

## Ending Impunity in the South Caucasus: The Challenges Ahead

*"Punishment is now unfashionable, because it creates moral distinctions among men, which, to the democratic mind, are odious. We prefer a meaningless collective guilt to a meaningful individual responsibility", - Thomas Szasz<sup>1</sup>*

### 1. Introduction

The South Caucasus' so-called "frozen" conflicts are anything but frozen, and very often the situation is on a knife's edge, threatening not only the military forces on the ceasefire lines, but also the civilian populations in the region. The conflicts are also far more than domestic or territorial controversies<sup>2</sup> because they have both regional and international implications and represent one of the principal obstacles to the development of the region.

This research does not aim at presenting a comprehensive history of the South Caucasus conflicts on the basis of international law or at examining the causes that brought these disputes about. Rather it highlights the consequences that came out of these conflicts and sheds light on the serious crimes and military hostilities committed by the belligerent parties. Ultimately, this paper aims at analysing the question whether the ENP in the South Caucasus demands a more serious commitment to prosecute the perpetrators of the atrocities which occurred during the conflicts in the region. The research focuses on the recent 2008 war because this situation is currently under preliminary examinations by the ICC, taking into consideration the fact that only Georgia is party to the ICC, among other South Caucasian countries (Armenia, Azerbaijan).

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<sup>1</sup> Thomas Stephen Szasz (April 15, 1920 – September 8, 2012) was a psychiatrist and academic.

<sup>2</sup> Tracey C. German, *Visibly Invisible: EU Engagement in Conflict Resolution in the South Caucasus*. In: *European Security*, Vol. 16, 2007, p. 363.].

We will examine the ICTY experience in the Western Balkans and compare the co-operation by the Balkan states with the ICTY and the co-operation by the South Caucasus countries with the ICC in the context of EU integration. The lack of progress in talks<sup>3</sup> would make it difficult for the parties involved to reach an effective compromise without the intervention of the international community. Hence, it needs to be discussed whether the South Caucasus countries would agree with SEE solutions for EU integration. Is it possible to draw a parallel between South Caucasus-ICC-EU and the Western Balkans-ICTY-EU strategy?

## **2. South Caucasus and Western Balkans in a comparative EU approach towards peace, security and justice**

One of the principal aims of the EU in the 2004 enlargement process was to expand the zone of “prosperity, stability and security” that its citizens enjoy to also include the neighbours of the EU. This approach has developed from an understanding that the EU cannot keep enlarging *ad infinitum* and there is a need to find new ways of spreading security beyond its borders to ensure the long-term stability and security for the EU and its citizens.

The bloody wars in the Balkans during the 1990s prompted for the EU as an international actor, to realise that peace and stability on the periphery are crucial to the security of the Union. Consequently, the EU has taken steps towards boosting its involvement in conflict resolution efforts not only in the Balkans but also in the South Caucasus. This interference is the main cause of the threat of unsettled conflicts which might seriously affect the stability in the region and stable security outspread. The importance of interacting with the South Caucasus is reflected in the EU’s gradual economic and political engagement with certain countries, notably with regard to conflict resolution. In February 2001 the General Affairs and External Relations Council (GAERC) declared that the EU was willing to play a more active political role in the South Caucasus, stating that it would seek ways of lending its support “to prevent and resolve conflicts” and to assist in post-conflict rehabilitation.<sup>4</sup> In addition, further co-operation with other international organisations such as the OSCE, UN and CoE would reinforce the bilateral and multilateral

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<sup>3</sup> Ibid, 4-5.

<sup>4</sup> See: 2331st Council Meeting, General Affairs, 26 February 2001, Press Release 6506/01 (Presse 61) Brussels, [www.ue.eu.int](http://www.ue.eu.int), See also C. German (2007), p. 358.

dialogue within the South Caucasus states. In the European Security Strategy (ESS) of 2003 the region was identified as an area in which the EU would be taking a “stronger and more active interest”.<sup>5</sup>

The path of integration into the EU of the Western Balkan countries is *individual* and depends on the merits of each one of them with regard, in particular, to the determination to satisfy all the requirements, meet all the obligations, carry out the reforms and adopt the necessary measures that EU membership implies. The EU maintains a principled and consistent approach towards Serbia in relation to its co-operation with the ICTY.<sup>6</sup> It is necessary to affirm that for the EU and its institutions, impunity for war crimes and genocide is incompatible with the values of the Union, and that full co-operation with the ICTY was the key for Serbia to have closer ties to the EU.<sup>7</sup>

The SAA negotiations with Serbia and Montenegro were officially opened on 10 October 2005.<sup>8</sup> There have been many tensions, hence in May 2006, the Commission, supported by the GAERC decided to suspend the negotiations of the SAA with Serbia in light of the successive governments’ continuous failure to co-operate with the Tribunal, in particular, Serbia’s failure to transfer to the custody of the ICTY wartime Bosnian Serb Commander Ratko Mladić. The Commission’s annual progress report on Serbia in November 2006 emphasized that full co-operation with the ICTY is a precondition for the resumption of SAA talks:

1. *The Council regretted that Serbia and Montenegro were still not fully co-operating with the ICTY and it therefore supported the Commission’s decision to call off the negotiating round on an SAA scheduled for 11 May, in line with its Conclusions of 3 October 2005 and 27 February 2006.*
2. *The Council reiterated its firm commitment to the European perspective of Serbia and Montenegro. In this context, the Council indicated its support to resume negotiations as*

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<sup>5</sup> *European Union, European Security Strategy: A Secure Europe in a Better World*, EU, Brussels, 12 December 2003, p. 8. See also C. German (2007), p. 358.

<sup>6</sup> ICTY was established pursuant to Security Council Resolution 827 (23 May 1993) S/Res/827 (1993).

<sup>7</sup> *Human Rights Watch*, Letter to the EU on Relations with Serbia and ICTY Co-operation, Brussels, March 26, 2007, <http://www.hrw.org/news/2007/03/25/letter-eu-relations-serbia-and-icty-cooperation>.

<sup>8</sup> Serbia Progress Report 2006, p.5

[http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/sr\\_sec\\_1389\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/sr_sec_1389_en.pdf) (accessed on January 3, 2013).

*soon as full co-operation with the ICTY is achieved. It once again urged the authorities in Belgrade to ensure that all remaining fugitive ICTY indictees, notably Ratko Mladić, are brought to justice without further delay.*

- 3. If the necessary conditions are met and negotiations can resume rapidly, the Council underlines that a swift conclusion of the negotiations according to the timetable envisaged by the Commission is still within reach.*<sup>9</sup>

On February 26, 2007, the ICJ ruled that Serbia's failure to transfer Ratko Mladić to the ICTY amounted to a violation of its obligations under the Convention on Genocide. The Court also ordered Serbia to transfer to the ICTY individuals indicted for genocide and to co-operate fully with the Tribunal for Ratko Mladić, and Bosnian Serb wartime President, Radovan Karadžić.

