“Dirçəliş-XXI əsr”.-2010.-№143-144.-S.153-168.

GENOCIDE IN KHOJALY IN THE PERSPECTIVE OF THE INTERNATIONAL COURT OF JUSTICE

Saadat YUSIFOVA, *candidate of legal sciences*

Interrelationship of the principles of territorial integrity and self-determination of the nations with respect to the Nagorno-Karabakh conflict has been the object of study and international-legal analysis for a long time. Besides, the research has been carried out to find out the perspectives to lodge the case before the various international judicial organs for consideration.

However, the possibility' of consideration of the issue of genocide in Khojaly within the international justice has not been the subject of study frequently. From this point of view, the study of the international-legal perspective of the tragedy m Khojaly is the matter of great interest.

* * *

"Genocide" originates from the Greek word *"genos"* (birth, kind) and latin word "caecfo" (murder). This term was introduced in 1944 by Polish lawyer and future US prosecutor at the Nuremberg Trials and used for the classification of the barbaric acts of the Nazi Germany in relation to the Jews. It was Lemkin to initiate first time to elaborate a treaty declaring the aggressive acts against national, religious or ethnic groups as international crimes

Although, the term genocide was not mentioned in the Judgment of the Nuremberg Tribunal, in the act of indictment it was noted that the accused persons had committed "genocide", i.e. "exterminated racial, religious groups, murdered part of civil population m the occupied territories with the purpose to destroy particular nations and classes, national, ethnic and religious groups..."

On 11 December 1946, the UN General Assembly adopting the Resolution in its first session declared that "genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."

The UN Economic and Social Council elaborated the draft convention on prevention of genocide upon the instruction of the General Assembly. The Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948 and entered into force in 1951 sets forth the legal definition of "genocide".

In accordance with Article II of the Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group

This definition of "genocide" does not match its etymological meaning, since the former includes not only killing, but also the other acts. However, unfortunately, more appropriate definition to encompass all the acts enumerated in Article II has not been revealed so far.

The definition of genocide, set forth in Article II was reproduced in Article 17 of the draft "Code of Crimes against the Peace and Security of Mankind" of 1996, as well as in the Statutes of the International Tribunals on Former Yugoslavia and Rwanda, Rome Statute of the International Criminal Court. The latter make difference between the genocide and cranes against humanity and war crimes, classifying them as separate international crimes.

I. The issue of Ratione temporis

The USSR signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1949 and on 3 May 1954 presented its ratification instrument to the UN. In spite of that, the responsibility foi genocide was envisaged in our legislation only in 2000 for the first time. Azerbaijan acceded to the Convention on 31 May 1996 and presented the instrument of accession to the UN on 16 August of the same year. In the meantime, Armenia acceded to the Convention on 23 June 1993. The tragedy in Khojaly took place on 26 February' 1992. Azerbaijan and Armenia became the members of the UN and Statute of the International Court of Justice on 2 March 1992.

The question arises: *Was the Convention on prevention of genocide applicable with respect to massacre in Khojaly, i.e. was the Convention in force since the collapse of the Soviet Union respectively with regard to*

Azerbaijan from 8-21 December 1991 till 16 August 1996 and to Armenia from December 1991 to 23 June 1993?

1. Succession of states in respect of treaties

International succession of states is one of the recently codified fields of international law. The UN International Law Commission elaborated some draft conventions in this field. As a result, the Diplomatic Conference in Vienna adopted the Convention on Succession of States in respect of Treaties on 23 August 1978 and the Convention on Succession of States in respect of State Property, Archives and Debts on 8 April 1983.

