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Enforcement of International Law in the Nagorno-Karabakh Conflict

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Summary

This work called: “Enforcement of International Law in Nagorno-Karabakh Conflict” discusses problems of branches of international law, such as International Humanitarian Law and International Criminal Law, in regard to Nagorno-Karabakh Conflict situation and draws the picture of reasons why enforcement of these branches of international law failed in the aforementioned conflict.

This work consists from 5 main chapters. Chapter 1 called “Introduction” gives short reasoning of the choice of the subject, why Nagorno-Karabakh Conflict in particular, discusses questions in focus of work and previous research on the same subject, focusing on lack of such research.

Chapter 2 called “Overview of Nagorno-Karabakh Conflict” gives short date-by-date history of Nagorno-Karabakh Conflict and discusses legal aspects (arguments) of Nagorno-Karabakh Conflict from the points of view of Azerbaijan Republic and Republic of Armenia.

Chapter 3 called “Applicable International Law” begins with short introduction to international humanitarian law, including background and history of that branch of international law, introduction to The Law of The Hague, to The Law of Geneva, to Protocols Additional to the Geneva Conventions of August 1949, and also to fundamental principles of international humanitarian law. Then it proceeds with short introduction to international criminal law, including theory of international criminal law, introduction to *ad hoc* international tribunals and International Criminal Court and to international crimes. The purpose of that Chapter is to show what norms of international humanitarian and international criminal law are important to be applied in the Nagorno-Karabakh Conflict.

Chapter 4 called “Failure of International Law in Nagorno-Karabakh Conflict” discusses international humanitarian law applicable to Nagorno-Karabakh Conflict, combatants and civilians situation in Nagorno-Karabakh Conflict and rules of customary international humanitarian law in Nagorno-Karabakh Conflict. Then it discusses war crimes, genocide of Azerbaijanis, Armenian aggression and crimes against humanity in regard to Nagorno-Karabakh Conflict. This Chapter shows the actual failure of international law in Nagorno-Karabakh Conflict based on examples.

Chapter 5 called “Reasons of Failure of International Law in Nagorno-Karabakh Conflict and Possible Solutions”. It argues possible reasons of failure of implementation and enforcement of international humanitarian and international criminal law in Nagorno-Karabakh Conflict and then makes a summary of recommendations on how to change the situation with implementation and enforcement of these branches of international law in Nagorno-Karabakh Conflict (as it is still continuing) and how to avoid such situations in future.

This work finishes with conclusions and final statements.

Abbreviations

ADR	Azerbaijan Democratic Republic
CE	Council of Europe
CSCE	Commission on Security and Cooperation in Europe
EU	European Union
GCI	Geneva Convention I
GCII	Geneva Convention II
GCIII	Geneva Convention III
GCIV	Geneva Convention IV
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
NKAO	Nagorno-Karabakh Autonomous Oblast
NKAR	Nagorno-Karabakh Autonomous Region
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of Council of Europe
POW	Prisoner of war
SC	Security Council
TSFSR	Transcaucasian Socialist Federal Soviet Republic

UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN GA	United Nations General Assembly
UK	United Kingdom
US	United States
USSR	Union of Soviet Socialist Republics
WWII	World War II

1 Introduction

The end of XX century was marked by horrible atrocities. Sudden increase of violence on the international level occurred in the period of fall of Soviet Union and followed by the horrible events of wars in Yugoslavia and genocide in Rwanda. In the beginning of 1990s the worlds attention was bound to this inhuman events mostly troubled by the failure of international community to prevent situations in Yugoslavia and Rwanda. But in the light of these events one conflict was forgotten. One can only wonder why the conflict that was not less atrocious and started before events of Yugoslavia, for instance, suddenly went to shades and was not largely discussed by scholars of international community. It haven't drag that much attention, it was not discussed by media on the day-by-day basis, almost no scholars refer to it in their works. This conflict is known as the Nagorno-Karabakh Conflict between Azerbaijan Republic and Republic of Armenia.

The Nagorno-Karabakh Conflict started in 1988 and continues till this day. Being Azerbaijani I have grown up with that conflict present and experiencing the situation from inside the country that is a party to that conflict and also a victim of occupation of its territories.

One can only imagine how much pain and suffering can be caused by the conflict that last already more than 19 years and is far from being over. Being the resident of the region affected by the conflict I cannot stay indifferent to that situation.

I have studied international law for several years and conducted previous researches on International Humanitarian and International Criminal Law. Witnessing this conflict I have come to the conclusions that this conflict is not studied properly by international lawyers and requires deeper attention of scholars in field of international law. Feeling deep affection by that conflict and specializing in international humanitarian, international criminal and international human rights law I have decided to dedicate that work to the problems of enforcement of international law in the Nagorno-Karabakh Conflict.