In the 2007 report, the Commission indicated that SAA negotiations with Serbia resumed, following a clear commitment by the country to achieve full co-operation with the ICTY, and concrete actions undertaken by the country that have matched this commitment.<sup>10</sup>

To transfer Mladić as a condition for resuming SAA negotiations demanded more from Belgrade than was expected of Croatia, for whom the transfer to the ICTY of Croatian General Ante Gotovina was a precondition for EU candidate status rather than SAA talks. What the case of Gotovina actually demonstrates is the value of a clear, firm and consistent position on the part of the EU as regards ICTY co-operation, since there is little doubt that without firm EU pressure Gotovina would never have been brought to justice.<sup>11</sup>

In July 2006, the Serbian Government adopted an Action Plan on co-operation with the ICTY. The implementation of the Action Plan suffered from a number of deficiencies, as regards the co-ordination between the civilian and military security services and the role and power of the prosecution. The inclusion of provisions concerning the co-operation of Serbia with the ICTY in the SAA indicates the importance of the effective functioning of the international judicial institution in the context of the Serbia's EU integration. Considering the strong links between the EU and Serbia to establish a relationship based on reciprocity and mutual interest, which should

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<sup>9</sup> GAERC, Conclusions on the Western Balkans. Brussels, 15 May 2006, [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/89618.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/89618.pdf).

<sup>10</sup> SEC (2007) 1435, Serbia 2007 Progress Report, p, 16.

<sup>11</sup> Human Rights Watch, Letter to the EU on Relations with Serbia and ICTY Co-operation, 26 March 2007. [http://www.hrw.org/news/2007/03/25/letter-eu-relations-serbia-and-icty-cooperation#\\_edn2](http://www.hrw.org/news/2007/03/25/letter-eu-relations-serbia-and-icty-cooperation#_edn2).

allow Serbia to further strengthen and extend its relations with EU member states, in March 2012 Serbia was granted EU candidate status and in September 2013, the Stabilisation and Association Agreement (SAA)<sup>12</sup> entered into force. Besides, Serbia continues to have a positive attitude towards the ICC: it did not conclude bilateral agreements granting exemptions from ICC jurisdiction. It is important that Serbia continues to support fully the ICC and the integrity of its Statute in line with relevant EU decisions.<sup>13</sup>

The EU's approach to the South Caucasus shares the same philosophy, as the countries should enhance regional co-operation and good-neighbourly relations as key elements of the PCAs which coherently addresses political, economic and assistance-related issues, as well as promotion of peace, strengthening of democratic processes and protection of human rights, enhancing bilateral and regional co-operation, and so forth.

Both Western Balkans and South Caucasus countries play a decisive role in the process of transformation into an area of longstanding stability and guaranteeing security in the region. The EU itself is based on principles such as reconciliation, compromise and peaceful coexistence; and it condemned all war crimes that took place in the former Yugoslavia and South Caucasus. The EU supports the work of the ICTY and of the local War Crimes Chambers in their effort to ensure justice and accountability, but is also the main promoter of the ICC.

Actually, the similarities and differences between the two regions in relation to the EU are at variance. The EU has not been involved in all the conflicts in the South Caucasus as it was in the Western Balkans, but only in ascertaining a settlement between South Ossetia (Tskhinvali), Abkhazia and Tbilisi. South Ossetia is not seeking to become an independent state, but it is calling for reunification to become a constituent part of the Russian Federation,<sup>14</sup> which is different from the countries of former Yugoslavia which declared independence.

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<sup>12</sup>Stabilisation and Association Agreement (SAA) between the European Communities and their member states of the one part and the Republic of Serbia, of the other part.

<sup>13</sup> Ibid, "The Commission stressed its readiness to resume negotiations as soon as full co-operation with the ICTY is achieved", p. 5. Link: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/sr\\_sec\\_1389\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/sr_sec_1389_en.pdf).

<sup>14</sup>*Novye Izvestiya*, 4 February 2004, pp. 1-4. (in February 2004 the South Ossetian leader, Eduard Kokoity, proclaimed that 95 per cent of the Republic's population of approximately 100,000 had adopted Russian citizenship).

The situation in Abkhazia<sup>15</sup> is somewhat different to South Ossetia and the EU is far less involved in the search for a negotiated solution, lending its support to on-going negotiations and providing financial assistance for rehabilitation.<sup>16</sup> Abkhazia is seeking full independence based on close political and economic integration with the Russian Federation.

The accountability for serious past crimes through fair trials is the foundation for successful post-conflict reconstruction based on the rule of law and respect for human rights.<sup>17</sup> The Western Balkans' full co-operation with the ICTY, as well as a commitment to fair domestic war crimes trials demonstrated the States' maturity and commitment to embrace fully the values of the EU. Given the successful position of the EU towards the Western Balkans for a European, democratic future including a commitment to justice and prosecuting war criminals, the EU cannot ignore the plight of thousands of victims and their families still waiting for justice in the South Caucasus. This position puts in doubt the seriousness of the EU's demands towards member states, candidate states and those countries which aim at EU integration, regarding the commitment to justice, the rule of law and respect for human rights. That in turn depends on the EU providing principled and consistent leadership on these matters in the South Caucasus other than political and economic.

Considering Serbia and Georgia, the EU's position is rather different. The EU strongly reaffirmed that it would be ready to consider any concrete measures which would help Serbia to integrate swiftly into the family of European nations<sup>18</sup> through full co-operation with the ICTY. In the European Parliament Resolution 2011<sup>19</sup> full co-operation with the ICTY was a fundamental condition for Serbia to progress on the path to EU membership. This statement underlines the fact that all the states of the Western Balkans could only gain candidate status and/or open

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<sup>15</sup> See *German C.*, (2007), p. 373.

<sup>16</sup> *ibid.*

<sup>17</sup> Human Rights Watch, Letter to the EU on Relations with Serbia and ICTY Co-operation, 26 March 2007. [http://www.hrw.org/news/2007/03/25/letter-eu-relations-serbia-and-icty-cooperation#\\_edn2](http://www.hrw.org/news/2007/03/25/letter-eu-relations-serbia-and-icty-cooperation#_edn2).

<sup>18</sup> GAERC, Conclusions on the Western Balkans, 12 February 2007, p.13. [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/92758.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/92758.pdf) (accessed on January 3, 2013).

<sup>19</sup> European Parliament resolution of 19 January 2011 on the European integration process of Serbia P7TA (2011)0014.

accession negotiations with the EU if the ICTY Office of the Prosecutor assesses that these countries had offered full co-operation.<sup>20</sup>

In case of the South Caucasus, the co-operation with the ICC is more complex. The reasons are, firstly, that not all the South Caucasus countries are parties to the Rome statute, thus, have no obligation to co-operate, but may do it voluntarily, secondly, the conflicts in the region and the consequences of those conflicts occurred long before the creation of the ICC, since 1990s, which makes it more difficult and even impossible to impose ICC jurisdiction on the crimes having been committed during the wars in 1990s.

### **3. South Caucasus conflicts and the role of the EU**

After the cold war when the Soviet Union collapsed, a number of violent conflicts occurred in the post-Soviet area. In practice, individuals involved and responsibility for the crimes committed during those armed conflicts remained unpunished. The conflicts escalated and became violent especially in South Ossetia (Georgia), Transnistria (Moldova), Abkhazia (Georgia), Chechnya (Russian Federation) Nagorno-Karabakh (Armenia, Azerbaijan and Nagorno-Karabakh) and the conflict between Georgia, South Ossetia/Abkhazia and Russia in August 2008.

