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# REPORT

UNABLE OR UNWILLING?  
Georgia's faulty investigation  
of crimes committed during  
and after the Russo-Georgian  
war of August 2008



NORWEGIAN HELSINKI COMMITTEE

The Norwegian Helsinki Committee (NHC) has worked closely with many Georgian and international human rights groups in documenting and reporting about crimes committed during and after the 2008 war. Three Georgian human rights groups have contributed with research for this report, namely Article 42, Georgian Young Lawyers' Association (GYLA) and Georgia's Human Rights Center (HRC). However, responsibility for analyses and conclusions rests with the NHC.

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# Summary and Conclusions

Almost three years have passed since the armed conflict between Georgia and Russia in August 2008. Evidence from a wide range of sources indicates that grave crimes occurred during the conflict, including war crimes and crimes against humanity.

The International Criminal Court (ICC) has decided that these crimes fall under its mandate and is currently monitoring domestic investigations of crimes in Georgia and Russia<sup>1</sup>. If the Court finds that the parties are unable or unwilling to effectively investigate, the Court may assume jurisdiction and open an investigation. Although the parties claim that investigations are ongoing and effective, doubts persist about both their ability and willingness to effectively investigate.

As both parties are unable to investigate on the other's territory, and as they are unable to cooperate meaningfully with regard to the investigation, there are from the outset serious obstacles to an effective investigation. Another impediment is that at least one of the parties denies having committed any crimes, and both attribute responsibility for various grave crimes mostly to the other party. While Georgia has opened investigations in at least seven cases where the alleged perpetrators are Georgian servicemen, the position of Georgia that "the Georgian response to the Russian armed attack was confined entirely to its own sovereign territory, was reluctantly undertaken, and was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self defense" is not conducive to an unbiased and effective investigation.

In letters sent to GYLA from the Russian General Prosecutor's Office, it is stated that Russia only investigates crimes against Russian peacekeeping servicemen and Russian nationals. This approach would make the Russian investigation even more lopsided than the Georgian investigation, but is in line with Russian position on the war expressed in the Tagliviani Report: "the Russian side never attacked the local population or any civilian facilities."

Given these obstacles, domestic investigations can only proceed within very narrow parameters: Each on their own territory, each the other's crimes. Even within these parameters, however, there are grounds for concern that the authorities are not investigating effectively. Given the legacy of impunity in relation to armed conflict in the Caucasus, this is unfortunate, but not very surprising.

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<sup>1</sup> See for instance this press release from the Office of the Prosecutor in June 2010, [http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr551](http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr551)

This report looks at the state of Georgia's investigation. One section of the report deals with Georgia's legal obligation to investigate grave crimes, which is stated clearly in both domestic and international law. The next section describes the role of the ICC in relation to the 2008 war, and the Court's dealings with the state parties concerned. The court is monitoring domestic investigations. However, at some point it will have to decide whether or not it wants to get directly involved.

In addition to seeking out information from the authorities, in order to assess the Georgian investigation, research teams have conducted spot checks at some of the sites of alleged crimes in 2008, and interviewed 244 applicants to the European Court of Human Rights with complaints relating to the 2008 war. All of the applicants and other interviewees were alleged victims of Russian and South Ossetian perpetrators. Research was done in November and December 2010. The findings resulting from this three-pronged method of gathering information give grounds for certain conclusions.

The fact that the Georgian authorities mostly deny that war crimes may have been committed by their side, has blindsided the investigation from the outset. There are credible reports of war crimes committed by the Georgian side, especially during the attack on Tskhinvali in the period from 6 to 7 August 2008. Legal amendments to the General Administrative Code of Georgia introduced in July 2010 have curtailed public access to information about dealings with international tribunals, including the ICC, in a manner that seems to run against the idea of accountability for crimes and public scrutiny of the process of accountability. The amendments may have been the reason that Georgian justice authorities have not responded to our requests for information and meetings in the fall of 2010.

The fact that Georgian investigators are unable to access South Ossetia, where the most serious crimes were committed, and investigate there and in Russia, where arguably the main perpetrators of crimes are located, makes Georgia unable, even if it was willing, to effectively investigate some of the most serious allegations stemming from the 2008 war.

Moreover, the results from interviewing witnesses to and victims of grave crimes who had submitted complaints to the European Court of Human Rights, and who had in effect some of the most compelling and well-documented cases relating to international crimes, give grounds for serious doubts about the nature of the on-going Georgian investigation.

- Lack of transparency/updated information about the investigation. None of the respondents reported receiving news about the progress of the investigation.
- Lack of investigative measures, such as crime scene investigations, collecting forensic and medical evidence, etc. Even granted that steps may have been taken

- without the interviewees being informed, only 3% reported that other steps than questioning had taken place, and no one knew about any crime scene investigation.
- Low number of applicants (26%) had been contacted and questioned by the police. The group that contradicts this general scheme, are the hostages, who were held together in a prison in Tskhinvali, South Ossetia, for most of August 2008. The hostage situation was a high profile media case at the time, and most of these people (94%) were interviewed immediately upon their return to Georgia. If one excludes this group, only 13% of the other applicants report being contacted by police.
  - The crimes prioritized by the investigation are 1) hostage taking (with 94% of interviewees contacted and questioned), 2) killings (37% of the applicants with right to life complaints reported being contacted), 3) torture/inhuman treatment (with 5% of applicants contacted), and lastly 4) forced eviction/property loss (3% contacted).

