



Georgia: Five Years of Non-Action

The Failure to Investigate the Crimes of the Russian-Georgian War of August 2008

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After the brief war in Georgia in August 2008, when Russia invaded and for a short period occupied large parts of Georgia, the Norwegian Helsinki Committee (NHC) established a war crimes documentation project, supported by the Norwegian Ministry of Foreign Affairs. NHC cooperated with a number of Georgian and international human rights groups in order to document crimes committed during and after the war. Our findings indicated that war crimes and crimes against humanity had been committed. Both sides committed crimes, but the most serious crimes, associated with the ethnic cleansing of South Ossetia, were committed by the Russian and South Ossetian side. Most of the findings together with those of a number of other human rights groups were presented in the report *August Ruins*, published by the Open Society Foundation, Georgia, in May 2010.¹

Failure to investigate

Already on 14 August 2008 the Office of the Prosecutor of the International Criminal Court in The Hague (the ICC OTP) announced that it opened a preliminary examination of “the situation in Georgia”. The situation falls within the jurisdiction of the ICC under the territoriality principle as Georgia has ratified the Rome Statute, and the ICC OTP later asserted that there is a reasonable basis to believe that two categories of crimes, war crimes and crimes against humanity, have been committed. These crimes fall within the mandate of the ICC.

However, due to the principle of complementarity the ICC only steps in when the states are “unable or unwilling” to investigate. The ICC has thus so far only been monitoring the progress (or lack of progress) of domestic investigations. The ICC OTP has had repeated contact with the competent national authorities “with a view to assessing whether they are actually willing and able to bring the perpetrators to justice.” If investigations proved ineffective, the OTP could either open an investigation on its own initiative or be invited in by one of the parties.

In the years afterwards, NHC has monitored the effectiveness of the investigations conducted by the national authorities of Georgia and Russia, and also observed the actions of the ICC OTP, as ICC from early on became the third pole in a triangle of justice. The NHC subsequently released three reports that documented the lack of effective investigation by the respective national authorities, despite repeated claims that investigations were on-going and effective.

In May 2011 the NHC released the report *Unable or unwilling? Georgia’s faulty investigation of crimes committed during and after the Russo-Georgian war of August 2008*.² In addition to asking the Georgian government for information on the status of the investigations, 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. In addition, through a telephone survey 244 applicants to the European Court of Human Rights (ECtHR) in cases related to the 2008 war were contacted and asked about the investigative steps that had been taken in their cases.

The information collected strongly suggested that Georgian authorities were partly unable and partly unwilling to conduct an effective investigation. Georgian prosecutors were barred from investigating in South Ossetia and Russia, and did not investigate effectively on Georgian territory.

Further evidence of the lack of meaningful investigative steps by Georgian authorities was presented in the second report, *The Impunity Syndrome in the Caucasus*, published in October 2011.³

In a third report, *Waiting for Russian Justice*, published in September 2012, the lack of an effective investigation by Russian authorities was documented based on available evidence collected from non-governmental organizations working with documenting crimes and representing victims from South Ossetia before the ECtHR.⁴

Further information from organizations representing victims of the war before the ECtHR strengthens the impression that the Russian Investigative Committee remains

unwilling to investigate crimes allegedly committed by Russian servicemen or South Ossetian paramilitaries.

In conclusion, the NHC stressed that it is in the general interest of justice, as well as in the interests of the victims, as well as in the interest of regional stability, that a real and effective investigation is launched and that the ICC has an important role to play. While the principle of complementarity must be respected, the **ICC OTP should at the very least require proof of progress in domestic investigations within a defined timeframe.**

The change of Government in October 2012

The parliamentary elections of October 2012 resulted in a peaceful transfer of power from the government of the United National Movement (UNM) of President Mikheil Saakashvili to the opposition coalition Georgia's Dream (GD), led by Bidzina Ivanishvili, who went on to become prime minister.

Given that the UNM had been involved in the August 2008 war, it was hoped that the change of government would result in change of policy with regard to the investigation.

From November 2012 to October 2013, the NHC had three meetings with the Chief Prosecutor of Georgia, Archil Kbilashvili, and with several officials in the government. In the meetings, the NHC recommended that the new authorities of Georgia refer the war situation to the ICC since its justice authorities and prosecutors are unable to investigate in the breakaway regions of South Ossetia and Abkhazia.

The authorities acknowledged that the investigation into the 2008 war was of poor quality, and in March 2013 the government established a new investigative commission composed of prosecutors under the leadership of Medea Osepaishvili. However, there has been almost no information about the work, plans or meetings of the commission.

