INTERNATIONAL LEGAL RESPONSIBILITY FOR THE CRIME OF GENOCIDE IN KHOJALY

Tofig F. Musayev*

INTRODUCTION

The logical consequence of the territorial claims against Azerbaijan by Armenian nationalists at the end of the 1980s was the occupation in 1992-1993 of a significant part of its territory, including Nagorny Karabakh and seven adjacent districts. The resulting war unleashed against Azerbaijan led to the deaths and wounding of thousands of people; hundreds of thousands became refugees and were forcibly displaced and several thousand disappeared without trace.

The capture of Khojaly was particularly tragic. Before the conflict 7000 people lived in this town of Nagorny Karabakh inhabited by the Azerbaijanis. From October 1991 the town was entirely surrounded by the Armenians. Over the night from the 25th and 26th of February 1992, following massive artillery bombardment of Khojaly, the assault on the town begun from six directions. The infantry guards regiment of the former Soviet Union army stationed in Nagorny Karabakh, the personnel of which was composed mainly of the Armenians, participated directly in the capture of Khojaly by the Armenian armed units. As a result, 613 civilians, including women, children and the elderly were killed with especial cruelty.

THE PERPETRATORS OF THE CRIME

There have been numerous instances in the practice of states disguising their role in the forcible capture of the territory of another state as well as denying the crimes committed in this territory. These features are all evidenced in the policies and practices followed by Armenia. It denies both the involvement in the armed conflict, along with that it has anything to do with controlling these territories, and that there is any occupation within the meaning of international law. Thus, in one of his interviews the current president of Armenia Serzh Sargsyan claimed that "only volunteers had fought for Nagorny Karabakh". At the same time, Armenia, in his words, acted as "guarantor of the security of Nagorny Karabakh", prepared to intervene immediately in the event of the outbreak of a new war.[1] The question of Armenia providing guarantees is also mentioned in the country's national security strategy of 7 February 2007.[2] No explanation is provided, however, of how these guarantees, which affect a portion of Azerbaijan's territory, fit with international law.

Generally speaking, such attempts to disguise aggression against a neighbouring state and thereby to assert its innocence for crimes committed in the course of this aggression are unlikely to be taken seriously, given the incontrovertible evidence testifying to the diametrically opposite situation.

In addition to the facts at the disposal of the Azerbaijani authorities attesting to the direct involvement of the Armenian armed forces in the military hostilities against Azerbaijan and the presence of these forces in the occupied territories — issues which merit a separate and careful investigation — the assessment of Armenia's role given by independent observers is also completely unequivocal.

As the PACE rapporteur David Atkinson pointed out, "Armenians from Armenia had participated in the armed fighting over the Nagorno-Karabakh region besides local Armenians from within Azerbaijan. Today, Armenia has soldiers stationed in the Nagorny Karabakh region and the surrounding districts, people in the region

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* LL.M in International Human Rights Law (University of Essex, 2003-04).

[1] Caucasus Context 2007, vol. 4, issue 1, pp. 43-44. See also the message by Serzh Sargsyan of 1 September 2007 on the occasion of the "sixteenth anniversary of the independence of the Republic of Nagorny Karabakh", "Hayinfo" website: <http://www.hayinfo.ru/page_rev.php?tb_id=18&sub_id=1&id=18956>.

[2] National security strategy of the Republic of Armenia of 7 February 2007, chapter III, see website of the Ministry of Defence of Armenia <http://www.mil.am/eng/?page=49>.

have passports of Armenia, and the Armenian government transfers large budgetary resources to this area".[3]

Resolution 1416 (2005) adopted on 25 January 2005 by the Parliamentary Assembly of the Council of Europe acknowledges the continued occupation of considerable parts of the territory of Azerbaijan and the conduct of ethnic cleansing. It is no coincidence that the Assembly draws attention to Armenia's obligations under international law and points out "that the occupation of foreign territory by a Member State constitutes a grave violation of that State's obligations as a member of the Council of Europe [...]".[4]