Given that most of these 244 applicants probably are not only victims, but also witnesses to grave crimes, and that one would expect at least some of them to have useful information concerning perpetrators, both Russian military and South Ossetian paramilitary commanders, soldiers and command structures, the fact that only 13% of them (excluding the hostages, which is a somewhat different case) report being contacted, is revealing.

Another aspect of the results is the temporal dimension. Only a few interviews have been added after the initial burst of investigative activity in August/September 2008 (when the hostages were questioned). While 69% of witness interviews were conducted in August/September 2008, only 6% and 16% respectively of the interviews were conducted in 2009 and 2010. It would seem that the slow pace of the investigation poses the question of whether the adequate resources have been allocated to this demanding and extraordinary task.

Overall, it would seem that the information provided by the survey of the ECHR applicants indicates that the Georgian authorities are at least both partly unable and partly unwilling to conduct an effective investigation into international crimes allegedly committed during and after the August 2008 war, in the sense described in Art 17 (3) of the Rome Statute: "The proceedings ... were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. "

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# Introduction

## The August 2008 War

Large-scale military conflict broke out in Georgia on 7 August 2008, when Georgian military units launched an attack on the separatist region of South Ossetia. Russian military forces intervened almost immediately, forcing Georgian units to withdraw. Russia subsequently assumed control of a substantial part of Georgia. A ceasefire negotiated by France and the European Union came into force on 12 August, spelling the end of the first phase of the conflict. However, the ceasefire agreement did not put an end to crimes against the civilian population in parts of South Ossetia and the so-called buffer zones established by the Russian army.

In the second phase of the conflict, after the ceasefire came into force, the civilian population was specifically targeted in areas effectively controlled by the Russian armed forces. Evidence from a number of sources describes a pattern of attacks against the civilian population perpetrated by paramilitary groups. Looting was accompanied by killings, hostage taking, beatings, and threats. In some villages, notably in South Ossetia, the burning of houses and destruction of public and private civilian property had a systematic character.

To date, more than twenty thousand people remain internally displaced from their homes in South Ossetia, in what constitutes the largest instance of ethnic cleansing in Europe since the Balkan wars of the 1990s.

## NHC and the Georgian Coalition for the International Criminal Court

From Mid- August to October 2008, the Norwegian Helsinki Committee (NHC), together with the Austrian Helsinki Foundation, Caucasica Centre for Human Rights and Conflict Studies, and the Georgian Human Rights Centre (HRC), interviewed IDPs and villagers from villages in the Zugdidi region (on the border with Abkhazia), South Ossetia, and the Gori and Kareli regions. Some were victims of, or eyewitnesses to, grave violations of humanitarian law and human rights law. Researchers also visited a number of the villages in the conflict zones, in order to document the crimes that had occurred and continued to occur there.

In general the findings were in line with those published by other human rights monitors, such as Memorial Human Rights Center, Human Rights Watch, Amnesty

International, and the EU monitoring group lead by Ambassador Heidi Tagliavini.<sup>2</sup> The evidence strongly suggests that war crimes were committed by both sides in the conflict, while the ethnic cleansing of the Georgian population in South Ossetia could be classified as “persecution,” a crime against humanity.

The material collected by the NHC and its partners was presented to the International Criminal Court in November 2008. Most of the material was later presented in the joint NGO-report *August Ruins*,<sup>3</sup> published by the Open Society Foundation, Georgia in May 2010, which included the findings of other Georgian human rights groups, notably Georgian Young Lawyers’ Association (GYLA) and Article 42.

HRC continued to work with documenting war crimes after October 2008, and is currently representing victims in 101 individual cases from the 2008 war before the European Court of Human Rights in Strasbourg. GYLA and Article 42 also represent a number of clients before the Court in cases connected to the 2008 war. In May 2010 several Georgian human rights organizations – the Human Rights Priority, the Human Rights Center, the International Center on Conflict Resolution, the Center for Constitutional Rights, Article 42, the Georgian Young Lawyers’ Association and the Union “XXI Century” – founded the *Georgian Coalition for the International Criminal Court*, with the aim of promoting justice after the August 2008 war.

## The need for a proper investigation

That there should be accountability for war crimes and crimes against humanity is a basic international principle, recognized during the Nuremberg trials and enshrined in the Rome Statute of the International Criminal Court (ICC). States have an obligation to investigate if there is evidence suggesting international crimes have been committed. Among the recommendations presented to Russian and Georgian authorities by the cooperating human rights groups in October 2008, was the following:

*To the Georgian government:*

...