In effect, these conventions are the only international universal treaties in the field of international succession of states. International treaties, regulating the similar relations are of regional or bilateral character. As a rule, such kinds of treaties are concluded as a result of territorial changes (the collapse of the USSR, Yugoslavia, Czechoslovakia, the unification of Northern and Southern Yemen, FRG and GDR). Memorandum on Mutual Understanding on Issues of Succession in respect of Treaties of Mutual Interest of the Former USSR" (signed by Armenia, but not by Azerbaijan) belongs to the same category. The Memorandum determines the common approach with respect to the treaties of the USSR. *(Memorandum of the Council of Head of States on Mutual Understanding on Issues of Succession in respect of Treaties of Mutual Interest of the Former USSR, dated 6 July 1992).* Paragraph 1 of the Memorandum reads as follows,

Almost all the multilateral international treaties of the former USSR have mutual interest for the member states of the CIS. Nevertheless, these treaties do not require any joined decision or act of the CIS member states. **The issue of accession to these treaties is decided by each CIS member state independently, in accordance with the principles and norms of international law,** depending on specifics of each particular case, character and content of the treaty.

Neither Azerbaijan, no Armenia acceded to the Vienna Convention of 1978 and 1983. Nevertheless, some provisions of the Vienna Conventions have the character of customs law and respectively, they have been asserted in international practice For example, this is characteristic for the norm of the Convention (Article 31.1), which stipulates, **"When** two or more **States unite** and so form one successor State, **any treaty in force at the date of the succession of States in respect of any of them continues in force** in **respect of the successor State unless:"**

Or, according to Article 34 of the Convention,

1 **When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:**

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues m force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treat}' or would radically change the conditions for its operation.

The effort is undertaken in the "Memorandum on Mutual Under standing on Issues of Succession in respect of Treaties of Mutual Interest of the Former USSR" of 1992 to meet this lack. However, in practice, except the Russian Federation, declaring itself the successor in respect of treaties of the USSR, the majority of the former soviet republics, as well as Armenia and Azerbaijan applied the principle of *"tabula rasa"* (the new state is not bound with the international treaties of the state-predecessor) instead of the principle *«continuitet»* (the existing treaties continue to keep their force).

In other words, in the context of Khojaly the issue of force of the Convention on prevention of genocide with regard to Azerbaijan and Armenia since the collapse of the Soviet Union till respectively 16 August 1996 and 23 June 1993 remains open.

In the case of Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) the International Court of Justice rendered a decision (Ordonnance de la Cour indiquant des mesures conservatoires, Comme suite au communique de presse 93/9 du 8 avril 1993) related to its competence ratione materiae under Article IX of the Convention on prevention of genocide:

The Court observes that the former Socialist Federal Republic of Yugoslavia signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; and that **both Parties to the present case correspond to parts of the territory of the former Socialist Federal Republic of Yugoslavia.**

The Court proceeds to consider two instruments: a Declaration whereby (the present) Yugoslavia, on 27 April 1992, proclaimed its intention to honor the international treaties of the former Yugoslavia, and a "Notice of Succession" to the Genocide Conven tion deposited by Bosnia-Herzegovina on 29 December 1992.

Yugoslavia contended that Bosnia-Herzegovina should be held to have acceded (not succeeded) to the Convention with effect, under Article XI thereof, only as from the ninetieth day following the deposit of its

instrument, so that the Court would possess jurisdiction, if at all, only subject to a temporal limitation. **The Court, however, considers it unnecessary to pronounce upon this contention in deciding whether to indicate pro visional measures, when it is concerned not so much with the past as with the present and future.** On the basis of the two instruments **the Court finds that Article IX of the Genocide Convention appears to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfillment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III" of the Convention.**

Having further examined a document which in Bosnia-Herzegovina's sub mission constituted an additional basis of jurisdiction of the Court in this case, namely a letter, dated 8 June 1992, addressed to the President of the Arbitration Commission of the Inter national Conference on the former Yugoslavia by the President of the Republic of Montenegro and the President of the Republic of Serbia, **the Court finds itself unable to regard that letter as constituting a prima facie basis of jurisdiction in the present case and must proceed therefore on the basis only that it has prima facie jurisdiction, both ratione personae and ratione materiae under Article IX of the Genocide Con vention.**

In other words, the Court determined its competence under Article IX of the Convention on prevention of genocide, without touching upon the issue of temporal framework (discontinuity) (i.e. the issue of participation in the convention remained open). In this context, the participation of Armenia in the Convention in February 1992 generates more questions (as Armenia acceded to the Convention in 1993), rather than the participation, for example of Russia (motorized infantry regiment no. 366, affiliated in the composition of the Russian troops having taken part in the massacre in Khojaly), which did not interrupt its participation in the Convention in line with the *"continuitet"* principle. In other words, the Convention did not lose its force with respect to Russia.

