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THE RUCKUS IN THE CAUCASUS: A CASE AGAINST MIKHEIL SAAKASHVILI FOR CRIMES AGAINST HUMANITY IN THE AUGUST WAR

Yancy Cottrill*

INTRODUCTION

While the world's attention was focused on the fireworks display of the 2008 Olympic Games in China, the citizens of South Ossetia were watching the sky too. Only their sky was being lit up by warfare. At 7:30 p.m. on August 7, 2008, Georgian President Mikheil Saakashvili, held a televised speech promising the Ossetians a ceasefire and unlimited autonomy.¹ At 11:00 p.m., Saakashvili ordered the Georgian Army to launch an offensive on Tskhinvali, the capital of South Ossetia. Over the next five days, the civilians of South Ossetia and Abkhazia would be directly targeted by the Georgian forces and forcibly displaced from their homes.²

Rising to power after the tainted elections of 2003, known as the Rose Revolution, Mikheil Saakashvili gave the Georgian people hope that a true democracy would be established. Instead, his unilateral decision to attack his own citizens along with Russian peacekeepers in South Ossetia and Abkhazia proved that he was no different than previous leaders. The same Georgian people who swept Saakashvili to power are now in the streets demanding his resignation.³ His actions in the August War lead to the forced displacement, murder, imprisonment, and enforced disappearance of the civilian populations of South Ossetia and Abkhazia.⁴ Saakashvili, being responsible for these crimes against humanity, should stand trial in the International Criminal Court.

This article will begin by identifying and defining the crimes against humanity, which were committed by the Georgian forces. Then the evidence of the crimes will be evaluated as documented through media and international non-profit assessments. Finally, by examining international case law, it will become apparent

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1 Dimitry Avaliani, et al, *How Georgia Began War*, INST. FOR WAR AND PEACE REP., http://www.mail-archive.com/caucasus_reporting_service_english@iwpr.gn.apc.org/msg00133.html; AMNESTY INT'L, CIVILIANS IN THE LINE OF FIRE: THE GEORGIA-RUSSIA CONFLICT, <http://www.amnesty.org/en/library/asset/EUR04/005/2008/en/d9908665-ab55-11dd-a4cd-bfa0fdea9647/eur040052008eng.pdf> [hereinafter AMNESTY INT'L].

2 AMNESTY INT'L, *supra* note 1, at 18; Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, July 17, 1998, *Rome Statute of The Int'l Crim. Court*, Art. 7, U.N. Doc. A/CONF.183/9 (1998), available at <http://www.un-documents.net/lcc.htm> [hereinafter Rome Statute].

3 *Protests in Moldova and Georgia: Street Scenes*, ECONOMIST, April 18-24, 2009, at 58.

4 HUMAN RIGHTS WATCH, UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA, <http://www.hrw.org/en/reports/2009/01/22/flames-0>; AMNESTY INT'L, *supra* note 1, at 19.

that Saakashvili should be held accountable for his actions. Under the theory of command responsibility, the Georgian president oversaw the forced displacement, murder, imprisonment, and the enforced disappearance of civilians, which he should now have to explain to the international community.

I. CRIMES AGAINST HUMANITY

A. *Command Responsibility*

Mikheil Saakashvili will be held responsible for the crimes against humanity of forced displacement, murder, enforced disappearance, and imprisonment under Article 28 of the Rome Statute addressing the responsibilities of commanders and superiors.⁵ The statute states that the military commander of the Army can be held criminally responsible for the crimes committed by his forces under his command or control.⁶ It further states that the commander will be held criminally responsible if he knows the crimes are being committed and does not take steps to prevent them from occurring.⁷ Saakashvili was President and Commander of the Georgian armed forces during the August War against Russian peacekeepers and local militias when these crimes against humanity occurred.⁸

On September 5, 2003, Georgia ratified the Rome Statute - making any war crimes, genocide, or crimes against humanity committed within the country fall

5 The responsibility of commanders and other superiors specifically states:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Rome Statute, *supra* note 2, at Art. 28.

6 Rome Statute, *supra* note 2, at Art. 28.

7 Rome Statute, *supra* note 2, at Art. 28.

8 President of Georgia Website-Functions, <http://www.president.gov.ge/?l=E&m=1> (last visited May 2, 2010) (laying out the power of the Georgian Executive Branch under Georgian Constitution.).

under the jurisdiction of the International Criminal Court.⁹ Under the Rome Statute, certain “acts when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” are considered crimes against humanity.¹⁰ Those acts include: murder; extermination; enslavement; deportation or forcible transfer of a population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules or international law; torture; rape and other sexual crimes; persecution against any identifiable group or collectively; enforced disappearances; apartheid; and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹¹ One of the results of the August War and the actions of the Georgian forces under Saakashvili’s command was that thousands of civilians were forcibly displaced.¹²