- *Investigate the numerous allegations of grave violations of humanitarian law and human rights that have occurred during and after the armed conflict, irrespective of which side was responsible for the violations.*<sup>4</sup>

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2 **Human Rights Watch:** Up In Flames; Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia, <http://www.hrw.org/en/reports/2009/01/22/flames-0>, Georgia/Russia: A Year Later, Justice Still Needed, <http://www.hrw.org/en/news/2009/10/01/georgiarussia-year-later-justice-still-needed>. **Amnesty International:** *Civilians in the aftermath of war: The Georgia-Russia conflict one year on*, <http://amnesty.org/en/library/info/EUR04/001/2009/en>, <http://www.amnesty.org/en/for-media/press-releases/georgiarussia-conflict-counting-cost-war-return-security-and-truth-still>. **Tagliavini commission’s report:** [www.ceiig.ch](http://www.ceiig.ch)

3 [http://www.osgf.ge/files/publications/2010/Etnikuri\\_cmenda\\_English\\_WEB\\_version.pdf](http://www.osgf.ge/files/publications/2010/Etnikuri_cmenda_English_WEB_version.pdf)

4 <http://humanrightshouse.org/Articles/5225.html>



A researcher from the NHC investigating an attack on a civilian house in Tkviavi, a Georgian village in the so-called 'buffer zone' established by the Russian army, September 2008.

The organizations made a similar recommendation to the Russian government. However, two years after the war, there appears to be few concrete results of the investigations carried out by the parties, despite public statements claiming that investigations are on-going and effective. There are indications that the parties are not particularly active in seeking out evidence. Members of the Georgian Coalition for the International Criminal Court noted, for instance, that Georgian prosecutors did not react to the publication of the report *August Ruins*, which probably constitutes the most detailed in-depth study of war crimes compiled by Georgia's human rights groups.

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, research teams were 2) 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) a telephone survey contacted 244 applicants to the European Court of Human Rights in cases related to the 2008 war and asked about the investigative steps that had been taken in their cases.

Research and analysis was done in November and December of 2010. Despite numerous requests and letters, starting from October 2010, it proved difficult to obtain information from the Georgian government about the investigations. In April 2011 we finally decided to publish our findings, although we have so far not received any information from the Georgian government.

# Georgia's Obligation to Investigate Crimes of International Character

## Georgian Legislation

Upon ratification of the Statute of the International Criminal Court (Rome Statute) on 16 July, 2003, Georgia undertook the obligation to enact legislation which would contribute to its implementation. A separate chapter was added to the Criminal Code of Georgia, which envisages criminal responsibility for following crimes:

- Preparations for and Waging of Aggressive War (Article 404)
- Calling for Unleashing Aggressive War (Article 405)
- Production, Purchase or Sale Of Weapons of Mass Destruction (Article 406)
- Genocide (Article 407)
- Crimes Against Humanity (Article 408)
- Ecocide (Article 409)
- Participation of Mercenary into Armed Conflict or Hostilities (Article 410)
- Deliberate Violation of the Norms of International Humanitarian Law amid Armed Conflict (Article 411)
- Intentional Violation of the Norms of International Humanitarian Law amid Armed Conflict amid Inter-State and Internal Conflict by Endangering Life or by Mutilation (Article 412)
- Violation of Other Norms of International Humanitarian Law (Article 413)<sup>5</sup>

Based on the information available from open sources, such as the *August Ruins* report, there exists compelling evidence suggesting that crimes described in the Articles 408, 410, 411, 412 and 413 of the Georgian Criminal Code were committed during the armed conflict between Georgia and Russia in August 2008 and in the consequent period.

Article 4 of the Georgian Criminal Code stipulates the principle of territoriality as follows: “the crime shall be deemed perpetrated on the territory of Georgia if it began, continued, terminated or ended on the territory of Georgia.”

In accordance with Article 100 of the Criminal Procedural Code of Georgia, upon receiving information about the occurrence of a crime, the investigator/prosecutor is obliged to open a criminal case and start the investigation. Any kind of information that has been made available to the investigator/prosecutor, including information published by the media, can serve as a basis for opening an investigation. Information

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<sup>5</sup> Translation of the Georgian original by OSCE ODIHR, see <http://legislationline.org/documents/section/criminal-codes>.



September 2008: A woman from the Georgian village of Ganmukhuri on the border with Abkhazia describes how armed paramilitaries forced her to leave her house in August 2008.

concerning the possible occurrence of the crime can be oral, in writing or may as well exist in other form (Article 101 of the Criminal Procedural Code). Investigation should be concluded in reasonable time, but shall not exceed the terms defined by the Criminal Code (Article 103 of the Criminal Procedural Code).<sup>6</sup>

## Obligation to Investigate under International Law

The obligation to investigate international crimes has two dimensions: international criminal law and international human rights law. In accordance with applicable international legal norms, states are a) obliged to recognize certain crimes, such as genocide, crimes against humanity and war crimes as punishable acts under national law and b) to carry out effective investigation when such crimes occur. This principle is enshrined in numerous human right treaties concerning civil and political rights, as well as in the Rome Statute.

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<sup>6</sup> Article 103 (term of investigation): Investigation lasts for a reasonable period of time but no further then the term of statute of limitation envisaged under the Criminal Code for the crime concerned.

