Council relate to the civil uprising against Gaddafi regime in Libya and the armed conflict among the Sudanese government, militia, and rebel forces in Darfur. Three of the *proprio motu* situations, which the ICC Prosecutor initiated independently, relate to post-election violence in Kenya, Cote d'Ivoire and Burundi.

In Georgia's situation, which was also authorized as a *proprio motu* investigation, the court is investigating crimes committed during an international armed conflict for the first time. As noted earlier, the investigation covers the 2008 conflict between Georgia and Russia. The former has been an ICC member since 2003 and officials have previously made statements demonstrating their willingness to cooperate with the investigations. The latter is a permanent member of the UN Security Council and has already declared of its intentions not to cooperate with the ICC, culminating in the withdraw of its signature from the Rome Statute in November 2016⁷.

In addition, in Georgia there was a gap of over seven years since the crimes were committed and the opening of the ICC investigation. In contrast, in most of the court's previous experiences, an investigation was opened just one to two years after crimes occurred. Such considerable time delay creates problems for the OTP due to a potential loss and contamination of evidence.

The situation in Georgia is unique in many ways and brings new challenges related to a lack of knowledge of the new region, inexperience of dealing with international conflict, and non-cooperation of a very powerful non-member state involved in the conflict.

The ICC investigation in Georgia will be an important test case for other situations, and the way it proceeds will tell much about what could happen in Ukraine or Afghanistan, as well as in Palestine or Iraq, which are currently under preliminary examination by the OTP.

CHALLENGES

Many challenges remain. This is the first time an ICC investigation has brought it into a potential confrontation with a powerful, UN Security Council member state that is not a party to the Rome Statute. In addition, the separatist administration of South Ossetia is only recognized by Russia and a handful of other states, and it remains under the political sway of Moscow, raising further difficulties for the investigation. Despite the ICC's hopes on Russia's cooperation during the early stages of investigation, Russia has shown no signs of cooperation. The spokeswoman of the Foreign Ministry, Maria Zakharova has declared that Russia is disappointed with the chamber's decision to support the case. By the end of 2016, Russia has withdrawn signature from the Rome Statute, clarifying any doubts that court officials might have had about the cooperation. Due to these developments, there is a general fear among ethnic Georgian victims, that the court might not be able to arrest alleged perpetrators as Russia does not cooperate with the investigation.

Georgia, meanwhile, has been a member of the ICC since 2003 and has an obligation to cooperate fully with the court in this investigation. This does not automatically guarantee effective cooperation between the two throughout the entire process. For example, execution of arrest warrants for Georgian citizens may become problematic if the investigation progresses to this stage. So far, however, the official statements from Georgia are rather supportive and gives one hope that the cooperation will continue in this spirit. The pre-trial chamber's decision to proceed with the investigation was widely welcomed by Georgian victim groups, as well as by high level officials including the former Prime Minister Giorgi Kvirikashvili and the Minister of Justice, Tea Tsulukiani. The latter has emphasized the importance of the chamber's decision and stated that Tbilisi will continue to actively cooperate with the court.

The decision to open an investigation has implications for the work of civil society, victims, and the local media in both Russia and in Georgia. Neither country has been subject to an ICC investigation before. Until now, this has remained a distant issue for the region, perceived only as an 'African problem.' As a result, there is locally a very little knowledge of past experiences and of the international context. This increases the risk of undermining the overall process and its outcomes.

Victims' groups have a huge role to play as the investigation further progresses. The past experience shows that civil society organizations are the key gate openers for different sections of the ICC, including OTP and Outreach. Donor support from the initial stage is essential to contribute to the court's investigations and to fill in the gap created by the general lack of knowledge and experience, as well as by lack of funding and coordination in this area.

Managing public expectations and balancing the timeframe are two of the biggest anticipated challenges. Communication with victims' communities and their engagement is challenging, especially when it comes to individual examination of their stories. Providing incorrect information and creating high expectations will surely damage the process and undermine respect for international justice, rule of law and culture of accountability for grave crimes.

Understanding how to engage in the process was particularly problematic for civil societies in other ICC Situations. Lack of knowledge on how to deal with different sections of the Court, in particular with the OTP, and putting lots of expectations on the Court turned out devastating for the civil society.

Capacity building at the local level is necessary, and, ideally, there should be public debates and proactive information sharing to educate victims and the general public on the issues. In this regard, much will depend on donor's assistance to victims' groups to ensure adequate information, protection and participation before the court.

Lastly, Georgia is located in a highly volatile region, where a number of secessionist conflicts have been festering for decades and temptation to resolve them by force is high, including a temptation to change the status quo in a swift military operation. In this regard, the ICC investigation in Georgia and possible accountability for grave international humanitarian law violations could serve as a deterrent for future conflicts and advance greater respect for international justice and the rule of law.

LITTLE PROGRESS

During the first year of the investigation, the ICC appeared to have little engagement in the Georgia situation. The country and the region were unfamiliar to the court, as much as the institution of the ICC was unfamiliar to Georgians. Most of the people within the court involved in the investigation had no knowledge or experience working in this region. This has resulted in various misconceptions from the court's side about the new situation and delays in the investigative process. For almost a year, there was scant evidence that the OTP had undertaken any activities on the ground.