The Court further observes that, in the context of the present proceedings on a request for provisional measures, it cannot make definitive findings of fact or of imputability and that it is not called upon now to establish the existence of breaches of the Genocide Convention by either Party, but to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of rights under the Genocide Convention. The Court then finds that it is satisfied, taking into account the obligation imposed by Article I of the Genocide Convention, that the indication of measures is required for the protection of such rights.

The Court finally observes that the **decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves, and leaves un affected the right of the Governments of Bosnia-Herzegovina and Yugos lavia to submit arguments in respect of such jurisdiction or such merits.**

2. Rights and obligations, set forth in the Convention on prevention of genocide have "erga omnes" character The 1948 Convention is the integral part of international customary law. Thus, the Convention on prevention of genocide states: "The rights and obligations enshrined in the Convention are rights and obligations erga omnes" *(CIJ, Application of Convention for the prevention and the repression of the crime of genocide (Bosnia-Herzegovine against Yugoslavia), preliminary exceptions of July 11, 1996, Rec, 1996, p. 616),* i.e. this is the obligation envisaged for all, in other words, general obligation. Accordingly the *rationae temporis* competence of the Court with respect to the complaint is not limited with the moment of abidance of the parties with the Convention.

Besides that, the paragraph 3 of Article 6 of the International Covenant on civil and political rights reads as follows,

"When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide".

In other words, the paragraph 3 of Article 6 of the Covenant confirms the *"erga omnes "* character of the rights and obligations enshrined in the Convention on prevention of genocide In the Advisory Opinion of the International Court of Justice *(International Court of Justice. I.C.J. Rep. 1951. P. 15. — L.C Green. International Law through the cases. Fourth Edition. The Carswell Company Limited. Toronto, Canada;*

Oceana Publications, Inc. Dobbs Ferry, New York, USA. 1978. P. 573 -579) on "Lawfulness and validity of the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", rendered in 1951 on the request of the General Assembly, it is stated that,

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution **96 (1)** of the General Assembly. December 11th 1946). The first consequence arising from this conception is that **the principles underlying the Convention are principles which are recognized by civilized nations** as **binding on States, even without any conventional obligation.** A second consequence is **the universal character** both of **the** condemnation of genocide and of the

co-operation required "in order **to** liberate mankind from such an odious scourge" (Preamble to the Convention). **The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.** The Convention was manifestly adopted for a purely humanitarian and civilizing purpose.

Its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. **In such a convention the contracting States** do not have any interests of their own; they merely have, one and **a common interest,** namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and ensure of all its provisions.

2.1. ***«Erga omnes»*** obligations and consequences for the third parties

As it has already been noted, the obligations enshrined in the Convention on prevention of genocide have *"erga omnes"* character. *(CIJ, Application of Convention for the prevention and the repression of the crime of genocide (Bosnia-Herzegovine against Yugos lavia), preliminary exceptions of July 11, 1996, Rec, 1996, p. 616.).* Today it is undisputable that there exist a number of agreements, which generate conse quences not only for non-participants, but also for "all states"

In accordance with Article 31 of the Vienna Convention on the Law of Treaties of 1969, "The rights arise for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that either to the third State, or to a group of States to which it belongs, or to all States, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides"

(Article 36 §1 of the Convention of Vienna on the right of the treaties of May 23, 1969).

3. Retroactive effect of the Con vention

In order to solve this issue, the Azerbaijani legislature adopted the Constitutional Law (12 May 2006) on "Retroactive effect of the law deter mining responsibility for international crimes".