The responsibility of Armenia for the massacre in Khojaly, despite its denial by the official Yerevan, is confirmed by numerous facts at the disposal of the law-enforcement agencies of Azerbaijan and testimonies by eyewitnesses of the tragedy. The following words by current President of Armenia Serzh Sargsyan in the famous book by the British journalist Thomas de Waal "Black Garden: Armenia and Azerbaijan through Peace and War" leave no doubts:

"Before Khojali, the Azerbaijanis thought that they were joking with us, they thought that the Armenians were people who could not raise their hand against the civilian population. We were able to break that [stereotype]. And that's what happened. And we should also take into account that amongst those boys were people who had fled from Baku and Sumgait". [5]

QUALIFICATION OF THE CRIME

International law of armed conflict appeared to a considerable extent as the right of war which included the legal basis to embark upon wars (*jus ad bellum*) and the law of warfare (*jus in bellum*). After the adoption of the United Nations Charter, the threat or use of force against the territorial integrity or political independence of any state was recognized unlawful, while the legitimate use of armed force was limited to the exercise of the right of self-defence. As a result, the right of war has transformed into humanitarian law, the basic sources of which are the norms of customary law as well as such multilateral instruments as the Hague Conventions of 1899 and 1907 on the laws and customs of war, the Geneva Conventions of 1949 on the protection of war victims and two additional protocols of 1997 thereto.

The Diplomatic Conference held in Rome in 1998 under the United Nations auspices adopted the Rome Statute of the International Criminal Court, the jurisdiction of which covered the most serious crimes affecting the interests of the international community as a whole. Such crimes include genocide, crimes against humanity, war crimes and aggression.

A distinction should be drawn between the two stages in the perpetration during the conflict between Armenia and Azerbaijan of the most serious international offences such as genocide, crimes against humanity and war crimes. The first stage can be sited during the active military campaign, which had such tragic consequences for the civilian Azerbaijani population. The second stage relates to the situation in the occupied territories of Azerbaijan, in particular to the transfer of settlers into these territories, exploitation of natural resources, destruction and appropriation of the historical and cultural heritage of Azerbaijan.

Depending on the specific circumstances, a single action may constitute a number of offences. Thus, the war crimes committed by the Armenians during the conflict in some cases compound other international crimes, such as genocide and crimes against humanity, or are coterminous with them. For example, the massacre of the civilian Azerbaijani population of the town of Khojaly, which constituted a serious breach of the law of armed conflicts, is also qualified as genocide.

In 1948 the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. This international instrument represents a competent codification of basic legal principles relating to genocide. The Convention confirmed that genocide is a crime under international law entailing individual criminal responsibility. In accordance with this multilateral treaty, genocide means acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religions group, as such.

In the following years genocide was included among the number of offences falling under the jurisdiction of the international tribunals on the former Yugoslavia and Rwanda and of the International Criminal Court. Important case law has been developed through these first two international judicial institutions, while the leading judgment is now that of the International Court of Justice dated 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*).

RESPONSIBILITY UNDER INTERNATIONAL LAW

Offences committed during the conflict between Armenia and Azerbaijan entail state responsibility and individual criminal responsibility.

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[3] Report of the Parliamentary Affairs Committee of the Parliamentary Assembly of the Council of Europe. Document 10364, 29 November 2004. Explanatory memorandum by the Rapporteur, para. 6.

[4] PACE resolution 1416 (2005), entitled "The conflict over the Nagorny Karabakh region dealt with by the OSCE Minsk Conference", 15 January 2005, para. 2.

[5] Thomas de Waal, Black Garden: Armenia and Azerbaijan through Peace and War (New York and London, 2004), p. 172.

According to article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001 and commended to governments in General Assembly resolution 56/83, "[e]very internationally wrongful act of a State entails the international responsibility of that State", while article 2 provides that "there is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"[6]. This principle has been affirmed in the case-law. Thus, as early as 1928, in its ruling in the *Factory at Chorzów* case, the Permanent Court of International Justice described the principle of international responsibility as one of the principles of international law and, furthermore, of the general understanding of the law.[7]

The principle of responsibility is closely bound up with the principle of the conscientious fulfillment of obligations under international law (*pacta sunt servanda*).

