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Письмо Постоянного представителя Азербайджана при Отделении Организации Объединенных Наций и других международных организациях в Женеве от 20 июля 2016 года на имя Председателя Совета по правам человека

Имею честь препроводить настоящим изложение фактов, касающееся граждан Азербайджанской Республики, которые числятся пропавшими без вести в связи с вооруженным конфликтом между Арменией и Азербайджаном (см. приложение).

Буду весьма признателен за распространение настоящего письма и приложения к нему* в качестве документа тридцать третьей сессии Совета по правам человека по пункту 4 повестки дня.

(*подпись*) Вагиф **Садыгов**

Посол, Постоянный представитель

* Воспроизводится в полученном виде только на языке оригинала.

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Просьба отправить на вторичную переработку

Annex to the letter dated 20 July 2016 from the Permanent Representative of the Republic of Azerbaijan to the United Nations Office at Geneva addressed to the President of the Human Rights Council

Fact sheet on the citizens of the Republic of Azerbaijan reported missing in connection with the conflict between Armenia and Azerbaijan

Background

1. At the end of 1987 Armenia overtly laid claim to the territory of the Nagorno-Karabakh region of Azerbaijan, and a number of illegal decisions were taken by both Armenia and the Armenian community of the Nagorno-Karabakh region announcing the unilateral secession of this region from Azerbaijan. Shortly after the Soviet Union ceased to exist at the end of 1991 and both Armenia and Azerbaijan were accorded international recognition within their respective borders, armed hostilities and Armenian attacks against Azerbaijan intensified. Armenia unleashed the war, used force against Azerbaijan and occupied its territories, including the Nagorno-Karabakh region and seven adjacent districts, carried out ethnic cleansing of the seized areas by expelling about one million Azerbaijanis from their places of origin, committed other serious crimes during the conflict and established the ethnically constructed subordinate separatist entity on the occupied Azerbaijani territory.

2. The international community has consistently deplored and condemned the use of military force against Azerbaijan and the resulting occupation of its territories. In 1993, the United Nations Security Council adopted resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993), condemning the use of force against Azerbaijan and occupation of its territories and reaffirming the sovereignty and territorial integrity of Azerbaijan and the inviolability of its internationally recognized borders. In those resolutions, the Security Council reaffirmed that the Nagorno-Karabakh region is part of Azerbaijan and demanded immediate, complete and unconditional withdrawal of the occupying forces from all the occupied territories of Azerbaijan [1]. The United Nations General Assembly adopted three resolutions on the conflict (48/114 of 20 December 1993, 60/285 of 7 September 2006 and 62/243 of 14 March 2008) and included the special item entitled "The situation in the occupied territories of Azerbaijan" in the agenda of its regular sessions. Other international organizations have adopted a similar position.

3. The documents of international organizations also make explicit reference to serious violations of international humanitarian and human rights law during the conflict. Thus, in its aforementioned resolutions, the UN Security Council condemned the attacks on civilians and bombardments of inhabited areas within Azerbaijan and expressed grave concern at the displacement of a large number of civilians in Azerbaijan. In its resolution 48/114 of 20 December 1993, the UN General Assembly noted with alarm "that the number of refugees and displaced persons in Azerbaijan has ... exceeded one million". In its resolution 1416

[1] See Repertoire of the Practice of the Security Council, Chapter VIII, Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security, Agenda Items in 1993-1995, Part 19, Items relating to the situation between Armenia and Azerbaijan, <http://www. un.org/en/sclrepertoire/93-95/Chapter%208/EU ROPE/93-95 8-19-ARMENIA%20AND%20AZERBAIJAN.pdf>.

(2005) of 25 January 2005, the Parliamentary Assembly of the Council of Europe, of which both Armenia and Azerbaijan are members, noted particularly that large-scale ethnic expulsion of the Azerbaijani civilian population and the creation of mono-ethnic areas resemble the terrible concept of ethnic cleansing. The European Court of Human Rights later arrived at an important conclusion qualifying the offences of the invading Armenian troops against Azerbaijani civilians as acts of particular gravity that amount to war crimes or crimes against humanity[2].