The armed conflict that occurred in Georgia in August 2008 has its roots in the Soviet era, in which Georgia was divided into three political-territorial entities, including the Autonomous Republic of Abkhazia and the Autonomous Oblast' (district) of South Ossetia. The conflicts arose during the period of the country's first President, Zviad Gamsakhurdia, who promoted nationalistic ethno-centrist slogans such as "Georgia for Georgians" towards the two political-territorial entities of Abkhazia and South Ossetia. Tensions arose and the conflict occurred between Georgian forces and separatist forces, first in South Ossetia in 1991 - 1992 and then in Abkhazia 1992 – 1994. The conflict ended with a peace agreement signed on 24 June 1992 in Sochi by Russian and Georgian Presidents, Boris Yeltsin and Eduard Shevardnadze. At the time, South Ossetia became a semi-autonomous area with a separate administration. One of the reasons

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<sup>20</sup> This political imperative has been clearly formulated vis-à-vis in the South Caucasus countries through ENP action plans.

why Georgia lost control over large parts of both territories was notably because of the support from Russia to South Ossetia and Abkhazia.

Significant similarities exist between these conflicts.<sup>21</sup> *First*, in each case, ceasefire agreements have been settled since 1992. They are monitored by a variety of international organisations and enshrine the victory of the separatist forces on the battlefield. *Second*, a fragile stability level emerged in the region, but the governments are still weak and the international community does not recognize the newly emerged states. *Third*, the EU perspective reflects in the development of institution-building and economic policies. The conflicts present an ethno-political dimension characteristic at the post-Soviet era. The Georgia-Abkhazia conflict has a distinctly ethnic character and the roots of this conflict lie partly in the Soviet period.<sup>22</sup>

The current stage of the conflict between Azerbaijan and the former autonomous region of Nagorno-Karabakh began in the late 1980s and turned into a vicious war where Armenia was also involved later. It started when in response to the self-determination claims of the Nagorno-Karabakh population the Azerbaijani authorities organized massacres and ethnic cleansing of the Armenian population on the entire territory of Azerbaijan. 25.000 people died in the war and over 700.000 people were displaced from the sides.<sup>23</sup>

Russia played a critical role in all of the separatist conflicts, as a mediator-cum-supporter-cum-combatant.<sup>24</sup> The *de facto* states of Abkhazia, South Ossetia and Nagorno-Karabakh, on the one hand, and their “home countries”, Georgia and Azerbaijan, on the other, can survive without conflict settlement, but none of them will prosper.<sup>25</sup>

As the EU has expanded, the Eastern European and the South Caucasus countries became closer neighbours, and their security, stability and prosperity increasingly affect that of the EU. Thus, closer co-operation between the EU and its Eastern European partners – Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine – is vital for the EU's external relations.

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<sup>21</sup> Lynch D., (2004) Engaging Eurasia's Separatist States: Unresolved Conflicts and de facto States. Forward by Richard H. Solomon. Washington D.C.: United States Institute of Peace, p. 6.

<sup>22</sup> Ibid, p.27.

<sup>23</sup> Ibid, 35.

<sup>24</sup> Ibid, 21.

<sup>25</sup> Ibid, 9.



After the 2008 Russian-Georgian war, on 2 December 2008, the Council of the EU appointed Ambassador Heidi Tagliavini Head of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG - CEIIG). The Mission was mandated by the Council to investigate the origins and the course of the conflict in Georgia, including with regard to international law (including the Helsinki Final Act), humanitarian law and human rights, and the accusations made in that context (including allegations of war crimes).

On 30 September 2009, the Mission formally presented the results of its investigation in the form of a Report to the Council of the EU, the OSCE and the UN, as well as to the parties of the conflict. In the context of the 2008 war the EU Fact-Finding Mission stated that “[for] the first time in its history [that] the European Union has decided to intervene actively in a serious armed conflict”.<sup>26</sup>

#### **4. ICC and the South Caucasus**

##### **4.1. The ICC as an instrument to establish justice**

In order to end the adverse effect of the prevalence of impunity,<sup>27</sup> the international community established international criminal courts such as the ICTY, ICTR, and ICC. The ICC as a manifestation of the establishment of criminal justice proclaimed as its main objective “to prosecute and investigate committed core international crimes and punish the perpetrators in order to “put an end to impunity and to contribute to the prevention of the [most serious ]crimes”<sup>28</sup> of international concern, such as genocide, crimes against humanity and war crimes.

The ICC relies on State parties to the Rome Statute based:

1. on the principle of complementarity (which ensures that states will have both the right and an incentive to prosecute crimes within their jurisdiction); and

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<sup>26</sup> The key materials used for constructing the arguments are the “Tagliavini Report” or the Independent International Fact-Finding Mission on the Conflict in Georgia by the EU.

<sup>27</sup> Impunity is defined as “the impossibility, de jure or de facto, of bringing the perpetrators of human rights 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 .” in: Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 08 February 2005, UN ECOSOC E/CN.4/2005/102/Add.1, p. 6.

<sup>28</sup> *Triffterer, Otto (red.) (2008). Commentary on the Rome Statute of the International Criminal Court: Observer's Note, Article by Article. 2. ed. München: Beck, p. 16.*

2. on the obligation of Member States to co-operate (which presupposes effective implementation of the Rome Statute into national law).

International criminal law does not contain abstract norms about crimes but it provides certain actions that shall be prohibited and punishable directly under international law, if there is a concrete threat to legally protected values and interests of the community of nations.<sup>29</sup>

Only one country of the South Caucasus – Georgia – took the step to ratify the Rome Statute of the ICC which establishes that every signatory vows to respect the non-impunity principles for all the crimes that occurred after the entry into force of the Statute on July 1, 2002.<sup>30</sup> The ICC is considered as a last resort, a complement to national courts, and has jurisdiction over serious crimes: genocide, crimes against humanity, war crimes and aggression, if national courts are unwilling or unable to investigate or persecute.

Co-operation with the ICC is not the same in case of state parties compared to states which are not parties of the Rome statute. This makes a difference especially for the conflicts in the South Caucasus, as not all the states in the region are parties to the statute. To state parties, the ICC “is entitled” to present “co-operation requests” and they are obliged to “co-operate fully’ (art 86)’ with it in ICC investigations and prosecutions of crimes. But as for non-party states, the ICC only “may invite” (art 87/5) them to “provide assistance” on the basis of an ad hoc arrangement. The word “invite” shows that co-operation by states which are not parties to the ICC is in the legal category of co-operation of a “voluntary nature”.

#### **4.2 Implementation of the Rome Statute: Georgia**

Georgia signed the Rome Statute on July 18, 1998 and ratified it on September 5, 2003. A legislative package of five bills was passed by Georgia’s Parliament on August 14, 2003:

1. regarding co-operation with the ICC;
2. amending the Code of Criminal Procedure;
3. amending the Criminal Code;

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<sup>29</sup> Ibid, p. 31.

<sup>30</sup> See the Preamble of the Rome Statute: “[...] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.”

4. amending the law of Georgia on custody;
5. amending the law on executive actions.

No problems arose regarding the surrender of its own nationals, sentencing or the principle of *ne bis in idem*. No incompatibility was found between the Statute requirement and Georgian law.<sup>31</sup> The Georgian Constitution was not amended as it was compatible with the Rome Statute although the Constitution does provide for immunities (Arts. 63, 75), but from the legal point of view “these [the immunities] are not absolute and if necessary can be lifted by the Parliament.”<sup>32</sup>

Parliament amended Art 9 (2) of the Code of Criminal Procedure which provides that prosecution, detention or any other procedural means regarding certain officially accorded immunities or similar protections by Georgian law or its Constitution, as well as persons enjoying diplomatic immunity and representatives of the ICC, are determined by the Constitution, by international agreements to which Georgia is party, as well as the Code of Criminal Procedure and other laws.