The amount of suffering of the victims of conflict is uncountable. However, effective and just enforcement of international law would be able to reduce this amount to possible minimum. Unfortunately, lack of interest from international community towards this conflict, failure of states parties to the conflict to enforce international law effectively and the fact that this conflict is understudied brought me as an author of this thesis to difficult situation where my responsibility lies both on the grounds of being the first to talk about enforcement of international law in the Nagorno-Karabakh Conflict and how it could affect that conflict, and on the grounds of being as impartial as I can possibly be (being a national of one of the parties to the conflict).

In this work I ask for justice. Justice – for my people, the very ones that were affected by this conflict. Being a lawyer I see it in the court of law with proper fair and impartial trial. I see this as the only way to obtain justice.

In this work I would like to do my best to show the real picture of international law in the Nagorno-Karabakh Conflict. I would like to argue how the situation should be with proper international law enforcement and why have it failed in the Nagorno-Karabakh Conflict. But that brings me to the questions in focus of this work.

1.1 Questions in Focus

The importance of implementation of international humanitarian and international criminal law in any armed conflict should not be underestimated. As it can be seen in close history, international community became very concerned with issues such as violations of international humanitarian law and enforcement of international criminal law. The best examples can be international criminal tribunals for Yugoslavia and Rwanda created in the beginning of 90s specially (*ad hoc*) for the situations with mass grave breaches of international humanitarian law (Yugoslavia) and genocide crimes (Rwanda). These tribunals will be discussed in more details later in this work.

On the other hand effective implementation of aforementioned branches of international law is essential for the enforcement of international law in any conflict and thus supports the restoration of peace and security in the world.

What we see here is the need of maintenance of peace and security in the world pronounced (if not dictated) by the UN Charter and at the same time supported by the international community. Such situation demands responsibility of states for the effective enforcement of international law not only in times of peace, but also in times of war.

In this work I would like to discuss those provisions of international humanitarian and international criminal law that should be enforced in the Nagorno-Karabakh Conflict. Being unique from one perspective this conflict is still an armed conflict between two States and should be treated as provided in international law. That is why it is important to see what international law says about rights and obligations of parties to the conflict and at the same time prohibits certain conduct of individuals that are actually engaged in armed conflict on behalf of States. Some may argue that this should be determined only on case-by-case basis, however, to understand situation as it is given, it is essential to understand general provisions and principles of law.

That is exactly what I would like to concentrate on in the first part of my work – showing a picture of international law applicable to the Nagorno-Karabakh Conflict, in other words – how the situation should be.

Further this work is also concerned with failure of international law in the Nagorno-Karabakh Conflict. In other words how implementation and enforcement of aforementioned branches of international law failed during all stages of conflict in question. This part of work is concerned with clearing the picture of multiple violations of international humanitarian and international criminal law in the Nagorno-Karabakh Conflict and failure to act from both States that are parties to the conflict and international

community itself. It is concerned with the reasons of such failure and possible actors and forces that drive up to such situation.

This work is also concerned with introduction of possible solutions to the situation with enforcement of international law in the Nagorno-Karabakh Conflict and recommendations on how to avoid repetition of such situations in future. The steps that States should undertake to be prepared for the situations of armed conflicts and to react rapidly and effectively will also be discussed. One of the questions that arise here is: are States able to develop to a certain point where implementation and enforcement of international law is rapid, effective and provided with accordance with all principles of humanity and human rights? One can only speculate about that, but from my point of view this is possible, provided that it meets some requirements and combines complex row of solutions. These kinds of solutions will be also discussed in the concluding parts of this work.

Some may ask why international humanitarian and international criminal law should be discussed together in this work? These are quite separate branches of international law with their own subjects, methods, sources, questions, problems and dilemmas, scientific researches, experiences, etc. This is all true. However, being two separate branches of international law they are very close to each other and in some cases overlap on the matters of subjects and objects of law. For example, many grave breaches of international humanitarian law (that will be discussed later in this work) are considered to be international crimes under international criminal law. On the other hand international criminal law based on principles of prosecution of grave violations of humanitarian law and human rights law that are in concern of the international community as a whole

Furthermore, discussion of only one of these branches of international law in regard to the Nagorno-Karabakh Conflict would not be able to give a clear picture of international law that should be enforced in such conflict. International law is concerned with both reduction of suffering of victims of violence and prosecution of individuals that caused this violence. On the other hand effective enforcement of only one of these branches of international law will bring positive results, however, it will not reach the goals of effective and just implementation of international law, and will give a loophole for further violations of international humanitarian and criminal law. As it can be seen from above it is essential in this work to discuss those closely link though separate branches of international law together, complementing one another.

These are the main questions in focus of my work that I would like to discuss. Being wide at some points they are quite focused on the same idea of enforcement of international law in the Nagorno-Karabakh Conflict, why have it failed and what can be done to improve situation. But the importance of this work can only be seen in comparison with previous research done on the same subject.