The Preamble of the law reads,

The current Constitutional Law is adopted to ensure the accordance of the application of the norms of the criminal legislation in force of the Republic of Azerbaijan, setting forth the responsibility for the crimes against peace and mankind, the crime of genocide and war crimes with the relevant provisions of the Convention for the "Protection of Human Rights and Fundamental Freedoms" and International Covenant on "Civil and political rights".

Article 1 of the Law reads.

Nothing in the Constitution of the Republic of Azerbaijan shall be interpreted or understood as a provision prejudicing the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general norms of international law.

The Constitutions of a number of states (for example, Poland. Portugal) envisages the retroactive application of the law, setting forth the responsibility for international crimes The international practice demonstrates that. in the exceptional circumstances the norms of criminal law can have retroactive effect. Thus, after World War II the norms determining the criminal responsibility were applied retroactively in order to ensure the punishment of the war criminals (the statutes of the Nuremberg Tribunal 1945, of the Tokyo Tribunal 1946) *(R.K.Məmmədov «Beynəlxalq cinayət hüququ və Azərbaycan Respublikasmın cinayət qanunvericiliyi», dis. avtoreferat, Bakı 2005).*

In accordance with Article 7.2 of the European Convention on Human Rights,

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

The waiver with regard to some crimes was aimed for the application under very exceptional circumstances after World War II, when the laws with retroactive effect "were rather applied to punish the persons, accused of was crimes, treason and collaboration with enemy than intended to legal or moral condemnation of such crimes". In this case, Germany made a reservation, making a reference to the constitutional provision on prohibition of the retroactive application. However, in practice, it did not protect the war criminals, since their deeds were qualified as illegal in accordance with pre-Nazi legislation irrespective of the "laws" of the Hitler regime, which were declared invalid *(Д.Гомьен, Д.Харрис, Л.Зевак. Европейская Конвенция о правах человека и Европейская Соци альная Хартия., М., 1998, с.268).*

One of the main prosecutors of the Nuremberg Tribunal Hartley Showcross said in his speech, that "the Statute of the Tribunal only envisages the responsibility of the persons having committed crimes, which are obviously crimes under common legislation. There is a big difference between to tell to the person: Now, you will be punished for the deeds, which did not constitute a criminal offence at the tune when it was committed", and to tell that: "Now, you will be punished for the deed, which contradicted the law and constituted a criminal offence, at the tune when you committed it, however due to the shortcomings of the international mechanism, that time there was not a court, which had a competence to try you for that". .And if this is the application of the retroaclive effect

of the law, we state that, it is in full line with the supreme norms of justice, which in practice of all civilized nations, set certain framework for the application retroactively of the law" *(Из выступлений речи главного обвини теля от Великобритании Хартли Шоукросса,* произнесенной на засе дании Международного Военного Трибунала в Нюрнберге на процессе по делу главных немецких военных преступников 4 декабря 1945 г).

On the basis of the same provision the paragraph 2 of Article 15 of the Covenant on Civil and Political Rights of 1966 states that,

"Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

Thus, the application retroactively of the norms of criminal law, envisaging the responsibility of the persons, having committed criminal offences under the international customary law and the general principles of law is not ruled out *(Действующее международное право в 3-х томах/под ред. Ю.М.Колосова и Э.С.Кривчиковой, М., 1999, том 2).*

4. Statutory limitations to crimes of genocide

Some moments should be mentioned with respect to the question of application of statutory limitations to crimes of genocide. The matter is that only in the Statues of the Tribunals on former Yugoslavia and Rwanda, as well as the Statute of the ICC the genocide is distinguished from the war crimes and crimes against humanity and is set forth as separate crime. Taking into account this point, it is possible to understand, why the genocide is not envisaged as a separate crime in the UN Convention of 1968 on "Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity".