The responsibility of the state is incurred for any act or omission of its authorities which occurs either within or beyond its national borders. An internationally wrongful act is also perpetrated by the organs of a State or by its agents, acting *ultra vires* or contrary to instructions.[8]

There is a convincing body of evidence attesting to the use of force by Armenia against the territorial inviolability of Azerbaijan and the exercise by Armenia of effective overall military and political control over the occupied territories of Azerbaijan. This control is being exercised both directly by the armed forces of Armenia and indirectly through its subordinate separatist regime established in the occupied territory, which, by performing the functions of a local administration, survives by virtue of the military and other support of the occupying power.

Armenia's responsibility arises as the consequence both of the internationally wrongful acts of its own organs and agents in the occupied territories and the activities of its subordinate local administration. Furthermore, there is responsibility even in the event of consent to, or tacit approval of, the actions of this administration.[9]

Armenia's international responsibility, which is incurred by its internationally wrongful acts, involves legal consequences manifested in the obligation to cease these acts, to offer appropriate assurances and guarantees that they will not recur and to provide full reparation for injury in the form of restitution, compensation and satisfaction, either singly or in combination.[10]

As stated in the commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, "[e]very State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations".[11] A significant role in securing recognition of this principle was played by the decision of the International Court of Justice in the *Barcelona Traction* case. This identified the existence of a special category of obligations — obligations towards the international community as a whole. The International Court of Justice states: "[b]y their very nature the former [the obligations of a State towards the international community as a whole] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[12]

Accordingly, serious breaches of obligations flowing from peremptory norms of general international law may have additional consequences affecting not only the state bearing the responsibility, but also all other states. Inasmuch as all states have a legal interest, they are all entitled to invoke the responsibility of the state which has breached its responsibility *erga omnes*. Furthermore, states must cooperate with a view to ending such breaches by lawful means.[13]

It is generally recognized that the category of serious breaches of obligations under peremptory norms of general international law includes, among others, the crime of genocide.[14] Thus, the Convention on the Prevention and Punishment of the Crime of Genocide is

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[6] James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries (Cambridge: Cambridge University Press, 2002), p. 61.

[7] Factory at Chorzyw (Claim for Indemnity) Case (Germany v. Poland) (Merits), P.C.I.J. Series A (1928) No. 1, Permanent Court of International Justice. For text, see Martin Dixon and Robert McCorquodale, Cases and Materials on International Law (Oxford: Oxford University Press, 3rd ed., 2003), p. 404. See also I.I.Lukashuk, International law (Moscow: Walters Kluwer, 3rd ed., 2007), p. 376.

[8] Ilaşcu and others v. Moldova and Russia, ECHR Judgment of 8 July 2004, para. 319. See also Ireland v. United Kingdom, ECHR Judgment of 18 January 1978, para. 159, ECHR Portal, HUDOC Collection; Articles on Responsibility of States for Internationally Wrongful Acts, article 7, in Crawford, op. cit., p. 62.

[9] See Louizidou v. Turkey, EHCR Judgment of 23 March 1995, para. 62; Louizidou v. Turkey, EHCR Judgment of 18 December 1996, para. 52; Cyprus v. Turkey, ECHR Judgment of 10 May 2001, para. 77; Ilaşcu and others v. Moldova and Russia, paras. 314-319, ECHR Portal, HUDOC Collection.

[10] See Articles on Responsibility of States for Internationally Wrongful Acts, articles 28, 30, 31 & 34-37, in Crawford, op. cit. pp. 66-68.

[11] See Crawford, op. cit., comment to article 1, p. 79, para. 4.

[12] Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), I.C.J. Judgment of 5 February 1970, I.C.J. Reports 1970, para. 33. See also Lukashuk, pp. 379-380.

[13] Lukashuk, pp. 379-380, 394-396; Commentary to article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts, in Crawford, op. cit., p. 79, para. 4.