B. *Forced Displacement*

The August War, initiated by the invasion of Georgian forces upon South Ossetia, displaced an estimated 127,000 people in South Ossetia and Abkhazia combined.¹³ The intentional targeting of civilians by the Georgian forces led to the forced displacement of these individuals.¹⁴ Forcibly displacing civilians by parties at war is prohibited by the Article 7 of the Rome Statute unless it is for their own safety or when necessary for vital military reasons.¹⁵ The Rome Statute defines this crime against humanity as: “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”¹⁶

The elements of forcible displacement as defined in the Rome Statute include “conduct [that] was committed as a part of a widespread or systematic attack directed against a civilian population.”¹⁷ While 68,000 individuals were able to return to their homes, the United Nations High Commissioner for Refugees estimated that 54,000 civilians would remain displaced through 2009.¹⁸ As well as being forcibly displaced, civilians were also victims to murder at the hands of the Georgian forces during the August War.¹⁹

9 Rome Statute, *supra* note 2, at Art. 5, 12.

10 Rome Statute, *supra* note 2, at Art. 7.

11 Rome Statute, *supra* note 2, at Art. 7.

12 AMNESTY INT’L, *supra* note 1, at 18-19.

13 U.N. High Comm’r for Refugees - Georgia, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48d2e6#> (last visited May 2, 2010).

14 Rome Statute, *supra* note 2, at Art. 7(1)(d); Human Rights Watch, *supra* note 4, at 6.

15 Rome Statute, *supra* note 2.

16 Rome Statute, *supra* note 2, at Art. 7(2)(d).

17 Int’l Crim. Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://www1.umn.edu/humanrts/instreet/icelementssofcrimes.html> (last visited May 3, 2010).

18 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 13.

19 HUMAN RIGHTS WATCH, *supra* note 4, at 31.

C. *Murder*

Georgian forces murdered civilians during their attacks in South Ossetia by failing to distinguish between military targets and civilians.²⁰ Furthermore, the Georgian Army attacked civilian vehicles in South Ossetia as they were trying to flee the combat zone resulting in the murder of those civilians.²¹ The elements of murder under the Rome Statute are as follows: the perpetrator killed one or more persons; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.²² The Georgian Army's actions under the directive of Mikheil Saakashvili resulted in the murder of civilians which is a crime against humanity under Article 7 of the Rome Statute.²³ In addition to the murder of civilians, the Georgian President should also answer to the charge of enforced disappearance of a civilian.

D. *Enforced Disappearance*

There has been one documented case of enforced disappearance by the Georgian Army upon a South Ossetian civilian.²⁴ The Rome Statute defines enforced disappearance as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.²⁵

The Georgian Army took into custody Tomaz Kabisov, twenty-nine years old, in the village of Tebti, South Ossetia on August 8.²⁶ Kabisov was last seen by a fellow detainee who served as a translator for him on August 10th in a prison camp in the town of Khashuri.²⁷ The Georgian government denies that he is in their custody.²⁸ While this scenario resulted in the disappearance of the individ-

20 HUMAN RIGHTS WATCH, *supra* note 4, at 6.

21 HUMAN RIGHTS WATCH, *supra* note 4, at 6.

22 Int'l Crim. Court, *Elements of Crimes*, *supra* note 17, at 5.

23 Rome Statute, *supra* note 2, AMNESTY INT'L, *supra* note 1, at 28, HUMAN RIGHTS WATCH, *supra* note 4, at 53-57; INT'L CRISIS GROUP, RUSSIA VS. GEORGIA: THE FALL OUT, <http://www.crisisgroup.org/home/index.cfm?id=5636> (last visited May 3, 2010).

24 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

25 Rome Statute, *supra* note 2, at Art. 7(2)(i).

26 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

27 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

28 HUMAN RIGHTS WATCH, *supra* note 4, at 86.

ual, there were situations where civilians were imprisoned and denied their liberty before being released.²⁹

E *Imprisonment*

There were numerous accounts of Georgian soldiers detaining, beating, and then imprisoning Ossetian civilians.³⁰ While civilians are considered protected persons in times of conflict under the Fourth Geneva Convention, the Georgian Army denied them their liberty.³¹ The Georgian Army claimed to have thirty-two detainees which were all military combatants, but upon release of these individuals it was discovered that some those detained were civilians.³² It was also determined that at least five of the thirty-two prisoners were beaten and ill-treated while in custody.³³ This imprisonment of civilians is a crime against humanity pursuant to the Rome Statute.³⁴ Saakashvili oversaw the Georgian Army while they participated in these activities and should be prosecuted by the International Criminal Court for his role. Now that all the charges have been defined, the evidence as compiled by international human rights organizations and the media will be assessed.

II. THE EVIDENCE

International Criminal Court prosecutor has taken the allegations of crimes against humanity, which were committed during the August War, under analysis.³⁵ The prosecutor may initiate an investigation on his own under the Rome

29 HUMAN RIGHTS WATCH, *supra* note 4, at 81-85 (relaying the accounts of prisoners detained by Georgian forces in Khetagurovo, Tskhinvali, Znauri, and the conditions of detainment).