In addressing possible inconsistencies between the Georgian Criminal Code and the Code of Criminal Procedural, Georgia chose not to adopt a separate law but rather to proceed with a series of amendments to certain provisions. The crimes within the jurisdiction of the Court are now included in the Georgian Criminal Code as follows: genocide under Art 407, crimes against humanity under Art 408, and war crimes under Arts 411, 412 and 413.<sup>33</sup>

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<sup>31</sup> Art 13 of the Constitution of Georgia provides that Georgian nationals cannot be extradited except when otherwise established by international treaties to which it is a party. The distinction in the Rome Statute (Art 102) between extradition (to another State) and surrender (to the ICC) was recognized. See also: “*Workshop on the Ratification and Implementation of the Rome Statute of the International Criminal Court in the Southern Caucasus*” February 29 March 1, 2004, Tbilisi, Georgia.

<sup>32</sup> Ibid. Prof. Marina Kvachadze and Judge Merab Turava of the Supreme Court of Georgia summarized the steps that were taken by Georgia towards ratification and implementation of the Statute.

<sup>33</sup> Ibid.

## 4.3 Steps undertaken towards the implementation of the Rome Statute

### 4.3.1 Armenia

Armenia signed the Rome Statute on October 1, 1999<sup>34</sup> and took a number of steps towards ratification and implementation. In August 2004, the Armenian Constitutional Court delivered a negative opinion<sup>35</sup> on the compatibility of the Rome Statute with the national legislation. The reasons were: *a*) the ICC is seen as supplementing the national judicial system of Armenia (contradicting Arts 91 and 92 of the Constitution); *b*) national authorities would be deprived of the right to grant amnesty (Art 40, Art 55 para 17, Art 81 para 1).<sup>36</sup>

In the Constitution, it is stated that once ratified international agreements become part of national law, they prevail over conflicting laws of Armenia. In order to harmonize the Statute with domestic laws, there was a need to amend the Criminal Code and the Code of Criminal Procedure regarding the surrender or extradition of Armenian citizens but whilst the Rome Statute is ratified, it would have primacy over national laws. A new Criminal Code was adopted on April 18, 2003. This provides for some changes in section 13 (“Crimes against peace and human security”) which gives the definition of: *a*) serious breaches of international humanitarian law during armed conflicts (Art 391); *b*) crimes against human security (Art 392); *c*) genocide (Art 393).<sup>37</sup>

### 4.3.2 Azerbaijan

Azerbaijan’s position concerning implementation of the Rome Statute has been more influenced by a lack of political interest rather than by serious incompatibilities between the Statute and domestic legislation. A new Criminal Code entered into force on September 1, 2000. However, Azerbaijan did not sign the Rome Statute.<sup>38</sup> On September 2002, a discussion on signing began in the Parliament, but it was impeded by constitutional provisions on extradition, immunity and trial by jury.

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<sup>34</sup> Country Summary - Georgia: <http://www.iccnw.org/?mod=newsdetail&news=15>.

<sup>35</sup> SDO-502, 13 August 2004, Constitutional Court of the Republic of Armenia, Decision in English is available at <http://www.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/b07416492992a833c12576500051dd64?openDocument>.

<sup>36</sup> 5 July 1995, Constitution of the Republic of Armenia. The constitution was amended in 2005.

<sup>37</sup> English translation of the Armenian Criminal Code at:

[www.legislationline.org/data/Documents/Armenia\\_Criminal\\_Code\\_2003.htm](http://www.legislationline.org/data/Documents/Armenia_Criminal_Code_2003.htm).

<sup>38</sup> Country Summary- Azerbaijan: <http://www.iccnw.org/?mod=country&iduct=11>.

Crimes enumerated in the ICC Statute are not fully provided for in the Criminal Code. The latter criminalises genocide<sup>39</sup> and the crime of aggression<sup>40</sup> as defined in the Rome Statute, and partially war crimes<sup>41</sup> and crimes against humanity.<sup>42</sup> Azerbaijan's hierarchy between national and international law is confusing: state authorities are bound by international law when addressing international issues and by national law when addressing national ones.<sup>43</sup> Hence, it is the Constitutional Court that has the duty to interpret the law and establish the applicable hierarchy.

### 4.3.3 Russian Federation

As Russia was involved in the 2008 war in Georgia and because the situation is currently under preliminary examination by the ICC, the analysis of Russia's attitude towards the ratification of the Rome statute is also essential in the context of the South Caucasus conflicts. The Russian Federation signed the Rome Statute on 13 September 2000.<sup>44</sup> In September 2002, there were some attempts to submit the ratification bill to the Duma for approval, but sources reported that ratification was not on the Duma's legislative agenda<sup>45</sup> mostly because of political reasons. State Duma deputy speaker Vladimir Lukin stated, "I'm deeply convinced that we should ratify the [Rome] Statute without looking at the US stance. We should carry out not pro-American or anti-American policy, but pro-Russian policy, proceeding from our own views and beliefs."<sup>46</sup>

The national legislation of Russia does not fully comply with the Statute, thus the Criminal Code and Criminal Procedural Code must be adapted to include crimes under the jurisdiction of the Rome Statute. Co-operation legislation must also be incorporated into implementing legislation. However, a comparative study<sup>47</sup> of national legislation and provisions of the Rome Statute

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<sup>39</sup> Criminal Code of the Republic of Azerbaijan, 1 September 2000, Arts 103, 104 available in English at [www.carim-east.eu/media/legal%20module/natfr/AZ\\_1.2%20Criminal%20Code%20of%20AR\\_EN.pdf](http://www.carim-east.eu/media/legal%20module/natfr/AZ_1.2%20Criminal%20Code%20of%20AR_EN.pdf).

<sup>40</sup> Ibid, Arts 100, 101, 102.

<sup>41</sup> Ibid, Chapter 17, Arts 114-119.

<sup>42</sup> Ibid, Arts 105-113.

<sup>43</sup> The Law on Extradition of Criminals on May 15, 2001 does not enable the surrender to the ICC. In respect to the extradition of nationals, there is a linguistic particularity in the Azerbaijan legislation as it refers to "extradition" and "surrender" with the same meaning differently as the Statute provides. Another difference is related to the maximum term of provisional detention: under Azerbaijan law it is limited to 48 hours and under Rome Statute the limit is 96 hours.

<sup>44</sup> Country Summary ICC: <http://www.iccnw.org/?mod=country&iduct=143>

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. Country Summary ICC: <http://www.iccnw.org/?mod=country&iduct=143>.

was conducted to deal with constitutional issues, criminal law and co-operation with the Court. With regard to surrender and extradition, the legal study concluded that no constitutional amendments are required.