However, the obligation to investigate poses certain questions in relation to the interaction between domestic and international tribunals whenever both types of courts are empowered to pronounce on the same crimes, such as: which should take the precedence, under which conditions, etc. In the case of international tribunals for former Yugoslavia and Rwanda (ICTY and ICTR), the statutes provided that each international tribunal had concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law, and that the tribunals had primacy over the national courts.<sup>7</sup> In the case of the former Yugoslavia, ongoing armed conflict among the successor states and deep-seated animosity between the various ethnic and religious groups made it unlikely that national courts would be willing or able to conduct fair trials and to hold the perpetrators responsible. Another factor for deciding in favor of international jurisdiction was the fact that domestic proceedings could have been biased. In the case of Rwanda, “legal intervention” was seen as one of the major guarantees for preventing future re-occurrence of the genocide.

States took a different approach when adopting the Rome Statute, which emphasizes state sovereignty, and gives priority to the domestic courts to exercise jurisdiction over the ICC crimes (principle of complementarity). Nevertheless, if domestic authorities prove to be unwilling or unable to carry out effective investigation, the ICC shall intervene, provided that the situation is of a certain gravity.

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<sup>7</sup> Respectively Articles 9 and 8 of the Statutes for ICTY and ICTR

# Georgia and the International Criminal Court

## ICC and the Principle of Complementarity

The Rome Statute states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” and emphasizes that the ICC shall be complementary to national criminal jurisdictions. Relevant articles of the Rome Statute (Articles 15, 17, 18 and 19), define the relationship between the ICC and domestic jurisdictions. Under these provisions the ICC is barred from exercising jurisdiction in circumstances when a national court asserts jurisdiction over a crime, and under its national law has jurisdiction, including also if the case has been fully investigated by domestic authorities, and these authorities then decide, in a proper manner, not to prosecute the person concerned.

The court is, however, authorized to exercise jurisdiction over a crime even if the case concerning the crime is pending before the national authorities, and thus to override the national criminal jurisdiction, whenever:

- a. The State is unable or unwilling genuinely to carry out the investigation or prosecution, or its decisions not to prosecute the person concerned has resulted from its unwillingness or inability genuinely to prosecute the person and
- b. The case is of sufficient gravity to justify the exercise of the ICC’s jurisdiction.

The notions of “unwillingness” and “inability” are defined by the Article 17 of the Rome Statute, according to which:

*In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

*In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*

In practice, ICC examines all aspects of the investigation undertaken by the domestic authorities in the light of the notions of “unwillingness” and “inability”. This includes a thorough assessment of the general effectiveness of the investigation, the scale and quality of the undertaken investigative measures, issues of fairness of trial, including respect for the principle of equality of arms, defendant’s and victim’s access to case materials and the overall transparency and credibility of the investigation.

If the ICC finds that domestic authorities are unable or unwilling to carry out investigation, and that the case is of a sufficient gravity, it shall commence the investigation, if the opening of an investigation by the Prosecutor would not go against the interests of justice.

## **Response of the ICC to the August 2008 Conflict**

The armed conflict in early August 2008 attracted great attention from the international community, including international media, and the ICC was initially informed about the developments on the ground through the media. In the following period the Office of the Prosecutor (OTP) closely monitored all information on the situation in Georgia, including information from public sources.

A week after the signing of the cease fire agreement between Georgia and Russia, the Prosecutor of the ICC, Mr. Luis Moreno Ocampo released a statement in which he stated that: “Georgia is a State Party to the Rome Statute and OTP considers carefully all information relating to alleged crimes within its jurisdiction – war crimes, crimes against humanity and genocide - committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or groups alleged to have committed the crimes. The Office is, inter alia, analyzing information alleging attacks on civilians.”

The ICC has singled out three types of crimes as being of particular interest: forced displacement of civilians, directing attacks against protected persons (ie peace keepers killed in the Georgian attack on Tskhinvali) and widespread destruction of civilian objects.

Later on, representatives of the Georgian authorities met with the Division of Jurisdiction, Complementarity and Co-operation of the OTP to offer information and co-operation.

Right from the beginning, Georgian authorities made a decision not to refer the situation to the ICC based on the Article 14 of the Rome Statute. It is important



A Russian military post near the Georgian village Ali in the so-called 'buffer zone' established by the Russian army, September 2008.

to note that at the same time Georgian authorities have actively pursued all other available international legal remedies to seek justice. This includes bringing an interstate application to the European Court of Human Rights based on the violations of numerous provisions of the ECHR, and an application to the International Court of Justice concerning violations of Convention for the Elimination of all forms of Racial Discrimination.