30 HUMAN RIGHTS WATCH, *supra* note 4, at 81-85.

31 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, Switz., Aug. 12, 1949, *Final Declaration*, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (last visited May 3, 2010) (stating: "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity"); HUMAN RIGHTS WATCH, *supra* note 4, at 81-85.

32 HUMAN RIGHTS WATCH, *supra* note 4, at 81-85.

33 HUMAN RIGHTS WATCH, *supra* note 4, at 4.

34 Rome Statute, *supra* note 2, at Art. 7(1)(e): Crime against humanity of imprisonment or other severe deprivation of physical liberty defines the elements as: 1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; 2. The gravity of the conduct was such that it was in violation of fundamental rules of international law; 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. *Id.*

35 Press Release, Int'l Crim. Court, ICC Prosecutor Confirms Situation in Georgia Under Analysis (n.d.), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20re>

Statute by means of relying on information from sources such as state parties, non-governmental organizations, or other reliable sources.³⁶ Currently, the Office of the Prosecutor is conducting preliminary analysis of the situation in Georgia.³⁷ The reports of well known international human rights organizations are influential in compiling the facts to begin an investigation.³⁸

Another court looking into Georgia's actions is the Parliamentary Assembly of the Council of Europe which determined that Georgia's initiation of the shelling of South Ossetia accompanied by disproportionate use of force created grave risks for civilians, and thus, violated international humanitarian law.³⁹ The European Court of Human Rights has received over 3,300 complaints against Georgia due to the events of the August War, of which seven have received priority by the Chamber.⁴⁰ Many human rights groups have documented the crimes against humanity committed by the Georgian Army, under the direct control of Mikheil Saakashvili, during the August War with Russian peacekeepers and local militia.⁴¹

Despite the Georgian president's counterclaims that the Russian peacekeepers were responsible for the war, the people of Georgia have shown that they will not be fooled.⁴² Recently thousands of citizens attended an opposition Independence

leases%20(2008)/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis (last visited May 2, 2010).

36 Rome Statute, *supra* note 2, at Art. 15.

37 Int'l Crim. Court, Office of the Prosecutor, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (last visited May 2, 2010).

38 Rome Statute, *supra* note 2, at Art. 15.

39 Parliamentary Assembly Council of Europe, The Consequences of the War Between Georgia and Russia ¶5, <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1633.htm> (last visited May 2, 2010) "The use of heavy weapons and cluster munitions, creating grave risks for civilians, constituted a disproportionate use of armed force by Georgia, albeit within its own territory, and as such a violation of international humanitarian law and Georgia's commitment to resolve the conflict peacefully." *Id.*

40 Press Release, European Court of Human Rights, Seven Applications Against Georgia Concerning Hostilities in South Ossetia, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=845593&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C166DEA398649> (last visited May 2, 2010).

41 AMNESTY INT'L, *supra* note 1, at 24-28, 48-49; HUMAN RIGHTS WATCH, *supra* note 4, at 46-53, 64-66; INT'L CRISIS GROUP, *supra* note 23; NORWEGIAN HELSINKI COMMITTEE, GEORGIA-RUSSIA CONFLICT: ETHNIC CLEANSING CONTINUES IN SOUTH OSSETIAN CONFLICT ZONE IN GEORGIA, <http://www.nhc.no/php/index.php?module=article&view=784>; Brian Whitmore, *Is The Clock Ticking For Saakashvili?*, RADIO FREE EUROPE, Sept. 12, 2008, available at http://www.rferl.org/content/Is_The_Clock_Ticking_For_Saakashvili/1199512.html; INST. FOR WAR AND PEACE REP., *supra* note 1; Nona Salaghaia, *Georgian People Rose to their Feet to Express Respect for Abkhaz and Ossetian People*, GEORGIAN HUMAN RIGHTS CENTRE, May 28, 2009, available at <http://www.humanrights.ge/index.php?a=article&id=3792&lang=en>.

42 *Factual Evidence Contradicts War Claims in Recent Media Stories: OSCE Cautions on Drawing Conclusions Based on Incomplete Evidence*, GEORGIA UPDATE, NOV. 18, 2008, <http://georgiaupdate.gov.ge/en/doc/10006924/OSCE%20Nov%2018%20v1.htm>.

Day celebration voicing their disdain for the sham democracy Saakashvili has perpetuated and showing their support for the citizens of South Ossetia and Abkhazia.⁴³ The evidence of the forced displacement of the South Ossetian civilians is well documented by international human rights organizations and will be evaluated below.⁴⁴

A. *Forced Displacement*

Forced displacement of Ossetians and Abkhazians, due to civilians being attacked during August War, has been widely acknowledged.⁴⁵ As of October 27, 2008, the Georgian government website had the number of internally displaced persons at 35,495, but the UNHRC estimated a total of 54,000 people would be displaced through 2009.⁴⁶ Civilians in South Ossetia were not taken into consideration as villages and residential areas were bombed, schools and hospitals damaged or destroyed, and civilian deaths outnumbered those of combatants.⁴⁷ There were also reports of fleeing civilians being targeted by bombs.⁴⁸