## **5. Case study: The August 2008 armed conflict**

### **5.1 The obligation of States to investigate**

According to international humanitarian law, States have an obligation to investigate war crimes allegedly committed by their nationals or armed forces or on their territory, and, if appropriate, prosecute the suspects falling under their jurisdiction.<sup>48</sup> The obligation to investigate and prosecute applies to both international and non-international armed conflict.<sup>49</sup> It is also confirmed by the UN Security Council and General Assembly that States should take measures to ensure the investigation of war crimes and crimes against humanity and the punishment of the perpetrators.<sup>50</sup> In 1946, the UN General Assembly recommended that all States, including those not members of the UN, arrest persons who allegedly committed war crimes in the Second World War and send them back for prosecution to the State where the crimes were committed.<sup>51</sup>

A number of human rights treaties include a clear obligation on States to prosecute persons suspected of having committed serious violations of human rights such as the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which impose a general obligation on all States Parties to provide an effective remedy against violations of the rights and freedoms contained in these two core human rights treaties. This includes not only a duty to investigate but also to punish the individuals held criminally responsible for the crimes committed.

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<sup>48</sup> First Geneva Convention, Art 49; Second Geneva Convention, Art 50; Third Geneva Convention, Art 129; Fourth Geneva Convention, Art 146.

<sup>49</sup> Genocide Convention, Art VI; Hague Convention for the Protection of Cultural Property, Art 28; Convention against Torture, Art 7; Chemical Weapons Convention, Art VII(1); Amended Protocol II to the Convention on Certain Conventional Weapons, Art 14 ; Ottawa Convention, Art 9; Second Protocol to the Hague Convention for the Protection of Cultural Property, Arts 15–17.

<sup>50</sup> See: UN General Assembly, Res. 2583 (XXIV) and 2712 (XXV), Res. 2840 (XXVI) and Res. 3074 (XXVIII).

<sup>51</sup> UN General Assembly, Res. 3 (I) para 570.

The preamble to the Statute of the ICC recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. As the ICC former Prosecutor Moreno-Ocampo stated “The Rome Statute ensures the end of impunity and that ... States have the primary responsibility to investigate and prosecute; the Court only steps in if there are no genuine national proceedings.”

Article 1 of the Rome Statute emphasizes that “... the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. The ICC principle of complementarity governs the exercise of the Court’s jurisdiction. This distinguishes the Court in several significant ways from other known institutions, including the ICTY and the ICTR. The Statute recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.

The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings.

## 5.2 The EU Fact-finding Mission to Georgia

Considering the sensitive situation in Georgia, on 1 September 2008 the EU Council pledged its commitment to support, *first*, every effort to “secure a peaceful and lasting solution” and *second* “confidence-building measures” to the conflict in Georgia.<sup>52</sup>

Therefore on 2 December 2008, the EU Council of Ministers decided to establish an Independent International Fact-Finding Mission on the Conflict in Georgia which would aim as provided in Art 1 (2) of the Rome Statute “to investigate the origins and of the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusation made in that context”<sup>53</sup> including allegations of war crimes.

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<sup>52</sup> IIFFMCG, Vol. I, margin 3, p. 6.

<sup>53</sup> Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia.

The Tagliavini report, concluded by the Fact-Finding Mission, noted that: “[...] guided by the principles of fairness, impartiality, even-handedness and balance for the report, the Mission’s purpose was to present the sequence of events to discuss the responsibility and will make a contribution to the stable and peaceful environment the South Caucasus as a prerequisite for the development of all the countries and nations sharing the region.”<sup>54</sup>

As for the conflict in South Ossetia and adjacent parts of the territory of Georgia, the Mission established that all sides to the conflict - Georgian forces, Russian forces and South Ossetian forces - committed violations of international humanitarian law and human rights law. Numerous violations were committed by South Ossetian irregular armed groups, by volunteers, mercenaries, and by armed individuals. One of the main problems which was stated in the Report was that “it is difficult to identify the responsibilities for and the perpetrators of these crimes” because both Georgian and Russian forces in many cases used similar armament, further complicating the attribution of certain acts. Therefore, many crimes committed during the conflict have significant elements which might be described as war crimes, if it were not for the difficulties of identification and attribution.<sup>55</sup>

Apart from war crimes, one of the most serious allegations was made by Russia and South Ossetia against Georgia: the charge of genocide.<sup>56</sup> Hence the Mission urgently started to examine this allegation, due to the grave connotations conjured up by the term genocide in public opinion and conscience, and also due to its very specific legal definition and to the ensuing serious consequences under international law.<sup>57</sup> Genocide is described as a specific act (killing, serious bodily or mental harm, etc) “committed with intent to destroy, in whole or in part, a national, ethnical, religious or racial group, as such”.<sup>58</sup> Moreover, the Mission reaffirmed the legal argumentation that international law requires proof of specific intent for the crime of genocide to be constituted.<sup>59</sup>

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<sup>54</sup> IIFFMCG, Vol. I, margin 10, p. 9.

<sup>55</sup> IIFFMCG, Vol. I, margin 26, p.26.

<sup>56</sup> IIFFMCG , Vol. I, margin 27 p. 27.

<sup>57</sup> Ibid.

<sup>58</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted on 9 December 1948 by the United Nations General Assembly.

<sup>59</sup> IIFFMCG Vol. I, margin 27, p. 26.



According to international law, all the acts that constitute genocide are grave breaches of the Geneva Conventions and represent war crimes if they are committed in the course of an international armed conflict.<sup>60</sup> Also, any act that constitutes genocide and is committed in the course of a non-international armed conflict is a violation of common Art 3 and of Protocol II.

The Mission concluded: "After having carefully reviewed the facts in the light of the relevant law, to the best of its knowledge allegations of genocide committed by the Georgian side in the context of the August 2008 conflict and its aftermath are neither founded in law nor substantiated by factual evidence."<sup>61</sup>

Several testimonies by direct eyewitnesses and indirect sources stated extrajudicial killings<sup>62</sup> of ethnic Georgians by Ossetian forces during the torching of villages in South Ossetia. Amnesty International documented "unlawful killings, beatings, threats, arson and looting perpetrated by armed groups associated with the South Ossetian side."<sup>63</sup> Although several international organisations documented different numbers of people killed in the war,<sup>64</sup> an exact number of summary executions has not been established by the Mission even though it "declared that there is credible evidence of cases of summary executions carried out by South Ossetian forces."<sup>65</sup>

Unfortunately, the August 2008 armed conflict saw many crimes committed in violation of international law, international humanitarian law and human rights law<sup>66</sup> from all the parts involved in the conflict by the Georgian forces, Russian forces and South Ossetian irregular armed groups, by volunteers or mercenaries or by armed individuals. Beyond those acts committed during the five days of hostilities from 7-8 to 12 August, additional acts were perpetrated after

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<sup>60</sup> Arts 50/51/130/147 of the Geneva Conventions; Art 85 of Protocol I.

<sup>61</sup> Ibid.

<sup>62</sup> IIFMCG, Vol. II p. 353.

<sup>63</sup> See also Human Rights Watch, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, op. cit., p. 143, OSCE, *Human Rights in the War-Affected Areas Following the Conflict in Georgia*, p. 23.

<sup>64</sup> "During and in the immediate aftermath of the war, at least 14 people were deliberately killed by Ossetian militias in territory controlled by Russian forces. Human Rights Watch documented six deliberate killings in Georgian settlements controlled by Russian forces, and received credible allegations of another six cases. Human Rights Watch also heard allegations of two such killings in South Ossetia." HRW, *Up In Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, p. 154.

<sup>65</sup> IIFMCG Vol. II, p. 355.

<sup>66</sup> IIFMCG Vol. I, margin 25, p 26.

the ceasefire came into effect, raising serious concerns about the co-responsibility of those forces in control of the situation, whose duty was to protect the civilian population.