1.2 Previous Research on Subject in Focus

The main issue with the subject in focus of this work is a lack of previous research done on the matter. As the Nagorno-Karabakh Conflict is frozen for many years and didn't attract much attention of international community when the actual war was going in the region, not many scholars have been writing about situation in general. Those who were paying attention to that infamous event in human history were mostly local scholars that had a hard time to bring their works to the attention of the world.

However, research done by such scholars was very wide analyzing political, economical, social and other spheres of the conflict and concentrating mostly on the conflict solution. Those researches that have been touching upon legal issues were mostly concentrating on legitimacy of actions of the States in that conflict. Basically they were trying to find out who is right and who is wrong without paying much attention on actual flow and development of conflict itself, people suffering in that situation, perpetrators of international crimes, and other very important issues.

Researches that were actually trying to write about international humanitarian law in the Nagorno-Karabakh Conflict made their works to wide on the subject and have been mostly comparing the Nagorno-Karabakh Conflict with conflicts in Abkhazia and South Osetia in Georgia from the perspective on international humanitarian law, lacking legal analysis. They were not concentrating on the Nagorno-Karabakh Conflict itself that much and thus lost a lot of very big issues that are wide enough by themselves and largely represented in aforementioned conflict.

There are no works in present time on the international criminal law in regard to the Nagorno-Karabakh Conflict. Being a very important branch of international law, international criminal law was not linked to the Nagorno-Karabakh Conflict by any scholars. Attempt to talk about enforcement of international criminal law in the Nagorno-Karabakh Conflict can be called first attempt ever.

On the part of international organizations, only Human Rights Watch published a short book on the situation in the Nagorno-Karabakh Conflict, covering some basic issues of political situation, some arguments of parties to the conflict and commenting briefly on human rights and humanitarian law situation in the Conflict. However, this book was published as far back as in 1994 and does not cover the whole situation of the conflict that lasts till this day, instead covering only actual war in Nagorno-Karabakh. Nevertheless, these materials are very important from the perspective of being neutral source and there are many references to them in this work.

From other publications of international organizations I should mention annual reports of Red Cross on Azerbaijan that have some important information, but lack complex data on the conflict.

Apart from what was mentioned before there are no more works on the subject in focus.

Though outside the scope of this thesis and thus will not be discussed further in this work, at the same time of importance to mention, one question especially troubles when looking and failure of international law: why international community witnessing international crimes and having in its interest their prosecution and prevention, prefer to stay blind and silent to such events in the Nagorno-Karabakh Conflict, but on the other hand immediately reacts to the events in Yugoslavia and Rwanda? How is it possible that such atrocious conflict escaped from the eyes of international community? One can only speculate about that. However, it seems logical that though there are several resolutions of UN Security Council, political will of certain States blocks all attempts of UN to act in regard to this conflict. From that follows lack of attention of international community, poor media coverage, and on some point loss of interest from western states, which is so important for any international conflict. Though Security Council provided in its resolutions to be actively seized on the matter, no such concentration have been seen. Nagorno-Karabakh Conflict became frozen and suffered lack of attention until now. Such situation clearly shows impotence of UN to act in certain situation and high level of its dependence on political will of the States.

In my previous research I came up with several articles shortly covering international humanitarian law in the conflicts of South Caucasus, general implementation of international criminal law, implementation of international humanitarian law into domestic legislation of Azerbaijan and other issues.¹ But this work is my first attempt to actually focus on the the Nagorno-Karabakh Conflict as a whole and on enforcement of international law in it.

¹ See, K. Makili-Aliyev, "Problems in Implementing and Observing the Law of War in the Central Caucasus", 1 (37) *Central Asia and the Caucasus* (2006), Lulea, Sweden, pp. 86-95; "Некоторые аспекты международного гуманитарного права на Южном Кавказе" (Several Aspects of International Humanitarian Law in South Caucasus), 2 *Renessans* (2005), Baku, Azerbaijan, pp. 53-60; "Некоторые аспекты личной ответственности в международном гуманитарном праве" (Several Aspects of Personal Responsibility in International Humanitarian Law), 3-4 *Самартали / Право* (2006), Tbilisi, Georgia, pp. 47-51; "О применении международного уголовного права" (On enforcement of International Criminal Law), *Dirçəliş - XXI əsr* (2007), Baku, Azerbaijan.

2 Overview of the Nagorno-Karabakh Conflict

2.1 Short History of the Nagorno-Karabakh Conflict

I would like to start overview with date-by-date short history of aforementioned conflict.