Human Rights Watch found that the Georgian Army failed to distinguish between military targets and civilians.⁴⁹ They went on to conclude “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.”⁵⁰ In many instances the Human Rights Watch researcher did not find any evidence of a military objective in the area which was targeted.⁵¹

The Guiding Principles on Internal Displacement have been recognized as an important tool to protect internally displaced persons by the United Nations General Assembly.⁵² It states that all authorities shall respect and ensure respect for their obligations under international law in all circumstances to prevent and avoid conditions that might lead to people being displaced.⁵³ Saakashvili’s inva-

43 INST. FOR WAR AND PEACE REP., *supra* note 1; GEORGIAN HUMAN RIGHTS CENTRE, *supra* note 41.

44 U.N. High Comm’r for Refugees, *supra* note 13; INT’L CRISIS GROUP, *supra* note 23, at ii, 3-4, 9-10, 15; AMNESTY INT’L, *supra* note 1, at 5.

45 U.N. High Comm’r for Refugees, *supra* note 13; INT’L CRISIS GROUP, *supra* note 23, at ii, 3-4, 9-10, 15; AMNESTY INT’L, *supra* note 1, at 5.

46 Georgia Update, *Russian Invasion of Georgia: Refugees and Displaced Persons*, <http://georgiaupdate.gov.ge/en/doc/10006949/IDP%20Update%2021.11.htm> (last visited May 2, 2010); U.N. High Comm’r for Refugees, *supra* note 12.

47 AMNESTY INT’L, *supra* note 1, at 5.

48 AMNESTY INT’L, *supra* note 1, at 5.

49 HUMAN RIGHTS WATCH, *supra* note 4, at 38.

50 HUMAN RIGHTS WATCH, *supra* note 4, at 38.

51 HUMAN RIGHTS WATCH, *supra* note 4, at 38.

52 G.A. Res. 60/1 ¶ 132, U.N. Doc. A/60/L.1 (Sept. 20, 2005).

53 U.N. Economic and Social Council, *Report of the Representative of the Secretary-General: Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Human Rights, Mass Exoduses*

sion of South Ossetia, showing little regard for civilian life, created a hostile environment where civilians were forced to flee.⁵⁴ He took no precautions to spare civilian casualties or adhere to guiding principles of any sort in the shelling of Tskhinvali or the issuance cluster munitions to the soldiers.⁵⁵

B. Murder

Mikheil Saakashvili told the Ossetian people that a ceasefire was in place just hours before he ordered Georgian troops to shell their villages.⁵⁶ Tskhinvali resident, Aelita Jioyeva, recalled, “no one thought that they would attack us so unexpectedly, at night, when everyone was asleep and when the Olympic Games were opening in another part of the world. It was such a horrible thing they did.”⁵⁷ The Georgian president made false representations to the Ossetians, and then the troops fired on civilians as they were fleeing the conflict, including an incident of a Georgian tank firing upon a civilian car.⁵⁸

Russian President, Dmitry Medvedev, ordered an investigation by the Investigation Committee at the General Prosecutor’s Office to gather evidence of the murders to ascertain if the actions amounted to genocide.⁵⁹ The Norwegian Helsinki Committee condemned both sides for using excessive bombing and indiscriminate use of force against civilians.⁶⁰ The disregard on behalf of the Georgian forces prompted the ICC to launch an investigation into the civilian attacks which occurred in South Ossetia.⁶¹

C. Enforced Disappearance

As described above Tomaz Kabisov was taken into Georgian custody on August 8, 2008 and was last seen on August 10, 2008.⁶² He was an Ossetian civilian

and Displaced Persons, §2, Principle 5, submitted pursuant to Commission resolution 1997/39, U.N. Doc E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

54 HUMAN RIGHTS WATCH, *supra* note 4, at 53-56 (detailing the accounts of civilians who were compelled to flee and came under attack while doing so).

55 HUMAN RIGHTS WATCH, *supra* note 4, at 64; Assoc. Press, *Georgia’s Saakashvili Commits War Crimes Against Humanity*, PRAVDA, Aug. 8, 2008, available at <http://english.pravda.ru/hotspots/106045-georgia-0>.

56 INST. FOR WAR AND PEACE REP., *supra* note 1.

57 INST. FOR WAR AND PEACE REP., *supra* note 1.

58 INST. FOR WAR AND PEACE REP., *supra* note 1; HUMAN RIGHTS WATCH, *supra* note 4, at 53-56; AMNESTY INT’L, *supra* note 1, at 28.

59 *Russia Launches Genocide Probe Over S.Ossetia Events*, RIANOVOSTI, Aug. 14, 2008, available at <http://en.rian.ru/russia/20080814/116026568.html>.

60 Norwegian Helsinki Committee, *Georgia-Russia Conflict: Ethnic Cleansing Continues in South Ossetian Conflict Zone in Georgia*, <http://www.nhc.no/php/index.php?module=article&view=784> (last visited May 2, 2010).