The Report demonstrated that "most of the violations committed during the August 2008 conflict and the ceasefire period were committed in South Ossetia and in the adjacent so-called buffer zone. By contrast, few violations were reported in the upper Kodori Valley and Abkhazia. This exception does not relate, however, to the situation of ethnic Georgians in the Gali district of Abkhazia and the upper Kodori Valley, where their rights as a minority seem to be endangered."<sup>67</sup>

With regard to allegations of ethnic cleansing committed by South Ossetian forces or irregular armed groups, the Mission reported continuing forced displacements of ethnic Georgians who had remained in their homes after the hostilities. It found evidence of systematic looting and destruction of ethnic Georgian villages in South Ossetia. Consequently, the Report concluded that ethnic cleansing of ethnic Georgians in South Ossetia was indeed practised both during and after the August 2008 conflict.<sup>68</sup>

In respect to international humanitarian law on the conduct of hostilities and the protection of non-combatants, the violations during the armed conflict concern the ill-treatment of persons, the destruction of property and forced displacement. More specifically, the violations include indiscriminate attacks in terms of the type of weaponry used and their targeting, the lack of adequate protection by Russia and Georgia, widespread campaigns of looting and destruction of ethnic Georgian settlements by South Ossetians, as well as ill-treatment, gender-related violence including rape, assault, hostage-taking and arbitrary arrests, together with the failure by Russian forces to prevent and stop violations by South Ossetian forces, armed irregular groups and armed individuals before and after the ceasefire in South Ossetia and the adjacent territories.

There was a considerable flow of IDPs and refugees which confirms the severity of the conflict. Reportedly about 135 000 persons fled their homes, most of them from regions in and near South Ossetia.<sup>69</sup> While most persons fled to other parts of Georgia, a significant number also

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<sup>67</sup> IIFMCG, Vol. I, margin 25-26, p.26.

<sup>68</sup> IIFMCG, Vol. I, margin 27, p. 27.

<sup>69</sup> Ibid, margin 28, p. 27.

sought refuge in Russia. The majority fled because of the dangers and the insecurity connected to the conflict situation. In addition, numerous cases of forced displacements in violation of international humanitarian and human rights law were noted. The Report highlighted that more than 35 000 IDPs/refugees are not expected to return to their homes in the foreseeable future, owing to the continued insecurity of the situation or to the destruction of their homes and property.

*Mullins* identified the variation in the type and frequency of the violations of the Geneva Conventions by the parties in the August 2008 conflict (see table below). This conflict produced 199 incidents in which South Ossetians (94 crimes) and Russian forces (82 crimes) were responsible for both the largest number and the most grave crimes recorded.

*Table: Violations of the Geneva Conventions (Mullins 2011)*

<b>Crime</b>	<b>Georgia</b>	<b>Russia</b>	<b>South Ossetia</b>	<b>Abkhazian</b>	<b>Totals</b>
<b>Failure to maintain order in an occupied territory</b>	0	14	n/a	n/a	14
<b>Rape</b>	1	0	5	0	6
<b>Indiscriminate/disproportionate: artillery/air strikes</b>	7	13	0	0	20
<b>Indiscriminate/disproportionate: vehicle/small arms</b>	4	1	0	0	5
<b>Looting</b>	1	3	30	2	36
<b>Destruction of property</b>	1	5	27	0	33
<b>Inappropriate targets (civilian)</b>	6	17	0	0	23
<b>Murder (civilian)</b>	1	5	17	0	23

<b>Ill-treatment/torture (civilian)</b>	0	3	8	0	11
<b>Detentions</b>	0	1	3	0	4
<b>POW violations</b>	0	3	4	0	7
<b>Destruction of cultural objects</b>	0	17	0	0	17
<b>Total</b>	<b>21</b>	<b>82</b>	<b>94</b>	<b>2</b>	<b>199</b>

Given the evidence, Russian forces were responsible for failure to maintain order in 14 incidents, inappropriate targeting and using indiscriminate and disproportionate artillery and air strikes. Of the four parties involved in the conflict, two (namely Russia and South Ossetia) clearly committed more crimes.<sup>70</sup>

### 5.3 Office of the Prosecutor: No impunity for crimes committed in Georgia

#### 5.3.1 National investigations into alleged crimes

Georgia is a State Party to the Rome Statute since 2003, thus the ICC has jurisdiction over the crimes committed on the territory of Georgia or by its nationals from 1 December 2003 onwards. This includes forced displacement of civilians, killing of peacekeepers and attacks against civilian targets.

The Office of the Prosecutor (OTP) received 3 830 communications in relation to the Georgian situation and made its preliminary examination public on August 2008. The Office conducted a visit to Georgia in November 2008 and to Russia in March 2010; both Russian and Georgian authorities provided substantial information from their national investigations before. In February 2011, the OTP conducted a second visit to the Russian Federation and received a comprehensive update on the progress of national investigations. In September 2011, both Governments of Russia and Georgia were requested to provide a written update on the progress and failures of their respective investigations.

<sup>70</sup> Mullins, Christopher W. (2011), 'War Crimes in the 2008 Georgia–Russia Conflict', *British Journal of Criminology*, 51, 918–936, 924.

On 18 October 2011, the Russian Embassy replied to the OTP that "factors create an obstacle to genuine advancements in the national investigation of the criminal case, preventing the possibility to properly bring to justice alleged perpetrators of crimes within the jurisdiction of the Russian Federation".<sup>71</sup> According to Russian authorities, "the Georgian side had refused to provide legal assistance in relation to the criminal case" and "senior officials of foreign states including those of Georgia enjoy immunity from the criminal jurisdiction of the Russian Federation".<sup>72</sup>

On 12 December 2011, the Georgian Government provided the OTP with an updated report concerning the national criminal proceedings related to the August 2008 armed conflict. On 15 May 2013, the Chief Prosecutor of Georgia officially confirmed that the investigation would focus on allegations of war crimes, including "attacks against Russian peacekeepers by the Georgian troops, attacks against civilians both by the Georgian and Russian troops, destruction of civilian properties, forcible displacement of civilian population, torture and other ill-treatment, and pillage of ethnic Georgian villages".<sup>73</sup> Georgia as a State Party to the Rome Statute in fulfilling its obligation to co-operate with the ICC "stressed its willingness to fulfil its obligations to investigate and prosecute those responsible for committing crimes within the jurisdiction of the Court, regardless of nationality or status".<sup>74</sup>

Apart from the Russian and Georgian governments' reports, the OTP received reports by different NGOs and participated in meetings with these organisations in which additional facts of the alleged crimes committed during the August 2008 conflict were provided.

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<sup>71</sup> *Report on Preliminary Examination Activities 2012*, The Office of Prosecutor ICC, November 2012, §133, 31, <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf> .

<sup>72</sup> Ibid.

<sup>73</sup> *Report on Preliminary Examination Activities 2013*, The Office of Prosecutor ICC, November 2013, §168, 40, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examination/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examination/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF).

<sup>74</sup> Ibid, §172, 41.