However, in paragraph b) of Article 1 the genocide is envisaged as a part of the crimes against humanity. It is explained, in the meantime, with the fact that some elements of the cranes against humanity and war crimes inherent to the genocide.

In accordance with the Convention of 1968 no statutory limitation shall be applied to war crimes and crimes against humanity. With this purpose the State Parties undertake to implement the relevant legislative and other measures (Azerbaijan acceded to the Convention on 16 August 1996 and Armenia on 23 June 1993).

In addition, on the regional level there is also a Convention of the Council of Europe on Non-Applicability of Statutory' Limitations to War Crimes and Crimes against Humanity, dated 25 January 1974 (however, neither Azerbaijan, no Armenia are parties to this Convention). Article 1 of the Con vention refers to the "crimes against humanity, enumerated in the Conven tion on prevention of genocide".

In other words, the statutory-limitation is not applied to this crime. One might assume that it is possible to achieve certain results, once the appropriate measures are taken on the international and national level.

II. *The issue of Ratione personae*

Article IX of the Convention reads, "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In other words, the State Parties can automatically lodge an application with the International Court of Justice against other State Parties on the issues of interpretation, application or fulfillment of the Convention.

In the case of Bosnia and Herzegovi na v. Yugoslavia (Serbia and Monte negro), which was considered in April 1993 *(Ordonnance de la Com indiquant des mesures conservatoires, Comme suite au communique de presse 93/9 du 8 avnl 1993).* touching upon the issue of its competence the Court stated,

Turning to the question of jurisdiction the Court recalls that it ought not to indicate provisional measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established; and that this consideration embraces jurisdiction both ratione personae and ratione materiae.

The Court then refers to the indication by Bosnia-Herzegovina in the Application that the "continuity" of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, has been contested by the entire inter national community, including the United Nations Security Council (cf. resolution 777) and General Assembly (cf. resolution 47/1). After citing the texts of the above-mentioned resolu tions of the Security Council and General Assembly, as well as the text of a letter from the Legal Counsel of the United Nations to the Permanent Representatives to the United Nations of Bosnia-Herzegovina and Croatia, which contains the "considered view of the United Nations Secretariat re garding the practical consequences of the adoption by the General Assembly of resolution 47/1", and noting that the solution adopted therein is not free from legal difficulties, the Court observes that the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine at the present stage of

the proceedings. Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

"The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court";

The Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council; that a compromissory clause m a multilateral convention, such as Article IX of the Genocide Convention, relied on by Bosnia-Herzegovina in the present case, in the view of the Court, can be regarded prima facie as such a "special provision"; that accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, **disputes to which Article IX applies are in any event prima facie within the jurisdiction ratione personae of the Court.**

In this regard, it should be noted that the international legal personality of both Azerbaijan and Armenia is not a subject for dispute. Both states have been recognized by the UN and its members as independent countries.

III. The issues on the substance of the Convention

In its decision of 26 February 2007 on the application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro) the International Court of Justice stated that,

In this case, the Court's juris diction is solely based on Article IX of the Genocide Convention. This means that the Court has no authority to rule on alleged breaches of obligations under international law other than genocide, as defined by the Genocide Convention. This is important to understand because in this *case we were confronted with substantial evidence of events in Bosnia and Herzegovina that may amount to war crimes or crimes against humanity -but we had no jurisdiction to make findings in that regard. We have been concerned *only* with genocide - and, one may add, genocide in the legal sense of that term, not in the broad use of that term that is sometimes made.

This was an extremely fact-intensive case. The hearings lasted for two-and-half-months, witnesses were examined and cross-examined, and the Parties each submitted thousands of pages of documentary evidence. About one third of the Judgment is devoted to analyzing this evidence and making detailed findings as to whether alleged atrocities occurred and, if so, whether there was the specific mtent on the part of the perpetrators to destroy in whole or in part the protected group, identified by the Court as the Bosnian Muslims. **It is this specific intent, or *dolus specialis,*** that distinguishes genocide from other crimes. In this case, it was not enough for the Applicant to show that, for example, deliberate unlawful killings of Bosnian Muslims occurred. **Something more was required - proof that the killings were committed with the intent to destroy the group to which the victims belonged.**

Accordingly, in order to **raise the issue of genocide in Khojaly, one must present the evidences certifying that the Armenians (the armed forces of Armenia) had specific intent to destroy the population of Khojaly.** Otherwise, these deeds will constitute the elements of the crime against humanity and war crimes and will not fall under the effect of the Convention on the prevention of genocide.