61 Int’l Crim. Court, *supra* note 35.

62 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

who, at the time of his detainment, was walking through a village.⁶³ Kabisov managed to give another prisoner his sister's cell phone number on August 10th and that individual contacted the family upon release.⁶⁴ The Georgian authorities exchanged thirty-two prisoners with the Ossetians at the end of August but Kabisov was not one of them.⁶⁵ Georgian authorities have denied that he is in their custody.⁶⁶

The most recent development of international law in the field of enforced disappearance is the International Convention for the Protection of All Persons from Enforced Disappearance.⁶⁷ This persuasive document prohibits enforced disappearance under any circumstances including war or internal stability.⁶⁸ The arrest, detention, and then denial by the Georgian forces that Kabisov is in their custody or that they know of his whereabouts violated the very first article of the abovementioned convention.⁶⁹ Saakashvili has been made aware of this case of enforced disappearance as the government has had to answer questions from the international community about Kabisov's situation.⁷⁰

D. *Imprisonment*

Amnesty International reports that the Georgian forces detained a small number of Ossetian civilians during the conflict.⁷¹ They provided an account of a young man, his wife, and his mother being detained just three days in Tbilisi and Gori.⁷² This individual told Amnesty International that he was arrested outside his home by Georgian troops, but maintained neither he nor his family was mistreated while being detained.⁷³

This is a much different tale from some of the accounts detailed by Human Rights Watch. They reported that Georgia took thirty-two detainees of which it was not possible to differentiate between civilians and combatants.⁷⁴ They interviewed five of the detainees and determined that at least one of them, Tengiz

63 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

64 HUMAN RIGHTS WATCH, *supra* note 4, at 85

65 HUMAN RIGHTS WATCH, *supra* note 4, at 85

66 HUMAN RIGHTS WATCH, *supra* note 4, at 85

67 U.N. High Comm'r for Human Rights, *Int'l Convention for the Protection of All Persons from Enforced Disappearance*, Art. 1, U.N. Doc. A/61/488 (Dec. 20, 2006), available at http://untreaty.un.org/English/notpubl/IV_16_english.pdf [hereinafter UNHCHR].

68 UNHCHR, *supra* note 67. Article 1 reads: 1. No one shall be subjected to enforced disappearance. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

69 HUMAN RIGHTS WATCH, *supra* note 4 at 85; UNHCHR, *supra* note 67.

70 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

71 AMNESTY INT'L, *supra* note 1, at 47.

72 AMNESTY INT'L, *supra* note 1, at 47.

73 AMNESTY INT'L, *supra* note 1, at 47.

74 HUMAN RIGHTS WATCH, *supra* note 4, at 79.

Bakaev, age sixty-six, was a pacifist on religious grounds, and not an enemy combatant".⁷⁵ He claimed that the Georgians beat him in the face and on the back with their fists and gun butts before dragging him away.⁷⁶

Human Right Watch gave the account of Sergei Lokhov, an Ossetian, who said the Georgians ignored his attempts to explain that he was a civilian, and then they beat him until they dislocated his jaw.⁷⁷ Lastly, the Georgian Army detained Zaza Lakhtilashvili, who is half Ossetian and half Georgian.⁷⁸ He is mentally disabled and when the soldiers were asking him his name he attempted to appease them (thinking they were Russian) and told them his mother's Russian maiden name.⁷⁹ He also told the soldiers that he had killed four Georgians; the soldiers then beat him up and detained him at an undisclosed location.⁸⁰

III. PAST TRENDS IN DECISIONS

The Rome Statute created the International Criminal Court ("ICC") in 1998 at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁸¹ The ICC is an independent court and is a court of last resort, hearing serious offenses such as crimes against humanity.⁸² Saakashvili should be tried in the ICC for the atrocities that took place under his command in the August War. The cases relied on in the following analysis are from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the Human Rights Chamber for Bosnia and Herzegovina. The ICTY was created by the United Nations and is governed by the Statute of the ICTY.⁸³ The Statute of the ICTY allows the Tribunal to hear the same crimes against humanity, which fall under the Rome Statute.⁸⁴ The Human Rights Chamber for Bosnia and Herzegovina was set up by the Dayton Peace Agreement and can also hear crimes against humanity in accord with the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁵ These judicial bodies' deci-

75 HUMAN RIGHTS WATCH, *supra* note 4, at 79, 83.

76 HUMAN RIGHTS WATCH, *supra* note 4, at 83.

77 HUMAN RIGHTS WATCH, *supra* note 4, at 79.

78 HUMAN RIGHTS WATCH, *supra* note 4, at 83.

79 HUMAN RIGHTS WATCH, *supra* note 4, at 83.

80 HUMAN RIGHTS WATCH, *supra* note 4, at 83.

81 Int'l Crim. Court - Establishment of the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Establishment+of+the+Court.htm> (last visited May 2, 2010).