The contemporary Azerbaijani statehood takes its roots back from the Kingdom of Caucasian Albania. The area presently known as Nagorno-Karabakh (or Mountainous Karabakh) was a part of that Kingdom since its formation. According to the Antic sources there were 26 tribal unions in Albania, ethnic composition of which was autochthonous Caucasian and Turkic. Albania with its autocephalous church possessed a rich and unique culture, where alphabet in use was composed of 52 letters. In a year 313 A.D. Christianity was confirmed as a state religion in Albania. Turbulent situation did not let it to keep its independence for a long time. In a year 705 A.D. the Kingdom was fully subordinated to the Arab Khalifat. After this, the Khalifat having an alliance with Armenians against Byzantium, with the aim of elimination of the close relations between Albania and Byzantium, subjugated Albanian Church to the Armenian Grigorian Church.

Throughout the Middle Ages, Karabakh was part of the state formations existed in the territory of present Azerbaijan led by Turkic Muslim dynasties and inhabited by Turkic speaking people.

18th century was marked with an establishment of the Karabakh Khanate, which was headed by the Turkic (Azerbaijani) dynasty of Djavanshirs. This was the Azerbaijani Khanate ruled by the hereditary dynastic tradition of Azerbaijani nobles, predominantly populated by ethnic Azerbaijanis.

A rule of Russian Empire was imposed on the Khanate after the signature of the Treaty of Kurakchay (1805) between the Khan of Karabakh and the Russian Empire. After the take-over of the overall Caucasian region, the Russian Empire pursued *divide et impera* policy through different means with a view to establishing and strengthening its total control. Enforced change of demographic situation in the region by massive resettlement of the Armenians to Karabakh from Persia and the Ottoman Empire was an extensive package of measures of such kind. After the Russo-Iranian (1806-1813, 1826-1828) and Russo-Ottoman (1828-1829) wars the ethnic composition of the region was substantially changed. Only during the period of 1828-1830 more than 40.000 Armenians from Persia and 84.600 from Ottoman Empire were settled to Azerbaijan.

In 1828, by the order of the Russian Emperor, an Armenian Oblast was formed in the territories of occupied Azerbaijani Khanates (Irevan and Nakhchivan). This was done with the aim of creating a buffer zone in the backyard of the Ottoman Empire and to divide the Turkic speaking band

into separate parts. Abolition of the Albanian Church by the Russian Czar in 1836 resulted in ultimate Grigorianization (Armenization) of the Albanian population.

1918:

Declaration of independence of the Azerbaijan Democratic Republic (ADR). On the same day the independence of the Republic of Armenia was declared. Later, the government of ADR yielded the town of Irevan (presently Yerevan, the 30% of population were people of different ethnicities, including Armenians, whereas the 70% majority were Azerbaijanis) to the Government of the Republic of Armenia, which had declared its independence, but had no political center.

The Batum Peace Treaty between the Ottoman Empire and the three South-Caucasian republics (Armenia, Azerbaijan and Georgia). The Ottoman Empire was the first state, which recognized independence of the South-Caucasian republics. According to the Treaty on the Armenian side signed by the Prime Minister of the Dashnak Government, the borders of Armenia have been defined and consequently the total area of this state was specified, as 10.000 sq. km. composed of Erivan and Echmiadzin districts with 400.000 residents. Naturally Karabakh was the part of the Azerbaijan Democratic Republic.

Further in 1918, contrary to the agreed terms of peaceful and good neighborly relations, Republic of Armenia began the large-scale aggression against Azerbaijan. Occupation of the town of Nakhchivan, massive attacks on Azerbaijani villages of Zangezur and Karabakh resulted in devastation of 115 villages and killing of 7729 Azerbaijani civilians. Around 50.000 people were displaced from their homelands.

1920:

De-facto recognition of independence of the Republic of Azerbaijan by the Supreme Council of the Allied Nations. Later this year, occupation of Azerbaijan by the 11th Red Army of Soviet Russia. Following that Azerbaijan Democratic Republic ceased its existence and the Soviet rule was established in Azerbaijan.

1921:

The Caucasian Bureau of the Central Committee of the Communist Party of Russia (bolshevik) decided: "Proceeding from the necessity to maintain peace between Moslems and Armenians, economic ties between Highland and Lowland Karabakh, its uninterrupted ties with Azerbaijan, to keep Mountainous Karabakh within the Azerbaijan SSR and to grant broad regional autonomy." At the same time with granting the right of self-rule to the Armenians of the Mountainous Karabakh, predominantly Azerbaijani populated regions of Zangezur and part of Kazakh district (in total 9.000 km²) was given to Armenia. In total, 20.000 km of Azerbaijani territories had been given to Armenia in the Soviet years.

1923:

Decree of the Central Executive Committee of the Communist Party of Azerbaijan SSR on "Formation of the Autonomous Region in the Mountainous Karabakh with an administrative center in Khankendi" (The name of the town was renamed from Khankendi to Stepanakert after Stepan Shaumian, famous bolshevik leader, in September 1923). At the same time, three hundred thousands of Azerbaijanis who have lived in compact settlements in Armenia were refused even cultural autonomy by the governments of both the USSR and the Armenian SSR.