This improved during the second year of the investigation. During this time, the OTP set up a team of investigators and launched various activities. However, due to the confidential nature of these activities, the public did not get sufficient information about the OTP's efforts.

Last year, civil society organizations have visited the victim settlements throughout Georgia. The goal was to provide information to the victims on the ICC's investigation, while at the same time, gather information on their current needs and living conditions. The majority of victims that the organizations have interacted with have not heard about the ICC investigation. This is largely because of the court's failure to provide outreach activities throughout the last three years.

Furthermore, there appears to be no involvement from the Trust Fund for Victims (TFV) which could help make the process more meaningful to those harmed in the conflict by initiating assistance mandate. As defined in Rule 85 of the Rules of Procedure and Evidence, TFV's assistance mandate enables victims of crimes and their families who have suffered physical, psychological

and/or material harm as result of war crimes, to receive assistance separately from, and prior to, a conviction by the court. Such support may include physical and psychological rehabilitation, as well as material support to address the care and rehabilitation and to improve the economic status of victims as a means to assist in their recovery.

TFV's engagement at this stage might be the crucial element for the victims of the Georgia Situation as it is not linked to a conviction, which might be particularly problematic due to the non-cooperation challenges discussed above. However, even after a decade of the conflict, TFV still has a long way to go before reaching the affected communities, starting with its needs assessment which is a pre-requisite to the implementation of the assistance mandate.

After two years of opening the investigation, the ICC has managed to open a field office in Tbilisi. However, the office has remained largely inoperative throughout 2018 as it consisted of only a head of the office and a temporary staff member, both unable to speak Georgian. This has caused further delays in the process, once again leaving the victims and public at large in an informational vacuum.

The lack of outreach and incapacity of the country office has been fused with silence from the OTP's side regarding the investigative activities. Due to the confidential nature of the investigation there is little known about the activities being implemented by the prosecutor's office. This has led to further ambiguity in the process, providing space for misinterpretation and incorrect information about the ICC, damaging its credibility.

In the context of the recent and highly contested presidential elections, Georgian politicians have been trading accusations about who is responsible for the 2008 armed conflict with Russia and about improperly influencing the ICC's investigation. Although a lack of information is a root cause of this situation, the ICC has repeatedly failed to provide updated, neutral information about the Georgian investigation. In the current, tense political environment, the ICC's continued silence puts it at risk of becoming a delegitimized and politicized tool for destabilization in Georgia.

The recent discussions have revealed that the public is not well informed about the ICC proceedings in Georgia. The public does not know the details of the ICC process - not even basic facts, such as who is under investigation or for what acts. This ignorance of the ICC proceedings is not limited to the general public, but also extends to government, academia, and legal communities.

For example, many, if not most, government officials have made statements excluding Georgian forces as part of the investigation. This is untrue, as Georgian forces stand accused of alleged war crimes against Russian peacekeepers and of alleged indiscriminate and disproportionate attacks against civilian targets. Senior officials and politicians have also mixed up the ICC investigation with proceedings⁸ initiated at the International Court of Justice (ICJ) by the former Government of Georgia against the Russian Federation in 2008.

The ICJ proceedings finished in 2011, when the ICJ found that it had no jurisdiction to decide the dispute. But the ICJ is also located in The Hague, and the ICC has not conducted any outreach to explain the difference between the courts and their respective proceedings. Therefore, the Georgian public confuses the two processes and often thinks there is an inter-state claim being discussed at the ICC.

Public information and outreach activities could help to avoid the spread of misinformation, and could fill in the informational vacuum and minimize misinterpretations of the process from various stakeholders. Unfortunately, the ICC field office has remained detached and appears to ignore local developments. There follows a similar pattern of silence from the OTP and the Trust Fund for Victims. This has contributed to extreme politicization of the ICC investigation, to the extent that the whole process now stands at the risk of losing legitimacy. There is a risk that this may be used to foment disagreement within the armed forces and destabilize the country.

Senior officials from the OTP and the ICC Registrar, Peter Lewis, made statements during their visit to Tbilisi in last October. OTP representative Phakiso Mochochoko has assured Georgians that “the process will be free from political influence and the evidence collected by the OTP is aimed at revealing responsibility of individuals, and not on who started the war.” According to Mochochoko, “political opinions are not relevant for the OTP’s aims.” According to the Registrar, statements made by politicians must be verified before being considered evidence during the trial.

Despite these comments, the statements of politicians have an enormous effect on the ongoing process and need to be taken seriously by the court. There is a critical need for information as the discussions continue and the way the investigation proceeds will have an effect on the political developments within the country. If the ICC continues ignoring the local developments, it may risk becoming irrelevant and an untrustworthy institution for Georgian public.

ENDNOTES

1. https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF
2. https://www.icc-cpi.int/RelatedRecords/CR2015_19548.PDF
3. Ibid, para. 1, p.2.
4. OTP Request for authorization of an investigation pursuant to article 15, para. 303, available on: https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF
5. https://www.icc-cpi.int/iccdocs/otp/Article_15_Application--Notice_to_victims-ENG.pdf
6. https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF
7. <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>
8. <https://www.icj-cij.org/en/case/140>