Another important point to consider is the position of the Georgian authorities who claim that "the Georgian response to the Russian armed attack was confined entirely to its own sovereign territory, was reluctantly undertaken, and was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self defense."<sup>8</sup> In spite of 7 cases known to us<sup>9</sup> where investigations have been opened in cases where Georgian servicemen are alleged to have committed crimes during the 2008 war, the implication of the Georgian position is that ICC crimes have exclusively been committed by the other party of the conflict, i.e. the armed forces of the Russian Federation and South Ossetian paramilitary groups acting under the protection of Russian military. This view contradicts the body of evidence collected about the war.<sup>10</sup> Yet even

8 Tagliavini report, p. 188.

9 The victims are represented by GYLA. How effective these investigations are, is unclear.

10 **Human Rights Watch:** *Up In Flames; Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, <http://www.hrw.org/en/reports/2009/01/22/flames-0>, *Georgia/Russia: A Year Later, Justice Still Needed*, <http://www.hrw.org/en/news/2009/10/01/georgiarussia-year-later-justice-still-needed>. **Amnesty International:** *Civilians in the aftermath of war: The Georgia-Russia conflict one year on*, <http://amnesty.org/en/library/info/EUR04/001/2009/en>, <http://www.amnesty.org/en/for-media/press-releases/georgiarussia-conflict-counting-cost-war-return-security-and-truth-still>. **Tagliavini commission's report:** [www.ceiig.ch](http://www.ceiig.ch)

if it was correct, one would expect Georgian Authorities to assume that exercising justice over the South Ossetian paramilitary groups, and more importantly the Russian military command which gave protection to those groups, will be impossible, and consequently that a decision to refer the situation to the ICC would seem reasonable.

That decision has not been made. Perhaps Georgian authorities are not convinced that ICC can, in practice, exercise jurisdiction over South Ossetian paramilitaries or the Russian military command because Russia will not be willing to cooperate with the Court. Another potential reason is that Georgian authorities are afraid that a referral could have a boomerang effect, i.e. could lead to parts of its military and political leadership being prosecuted for war crimes, and that an ICC investigation could be one sided in its practical outcomes.

As stated earlier, the fact that the Russian Federation has not ratified the Rome Statute does not constrain ICC jurisdiction since crimes have been committed on the territory of a State Party (Georgia), consequently the principle of territoriality applies. Furthermore, it is clear from the press releases of the OTP that Russia, despite not being a State Party to the Rome Statute has shown a degree of cooperation with the ICC. The OTP press release dated August 20, 2008 states that: “the Russian Federation has formally delivered information to the Office of the Prosecutor and is continuing to do so.” The OTP visited Russia in March 2010, and again in February 2011. Following the OTPs most recent visit, the prosecutor stated that: “We commend the Russian authorities for their cooperation and for their willingness to share their preliminary conclusions with the Office.” Nonetheless, in letters sent to GYLA from the Russian General Prosecutor’s Office, it is stated that they only investigate crimes against Russian peacekeeping servicemen and Russian nationals. This approach would make the Russian investigation even more lopsided than the Georgian investigation, in which there are at least formally opened investigations into crimes allegedly committed by Georgian servicemen. According to the Tagliviani Report, the Russian position is that “the Russian side never attacked the local population or any civilian facilities.” This position would not seem to be conducive to an unbiased and effective investigation.

The OTP has also conducted two visits to Georgia, the first in November 2008 and the second in June 2010. The main purpose of the visits was to gather information from the authorities on the on-going national investigation relating to crimes committed during the August conflict. The OTP press release of June 25, 2010 states that: “the Court potentially has the jurisdiction over ICC crimes allegedly committed on the territory of Georgia, including forced displacement of civilians, killing of peacekeepers and attacks against civilian targets...it is mandatory that those most responsible for serious crimes be investigated.” The further steps of the OTP will depend on the outcome of its analysis on the effectiveness of the investigation by the Georgian authorities.

# Investigative efforts by the Georgian authorities

Despite numerous efforts in the fall of 2010, NHC was unable to obtain information from the Georgian authorities regarding the investigation of the ICC crimes committed during the August 2008 events. Our last letter sent to the Georgian Ministry of Justice on 20 December 2010 remains unanswered. Local NGOs informed NHC that although there is an ongoing investigation, it is difficult to have a clear picture as to how far it has progressed and how effective it is.

There are grounds for concern with respect to the transparency of the investigation into situations relevant to international tribunals. In July 2010 Article 3 (5) of the General Administrative Code of Georgia was amended to limit public access to information relating to proceedings before the international tribunals to which the Georgian Government is a party.<sup>11</sup> It seems questionable whether the amendments are compatible with Article 41 of the Georgian Constitution (right to access to information), since it does not specify what is the legitimate aim of restricting the public access to information. It would seem that this provision specifically limits the access of civil society to the communication between the Government of Georgia and the OTP relating to the investigation of the ICC crimes.

The only official source concerning the investigation on ICC crimes that NHC has obtained, is a letter of the Office of the Chief Prosecutor of Georgia in response to a request by the Georgian Young Lawyers' Association (GYLA) to be notified about the status of some of the individuals it is providing legal aid to (namely alleged victims of Russian and South Ossetian forces, not of perpetrators from the Georgian side), as well as about the progress of the investigation of crimes committed during the August events. The letter of the Office of the Chief Prosecutor, dated 18 March 2009, states that there is an ongoing investigation in the Office of the Chief Prosecutor concerning the crimes committed during the August 2008 events, more specifically, crimes envisaged by the Articles 407 (Genocide), 411 (Deliberate Violation of the Norms of International Humanitarian Law amid Armed Conflict) and 413 (Violation of Other Norms of International Humanitarian Law) of the Criminal Code of Georgia.