1948-1953:

Azerbaijani population of Armenia always lived under pressure and this resulted in massive organized deportation of Azerbaijanis from Armenia. According to official data, more than fifty thousands of Azerbaijanis from Armenia were resettled in the Kur-Araz lowlands regions of Azerbaijan between the years of 1948-1953.

1987:

November 18 - The statement of A. Aganbegian, the Kremlin counselor, on expediency of uniting Mountainous Karabakh with the Armenian SSR. This statement played a crucial role in firing national hatred and fomenting the conflict.

This resulted in later demonstrations calling to annex the Nagorno-Karabakh Autonomous Region (hereinafter - NKAR) of the Azerbaijan SSR to the Armenian SSR were held in Yerevan (Armenia).

1988:

Massive deportation of Azerbaijanis living in the Armenian SSR to Azerbaijan. By decision of the authorities, these refugees were settled in Baky and Sumgayit.

Next month brought first victims of the conflict: two civilian Azerbaijanis were killed in Askeran (Nagorno-Karabakh).

Massive disorders in Sumgayit took place. As a result 32 people were killed of different ethnicity, including Armenians, Azerbaijanis and Russians.

The enlarged meeting of the Presidium of the Supreme Soviet of the USSR confirmed NKAR as an integral part of the Azerbaijan SSR.

As a result of pogroms against Azerbaijani civilians in the cities of Gugark, Spitak and Stepanavan of the Armenian SSR, 33 people were killed.

At the end of the year more than 220.000 ethnic Azerbaijanis were forced to leave their homelands in the Armenian SSR.

1989:

The railway link from Azerbaijan to Armenia was closed because of the attacks to the trains in the territory of Armenia. Beginning of the isolation of the Nakhchivan Autonomous Republic of Azerbaijan by Armenia.

The Supreme Council of the Armenian SSR passed a resolution "on reunification of the Armenian SSR and NKAR"; thus in violence of all basic norms and principles of international law, Armenia officially declared its claim against the territorial integrity of the neighboring state.

1990:

Disarmament of the Baku police by the order of USSR Interior Office. Due to this, following next days (13-16 January) it was impossible to prevent disorders in Baku.

The Soviet Army invaded Baku and massacred hundreds of local civilians. Children, women and elderly people were the first victims of this vandalism. Official statistics claims around 150 people died, 700 injured.

1991:

Armenians declared the establishment of the so-called "Nagorno-Karabakh Republic (NKR)" in the territory of Mountainous Karabakh region of the Republic of Azerbaijan. The illegal armed groups of about 15.000 people were formed as a "self-defense forces of NKR".

Meeting of Presidents of Azerbaijan and Armenia in Zheleznovodsk (Russia) mediated by the Russian and Kazakhstan Presidents. An agreement was reached to settle the conflict in a peaceful way.

Later this year, in despite of the reached agreement, Armenian armed forces launched massive attacks against Azerbaijani population of the Khodjavand/Martuni and Hadrut districts of the NKAR. About 30 villages were occupied and devastated and inhabitants were driven out of their homes.

Armenian terrorists opened a fire at the civilian helicopter "MI-8", which was carrying a group of high-ranking people from Russia and Kazakhstan and senior leadership of Azerbaijan near the village of Garakend of the Khodjavand district (NKAR). The murder of 22 people was an end of the first attempt for the peaceful settlement of the Armenia-Azerbaijan conflict undertaken in Zheleznovodsk and gave an impetus to further escalation of violence.

1992:

The second meeting of the CSCE Council in Prague. Azerbaijan and Armenia got admitted to the CSCE.

A while after the accession of Armenia to the CSCE, the armed forces of this state committed an act of genocide against civilian population of Khojali, Azerbaijani town within the former NKAR. With substantial support of the regiment #366 of Russia (deployed in Khankendi), the Armenian army brutally killed 613 people (among them, 63 children, 106 women, 70 elders) and destroyed this town.

Later this year, 7th meeting of the OSCE Committee of Senior Officials was held in Prague. It called the parties to establish a cease-fire in the Nagorno-Karabakh region of Azerbaijan without delay, respect inviolability of internal, as well as external borders, which can only be changed by peaceful means and with common consent, and refuse from all territorial claims, including abstinence from all the hostile propaganda.

Removal of the 366th rifle regiment of the Russian armed forces from Khankendi to Russia and illegal transfer of 25 tanks, 87 armored infantry fighting vehicles, 28 armored vehicles, 45 artillery mortar systems to the Armenian separatists.

The declaration of the Committee of Ministers of the Council of Europe expressing its deep concern about recent reports of indiscriminate killings and outrages, and firm condemnation of the violence and attacks directed against the civilian populations in the Nagorno-Karabakh area of the Republic of Azerbaijan.