### 5.3.2 OTP Report on Preliminary Examinations

In its latest 2013 Report on the Preliminary Examinations, the OTP identified serious crimes allegedly committed in the August 2008 conflict as following:

1. *Forcible displacement of Georgian population:* Through systematic and widespread destruction and pillaging of houses and property, South Ossetian forces allegedly forced 30 000 ethnic Georgians to flee from villages within and outside South Ossetia.
2. *Attacks against peacekeepers:* According to available information, Georgian forces allegedly attacked Russian peacekeepers' positions in Tskhinvali.
3. *Unlawful attacks:* There are allegations that both Georgian and Russian forces might have used indiscriminate or disproportionate force and/or failed to take the required precautions to spare civilian losses.
4. *Pillaging and destruction of property:* Allegedly South Ossetian forces, not prevented by Russian forces, looted, burned and systematically destroyed ethnic Georgian villages in South Ossetia and the "buffer zone" for the purpose of forcing their residents to leave.
5. *Torture and other forms of ill-treatment:* Georgian prisoners of war as well as ethnic Georgian and South Ossetian civilians were reportedly victims of torture, degrading treatment or other forms of ill-treatment.<sup>75</sup>

The OTP stated that "there is a reasonable basis to believe that the war crimes of pillaging, destroying civilian property and inflicting acts of torture were committed in the context of the August 2008 armed conflict. There also is a reasonable basis to believe that the crime against humanity of forcible transfer or deportation of population was committed." At the same time, the OTP took a reserved position requiring "further evaluation of alleged unlawful attacks by all parties, including the alleged attack against Russian peacekeepers."<sup>76</sup>

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<sup>75</sup> Report on Preliminary Examination Activities 2013, The Office of Prosecutor ICC, November 2013, §157-162, 38-39.

<sup>76</sup> OTP Report on Preliminary Examinations, 13 December 2011 § 97.

## 6. EU policy on international criminal justice, the fight against impunity and the ICC

### 6.1 The EU's position

The EU is playing a key role in establishing a common criminal justice space. It recognises the ICC as a mechanism of last resort which is responsible for the enforcement of justice for the victims of crimes against humanity, genocide, war crimes and aggression, as laid down by the principle of complementarity in the Rome Statute. In the 2012 Resolution on the Annual Report on Human Rights and Democracy, the European Parliament “reiterates its strong support for ICC in the fight against impunity for the most serious crimes of international concern” and “calls on the EU and its Member States to continue their political, diplomatic, logistical and financial backing of the ICC and other international criminal tribunals, including the ad hoc international tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.”<sup>77</sup>

The European Parliament supports “the inclusion in the EU Strategic Framework and Action Plan on Human Rights and Democracy of reference to the need to fight vigorously against impunity for serious crimes, not least through a commitment to the ICC, and the understanding that it is the primary duty of states to investigate grave international crimes, promote and contribute to strengthening the capacity of national judicial systems to investigate and prosecute these crimes”.<sup>78</sup> It also enhanced efforts to secure full co-operation with the Court through relevant national legislation on co-operation. The European Parliament emphasised the need to ensure that the issue of the fight against impunity is addressed more systematically in the EU's bilateral relations with the relevant countries, including by raising it in public statements, and that the EU addresses impunity more consistently at the multilateral level, for instance at the UN General Assembly and Human Rights Council.

EU institutions have clearly underlined their commitment to the principle of the ‘Responsibility to Protect’ (R2P), stressing the importance that the international community, including the EU, assumes responsibility through humanitarian intervention and appropriate diplomatic pressure

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<sup>77</sup> European Parliament Resolution of 13 December 2012 on the Annual Report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter (2012/2145(INI)), [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0503+0+DOC+XML+V0//EN&language=EN#def\\_1\\_6](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0503+0+DOC+XML+V0//EN&language=EN#def_1_6) (accessed on January 3, 2013).

<sup>78</sup> Ibid.

for addressing gross human rights violations in third countries when the governments of these countries are unable or unwilling to protect their own citizens.

The EU systematically seeks the inclusion of a clause supporting the ICC in negotiating mandates and agreements with third countries. In the framework of the ENP, the Commission has included ICC clauses in Action Plans with the following countries: Armenia, Azerbaijan, Georgia, Egypt, Lebanon, Jordan, Moldova and Ukraine.

The positive approach of the EU to recognize the ICC as an important institution to establish global criminal justice has reinforced the Court's legitimacy and potential effectiveness and sends a strong signal to the South Caucasus. The inclusion of the ICC clause in ENP Action Plans is a positive step for the EU commitment as a successful mediator. There is a strong EU action to "condemn" instances of non-co-operation, such as invitations of individuals subject to an ICC arrest warrant and failure to arrest and surrender such individuals.

## **6.2 The New Partnership Perspectives: EU- Armenia**

The ENP opens up new partnership perspectives for Armenia, especially in the area of economic and political co-operation.<sup>79</sup> Additionally, there is a "continuing strong EU commitment to support the settlement of the Nagorno-Karabakh conflict; conflict resolution and post conflict rehabilitation."<sup>80</sup>

The EU-Armenia co-operation further strengthened since 2009 when former Soviet republics (Armenia, Azerbaijan, Georgia, Moldova, Belarus, Ukraine) were included in the EU EaP which considers these countries separately from the other ENP regions. A new generation of AA has been negotiated with some countries, including Armenia, on an individual basis. These would have replaced the PCA concluded, e.g. between EU and Armenia in 1999.

In priority area 7 of the Action Plans, the EU vows to contribute to a peaceful solution of the Nagorno-Karabakh conflict by specific actions such as increasing diplomatic efforts, political support on the basis of international norms and principles, including the principle of self-

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<sup>79</sup> European Neighbourhood and Partnership Instrument, Armenia Country Strategy Paper 2007-2013 [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_armenia\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_armenia_en.pdf).

<sup>80</sup> Armenia Progress Report Implementation of the European Neighbourhood Policy in 2008, Brussels, 23/04/2009 , SEC(2009) 511.



determination of peoples; by intensifying the EU dialogue with the parties concerned with a view to the acceleration of the negotiations towards a political settlement, and so forth.

Co-operation on foreign and security policy is one of the main pillars of the EU, hence the EU-Armenian political dialogue includes issues on regional and international level: with the Council of Europe, OSCE and UN, and on the implementation of the European Security Strategy.

According to the EU - Armenia relations, as provided in the Action Plan<sup>81</sup>, Armenia should initiate the accession to the Rome Statute. The EU stated that Armenia has to:

- make the necessary legislative and constitutional amendments for its implementation;
- fight against international crime in accordance with international law, giving due regard to preserving the integrity of the Rome Statute.<sup>82</sup>

After meeting Russian President Vladimir Putin in Moscow on September 3, 2013, Armenia's President Sargsyan announced his country's intention to join the Russia-led Customs Union. After this statement, European officials declared that the EU-Armenia AA, the initiation of which had been planned for November, "will not proceed with its initialling due to Armenia's new international commitments"<sup>83</sup>, as was put in the joint Armenia-EU statement within the framework of the EU EaP Summit in Vilnius. They agreed on the "need to update the EU-Armenia ENP Action Plan."<sup>84</sup>

### **6.3 Russia: Lack of interest towards membership in EU and ICC**

Russia does not have any interest in becoming a member of the EU although its economic co-operation with EU member states is very important. The Westernisation of Georgia's foreign and security policies is challenging to Russia especially with regard to the "breakaway territories"- a source of disagreements in the process of conflict resolution. In addition, the connection between the Euro-Atlantic orientation of Georgian foreign and security policy and the ex-

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<sup>81</sup> EU/Armenia Action Plan, 2006-2011, available at

[http://eeas.europa.eu/enp/pdf/pdf/action\\_plans/armenia\\_enp\\_ap\\_final\\_en.pdf](http://eeas.europa.eu/enp/pdf/pdf/action_plans/armenia_enp_ap_final_en.pdf).