82 Int'l Crim. Court - ICC at a Glance, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/ICC+at+a+glance.htm> (last visited May 2, 2010).

83 United Nations, Int'l Crim. Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/319> (last visited May 2, 2010).

84 United Nations, Undated Statute of the Int'l Crim. Tribunal for the Former Yugoslavia, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf; Rome Statute, *supra* note 2.

85 The Human Rights Chamber for Bosnia and Herzegovina, Annex 6 to the general framework agreement for peace in BiH, http://www.hrc.ba/ENGLISH/annual_report/2002/ANNEX6.HTM (last visited May 2, 2010).

sions should be looked to as precedence, as the ICC has not tried a case such as the one involving the Georgian forces.

A. *Forced Displacement*

There are two cases decided by the Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), which involve the crime against humanity of deportation or forcible transfer of population - forced displacement.⁸⁶ The first ICTY case involved Vinko Pandurevic, a Lieutenant Colonel in the Bosnian Serb Army (“VRS”), who oversaw the commission of atrocities upon the Bosnian Muslims in the city of Potocari.⁸⁷ He faced seven charges, including the crime against humanity of forcible transfer under the theory of command responsibility.⁸⁸ The VRS under his command went into Potocari, separated the women and children from the men, ages 16-60, and then executed the men.⁸⁹ The women and children were placed on buses and taken to another location.⁹⁰ Pandurevic was found guilty of having “committed, planned, instigated, ordered, or otherwise aided and abetted the planning, preparation, or execution of a crime against humanity, that is, the forcible transfer of Bosnian Muslims from the Srebrenica enclave.”⁹¹

The second ICTY case involved the prosecution of Jovica Stanisic and Franko Simatovic.⁹² Stanisic was the Head of the DB, the Serbian State Security Service, and Simatovic was commander of the Special Operations Unit of the DB.⁹³ These individuals financed, trained, and supervised special DB officers who forcefully transferred thousands of non-Serbians from their home regions to different parts of Bosnia.⁹⁴ The ICTY found both individuals, “acting alone or in concert with members of the joint criminal enterprise, planned, ordered, committed or otherwise aided and abetted the planning, preparation or execution of: deportation, a crime against humanity.”⁹⁵

The ICTY Trial Chamber found all three of these individuals guilty of forcible displacement via Article 28 of the Rome Statute addressing command responsibility. Like these individuals, Mikheil Saakashvili’s actions of using the South Os-

⁸⁶ *Prosecutor v. Pandurevic*, Case No. ICTY IT-05-86-I (Feb. 10, 2005), available at http://www.icty.org/x/cases/pandurevic_trbic/ind/en/pan-1ai050303.htm (last visited May 5, 2010); *Prosecutor v. Stanisic*, Case No. ICTY IT-03-69 (May 1, 2003), available at http://www.icty.org/x/cases/stanistic_simatovic/ind/en/sta-ii030501e.pdf (last visited May 5, 2010).

⁸⁷ *Pandurevic*, *supra* note 86, at ¶¶ 1-13.

⁸⁸ *Pandurevic*, *supra* note 86, at ¶ 33.

⁸⁹ *Pandurevic*, *supra* note 86, at ¶¶ 4-11.

⁹⁰ *Pandurevic*, *supra* note 86, at ¶¶ 4-11.

⁹¹ *Pandurevic*, *supra* note 86, at ¶ 33.

⁹² *Stanisic*, *supra* note 86, at ¶¶ 59-60.

⁹³ *Stanisic*, *supra* note 86, at ¶¶ 1-2.

⁹⁴ *Stanisic*, *supra* note 86, at ¶¶ 59-60.

⁹⁵ *Stanisic*, *supra* note 86, at ¶60.

setian and Abkhazian civilians as pawns in his plan to expose the Russian peacekeepers as unfit to perform in a neutral capacity, will win him a conviction.⁹⁶ He showed disregard for civilians in the ordering use of excessive force when invading South Ossetia as evidenced by residential areas being destroyed.⁹⁷ The Georgian president, as head of the armed forces, was aware that these acts were taking place as he issued the troops to advance into South Ossetia on the night of August seventh after telling the Ossetians that there was a ceasefire just hours earlier.⁹⁸ The attacks were a part of a systematic attack with a disregard for civilian lives, “resulting in large-scale damage to civilian objects and property, and civilian casualties.”⁹⁹ Finally, Saakashvili knew that the attack launched in Tskhinvali would cause excessive civilian death as he permitted the use of multiple rocket launching systems which use in populated areas is prohibited by international humanitarian law due to their “broad area effect.”¹⁰⁰ Having shown that Saakashvili should be found guilty of forced displacement under command responsibility, the crime of murder will next be evaluated.

