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# REPORT

THE IMPUNITY SYNDROME  
IN THE CAUCASUS  
The Situation of the  
Georgian-Russian conflict  
of August 2008



NORWEGIAN HELSINKI COMMITTEE

## **Preface**

The Norwegian Helsinki Committee (NHC) has worked closely with Georgian and international human rights groups in order to document crimes committed during and after the 2008 war between the Russian Federation and Georgia, and monitor domestic investigations of these crimes. Three Georgian human rights groups have contributed with information to this report, namely *Article 42 of the Constitution*, *the Georgian Young Lawyers' Association (GYLA)* and *The Georgian Human Rights Center (HRC)*. However, responsibility for the analyses and conclusions rests with the NHC.

Data for the report was mainly collected in October 2011. The report was written by Simon Papuashvili, and edited by Aage Borchgrevink and Gunnar M. Ekeløve-Slydal.

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# Background

The Norwegian Helsinki Committee (NHC) has been following events related to the armed conflict of August 2008 between the Russian Federation and Georgia since the hostilities erupted. The purpose of the NHC efforts has been twofold, namely to:

- a) Provide comprehensive documentation of grave human rights violations and violations of the norms of humanitarian law; and
- b) Advocate, together with the Georgian civil society, for accountability for the documented crimes in order to fight impunity and ensure redress for victims of such crimes.

In September and October of 2008 the NHC, together with Georgian civil society organizations, interviewed over 200 victims and witnesses in temporary internally displaced persons (IDPs) camps and conflict-affected villages and collected photo material suggesting a pattern of purposeful property destruction in Georgian villages.

Since the NHC was unable to obtain permission to access the Russian controlled territories the work was mostly done in Georgian controlled areas. An exception was the village of Disevi located close to the administrative boundary, which NHC researchers were able to visit in October 2008.

The evidence collected clearly indicated that two categories of crimes falling within the jurisdiction of the International Criminal Court (ICC) – war crimes and crimes against humanity – were committed during and in the aftermath of the August 2008 armed conflict.

Initial findings, based on witness and victim statements and photo materials, were handed over to the Office of the Prosecutor (OTP) of the ICC in November 2008 during the 7th session of the Assembly of States Parties of the ICC (ASP).

In November-December of 2010 the NHC carried out new research, the aim of which was to evaluate if the investigation initiated by the Georgian Government in relation to the August 2008 events met the criteria laid out in the Rome Statute. In order to assess the nature of the on-going investigations by the Georgian government, the NHC decided to make a study based on a three-pronged approach. In addition to 1) asking the Georgian government for information on the status of the investigations, 2) research teams were sent to some of the villages in the Gori and Kareli regions to ask witnesses and victims what investigative steps had been taken, and 3) through a telephone survey 244 applicants to the European Court of Human Rights (ECHR) in

cases related to the 2008 war were contacted and asked about the investigative steps that had been taken in their cases.

Since the Georgian government had not provided a response to the requests of the NHC, the research was completed by collecting and verifying information through interviews of victims and witnesses. Research was done jointly with the Georgian partner organizations The Georgian Young Lawyers' Association (GYLA), Article 42 of the Constitution and the Georgian Human Rights Center, and the report was published jointly by the NHC and the three Georgian partners.

Information provided by the survey of the ECHR applicants and site visits indicated an absence of comprehensive investigative efforts by Georgian authorities; demonstrating that Georgian authorities are partly unable and partly unwilling to conduct an effective investigation into international crimes allegedly committed during and after the August 2008 war.

The findings of the 2010 research were presented to the OTP in The Hague in May 2011 in the report *Unable or unwilling? Georgia's faulty investigation of crimes committed during and after the Russo-Georgian war of August 2008* (NHC Report No 2 2011, available at [nhc.no](http://nhc.no)).

## Follow-up visit

The NHC conducted a follow up visit in October 2011 to clarify if there had been changes in the status of the national investigative process, and to assess the expectations of the local civil society in relation to the outcome of domestic proceedings as well as the possible impact of ICC investigation on the local socio-political environment.

The mission included meetings with government officials (Ministry of Justice and Office of the Chief Prosecutor); series of spot checks in some of the villages possibly covered by the on-going investigation; interviews with victims and witnesses; and consultations with local civil society organizations.

The NHC has held a meeting with representatives of the Georgian Justice Ministry and the Office of the Chief Prosecutor together with the Coalition for the International Criminal Court (CICC) and the Georgian Young Lawyers' Association (GYLA) at the end of October. The meeting was followed by a written communication through which the NHC asked Georgian authorities to provide clarifications on some of the key issues that were also raised in previous communications. More specifically, NHC requested the Office of the Chief Prosecutor to provide the answers to the following questions:

1. What specific steps have been taken in relation to ICC crimes allegedly committed during and after the August 2008 armed conflict?
2. In what geographic locations have Georgian investigative authorities been carrying out investigative activities and what were the obstacles in terms of collecting the evidence?
3. Have there been any efforts to cooperate with Russian authorities on the matter of investigation of ICC crimes committed during and after the August 2008 armed conflict?
4. Is the evidence collected by Georgian authorities sufficient enough to lead to prosecutions in a foreseeable future?
5. Considering difficulties underlined by the Ministry of Justice and the Office of the Prosecutor in terms of both documentation and documentation – does the Government of Georgia intend to refer the situation to the International Criminal Court?