On 9 December 2013 Ucha Nanuashvili, the Public Defender of Georgia, sent a letter to the Chief Prosecutor's Office asking for news about the investigation. In a brief letter of 27 January 2014, the office replied that work was on-going. The letter also explained that the complex nature of investigations was the cause of delays.

Two factors make it highly unlikely that steps forward with the investigation of the crimes in question will take place under the current Georgian government. First, normalization of relations with Russia has been set as one of the key foreign policy priorities and proactive investigation of the crimes of August 2008 is seen as a potential

obstacle in this respect. Second, considering the political position of the two states who were parties to the August 2008 conflict, any genuine cooperation between the two sides is highly unlikely.

The role of the ICC Prosecutor

Although Russia is not party to the Rome Statute of the ICC, Georgia has been a party since September 2003. Its territory is therefore under the jurisdiction of the ICC, including South Ossetia and Abkhazia. On 14 August 2008, shortly after the cessation of hostilities, the ICC OTP issued a statement declaring that the "situation in Georgia" was under "preliminary examination". The ICC OTP mentions six types of alleged crimes, including the "forcible displacement of the Georgian population" (which could amount to a crime against humanity) and "unlawful attacks directed against the civilian population and civilian objects" (as well as a number of other war crimes).

In its *Report on Preliminary Examination Activities from the fall of 2013*,⁵ the ICC OTP highlights statements from the Georgian Chief Prosecutor made in May 2013 to the effect that Georgian authorities would "pursue the investigation." In September 2013 the ICC OTP was briefed by the newly-formed eight-member investigative commission about the "investigative steps implemented so far". The ICC OTP also mentions that it "expects to receive updated information" from the Investigative Committee of the Russian Federation.

The ICC OTP concludes that it will "continue to actively engage with relevant stakeholders and request updated information on national proceedings in order to conduct a comprehensive and accurate assessment of the admissibility of potential cases identified at this stage of the analysis."

According to a 2013 *Policy Paper on Preliminary Examinations*,⁶ there is no "specific time period for the completion of a preliminary examination." It is more than five years since the war ended, and it appears that the ICC remains content with monitoring states that while claiming to be active, remain partly unwilling and partly unable to investigate effectively.

Conclusions and Recommendations

The crimes of the August 2008 war between Georgia and Russia were grave, and included both targeted and indiscriminate killings of civilians, as well as persecution, i.e. the ethnic cleansing, of as many as 25 000 people. More than five years after the conflict, there are no signs that the displaced Georgians from South Ossetia will be allowed to return to

their homes. Both sides committed crimes, yet there have been no signs of real investigations by the relevant national authorities, as if there is a congruence of interest in not establishing facts about the war.

Impunity in the Caucasus is not only restricted to the war in Georgia, but has been a consistent feature of all the armed conflicts in the region over the last twenty years. One could argue that impunity drives the conflicts: It is easy to start wars, and commit crimes, if no one will hold you accountable for your actions.

Therefore we believe that ICC involvement in the Georgia war situation is important. It could restore justice to thousands of victims. It could be a game changer in a region of impunity. The threshold for starting new armed conflicts will be higher if it is clear that the ICC may investigate and prosecute crimes.

While the change of government in Georgia in the fall of 2012 brought hope that there would be a change in Georgia's attitude toward accountability, it now appears that the new justice authorities remain partly unwilling and partly unable to conduct an effective investigation. The ICC OTP continues to conduct an "assessment" of the inconclusive investigations. While the principle of complementarity must be respected, the **ICC OTP should at the very least require proof of progress in domestic investigations within a defined timeframe.**

If non-action is allowed to continue indefinitely, the possibility of raising the threshold for new conflicts in the region is diminishing. Moreover, the ICC risks losing credibility in the region.

The Norwegian Helsinki Committee (NHC) is an Oslo based non-governmental organization working since 1977 to ensure that human rights are respected in practice. It strives to achieve this goal through monitoring, reporting, teaching and democracy support. NHC bases its work on international human rights instruments adopted by the United Nations, the Council of Europe, and the Organization of Security and Cooperation in Europe (OSCE). It has projects in a variety of countries, including in Eastern Europe, Western Balkans, and Central Asia.

¹ Available at: http://www.osgf.ge/files/publications/2010/Etnikuri_cmenda_English_WEB_version.pdf

² http://www.nhc.no/filestore/Publikasjoner/Rapporter/2011/Report_2_11_web.pdf

³ http://nhc.no/filestore/Publikasjoner/Rapporter/2011/Report_3_11_web.pdf

⁴ http://www.nhc.no/filestore/Publikasjoner/Rapporter/2012/Rapport_3_12_web.pdf

⁵ http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/Preliminary-Examinations2013.aspx (pp 38-41)

⁶ http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/Preliminary-Examinations2013.aspx (p. 21)