<sup>82</sup> Armenia Progress Report 2010. This document reports on the progress made in the implementation of the EU-Armenia ENP Action Plan between 1 January and 31 December 2010, pp. 6-7.

<sup>83</sup> Joint declaration of the Eastern Partnership Summit, Vilnius, 29 November 2013, 17130/13

<sup>84</sup> Ibid.

pectations of Western support for reintegration do not support the conduct of Russian policies in the region.

However, the EU largely respects the strong Russian reservation about any change in the existing formats for peacekeeping and mediation in the “frozen conflicts” in the South Caucasus.<sup>85</sup> Thus, the EU’s engagement in its common neighbourhood with Russia was characterised by the International Crisis Group as “working around the conflict” since 2006, i.e. not “working on the conflict”.<sup>86</sup>

Kosovo’s declaration of independence raised a lot of debate in the South Caucasus on the issues of fundamental international legal principles of self-determination, sovereignty and territorial integrity. Western governments and regional organisations that recognised Kosovo’s declaration of independence argued a case of *sui generis*.<sup>87</sup> However, not all member states of the EU had a common argument in favour of the case because of the fear that the Kosovo precedent would be taken into account for separatist conflicts in their own territories.<sup>88</sup> Indeed, the precedent had a sensitive impact on the unresolved conflicts of Georgia and on the bilateral relations between Georgia and Russia. Russia took the advantage to consider the Kosovo case as a parallel precedent for unresolved conflicts in the South Caucasus region and recognised the independence of Abkhazia and South Ossetia.

The Russian Federation is a state which is not party to the Rome Statute and its co-operation with the Court is rather vague given the fact that its former adversary, the United States, has no intention to become a party to the ICC. Hence, Russia’s escape from impunity is a real challenge for the ICC, even though Russia could fall under the jurisdiction of the Court with a mandate from the UN Security Council. Considering that Russia has the right of veto in the Council, this puts in doubt the ICC efficiency to perform its tasks.

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<sup>85</sup> IIFMCG, Vol. II, p. 18.

<sup>86</sup> *Conflict Resolution in the South Caucasus: The EU’s Role*, ICG Europe Report No.173, 20 March 2006.

<sup>87</sup> IIFMCG Volume II p.2.

<sup>88</sup> IIFMCG Volume II, p. 26; see also: *Akçakoca A., Vanhauwaert Th., Whitman R., Wolff S., After Georgia: Conflict Resolution in the EU’s Eastern Neighbourhood*, European Policy Centre April 2009, p. 9.

## 7. Conclusions

The on-going “frozen” conflicts and unresolved territorial and political disputes in the South Caucasus do not allow the proper application of post-conflict justice rehabilitation and reconciliation. The ratification of the Rome Statute seems as a guarantee for international justice; a contributor in ending impunity for the perpetrators of heinous crimes and to the prevention of such crimes.

In all the conflicts which occurred in the South Caucasus, the belligerent parties committed violations of international humanitarian law, i.e. the Geneva Conventions and other international human rights laws. The result was always human tragedy. The primary consideration and final goal of the international community should be the physical security of its population. The states are responsible to take reforms and measures in order to enhance the protection of human rights and to condemn those who breach the laws. Politics plays a critical role in mastering the will-power to go through with the process of prosecuting crimes and to bring perpetrators of alleged crimes to trial. This requires not only a common understanding and expectation among the South Caucasus, EU and ICC in the process of investigation and prosecution, but also political mobilisation of all the actors, involved in frozen conflicts, including states, not parties to the Rome Statute. Despite the complexity and uncertainty for European Integration, there is hope for the democratisation of the South Caucasus countries following the example of the Balkans: Croatia as a new EU member state and Serbia as a candidate country to EU.

Even though there are similarities between the South Caucasus and the Western Balkans in the transition to democracy and in the attitude towards EU integration, the co-operation with international tribunals seems to be different. This reflects upon the failure of political support to insist on co-operation with the ICC. OTP conclusions might have been drawn differently if the countries involved in the conflict would have been more forthcoming to report all the facts in their reports. Unlike Georgia, neither Armenia nor Azerbaijan is still party to the ICC. But all the conflicts in the region have the potential to escalate, thus, there is a possibility of new crimes being committed in the future. Therefore, joining the ICC would serve as a restricting factor in future possible crimes. One of the main tasks is co-ordination between the EU and international organisations in the process of further investigation and pressure towards the

national governments of the South Caucasus into creating a better co-operation for enhancing access to justice to officials who committed serious crimes.

The EU underlines the importance of the EaP as a specific Eastern dimension of the ENP in order to enhance prosperity, security, democracy, rule of law, respect for human rights, good governance, sustainable development and regional co-operation throughout the South Caucasus, and it is ready to enhance efforts to support confidence building and peaceful settlements to the conflicts in the region, in close co-operation with all relevant parties especially with Armenia, Azerbaijan, Georgia and Russia. However, the lack of judicial intervention aiming to fight impunity for past human rights abuses can lead to never-ending instability, lack of transparency and denial of justice for the victims and Caucasian society-at-large. The historic argument that it would be dangerous to punish the perpetrators of human rights abuses in order to not "shame" the states and officials is quite inhuman rather than politically dangerous. Hence, no consideration was given to bring to justice those allegedly bearing responsibility for gross violation of human rights in armed conflicts.

It needs to be stressed that both South Ossetia and Abkhazia, together with Russia, have to take appropriate measures to ensure that IDPs refugees of the conflicts in respect to the principle of return based on free individual decisions by the displaced persons.

The Fact-Finding Report and the preliminary report of the OTP concluded that it was extremely difficult to confirm and verify the truth. Hence, searching for the truth is an absolute imperative for peace and unavoidable future co-existence in the Caucasus. The August war is the result of an untold truth about the wars of the 1990s, impunity for those crimes, and nearly 20 years of injustice. Ending this cycle will provide grounds for a real guarantee of peace and security not only in Georgia, but in the entire region, apart from Realpolitik. In this context the relationship of the EU and the South Caucasus remains a forward moving project while it seems that the ICC represents a retrospective challenge.

Full co-operation with the ICC, as well as a commitment to fair domestic war crimes trials would demonstrate the South Caucasus' maturity and commitment to fully embrace the values of the EU. Conversely, the failure to co-operate with the ICC impedes the normalization of the relations with the other countries of the region. The rule of law model that the EU is spreading in

the South Caucasus is not efficient to provide justice for the crime committed during the armed conflicts. As Bärbel Bohley, a victim of the East German government's alleged atrocities, stated: "*We wanted justice but we got the rule of law (Rechtsstaat) instead.*"<sup>89</sup>

To maintain peace, protect human rights and prevent the recurrence of similar serious atrocities in the future, the South Caucasus countries should become parties to the ICC Statute, rely in their co-operation with the ICC on the principle of complementarity and the system of co-operation which presupposes effective implementation of the Rome Statute into national law.

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<sup>89</sup> Retribution and Reparation in The Transition To Democracy, by Jon Elster (ed.). New York, NY: Cambridge University Press, 2006, p. 797-799.