As for the investigative steps undertaken in the framework of the criminal case file in question the Office of the Chief Prosecutor has clarified that it interviewed up to 4,500 witnesses, including servicemen of the Georgian Armed Forces and victims of crimes committed during and after the armed conflict. Moreover, according to the Office, it also conducted on-site examinations in 30 locations, assigned around

200 forensic examinations in diverse field of expertise and sought evidence in open sources. The investigative process among others includes satellite sensing imagery analysis. The Office did not specify the exact locations where the investigative actions like on-site investigations have been carried out.

Problems of communicating crime reports, particularly towards victims and witnesses residing in the Russian controlled territories and actual access to them, has been pointed out as one of the difficulties that are delaying the process of investigation. Moreover, the Office of the Chief Prosecutor has identified unwillingness of victims and witnesses to actively cooperate with the investigation as another obstacle for the smooth development of investigations.

In relation to the question of cooperation with Russian authorities, the Office of the Chief Prosecutor underlined that there is a lack of willingness to cooperate from the Russian side. Requests from Georgian authorities were either dismissed on legally invalid grounds or remained without response.

In the same communication, the Office of the Chief Prosecutor clarified that it has identified a number of possible offenders, though it finds it premature to file charges until investigations come to a conclusion. The Office once again reiterated that investigations are ongoing, and aimed at adding more evidence, including verification of identities of some possible offenders.

It seems from the contents of the communication that referral of the situation to the ICC is not being considered, at least not by the Office of the Chief Prosecutor. Nonetheless, the Office stresses that Georgian authorities will not bar ICC prosecutions by proceeding with their own indictments if the ICC decides to intervene.

# Renewed efforts to verify the effectiveness of domestic investigations

The only document available to the NHC that gave a concrete indication of where investigative steps have been undertaken by the Georgian authorities, is a letter of the Office of the Chief Prosecutor, dated 18 March 2009, in response to a request by GYLA.

The document specifies that investigative activities like examination of crime scenes have taken place in various locations including Gori and in the following villages: Tseronisi, Abisi, Ruisi, Berbuki, Dvani, Megvrekisi, Tirdznisi, Tergvisi, Karaleti, Garedjvari, Dzevera, Shertuli, Kidznisi, Nikozi, Avlevi, Ahkaldaba, Shindisi, Khviti, Sakasheti, Ghogheti, Ditsi, Khordi, Arbo, Knolevi, Ptsa, Variani, Tkviavi, Atotsi, Ergneti and Berbuki.

In mid-October NHC researchers visited the majority of the above listed villages to verify if such investigative steps have in fact been carried out, when they were carried out and by whom. Verification was done through targeted semi-structured interviews with local residents.

An important aspect considered during the interviews was the high probability of interviewee bias or confusion caused by the memory loss associated with passage of time as well as by the fact that the population still living in the conflict affected areas as well as the IDPs living in temporary housing, have been contacted by various institutions, among which are organizations administering humanitarian assistance like CARE or UNHCR as well as local civil society organizations who are providing legal assistance to the victims of the conflict.

Considering that representatives of these institutions have conducted several interviews, which could have been perceived as an interrogation by the local residents, it was considered important to clearly distinguish between the contact made by the investigative authorities and any other type of contact made by the above listed actors.

Such distinction was possible by administering targeted semi-structured interviews, during which the researcher asked questions specially designated to clarify the type of contact previously made with the victims and witnesses by various actors mentioned above.

Potential interviewees were identified based on the referrals of the villagers or IDP settlement inhabitants. The aim was to locate the most well-known, clear cut cases in relation of which the probability of investigative steps being undertaken was relatively high.



Overall NHC researchers have interviewed over 60 individuals both in the above listed villages and in IDP settlements in the outskirts of Gori and Tserovani. From the individuals interviewed only seven could recall having been interviewed by what seemed to be representatives of the investigative authorities. The interviewees were unable to recall if the authorities were representatives of the office of the prosecutor, police or any other department of the Ministry of Interior.

In all seven cases the contact was made in the period following the August 2008 war (within three months). Interviews were the only form of investigative activity that the interviewees could recall. No second contact had been established by the investigative authorities in the seven cases.

In addition to site visits the NHC researchers also held meetings with its three partner civil society organizations working on war crimes issues and providing legal aid since 2008 (the Georgian Human Rights Centre, GYLA and Article 42 of the Constitution). It appears that efforts of these organizations to obtain information regarding the status of the investigative proceedings related to the 2008 conflict have been unsuccessful. The requesting organizations either did not receive a reply or received only general information which was not sufficient to assess whether the investigation is progressing or not.