B. Murder

In *Prosecutor v. Pandurevic*, the ICTY Trial Chamber found Milorad Trbic guilty of the crime against humanity of murder through the theory of command responsibility.¹⁰¹ He was a reserve Captain in the VRS and the direct assistant to Lieutenant Drago Nikolic, the Chief of Security of the Zvornik Brigade.¹⁰² The crimes he was tried for related to the same incidents described above dealing with the abuses upon non-Serbs in the town of Potocari.¹⁰³ Trbic was a security officer who organized, and detained, murdered thousands of the Bosnian Muslim men (including personally executed Orahovac Muslim men from Srebrenica) from July 13-17, 1995.¹⁰⁴

In *Prosecutor v. Meakic*, the ICTY Trial Chamber held six individuals, Zeljko Meakic, Miroslav Kvočka, Dragoljub Prcać, Mladen Radic, Milojica Kos, and Momcilo Gruban, responsible for the crime against humanity of murder under command responsibility.¹⁰⁵ These individuals oversaw the atrocities that were carried out upon Bosnian Muslims at Omarska Camp during May of 1992.¹⁰⁶

96 INT'L CRISIS GROUP, *supra* note 23, at 7.

97 AMNESTY INT'L, *supra* note 1, at 5, HUMAN RIGHTS WATCH, *supra* note 4, at 6.

98 INST. FOR WAR AND PEACE REPORTING, *supra* note 1.

99 HUMAN RIGHTS WATCH, *supra* note 4, at 6.

100 HUMAN RIGHTS WATCH, *supra* note 4, at 7.

101 *Stanisic*, Case No. ICTY IT-03-69, *supra* note 86, at Count 4-5 (murder).

102 *Id.* at ¶15.

103 *Id.* at ¶¶1-11.

104 *Id.* at ¶10.

105 *Prosecutor v. Meakic et al*, Case No. ICTY 95-4-1, ¶19.5 (July 18, 2001), available at <http://www.icty.org/x/cases/mejakic/ind/en/mea-ii950213e.pdf> (last visited May 5, 2010).

106 *Id.* at ¶¶2.1-3.

Omarska Camp was established after the Muslim residential areas were shelled and the civilians surrendered.¹⁰⁷ While at Omarska, the prisoners were beaten, tortured, raped, sexually assaulted, humiliated, and killed.¹⁰⁸ The individuals charged had varying levels of responsibility but did not personally take part in the killings.¹⁰⁹ The ICTY stated they “are criminally responsible for the acts of their subordinates in the murder of Omarska prisoners.”¹¹⁰

The situation in Georgia was similar, as Georgian forces killed numerous civilians while carrying out operations in South Ossetia.¹¹¹ Their shelling of residential areas in Ossetian villages, shooting at fleeing civilians, and using prohibited weaponry in populated areas was a part of a widespread attack on the civilians of Ossetia.¹¹² Saakashvili most certainly knew that there would be massive civilian casualties due to his unilateral decision to invade South Ossetia as he had hours before the attack issued a ceasefire and promised the Ossetians “unlimited autonomy.”¹¹³ These factors satisfy all the elements needed to convict the Georgian President of the crime against humanity of murder under command responsibility.¹¹⁴ Now, Saakashvili’s actions will be analyzed in relation to the enforced disappearance of a South Ossetian civilian.

C. Enforced Disappearance

In a case before the Human Rights Chamber for Bosnia and Herzegovina, Esma Palic brought a claim against the Republika Srpska for the enforced disappearance of her husband Avdo Palic.¹¹⁵ On July 27, 1995, Colonel Avdo Palic, a commander in the Army of Bosnia and Herzegovina, was negotiating with Bosnian Serbs on United Nations premises when fighting broke out and he was taken prisoner.¹¹⁶ The Bosnian Serb Army was under the direction of Ratko Mladic at the time the fighting and subsequent imprisonment occurred.¹¹⁷ Ms. Palic initially brought the case against both Srpska and Bosnia and Herzegovina; however, the

107 *Id.* at ¶¶2.1-2.6.

108 *Id.* at ¶2.6.

109 *Id.* at ¶¶4-7.

110 *Meakic, supra* note 105, at ¶19.5.

111 AMNESTY INT’L, *supra* note 1, at 5, 10, 23-24, 27-28, 60; HUMAN RIGHTS WATCH, *supra* note 4, at 38-61.

112 *Id.*

113 INST. FOR WAR AND PEACE REP., *supra* note 1.

114 Rome Statute, *supra* note 2, at arts. 7, 28.

115 *Avdo and Esma Palic v. Republika Srpska*, Case No. CH/99/3196 (Jan. 11, 2001), ¶¶ 1-21, available at <http://www.hrc.ba/database/decisions/CH99-3196%20Palic%20Admissibility%20and%20Merits%20E.pdf> (last visited May 5, 2010).

116 *Id.* at ¶2.