Given the exceptional gravity of the crime of genocide, the Court requued that the allegations be proved by evidence that is "fully conclusive". We made our own determinations of fact based on the evidence before us, but we also greatly benefited from the findings of fact that had been made by the International Criminal Tribunal for the former Yugoslavia (ICTY) when it was dealing with accused individuals.

Although, no international tribunal was established in relation **to genocide in Khojaly a great number of factual materials were found out on the national level in the framework of** conducted investigation. In addition, many displaced persons lodged applications with the European Court of Human Rights with respect to the violations of their rights by Armenia. In this respect, one might benefit from the future decisions of the European Court.

The Court has found it conclusively established that massive killings and acts causing serious bodily or mental harm were perpetrated in specific areas and in detention camps throughout Bosnia and Herzegovina. We also found that there was deliberate infliction of terrible conditions of life. In many cases, Bosnian Muslims were the victims of these acts. However - with one exception which one should return to - the evidence did not show that these terrible acts were accompanied by the specific intent to destroy the group that is required for proof of genocide.

The Applicant had argued that the specific intent could be inferred from the pattern of atrocities. The Court could not accept this. The specific intent has to be convincingly shown by reference to particular circum stances; a pattern of conduct will only be accepted as evidence of its existence if genocide is the *only* possible explanation for the conduct concerned.

In other words, when the issue concerning Khojaly is raised, one must prove that the Armenians (the armed forces of Armenia) killing the population of Khojaly pursued specific intent, this conduct had systematic character and the only

explanation of such conduct was to carry out genocide. This conduct was directed against the Azerbaijani population. That means, there were conducted purposeful actions. The specific intent was to destroy the Azerbaijani population of Khojaly, which is one of the elements (specific intent - to destroy the representatives of the Azerbaijani ethnic group) characterizing the crime of genocide.

However, there was an important exception to these findings The Court found that there was conclusive evidence that killings and acts causing serious bodily or mental harm targeting the Bosnian Muslims took place in Srebrenica in July 1995. These acts were directed by the Main Staff of the VRS (the army of the Republika Srpska) who possessed the specific intent required for genocide.

Having determined that genocide was committed at Srebrenica, the next step was for фe Court to decide whether the Respondent was legally responsible for the acts of the VRS. If the VRS was an organ of Serbia and Montenegro (as that country was then called), then in law the Respondent would be responsible for the VRS actions. The Respondent would also be responsible in law if the VRS was acting on the instructions of, or under the direction or control of, the Respondent. In the light of the information available to it, the Court has found that it was not established that the massacres at Srebrenica were committed by organs of the Respondent. It has also not been established that those massacres were committed on the instructions, or under the direction of the Respondent, nor that the Respondent exercised effective control over the operations in the course of which those massacres werç perpetrated. This is the test in'international law. In fact, all indications are that the decision to kill the adult male population of the Bosnian Muslim community in Srebrenica was taken by some members of the VRS Main Staff, without instructions from or effective control by the FRY.

As far as the paramilitary unit called "Scorpions" is concerned, during the oral proceedings the Applicant presented a video to the Court showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, an area near Srebrenica, in July 1995. This video had previously been shown on Serbian television and during the Milosevic trial at the ICTY. In addition to this video, other evidence was submitted to the Court by the Applicant alleging that the Respondent was responsible for the acts of the "Scorpions". The Court has systema tically assessed all the information brought to its notice. The Court can only make decisions on the basis of materials before it. And, on the basis of these materials, the Court has been unable to find that the Respondent was responsible for the acts of the "Scorpions" in Trnovo in mid-1995.