Furthermore, the letter specifies some of the investigative activities that were carried out with respect to the individuals represented by GYLA. These investigative activities

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<sup>11</sup> Article 3, paragraph 5: Chapter III of the present Code does not apply to the activities of the executive branch which are related to the judicial proceedings and/or case examination before international arbitration, foreign or other international courts until the final decision on such cases are delivered and to which Georgia as a state is a party. Before delivery of final judgment by the court, information could be given according to the international agreement and understanding of Georgia and/or according to the roles foreseen by this part. (This was the only amendment made to the General administrative Code on 21 July 2010).r



A resident of the Georgian village Tkviavi explaining how he escaped from an attack on his house by South Ossetian paramilitaries to a HRC researcher in October 2008.

include: questioning, forensic examinations of wounds, autopsies, ballistic expertise reports, forensic psychiatric expertise reports and examination of crime scenes including in 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. Finally, the letter specifies that the technical assessment of the material damage is on-going and will be taken into account.

As will be seen, the information provided to us by victims and witnesses to crimes contrast with that of the government on many accounts.

# **NHC efforts to clarify the effectiveness of the investigation by the Georgian Government**

As we were unable to obtain more information about the investigation from Georgian authorities, we chose to gauge its effectiveness by approaching some of the crime scenes of the 2008 war and do a survey of a number of victims, i.e. applicants to the European Court of Human Rights (ECHR). While the village visits only serve as spot checks, the telephone survey of the Court applicants consists of a large sample, 244 individuals, all of whom have well-documented cases and many of whom have grave cases, and should be statistically significant.

The sample is representative of the types of violations committed by South Ossetian and Russian forces, and does not include victims of alleged Georgian crimes in Tskhinvali. In this sense, our sample is not challenging Georgia's assertion that only Russian and South Ossetian forces committed crimes during the war. One would therefore expect that our sample of interviewees would be those first approached by the Georgian investigators.

## **On-Site Spot Checks**

In early November 2010 researchers from HRC and NHC returned to some of the villages in the former buffer zone established by the Russian armed forces for a few months in the fall of 2008. The aim was to do a spot check by visiting some of the sites where crimes had occurred and ask local witnesses and victims about what investigative steps had been taken in the villages. During a visit to four villages in the Gori and Kareli regions, Dvani, Korbi, Gugutiantkari and Koshka (selected because NHC and HRC had documented crimes there in 2008), 10 villagers were interviewed, some of whom had allegedly been victims of serious crimes like hostage taking, torture and the killing of close family members, including family members of ECHR applicants represented by Georgia's Human Rights Center (HRC) and GYLA. They all claimed that Georgian police had not investigated at the places where people had been killed, and that, in one village, no forensic examinations had been undertaken with regard to suspicious deaths during the war (deaths in custody or in alleged extrajudicial executions).

Several of the interviewees in Dvani, who spoke on condition of anonymity, claimed that investigators had not been in the village, a fact that contradicts the letter from the Office of the Chief Prosecutor of Georgia to GYLA, which mentioned Dvani as one of the places where unspecified investigative measures were carried out on site. Whether the Chief Prosecutor had made a mistake in the letter, or the villagers were misinformed, we are not in a position to judge. In general, however, the interviewees

had a low opinion of the effectiveness of the investigation, and doubted that there would be accountability.

## The Phone Survey

The phone survey was conducted from 8 to 25 November 2010. 244 applicants with individual complaints to the ECHR were interviewed by the three Georgian NGOs that primarily represent Georgian victims before the Court. GYLA contacted 126 applicants, HRC contacted 80, and Article 42 contacted 38 applicants. The following questions were asked:

- Were you contacted by police/investigators/prosecutors after the war?
- If so, were you interrogated?
- If so, when, and how many times?
- Did you receive victim status?
- Did you receive any letters or phone calls from police/investigators/prosecutors, i.e. update on the investigation?
- Did they take you to the crime scene?
- Did they visit the crime scene?
- Did they collect evidence (photos, spent cartridges, medical statements, forensic reports, death certificates, property titles, other)?
- Is there anything else in this matter you would like to tell us?