117 *Id.*

Chamber only found responsibility with Srpska and dismissed the claim against Bosnia and Herzegovina.¹¹⁸

Ms. Palic sought the relief “that the Respondent Party be ordered to provide her with complete and accurate information on her husband’s fate.”¹¹⁹ Ms. Palic had witnesses who confirmed seeing her husband alive, imprisoned by the VRS.¹²⁰ The Chamber found that the Republik Srpska was responsible for the enforced disappearance of Mr. Palic under the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.¹²¹ They awarded Ms. Palic a full investigation into the whereabouts of her husband, the immediate release of Mr. Palic, and if deceased his remains would be made available, costs for mental suffering and non-pecuniary damages.¹²²

While the Georgian authorities arrested Kabisov, as witnessed by fellow inmates, they deny he is still in their custody.¹²³ Mikheil Saakashvili knew that civilians were being detained as they acknowledged thirty-two individuals were in their custody, but claimed they were all combatants.¹²⁴ The existence of Kabisov and his situation has been brought to the attention of the Georgian government, yet they still have not attempted to remedy the situation.¹²⁵ These actions collectively meet the elements needed to prove that Saakashvili is guilty of the crime against humanity of forced disappearance.¹²⁶ Finally, the crime against humanity of imprisonment, which occurred during the August War, will be proven.

D. Imprisonment

In *Prosecutor v. Meakic*, the same six individuals mentioned under the murder charges were found guilty of imprisonment – a crime against humanity.¹²⁷ The Tribunal’s Trial Chamber found them “criminally responsible for their own acts or omissions and for the acts of their subordinates in the unlawful imprisonment of the prisoners of Omarska.”¹²⁸ Once again, the six fulfilled a superior-subordinate relationship with the guards who carried out the unlawful imprison-

118 *Id.* at ¶3.

119 *Avdo and Esma Palic v. Republika Srpska*, Case No. CH/99/3196 (Jan. 11, 2001), ¶¶ 1-21, available at <http://www.hrc.ba/database/decisions/CH99-3196%20Palic%20Admissibility%20and%20Merits%20E.pdf> (last visited May 5, 2010).

120 *Id.* at ¶12-17.

121 *Id.* at ¶91(3).

122 *Id.* at ¶91(3)-(13).

123 HUMAN RIGHTS WATCH, *supra* note 4, at 85.

124 HUMAN RIGHTS WATCH, *supra* note 4, at 78.

125 HUMAN RIGHTS WATCH, *supra* note 4, at 85-86.

126 Rome Statute, *supra* note 2, Article 7(1)(i); Int’l Crim. Court, *Elements of Crimes*, *supra* note 17, at 7(1)(i).

127 *Meakic*, *supra* note 105, at ¶19.13.

128 *Meakic*, *supra* note 105, at ¶19.13.

ment.¹²⁹ They had knowledge, due to serving as superiors at the Camp, that civilians were being held unlawfully.¹³⁰ Finally, the six also failed to prevent or punish their subordinates for keeping the civilians imprisoned.¹³¹

There are detailed accounts of the Georgian Army detaining civilians, depriving them of their liberty, and in some cases subjecting them to extreme physical punishment.¹³² Saakashvili, as head of the armed forces who issued the attack, was fully aware of the factual circumstances and the gravity of the conduct.¹³³ The unlawful imprisonment of civilians was another example of the Georgian President's lack of regard for international law and the lives of civilians in South Ossetia.¹³⁴ The Georgian Army admitted to having thirty-two detainees, including civilians, they exchanged for their combatants that the Ossetians detained.¹³⁵ Thus, as the Commander of the Army, Saakashvili should be held accountable for the crime against humanity of unlawful imprisonment.

CONCLUSION

The events of that took place during the five days of the August War in Georgia were triggered by the actions of Mikheil Saakashvili. The Georgian President lied to the Ossetian people on national television just hours before he shelled their villages.¹³⁶ The Georgian Army under his command terrorized the civilian population of South Ossetia and committed crimes against humanity. The Georgian forces attacked residential areas where there were no military objectives, they fired upon civilians as they attempted to flee, they fired their tanks at civilian cars, they unlawfully imprisoned and beat civilians, they engaged in the enforced disappearance of a civilian, they forcefully displaced thousands of Ossetians and Abkhazians, and they used prohibited weaponry, cluster munitions in populated areas.¹³⁷ Saakashvili should be held accountable for his actions and tried in the International Criminal Court for the crimes against humanity of murder, imprisonment, enforced disappearance, and forced displacement under Article 28 of the Rome Statute, responsibility of commanders and other superiors.

129 *Meakic, supra* note 105, at ¶¶4-7.

130 *Meakic, supra* note 105, at ¶¶4-7.

131 *Meakic, supra* note 105, at ¶¶2.1-3.

132 AMNESTY INT'L, *supra* note 1 at 47; HUMAN RIGHTS WATCH, *supra* note 4, at 79-83.

133 INT'L CRISIS GROUP, *supra* note 23, at 7.

134 HUMAN RIGHTS WATCH, *supra* note 4, at 79.

135 HUMAN RIGHTS WATCH, *supra* note 4, at 79.

136 INST. FOR WAR AND PEACE REP., *supra* note 1

137 HUMAN RIGHTS WATCH, *supra* note 4, at 3, 6,7, 65-69, 79-83, 85; AMNESTY INT'L, *supra* note 1, at 5, 46-47, 60.

