

HUMAN RIGHTS CENTRE

Increasing Impunity and Denial of Justice

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The Human Rights Centre (HRIDC) is a non-governmental human rights organization, without any political or religious affiliations. The purpose of HRIDC is to increase respect for human rights and fundamental freedoms in Georgia, as well as to contribute to the democratic development of the country.

HRIDC implements projects to ensure compliance with human rights laws and standards. We cooperate with international and local organizations which share our view that respect for human rights is a precondition for sustaining democracy and peace in Georgia.

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Background

In the international law of human rights the term “impunity” refers to the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Impunity is especially common in countries that lack a tradition of the rule of law, suffer from corruption or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdictions or immunities either *de facto* or on the level of legislation. The amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, submitted to the United Nations Commission on Human Rights on 8 February 2005, defines impunity as:

"the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."

The First Principle of that same document states that:

"Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

The problem of impunity can arise in both weak and strong states. In the cases of weak states the problem of impunity is often rooted in the inability of the state to exercise the justice in an appropriate way. However, there are some states that despite having the capacity to carry out investigations with respect of grave human rights violations refuse to do so since the state apparatus and elite of the bureaucracy is the author of those violations.

Arguably Georgia belongs to the second category of countries where justice is selective and major accusations by the civil society with respect of grave human rights violations remain without investigation – identification and punishment of perpetrators. Notorious cases of extrajudicial killings or killings with use of excessive and unnecessary force are not duly investigated. The issue of responsibility of some of the high ranking officials is brought to the

attention of the investigative authorities only after they leave the office and become critical towards the official state policies. However, the clearest example of impunity in the recent Georgian history is the way how Georgian Government treated the crimes that have been committed during the conflict in August 2008.

Failure to investigate war crimes

The conflict in August between Georgia and Russian federation has brought hundreds of civilian casualties, destruction of civilian property and displacement of the residents of the conflict zone. These facts have been well documented by both national and international NGOs that did thorough fact finding on the both sides of the border. Based on the findings of those organizations that were involved in the fact finding both parties of the conflict have committed crimes that can be characterized as war crimes under international law. Some of these crimes are so called crimes of universal jurisdiction, meaning that any state is obliged to carry out prosecution in the presence of the specific evidence that the person(s) has committed such a crime. In addition to this, Government of Georgia is obliged under the Statute of the International Criminal Court (Rome Statute), which it had ratified in 2003, to carry out the prosecution in case any of the four crimes that fall within the jurisdiction of the International Criminal Court (ICC) have taken place within its jurisdiction.

Under the Article 8 of the Rome Statute following is considered to be the war crimes:

In the context of international armed conflict:

- Grave breaches of the 1949 Geneva Conventions (followed by the exhaustive list of acts (Article 8.2.a.))
- Other serious violations of the laws and customs applicable to the specific situation within the established framework of international law (followed by the exhaustive list of acts (Article 8.2.b.))

In the context on internal armed conflict:

- Serious violations of common article 3 to the four 1949 Geneva Conventions (followed by the exhaustive list of acts (Article 8.2.c.))
- Other serious violations of the laws and customs applicable to the specific situation within the established framework of international law (followed by the exhaustive list of acts (Article 8.2.e.))¹

Based on the Rome Statute the Government of Georgia has a legal obligation to investigate not only those crimes that have been committed by the Armed Force of the Russian Federation or by

¹ For the exhaustive list of war crimes please refer to the Article 8 of the Statute of the International Criminal Court

the South Ossetian paramilitary groups that were acting under the Russian control, but also to investigate allegations of the possible occurrence of war crimes by its own armed forces.

The Human Rights Watch released the comprehensive report in January 2009 which, inter alia, deals with the violations of the laws of wars by the parties to the conflict. The report contains violation on the account of the Georgian Government. In particular it states: “Human Rights Watch’s investigation concluded that Georgian forces committed violations of the laws of war during their assault on South Ossetia. Research shows that during the shelling of Tskhinvali and neighboring villages and the ground offensive that followed, Georgian forces frequently failed to abide by the obligation to distinguish between military targets that can be legitimately attacked, and civilians, who may not be targeted for attack. This was compounded by Georgia’s failure to take all feasible measures to avoid or minimize civilian casualties. While HRW found no evidence that Georgian forces sought to deliberately target civilians, Human Rights Watch research concludes that Georgian forces demonstrated disregard for the protection of civilians during the shelling campaign, causing large-scale damage to civilian objects and property, and civilian casualties.