In the processing of the results, although most of the applicants alleged violations of several articles of the European Convention on Human Rights, they were divided into four groups, according to the main type of violation they complained about. The groups were 1) right to life complaint (i.e. close relative killed), 2) hostage/forced labor (a large group of Georgians were taken hostage during the war), 3) torture/inhuman treatment, and 4) forced eviction/loss of property (this includes both people displaced from South Ossetia, i.e. with little prospect of return, and people temporarily displaced, whose property was stolen, destroyed or damaged). By grouping them in this manner, some of the strategic choices of the Georgian investigation become visible, for instance what types of violations were given priority by the investigators. The general results of the survey were the following:

Type applicant	Total	Had been contacted By police	Had been questioned	Updated on investigation	Granted victim status	Crime scene investigation <sup>12</sup>	Other evidence collected
Total	244 (100%)	64 (26%)	61 (25%)	-	58 (24%)	-	7 (3%)
Right to life Complaint	76 (100%)	28(37%)	26(34%)	-	27 (35%)	-	7 (9%)
Hostage, forced labor	34 (100%)	32 (94%)	32 (94%)	-	28 (82%)	-	-
Torture/ Inhuman treatment	18 (100%)	1 (5%)	1 (5%)	-	2 (11%)	-	-
Forced eviction/Loss of property	116 (100%)	3 (3%)	2 (2%)	-	1 (1%)	-	-

This survey of course only provides an indication of what investigative steps have been taken. Although the interviewees were generally unaware of investigative steps, such as crime scene investigations and the collection of other types of evidence (than collecting statements), this does not mean that such steps were not taken. Perhaps the applicants were not informed, perhaps they had forgotten that they were informed, or perhaps, for one reason or another, they did not wish to disclose all they knew about the investigation. Yet for all its flaws, the survey contains certain striking features, which, in our opinion, allow for some tentative conclusions about the nature of the Georgian investigation:

- Lack of transparency/updated information about the investigation. None of the respondents reported receiving news about the progress of the investigation. However, this is partly a reflection of the relatively limited rights of victims during the investigation process.<sup>13</sup>
- Lack of investigative measures, such as crime scene investigations, collecting forensic and medical evidence, etc. Even granted that steps may have been taken

12 Not relevant for the cases in which the alleged violation(s) occurred in South Ossetia, where Georgian investigators have no access. The collected material does not say where all of the violations occurred, but in the case of the 126 GYLA applicants, 47 (37%) of them alleged that the violations occurred in South Ossetia. That number probably gives a reasonable indication of the overall number.

13 Article 58 of the Georgian Criminal Procedure Code defines the rights to information of a victim, and consequently the transparency of the investigation: "Information and Explanation:

1. A body in charge of criminal procedure shall have the duty to give an advance notice to a victim of the place and time of the following procedural actions:

- a) the first appearance of a defendant before a magistrate judge
- b) pre-trial hearing
- c) main court session
- d) sentencing hearing
- e) appellate and cassation court sessions.

2. The notification shall be handed to a victim in writing, except in cases where the notification through other means is reasonable, considering the circumstances and where the time is sufficient for making an adequate decision.

3. A prosecutor is obliged to inform a victim regarding the plea agreement signed with a defendant;

without the interviewees being informed, only 3% reported that other steps than questioning had taken place, and no one knew about any crime scene investigation.

- Low number of applicants (26%) had been contacted and questioned by the police. The group that contradicts this general scheme, is the hostages, who were held together in a prison in Tskhinvali, South Ossetia, for most of August 2008. The hostage situation was a high profile media case at the time, and most of these people (94%) were interviewed immediately upon their return to Georgia. If one excludes this group, only 13% of the other applicants report being contacted by police.
- The crimes prioritized by the investigation are 1) hostage taking (with 94% of interviewees contacted and questioned), 2) killings (37% of the applicants with right to life complaints reported being contacted), 3) torture/inhuman treatment (with 5% of applicants contacted), and lastly 4) forced eviction/property loss (3% contacted).

Given that most of these 244 applicants probably are not only victims, but also witnesses to grave crimes, and that one would expect at least some of them to have useful information concerning perpetrators, both Russian military and South Ossetian paramilitary commanders, soldiers and command structures, the fact that only 13% of them (excluding the hostages, which is a somewhat different case) report being contacted, is revealing. One would expect a thorough investigation to 1) contact the majority of victims/witnesses in order to identify the most valuable witnesses, and 2) conduct in-depth interviews and fact-collection in at least a selected sample of the cases. However, only 3 of the interviewees (1%) reported having been questioned more than once.

After questioning the witnesses, gathering evidence at the crime scene would normally be considered one of the most important steps in an investigation, yet none of the 244 interviewees reported that such an investigation took place, a fact that seems to contradict the letter from the Office of the Chief Prosecutor of Georgia to GYLA mentioned above, in which the Chief Prosecutor gave an extensive list of villages where examinations of crime scenes had occurred. In a large number of cases (perhaps 35% - 40% of the sample) the explanation for this is that the crime scene is in South Ossetia, and consequently inaccessible to Georgian investigators. Still, the lack of crime scene investigations is a striking feature of the survey, a feature corroborated by statements from witnesses collected during the spot checks in selected villages in the former buffer zone.

Another issue regarding the investigation is the temporal dimension: when were the interviewees who were questioned actually interrogated? The table below gives a sense of the progression of the investigation in terms of questioning of witnesses/victims, and what kinds of violations were given priority at what time.