Missing persons

4. Since the beginning of the conflict, Armenia has extensively practiced the taking and holdingof hostages, and mistreatment and summary execution of prisoners of war and other captives [3].Thus, on 29 January 1994, eight Azerbaijani prisoners of war were killed in a prison camp under the jurisdiction of the Ministry of Defense in Yerevan. Dr. Derrick Pounder, a Scottish forensic expert retained by the Government of Azerbaijan who performed autopsies on their bodies shortly after they were returned to Azerbaijan, stated that the nature of wounds indicates summary execution."[4]

5. The State Commission for Prisoners of War, Hostages and Missing Persons was set up in Azerbaijan in 1993 to deal directly with the search for missing persons and hostages as well as seeking their release. It regularly collects and analyses relevant information and established a special comprehensive database on missing persons. The State Commission had also established close contacts with relevant international organizations, especially the ICRC.

6. During the conflict 1436 citizens of Azerbaijan, including 351 servicemen and 1085 civilians (341 women, 210 children and 285 elderly) were released from Armenian captivity. As of 1 July 2016, 3811 citizens of Azerbaijan are registered missing as a result of the conflict, including 3098 servicemen and 713 civilians. Among the civilians, 61 are children (20 girls and 41 boys), 255 are women and304 are the elderly (including 158 women [5]).5lt has been established that 877 out of 3811 missing persons were taken as prisoners of war or hostages, including 595 servicemen and 282 civilians.

7. There is evidence that some at least of the missing persons were seen alive subsequently in Armenian custody. The authorities in Armenia refuse to provide any information about them and other citizens of Azerbaijan remaining on the list of those reported missing in connection with the conflict.

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[2] Judgment of the European Court of Human Rights of 22 April 2010, Application no. 40984/07, para. 87.

[3] For more information, see e.g. the Information on the grave violations of human rights committed during the course of the Armenian aggression against Azerbaijan, U.N. Doc. AJC.3/51/9,30 October 1996; Information on human rights violations with respect to prisoners of war and hostages kept in Armenia and the Nagorno Karabakh region of Azerbaijan, U.N. Doc. E.CN.4/2001/107, 22 November 2000; Human Right Watch/Helsinki report “Seven Years of Conflict in Nagorno-Karabakh” (1994), pp. 56-57.

[4] Seven Years of Conflict in Nagorno-Karabakh,ibid., p.57.

[5] See the State Commission of the Republic of Azerbaijan for Prisoners of War, Hostages and Missing Persons<http://human.gov.az/az/view-page/27/%C6%8FS%C4%BOR%2C+G%C4%BOROV+V%C6%8F+%C4%BOTK%C4%BON+D%C3%9C%C5%9EM%C3%9C%C5%9EL%C6%8FR#.v3pK5U2DrIU>; There are some discrepancies between the lists of Azerbaijan and ICRC, but these are relatively insignificant.

Legal framework

8. The following special provisions in the relevant international legal instruments and other international documents apply with regard to missing persons:

- Article 26 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV), to which both Armenia and Azerbaijan are parties, provides that "Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, thework of organizations engaged on this task provided they are acceptable to it and conform to its security regulations".

- Article 33 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), to which Armenia is a party. entitled "Missing Persons", provides that:

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each party to the conflict shall search for the persons who have been reported missing by an adverse party. Such adverse party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

a) Record the information specified in article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;

b) To the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph I and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse party while carrying out the missions in areas controlled by the adverse party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties".

- The issues related to missing persons are also considered in the context of internationally protected human rights, in particular those relating to the right not to be arbitrarily deprived of one's life; the right not to be arbitrarily deprived of one's liberty; the right to a fair trial affording all judicial guarantees; the right to respect for one's family life; the prohibition of torture and other cruel, inhuman or degrading

treatment; the prohibition of enforced disappearances; the rights of persons deprived of their Iiberty.[6]

- Further, in resolution A/RES/69/184, adopted by the United Nations General Assembly on 18 December 2014, States parties to an armed conflict were called up to take all appropriate measures to prevent persons from going missing in connection with the armed conflict and to account for persons reported missing as a result of such a situation. The resolution also reaffirmed both the right of families to know the fate of their relatives reported missing in connection with armed conflicts; and that that each party to an armed conflict, as soon as circumstances permit and, at the latest, from the end of active hostilities, shall search for the persons who have been reported missing by an adverse party. States parties to an armed conflict were called upon to take all necessary measures, in a timely manner, to determine the identity and fate of persons reported missing in connection with the armed conflict.