In the course of three missions to South Ossetia in August, September, and November 2008, Human Rights Watch interviewed more than 150 witnesses and survivors of the attacks on Tskhinvali and the ethnic Ossetian villages of Khetagurovo, Dmenisi, Sarabuki, Satikari, Gromi, Tbeti, Novyi Tbeti, Nizhnii Gudjabauri, Muguti, Monasteri, Batatykau, Kohat, Bikar, Tsinagari and Tsairi. Human Rights Watch researchers also examined the majority of sites where attacks took place, and gathered information from public officials, hospital personnel, and public activists.

The mere fact of civilian casualties or destruction of civilian objects does not mean that a violation of international humanitarian law occurred. Where civilian loss or damage occurred, what was important to seek to determine was whether there was evidence of a legitimate military target in the attack area, and how that target was attacked. In many cases Human Rights Watch researchers found no evidence of military objectives in the area under attack; other attacks did strike legitimate military targets, causing combatant and, in some cases, collateral civilian casualties.

In a number of cases, moreover, there were no direct witnesses and no reliable information regarding the circumstances of the attack. Also, since Georgian and Russian forces use some identical Soviet-era weapons systems including main battle tanks, Grad multiple-launch rockets, BMP infantry fighting vehicles, and tube artillery, Human Rights Watch could not always conclusively attribute specific battle damage to a particular belligerent, especially for the attacks that happened on and after the evening hours of August 8 when both Russian and Georgian troops were present in Tskhinvali.

Yet many of the attacks on South Ossetia during the brief conflict can be clearly attributed to Georgian forces—based on witness accounts, the direction of the attack, and the timing of the damage in light of the advance of Georgian forces. Human Rights Watch has concluded that a number of these attacks were indiscriminate.

The massive shelling of Tskhinvali was indiscriminate because at the very least the Georgian military effectively treated a number of clearly separated and distinct military objectives as a single military objective in an area that contained a concentration of civilians and civilian objects.

In some of the attacks investigated by Human Rights Watch, evidence suggests that the Georgian forces targeted lawful military objectives (that is, objects or persons making effective contribution to the military action) but the attacks may have been disproportionate, because they could have been expected to cause loss of civilian life or destruction of civilian property that was excessive compared to the anticipated military gain. In others, Georgian forces carried out a number of artillery attacks in which they failed to take all feasible precautions to minimize the likely extent of loss or injury to civilians. Georgia's use of multiple rocket launching systems, such as BM-21s ("Grads") in civilian populated areas violated international humanitarian law's principle of distinction. These weapons cannot be targeted with sufficient precision to be accurate against military targets, and their broad area effect makes their use incompatible with the laws of war in areas where civilians or civilian objects (such as schools or hospitals) are located. The use of such weapons in populated areas is indiscriminate by nature and thus prohibited under international humanitarian law.

Several Ossetian civilians reported looting by Georgian ground forces but otherwise generally did not complain of other abusive treatment during the ground offensive by Georgian troops. Those detained by Georgian forces, however, reported they were ill-treated when taken into custody.²

The Amnesty International wrote in its report "Civilians in the Line of Fire the Georgia Russia Conflict": "The Georgian army entered South Ossetia at around 11.00pm on 7 August along three main axes. Part of the Georgian army headed directly for Tskhinvali along the main road from Gori. Georgian forces also sought to occupy the heights on either side of Tskhinvali, entering South Ossetia to the West of Tskhinvali via Muguti, Didmukha, and Khetagurovo and, to the east of Tskhinvali, through Dmenisi and Sarabukh. The entry of Georgian ground forces into these villages, and into Tskhinvali itself, was preceded by several hours of shelling and rocket attacks as well as limited aerial bombardment. Much of the destruction in Tskhinvali was caused by GRADLAR MLRS (GRAD) launched rockets, which are known to be difficult to

² Up in Flames – Humanitarian Law Violations and Civilian Victims over the South Ossetia Conflict. Human Rights Watch, January 2009 <http://www.hrw.org/en/reports/2009/01/22/flames-0>

direct with any great precision. Eyewitness reports, the nature of the munitions used and the evidence of scattered destruction in densely populated civilian areas strongly suggest that Georgian forces committed indiscriminate attacks in its assault on Tskhinvali on the night of 7 August, causing deaths and injuries among South Ossetian civilians and considerable damage to civilian objects.