Type of applicant	Questioned	August-September '08	2009	2010	Unclear
Hostage	32 (100%)	32 (100%)			
Right to life	26 (100%)	11 (42%)	4 (15%)	9 (35%)	2 (8%)
Torture	1 (100%)			1 (100%)	
Forced eviction/ loss of property	3 (100%)				3 (100%)
Total	62 (100%)	43 (69%)	4 (6%)	10 (16%)	5 (8%)

According to this table, it would appear that priority initially was given to the hostages from Tskhinvali, while interest in the killings has lingered on in 2009 and 2010, with an actual increase in interviews taking place in 2010. 35% of the interrogations being conducted in 2010 compared with 15% in 2009. In a sense, the numbers justify Georgia’s claim that the investigation is on-going. However, seen in the context of the number of potential relevant witnesses that were interviewed in table 1, only a few interviews have been added after the initial burst of investigative activity in August/September 2008. While 69% of witness interviews were conducted in August/September 2008, only 6% and 16% respectively of the interviews were conducted in 2009 and 2010. It would seem that the slow pace of the investigation poses the question of whether the adequate resources have been allocated to this demanding and extraordinary task.



From the Georgian village Tkviavi: A house destroyed by aviation during the armed conflict in August 2008.

## Conclusion

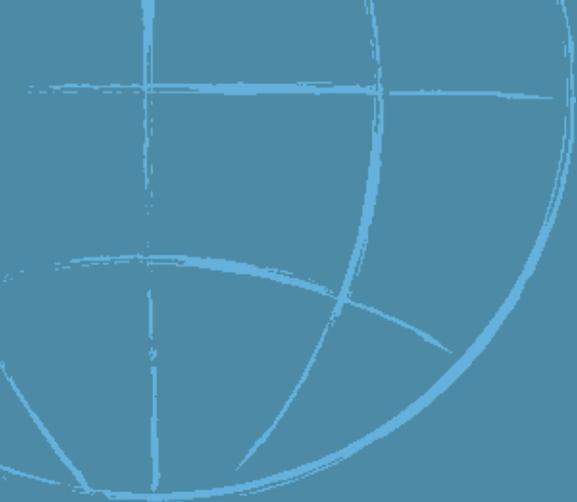
Overall, it would seem that the information provided by the survey of the ECHR applicants indicates that the Georgian authorities are at least both partly unable and partly unwilling to conduct an effective investigation into international crimes allegedly committed during and after the August 2008 war. Georgia is unable to conduct an investigation in South Ossetia and Russia, which means that both alleged perpetrators and a substantial part of the evidence is out of bounds for the investigators. With regard to the crimes that would seem both at least partly possible to investigate, and falling within the general scheme of the war described by Georgian authorities (i.e. that perpetrators of crimes were Ossetians and Russians), Georgia also seems unwilling to perform what is required, in the sense described in Article 17 (c) of the Rome Statute: “The proceedings ... were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. ” The investigation appears to be proceeding very slowly, with only a few witness interviews conducted after the initial rounds of interviews conducted shortly after the war. There are grounds to doubt the effectiveness and thoroughness of the investigation, as it appears that basic investigative steps (such as crime scene examinations) in many instances have not been taken. If investigative steps indeed have been taken, and the information provided to us was incomplete, then it would appear that there is a problem with the transparency of the investigation and in the communication with witnesses. In this regard, we find it noteworthy that the Georgian justice authorities were unable to meet us and answer our emails and letters.

One important issue remains: would it go against the interest of justice to open an ICC investigation? This is a complex question, and it is difficult to establish criteria that would help facilitate an answer. Whether the opening of an investigation would somehow undermine future domestic investigations in one or both of the states concerned, would be one scenario to consider. Whether the opening of an investigation could push one or both states into denial, isolation and a negative political development away from the rule of law and respect for international human rights obligations, is another question. Regarding the first scenario, the record of Russia and Georgia regarding accountability in connection with armed conflicts on their respective territories, of which there have been many over the last twenty years<sup>14</sup>, is so poor, that it is hard to see what could be undermined. On the contrary, if the ICC were to open an investigation, it would be a rare example of having a proper legal process introduced to a region that has seen many examples of impunity for grave crimes. In this sense, ICC intervention could be seen as a preventive measure, a warning to future combatants not to commit crimes.

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14 Two major armed conflicts in Chechnya, two armed conflicts in South Ossetia, major armed conflicts in Abkhazia and Nagorno-Karabakh, armed conflict in Ingushetia/North Ossetia, internal armed conflict in Georgia, and an on-going low intensity armed insurgency in large parts of the North Caucasus.

Regarding the potential political fall-out of an ICC legal intervention, in the form of an investigation, it is very hard to predict the consequences. Perhaps it would strengthen liberal forces seeking to overcome a legacy of impunity and corruption, perhaps it would lead to an authoritarian backlash. Perhaps there would be negative short term effects, and positive long term effects. And perhaps not. However, this dilemma goes to the core of the *raison d'être* for the ICC. By signing the Rome statute a large part of the international community expressed its belief in the idea that international justice should not be sacrificed to political expediency. By referring Libya to the ICC, the Security Council of the United Nations recently expressed the same idea. We believe that the introduction of international justice in a region that has seen some of the worst atrocities in Europe in recent years could assist in the formation of a new legal and political culture in the Caucasus that would be more in line with the values expressed by the European Convention of Human Rights and the Rome Statute.



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