Armenia's responsibility

9. Due to its continuing aggression against Azerbaijan and persisting occupation of this State's territory Armenia bears full international responsibility for the breaches of international law.

10. The key provisions of international responsibility are laid down in the Articles on State Responsibility adopted by the United Nations International Law Commission ("ILC") on 9 August 2001[7] and commended to States by the UN General Assembly on 12 December 2001.[8] According to Article 1 of the Articles, "[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".[9]

11. In addition to the "classic" consequences of an internationally wrongful act, the ILC Articles' deals also with an aggravated form of responsibility.[10] Some of the internationally wrongful acts attributed to States should be seen as a serious breach of obligations under peremptory norms (jus cogens) of general international law. The obligations under such norms arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.[11] Among these prohibitions, it is generally agreed that the prohibitions of aggression, genocide, crimes against humanity, ethnic cleansing, racial discrimination, torture and slavery are to be regarded as peremptory.[12] There can be no

[6] See e.g. the ICRC document "Missing persons and their families. Recommendations for drafting national legislation".

[7] See U.N. Doc. Al56/10, 2001. See also James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries (Cambridge: Cambridge University Press, 2002); James Crawford, Alain Pellet, Simon Olleson (eds.), The Law of International Responsibility (Oxford: Oxford University Press, 2010).

[8] See U.N. General Assembly resolution AlRES/56/83.

[9] See James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, op.cit., p. 61.

[10] lLC Articles, Chapter Ill, Serious breaches of under peremptory norms of general international law. See also commentary, para. (7).

[11] James Crawford, The International Law Commission's Articles on State Responsibility. Introduction,Text and Commentaries, op.cit.,commentary to Article 40, pp. 245-246, para. 3.

[12] Ibid.commentary to Article 26, p.188, para. 5, and commentary to Article 40, pp. 245·248, paras. 1·9.

doubt that the prohibitions listed above have been violated during Armenian aggression against Azerbaijan.

Conclusions

12. The Government of Azerbaijan submits the following with regard to the situation concerning its citizens reported missing in connection with the conflict between Armenia and Azerbaijan:

- The citizens of Azerbaijan went missing during the course of hostilities with Armenian forces.
- A clear list of missing citizens of Azerbaijan has been submitted to Armenia via the ICRC and regularly updated. Armenia can be in no doubt as to the identity of those missing persons.
- There is evidence that some at least of the missing persons were seen alive subsequently in Armenian custody.
- The relevant persons disappeared in circumstances raising concern as to their wellbeing.
- Armenia has failed to provide any or sufficient evidence with regard to those missing persons still on the list provided to it.
- A strong presumption may arise as to the death of some of those persons detained by forces for whom Armenia bears responsibility and to this extent Armenia is liable for a breach of the applicable international law.
- Armenia has failed to comply with an obligation under the applicable international law to conduct an effective investigation into the fate of all of the missing persons. The fact that the Armenian authorities had not conducted any investigation into the fate of such missing persons was a highly relevant factor, particularly when information as to their disappearance in such circumstances had been given to it.
- Further, Armenia is in violation of the applicable international law insofar as the additional suffering imposed upon the relatives of the missing persons is concerned due to the unhelpful and obstructive attitude it has adopted in this matter.
- Further, Armenia is in breach of the applicable international law for failing to account either properly or at all for the missing persons within its control and for failing to conduct a prompt and effective investigation into the arguable claims that such persons have been taken into its custody and have not been seen since.
- Armenia is responsible for the violation of applicable international humanitarian and human rights law with regard to the disappearance of 3811Azerbaijanis and the failure to account for them or to conduct investigations.
- Armenia's international responsibility involves legal consequences, including the obligation to provide adequate compensation, while individuals responsible for violations with regard to the citizens of Azerbaijan reported missing in connection with the conflict should face penal or other sanctions at the national and international levels.
- It is also important that all States cooperate and undertake necessary efforts in order to bring to an end both such breaches of international humanitarian and human rights law and impunity enjoyed by their perpetrators.