Whilst Ossetian forces may have violated Article 58(b) of Protocol I to the Geneva Conventions requiring parties to avoid locating military objectives within or near densely populated areas by firing at Georgian forces from locations close to civilian areas prior to their entry into Tskhinvali itself, Amnesty International is concerned that the Georgian forces may have selected targets in areas with large numbers of civilians on the basis of outdated and imprecise intelligence and failed to take necessary measures to verify that their information was accurate before launching their attacks. At the time of the initial shelling of Tskhinvali, Georgian forces were positioned several kilometres from Tskhinvali, at a distance from which it would have been difficult to establish the precise location of the Ossetian positions firing on them. Nor, as Ossetian forces were lightly armed and mobile, could there have been any guarantee that positions from which munitions had been fired in preceding days were still occupied on the night of 7 August. Amnesty International is also concerned that rules on other precautions, such as giving warning to civilians where feasible and choosing means and methods that are least likely to cause harm to civilians, were not properly followed.

The nature of the munitions used, the scale of the destruction caused and the number of civilian casualties that resulted from the bombardment of built-up residential areas in the course of the Georgian assault on Tskhinvali on the night of the 7-8 August all point to a failure to take necessary precautions in attack in violation of Article 57 or Protocol I and may in some instances have amounted to a violation of Article 51(4), the prohibition of indiscriminate attack.”³

The Georgian Government which brought legal action against the Russian Government by bringing a case to the International Court of Justice as well as by initiating the inter-state application against Russia in the European Court of Human Rights is not undertaking steps to investigate allegations of the commission of war crimes by its own armed forces and those who were in the high chain of command.

There was an attempt to establish the truth over the August war by creating some kind of truth commission, which at the end worked under political shadow and the issued rather political statement in the form of a conclusion. The commission was established by the Decree No 292 II s, of the Parliament of Georgia, dated 26 September 2008 for the period of three month. The

³ Civilians on the Line of Fire – the Georgia Russia Conflict, Amnesty International Publication, 2008, <http://www.amnesty.org/en/library/info/EUR04/005/2008/en>

purpose of the creation of the commission as it was defined by the Decree and the name of it was already political. The Commission was named as: “Commission on Enquiry of the Facts of Infringement of the Territorial Integrity, Military Aggression and other Acts Committed by the Russian Federation”. The Commission was empowered to examine the facts of infringement of the territorial integrity and military aggression against Georgia by the Russian Federation.

The Commission was composed of ten members out of whom four were from the ruling party – United National Movement, four from Christian Democrats and two majoritarian MPs.

The Commission had interviewed 21 representatives of the Georgian Government, including the President and issued its conclusion in late December 2008. Instead of providing balanced assessment of the August conflict the Commission’s conclusion is an attempt to justify the actions of the Georgian Government, especially the use of military force in the beginning of August. The conclusion briefly deals with the issue of conduct of hostilities and the application of the international humanitarian law during the August conflict. This part of the conclusion is mainly based on the abovementioned reports of the Human Rights Watch and Amnesty International. However, in the part of the conclusion which deals with the recommendations which are addressed to the Georgian Government there is no mention of investigation of the war crimes either committed by Georgian or Russian sides.

Arguably one of the reasons why the work and conclusion of the commission leave the impression of being biased and subjective is rooted in the way it was created and how it operated. Principle 6 of the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity states that: “To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality. In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied.” Moreover, the Principle 19 of the same document stipulates that: “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.”

Even though the Commission on Enquiry of the Facts of Infringement of the Territorial Integrity, Military Aggression and other Acts Committed by the Russian Federation is not a truth commission as such, the above mentioned principles should still have been applied, considering the fact that the commission sought to shed the light over the armed conflict in August – a task that commission had failed to deal with in an impartial and objective manner.

Recommendations

The Human Rights Centre recommends Georgian authorities to investigate the alleged occurrence of war crimes and crimes against humanity within the jurisdiction of Georgia. The investigation must be carried out in an impartial and transparent way and guarantee the participation of the victims at all stages of investigation. In the long term it is desirable that Government crates an institutional structure within the criminal justice system of the country that will be used for the purposes of investigation of the crimes of universal jurisdiction. This shall include the special investigative/prosecuting division within the relevant government structure and training of the judges that might have to deal with the issue.