Spring was marked by first additional Helsinki meeting of the CSCE Council. Decision to convene a conference on the Nagorno-Karabakh Conflict under the auspices of the CSCE.

Later in spring – meeting of the Heads of States of Armenia and Azerbaijan in Tehran with mediation of Iran. Meeting was devoted to the normalization of the situation in Nagorno-Karabakh and the peaceful settlement of the conflict. The Heads of States signed a communique at the end of the meeting.

At the same time with signing of the communique in Tehran Armenia occupied the Shusha district of NKAR (91.7 % population of which was Azerbaijanis). As a result of the occupation of Shusha region more than 20 thousand of Azerbaijanis were expelled from their homeland.

While discussions on peaceful settlement of the conflict in the meeting of the Senior Officials Committee of the CSCE in Helsinki were going on, armed forces of Armenia occupied Lachin region. As a result of this occupation 63.341 Azerbaijani civilians were forced to leave their homes.

Later, Agreement on cessation of all military actions for two months period (with later prolongation clause) was reached in Sochi (Russia) by Defense Ministers of Armenia and Azerbaijan.

Violating the agreement reached in Sochi, Armenia occupied 8 villages of Zangilan district of Azerbaijan.

1993:

At the same time with the peace talks in Geneva, Armenia occupied Kalbadjar district of Azerbaijan. 60.698 Azerbaijanis were driven out of their permanent residences.

The President of the UN Security Council made a statement condemning the occupation of Kalbajar.

The declaration of the Committee of Ministers of the Council of Europe on escalation of the Nagorno-Karabakh Conflict. The CM expressed its serious concerns on escalation of the Nagorno-Karabakh Conflict and especially the extension of the combat zone to the Kelbadjar district of the Republic of Azerbaijan and endorsed the demand of the President of the UN Security Council for the immediate cessation of all hostilities and calls for the withdrawal of all forces which endanger the peace and security of the region.

The Organization of Islamic Conference adopted a resolution strongly condemning the recent Armenian offensive against Azerbaijan and the occupation of Azerbaijani territories.

Adoption of the resolution 822 by the UN Security Council, demanding immediate withdrawal of all occupying forces from the Kelbadjar and other recently occupied areas of Azerbaijan.

Occupation of the Agdam district of Azerbaijan by Armenia, immediately after the visit of Mr. M. Rafaelli, the chairman of the Minsk Conference of

the OSCE. 158.000 Azerbaijani civilians were forcefully displaced from their homes.

Statement by the Chairman of the CSCE Minsk Conference on the offensive on and reported seizure of Agdam city (Azerbaijan).

Following these events, adoption of the resolution 853 of the UN Security Council, which demanded "the immediate, complete and unconditional withdrawal of occupying forces involved from the district of Agdam and other recently occupied districts of the Republic of Azerbaijan".

The statement of the President of the UN Security Council on full, immediate and unconditional withdrawal of the occupying forces from the Agdam district and other recently occupied districts of Azerbaijan.

Despite the mentioned warnings, Armenia, continuing its aggression, occupied Fizuli and Jabrail districts of Azerbaijan. As a result, 209.985 Azerbaijani civilians were forcefully displaced from their homelands.

Armenia ignores the request of the Chairman-in-office of the CSCE addresses to the Armenian President L. Ter-Petrosian on not advancing the armed forces for occupation of Gubadly and Zangilan regions of Azerbaijan. Later, occupation of the Gubadly district of Azerbaijan by the Armenian troops. As a result, 31.364 Azerbaijani civilians were displaced from their homes.

In autumn this year – adoption of the UN Security Council Resolution 874, which called for "immediate implementation of the reciprocal and urgent steps provided for in the CSCE Minsk Group's Adjusted timetable, including the withdrawal of forces from recently occupied territories".

Later, occupation of the Horadiz town and Zangilan district of Azerbaijan. 34.924 Azerbaijani civilians had to flee and leave their homes.

Following these events, adoption of the UN Security Council Resolution 884, which condemned the occupation of Zangilan district and the Horadiz town, attacks on civilians and bombardments of the territory of the Republic of Azerbaijan and demanded the unilateral withdrawal of occupying forces from the Zangilan district and Horadiz, and the withdrawal of occupying forces from other recently occupied areas of the Azerbaijani Republic.

1994:

The Heads of State and Government of the North Atlantic Cooperation Council adopted a declaration where they "condemned the use of force for territorial gains. Respect for the territorial integrity, independence and sovereignty of Armenia, Azerbaijan and Georgia is essential to the establishment of peace, stability and cooperation in the region...".

May 12 - Agreement on cease-fire entered into force.

1995:

Negotiations on elaboration of the agreement on cessation of the conflict.