As far as the question of complicity in the Genocide Convention is con cerned, the Court had to consider whether the Respondent provided the means to enable or facilitate the events in Srebrenica in full awareness that the aid supplied would be used to commit genocide. It is clear that the Respon dent supplied quite substantial aid of a political, military and financial nature to the Republika Srpska and the VRS, long before the tragic events of Srebrenica, and the aid continued during those events. But a crucial condition for complicity was not fulfilled, namely, the Court did not have conclusive proof that authorities of the Respondent, when providing this aid, were fully aware that the VRS had the specific intent characte rizing genocide.

It is not so easy to grasp the distinction in law between complicity in genocide and the breach of the duty to prevent genocide. In few words it can be explained as follows. The Court did find it conclusively proven that the FRY leadership, and Pre sident Milosevic above all, ***were*** fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres there were likely to occur. They may not have had knowledge of the specific mtent to commit genocide, but it must have been clear that there was a *serious risk of genocide* in Srebrenica. This factor is important because it activates the obligation to prevent genocide, which is enshrined in Article I of the Genocide Convention.

Here the legal issue is not whether, had the Respondent made use of the strong links it had with the Republika Srpska and the VRS, the genocide would have been averted. The legal issue is whether the Respondent took all the measures which were within its power to prevent the genocide.

The Court has found that the ***Respondent could, and should, have acted to prevent the genocide, but did not*** The Respondent did nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It therefore violated the obligation in the Genocide Convention to prevent genocide.

There is one further obligation, which is the obligation to punish genocide. Article VI of the Genocide Convention requires that persons charged with genocide or any other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by an interna tional penal tribunal. In this case, the genocide occurred in Srebrenica, which is outside the Respondent's territory. Therefore, the Respondent cannot be held responsible for not having tried before its national courts those accused of having participated in the Srebrenica genocide. The relevant question, then, is whether the Respondent fulfilled its obligation to co-operate with the ICTY by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory.

Taking into account an approach of the International Court of Justice, one can formulate the issue as the violation of Armenia of its obligation to prevent and punish the crime of genocide ***In other words, Armenia could and had to act in order to prevent and punish the genocide, but failed to do that***

The Court has not failed to notice the plentiful, and mutually corroborative, information suggesting that

General Mladic, indicted by the ICTY for as one of those principally responsible for the genocide in Srebrenica, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and may still be there now, without the Serb authorities doing what they could and can reasonably do to identify his location and arrest him. The Court has found that the Respondent failed in its duty to co-operate fully with the ICTY and therefore has violated the obligation to punish genocide.

As the Court has not found the Respondent itself committed, or was responsible for, the genocide at Srebrenica, the issue of massive reparations for that does not arise. So far as the violation of the obligation to prevent genocide, the Court has found -as the Applicant in fact suggested - that a declaration of the Court is itself the appropriate satisfaction. As to the breach of its obligation to punish genocide, the Court has determined that this is a continuing breach. We have therefore made a declaration that Serbia shall immediately take effective steps to ensure full compliance with this obligation and to transfer individuals accused of genocide for trial by the ICTY, and to co-operate fully with that Tribunal.

As it is seen, the ***Court regards the violation of obligation to punish the genocide as continuing violation.*** In addition, as it was indicated above, the Convention on the prevention of genocide states that the ***rights and obligations enshrined in the Con vention are*** erga omnes ones *(CIJ, Application of Convention for the prevention and the repression of the crime of genocide (Bosnia-Herzegovine against Yugoslavia), preliminary exceptions of July 11, 1996, Rec, 1996, p. 616.),* i.e. they are obligations for all. in other words ***general obligations.***

Thus, it is possible to raise before the International Court of Justice the issue of continuing violation by Armenia of the general obligation, which has to be fulfilled by all states and which is recognized as such by international law, i.e the obligation to prevent and punish the genocide and to raise also the issue of satisfaction.