# Serving the interests of justice?

Based on the criteria defined by a *Policy Paper on the Interests of Justice* by the Prosecutor of the ICC,<sup>1</sup> it can be argued convincingly that opening an investigation by the ICC would not be incompatible with the interests of justice in case of the August 2008 situation. The ICC Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice. It is clear from the Policy Paper that “only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice”.<sup>2</sup> There are no such circumstances related to the situation in question.

Under the explicit criteria to be considered the Policy Paper lists the following three factors:

- a) The gravity of the crimes;
- b) The interests of victims; and
- c) The particular circumstances of the accused.

In determining whether the situation is of *sufficient gravity*, the Prosecutor of the ICC considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact. Considering these factors there is no question that the events of the August 2008 war are sufficiently grave to be examined by the ICC.

The conflict has led to the deaths of hundreds of civilians; thousands have lost their property and have been permanently or temporarily displaced. In addition, both parties to the conflict have resorted to means of warfare which are incompatible with the requirements of international humanitarian law, including use of torture, purposeful persecution of civilians, indiscriminate use of force and use of prohibited weapons.

The *interest of victims*, in the given situation, does not seem to constitute an obstacle for ICC investigation either. While the primary considerations for most of the victims are their basic needs, like immediate physical security, housing and food, the absence of justice further exacerbates fears of reliving painful events that the local population had already undergone several times during the last twenty years. Therefore, ending impunity is greatly in the interests of victims. Impunity has characterized the numerous armed conflicts across Caucasus during the last 20 years. Involvement by the ICC could potentially be a game changer in the region.

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1 Available at: <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>

2 Op. Cit., page 3.

Under the *particular circumstances of the accused* the Policy Paper presupposes situations where for example “international justice may not be served by the prosecution of a terminally ill defendant or suspect who has been the subject of abuse amounting to serious human rights violations.”<sup>3</sup> In the given case, considering that many of the alleged perpetrators continue to occupy important political positions, and in some cases (like South Ossetian paramilitary commanders have been promoted for their participation in committing atrocities, the particular circumstances of the possible perpetrators do not seem to constitute an obstacle to ICC investigation.

The OTP Policy Paper refers to two other potential considerations under articles 53(1) (c) and 53(2)(c) of the Rome Statute: a) the availability of other justice mechanisms; and b) peace processes.<sup>4</sup>

So far local justice mechanisms have not appeared to be effective as it was demonstrated in the NHC report *Unable or Unwilling*, and as argued by this paper. As for international human rights mechanisms, like the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR), they are substantially different in nature, since they concern the issue of state responsibility not individual criminal responsibility. While just satisfaction sought through the ECHR for example, can be an important means of redress for victims, it has limited deterrent effect for the future reoccurrence of grave atrocities in question.

The only existing format for a peace and reconciliation process between Georgia and Russia are the so called *Geneva Talks*. Discussions are held in two working groups with the first one discussing security related issues and the second humanitarian issues.

Both parties agree that no progress have been made and that the talks did not in any way contribute to the resolution of the remaining serious problems. Therefore, within the meaning of the Rome Statute, there is no danger that an ICC investigation will jeopardize an existing peace process.

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3 *Op. Cit.*, page 7.

4 *Op. Cit.*, pages 7-9.

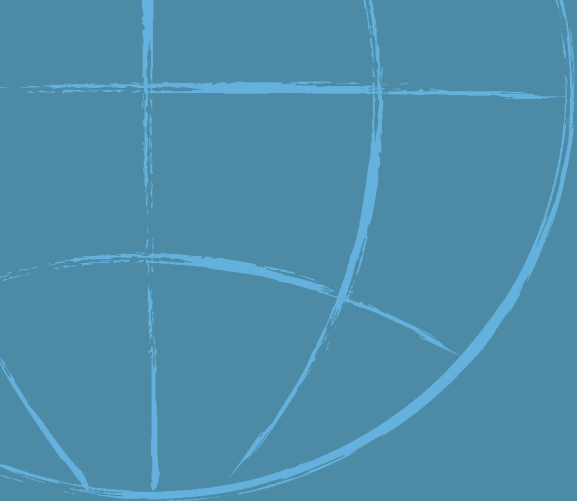
## Conclusions

The Caucasus region is one of the most fragile and complex regions in Europe. The line between war and peace is not stable, but dependent on composite local and global geopolitical factors. The region has experienced a number of armed conflicts since the early 1990s in which justice was neither sought nor found. The armed conflict of August 2008 between the Russian Federation and Georgia is no exception to this trend. It is a case of crimes without punishment.

While both Russian and Georgian authorities have formally opened investigations in relation to the August 2008 war, three years after the cessation of large scale hostilities, no prosecutions have been announced. Considering the practice of mutual recrimination and the overall atmosphere of politization of the investigations, it seems unlikely that that they will result in identification and punishment of key perpetrators in the years to come.

At this stage, it is in the general interest of justice, as well as in the interest of the victims, and, potentially, in the interest of regional stability, that a real and effective investigation is launched.

In light of this, the ICC has an important role to play. While the principle of complementarity must be respected, the Prosecutor of the ICC should at the very least require proof of progress in domestic investigations within a defined timespan.



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