1996:

OSCE Lisbon Summit. The OSCE Chairman-in-Office has made a statement supported by all (53) OSCE member states except Armenia, on three principles for the settlement of the conflict between Armenia and Azerbaijan: 1) territorial integrity of the Republic of Armenia and the

Azerbaijan Republic; 2) legal status of Nagorno-Karabakh defined in an agreement based on self-determination which confers on Nagorno-Karabakh the highest degree of autonomy within Azerbaijan; 3) guaranteed security for Nagorno-Karabakh and its whole population, including mutual obligations to ensure compliance by all the parties with the provisions of the settlement.

1997:

An institute of "triple" Co-Chairmanship of the OSCE Minsk Conference (Russia, USA and France) was introduced.

The report of the Chairman of the Defense Committee of the State Duma, Mr. Lev Rokhlin on an illegal delivery of the Russian weapons to Armenia worth of one billion USD. Later on, Mr. Rokhlin got killed in unknown circumstances.

Parliamentary Assembly of the Council of Europe adopted a Resolution (1119) on the conflicts in Transcaucasus, where it stressed the settlement of the conflicts in the region has to be on the basis of the principles set out in the 1975 Helsinki Final Act and the 1990 Paris Charter:

- Inviolability of borders;
- Guaranteed security for all peoples in the areas concerned, particularly through multinational peacekeeping forces;
- Extensive autonomy status for Abkhazia and Nagorno-Karabakh to be negotiated by all the parties concerned;
- Right of return of refugees and displaced persons and their reintegration respecting human rights.

The Co-chairmen introduced a "package plan" for the settlement of the conflict. The basic idea behind the proposal was to work in parallel negotiations on two core issues of the confrontation: withdrawal of the armed forces from occupied regions and elaboration of the status of Nagorno-Karabakh. Unlike Armenia, who refused this plan, Azerbaijan accepted the proposal with some exceptions.

The Co-chairmen introduced "step-by-step" settlement plan. This plan envisaged two-staged conflict settlement according to the following scheme: On the first stage - withdrawal of occupying armed forces from six districts, which are outside of the former NKAO (except Lachin district), return of civilian population and restoration of the main communication links in the conflict area; on the second stage - definition of the status of the Nagorno-Karabakh as well as of Lachin and Shusha.

Strasbourg Joint Statement of the Presidents of Azerbaijan and Armenia on supporting the plan for "step-by-step" settlement of the conflict. L. Ter-Petrosian noted the importance of the step-by-step resolution of the conflict in his article "War or Peace". Later, he had to resign under the pressure of the political-military circles. The Prime Minister R. Kocharyan (a resident of the Mountainous Karabakh region of Azerbaijan and leader of separatists until before this appointment) became an acting President of the country. Short after his victory in the presidential elections, the position of Armenia on the settlement of the conflict became tougher. Between 1997-2002, no meeting of the OSCE Minsk Group was held in full composition.

1998:

Armenia officially declared about the renunciation of the consent of the former President of the Republic on the step-by-step settlement.

The Co-chairmen brought forward a new plan for the settlement, called a "common state". Azerbaijani side refused to accept this proposal as a basis for the negotiations because of its inconsistency with the norms and principles of international law as well as the national legislation. Azerbaijan confirmed its readiness to resume negotiations within the OSCE Minsk Group framework, on the basis of the previous proposal of the co-chairmen, on the step-by-step settlement plan.

1999-2002:

Direct talks between the Presidents of Azerbaijan and Armenia. Up to date, they have met more than 20 times. No results have been achieved so far.

2002:

In search of the advancing the peace process, the Co-chairmen suggested to appoint Special Representatives of the Presidents of Azerbaijan and Armenia for negotiations on the conflict. The Special Representatives met three times during a year, twice in Prague - in May and July and once in Vienna - in November.

In the final document of the EU-Azerbaijan Cooperation Committee, the EU reaffirmed its support to the territorial integrity of Azerbaijan as the basis for the peaceful solution of the conflict.

The EU condemned holding of the so-called "presidential elections" in Nagorno-Karabakh region of the Republic of Azerbaijan.

2003:

Co-chairmen of the OSCE Minsk Group from Russia N.Gribkov was replaced by Y.Merzlyakov. During his visit to the region he held series of meetings with Azerbaijani officials on September 3-5.

The presidential elections were held in Azerbaijan. Ilham Aliyev was elected as the president of the Republic of Azerbaijan for his first term.

December 11 - The first meeting of the President of Azerbaijan Mr. I.Aliyev with his Armenian counterpart in Geneva.

2004:

The meetings of the Presidents of Azerbaijan and Armenia in Prague.

The meeting of the Foreign Ministers of Armenia and Azerbaijan with participation of the OSCE Minsk Group Cochairmen in Warsaw, Istanbul, Prague and Strasbourg.

The meeting of the Foreign Ministers of Armenia and Azerbaijan with participation of the OSCE Minsk Group Cochairmen in Prague.