[14] Commentary to article 40 of the Articles on Responsibility of States for Internationally Wrongful Acts, in Crawford, op. cit., p. 246, para. 4.

clear in stating that genocide is a crime under international law which states undertake to prevent and punish.

In accordance with international law, "[n]o State shall recognize as lawful a situation created by a serious breach [of obligations under peremptory norms of general international law], nor render aid or assistance in maintaining that situation."[15]

Furthemore, the crime of genocide falls under the purview of the principle of universal jurisdiction in international criminal law which empowers states to establish their jurisdiction over international crimes and, accordingly, provides unavoidability of punishment of the perpetrator, regardless of the place of commission of the crime and the nationality of the perpetrator or of the victim. Thus, with the aim of protecting universal values, states have been authorised to substitute territorial and national states in order to prosecute and punish, on behalf of the whole international community, persons responsible for international crimes. Under the influence of international rules, a number of states have included the principle of universal jurisdiction into their national legislation. This situation and the existing judicial practice in these and some other states create the necessary legal prerequisites for effective criminal prosecution of those individuals responsible for international crimes against the citizens of Azerbaijan.

Alongside Armenia's responsibility as the State which unleashed war against Azerbaijan, under the customary and treaty norms of international criminal law, certain acts perpetrated in the context of an armed conflict are viewed as international criminal offences and responsibility for them is borne on an individual basis by those participating in the said acts, their accomplices and accessories. As a result of operative and investigative measures undertaken by the law-enforcement agencies of Azerbaijan, concrete individuals have been accused of especially grave offences during the conflict, including the genocide in Khojaly. Arrest warrants have been issued to ensure effective international search of these persons.

The international community, acting chiefly through the United Nations, has proclaimed and set down in international instruments a compendium of fundamental values, such as peace and respect for human rights. The consensus on them was reflected in the adoption in 1948 of the Universal Declaration of Human Rights, according to which "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". At the same time, the Universal Declaration emphasizes that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."[16]

Regrettably, even some 60 years after the adoption of the Universal Declaration of Human Rights, the conspicuous "silence" in certain international criminal proceedings serves to accentuate a deficiency characteristic of the international community today: the gap between the theoretical values of law and harsh reality, which impedes the application in practice of the rich potential of international law standards. At the same time, if one is to be consistent in upholding universally accepted values, it is essential to take steps to inhibit any brazen attempt to reject these and not to permit lawlessness, including by prosecuting their supposed perpetrators.[17] It is clear that there can be no long-term and sustainable peace without justice and respect for human dignity, rights and freedoms.

All existing facts of the tragic events in Khojaly confirm that the intentional actions of the occupying forces were directed to mass extermination of the inhabitants of this town only because they were Azerbaijanis.

Measures taken at the national level as well as existing legal framework of prosecution of and punishment for international crimes secure conviction in the perspective of ending impunity for the genocide committed against the Azerbaijani population of Khojaly. Some are inclined to believe that the possibility of recognition of the unilateral secession of Kosovo from Serbia may create a precedent to address similarly the fate of other separatist territories, including Nagorny Karabakh. However, in addition to a number of differences between these two situations, the actions of Armenia aimed at forceful capture of a part of the territory of Azerbaijan, the puppet nature of the regime established in the occupied Azerbaijani lands as well as war crimes, acts of genocide and crimes against humanity committed by the occupying power *a priori* rule out any probability of application of the Kosovo scenario to Nagorny Karabakh.

[15] See Articles on Responsibility of States for Internationally Wrongful Acts, article 41, in Crawford, op. cit., p. 69; See also General Assembly resolution 62/243 of 14 March 2008, entitled "The situation in the occupied territories of Azerbaijan", op. 5.

[16] Universal Declaration of Human Rights, General Assembly resolution 217 A (III), 10 December 1948. For text, see United Nations Centre for Human Rights, Human Rights: A Compilation of International Instruments, ST/HR/1/Rev.5, vol. 1 (First Part), New York and Geneva, United Nations, pp. 1-7, at p. 1.

[17] See, e.g., Antonio Cassese, International Criminal Law (Oxford: Oxford University Press, 2003), p. 446.