BIBLIOGRAPHY

1. The Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948, http://untreaty.un.org/'cod/avl/aycppcg/cppcg.html

2. Memorandum of the Council of Head of States on Mutual Understanding on Issues of Succession in respect of Treaties of Mutual Interest of the Former USSR, dated 6 July 1992, http://www.savekosova org/articleimagesAlasani pdf

3. Ordonnance de la Cour indiquant des mesures conservatoires, Corame suite au communiqué de presse 93/9 du 8 avril 1993, http://www.icj-cij.org/search/index.php?p2=2&str coop%E9rant

4 CIJ, Application of Convention for the prevention and the repression of the crime of genocide (Bosnia-Herzegovine against Yugoslavia), preliminary exceptions of July 11, 1996, Rec, 1996, p. 616., http://www.icj-cij org/search/mdex.php?p2= 2&pg"=9pl&str=libyenne

5 International Court of Justice I C.J Rep. 1951 P. 15 LC Green. International Law through the cases. Fourth Edition The Carswell Company Limited Toronto, Canada. Oceana Publications, Inc Dobbs Ferry, New York, USA 1978 P 573—579)

6 Convention of Vienna on the right of the treaties of May 23, 1969. http://untreaty.un.Org/ilc/texts/instruments/engl1sh/convent10ns/l 1 1969 pdf

7. R.K.Mammədov «Beynəlxalq cinayət hüququ və Azərbaycan Respublikasının cinayət qanunvericiliyi», dis avtoreferat, Bakı 2005

8. Д.Гомьен, Д.Харрис, Л.Зевак Европейская Конвенция о правах человека и Европейская Социальная Хартия, М, 1998, с 268

9. Действующее международное право в 3-х томах/под ред Ю М.Колосова и Э.С.Кривчиковой, М, 1999, том 2

10. Из выступлений речи главного обвинителя от Великобритании Хартли Шоукросса, произнесенной на заседании Международного Военного Трибунала в Нюрнберге на процессе по делу главных немецких военных преступников 4 декабря 1945 г. http://www.pseudology.org/Nurnberg/index.htm

11 Decision of 26 February 2007 on the application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), http //wwwicj-cij.org/docket/index.php?pl=3&p2=3&k=f4&case=91&code=bhy&p3=4

BEYNƏLXALQ MƏHKƏMƏNİN PERSPEKTİVİNDƏ XOCALI SOYQIRIMI.

Səadət Yusifova.

Məqalədə beynəlxalq hüquq kontekstində Xocalı soyqırımı məsələsi nəzərdən keçirilir. Soyqırımı termininin yaranma tarixi təhlil edilir, onun etimoloji və hüquqi anlayışları müqayisə olunur. Müəllif Xocalı faciəsi ilə əlaqədar Beynəlxalq Ədalət Məhkəməsinin *ratione temporis, ratione personae, ratione materiae* kimi səlahiyyətlərini, BMT-nin baş məhkəmə orqanına şikayətlərin edilməsi imkanlarını araşdırır. Məqalədə Yuqoslaviyanın parçalanması dövründə 1993, 1996 və 2007-ci illərdə Bosniya və Herseqovinada baş vermiş oxşar

hadisələrin müqayisəli təhlili aparılır.

ХОДЖАЛИНСКИЙ ГЕНОЦИД В ПЕРСПЕКТИВЕ МЕЖДУНАРОДНОГО СУДА.

Саадат Юсифова.

В статье рассматривается вопрос геноцида в Ходжалы в контексте международного права. Анализируется история возникнове ния термина геноцид, сравниваются его этимологические и правовые понятия. Изучаются вопросы полномочия *ratione temporis, ratione personae, ratione materiae* Международного Суда Правосудия в связи с Ходжалинской трагедией, и возможность подачи жалобы в главный судебный орган ООН. Проводится сравнительный анализ аналогичных событий в Боснии и Герцеговине в период распада Югославии в 1993, 1996 и 2007 годах.