Azerbaijan requested the inclusion of an additional item in the agenda of the fifty-ninth session of the UN General Assembly, entitled "The situation in the occupied territories of Azerbaijan".

Acting on the recommendations of its General Committee, the UN General Assembly decided to include an additional item on its current agenda

entitled "The situation in the occupied territories of Azerbaijan". It took that decision by a recorded vote of 43 in favour to 1 against (Armenia) with 99 abstentions.

Additional item #163 "The situation in the occupied territories of Azerbaijan" was debated on the 59th session of UN General Assembly. The Minister of Foreign Affairs of Azerbaijan gave a speech concerning the content of the additional item and illegal activities of Armenia in the occupied territories of Azerbaijan.

The meeting of the Foreign Ministers of Armenia and Azerbaijan in Brussels in the framework of NATO EAPC Ministerial.²

2005-present time:

This period of time was marked by the series of negotiations on diplomatic level and within the framework of OSCE, including meetings on the highest level. However, this work gave no results so far. OSCE work seemed ineffective through all these years.

This is a short history of the Nagorno-Karabakh Conflict that highlights the most important events in the conflict beginning, escalation and development in settlement process. However, the result of that story as it can be seen from above is a "frozen" international conflict, settlement of which is not very close to present day. Further I would like to stress some legal aspects of the conflict.

2.2 Legal Arguments of the Parties to the Nagorno-Karabakh Conflict

This part of work is presenting legal arguments of both sides of the Nagorno-Karabakh Conflict. The importance of these arguments for this work is evident from the link that it establishes between historical disputes that took place during the history of conflict (discussed above) and enforcement of international law that will be analyzed further. To understand even possibility of enforcement of international law in the Nagorno-Karabakh Conflict it is important to understand the position of international law on territorial disputes and disputes touching upon the issue of sovereignty of states in the aforementioned conflict.

Main arguments of Armenia:

In order to justify the territorial claims of Armenia towards Azerbaijan, the officials of the former frequently raise a proposition, according to which Nagorny Karabakh has never been within the jurisdiction of independent Azerbaijan. The following arguments underlie this assertion:

Firstly, in the period when independent Azerbaijan became part of the Soviet Union Karabakh had not been within its jurisdiction, the evidence

² See, <www.mfa.gov.az>, visited 12 June 2007.

of which was the decision of the League of Nations that refused to recognize Azerbaijan because of its territorial claims to the Armenian populated Eastern Caucasus, including in particular Nagorny Karabakh, as well as the lack of efficient state control over its supposed territory and inability to ground the legitimacy of the frontiers of this territory.

Secondly, the legal cause for secession of Nagorny Karabakh from Azerbaijan in the process of disintegration of the USSR in 1991 and the establishment of the "Republic of Nagorny Karabakh". Thereby the special emphasis is placed on the provisions of the Law of the USSR "On the Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR" of 3 April 1990, according to which in case of realization by the Union republic of the secession procedure provided for in this Law autonomous entities would acquire a right to decide independently the question of staying in the USSR or in the seceding republic, as well as to raise the question of their own state-legal status.

Thirdly, refusal by Azerbaijan to regard itself as a successor state to the USSR, and thus the lack of any reason to have pretensions to the frontiers of that period.³

Main arguments of Azerbaijan:

1. Nagorny Karabakh in the context of consideration of a question regarding the admission of Azerbaijan and Armenia to the League of Nations:

Following the entry of the British forces into Baku in 1918, general V.Thomson, who represented the Allied Powers, recognized Nagorny Karabakh together with the neighboring Zangezur uyezd under the administration of Azerbaijan. He confirmed the appointment by the Government of Azerbaijan of Khosrov Sultanov as a Governor of the Karabakh General-Governorship, of which these two regions were part. In 1919 the Armenian Assembly of Nagorny Karabakh recognized officially the authority of Azerbaijan.⁴ In 1918-1920 the Republic of Azerbaijan had diplomatic relations with a number of states. Agreements on the principles of mutual relations were signed with some of them; sixteen states established their missions in Baku. On 12 January 1920 at the Paris Peace Conference the Supreme Council of the Allied Powers de-facto recognized the independence of the Republic of Azerbaijan.

The head of the Azerbaijani Delegation at the Conference by a letter of 1 November 1920 requested the Secretary-General of the League of

³ For more information about the position of Armenia see the initial reports of this country under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, UN Documents E/1990/5/Add.36 and CCPR/C/92/Add.2; UN Document E/CN.4/2005/G/23 "Legal aspects for the right to self-determination in the case of Nagorno-Karabakh"; Speech by S.Sarkisyan, Minister of Defense of Armenia, at the parliamentary hearings on the problem of Nagorny Karabakh, 29-30 March 2005, IA "REGNUM", <www.regnum.ru/news/437271.html>, visited 12 June 2007.

⁴ T. Swietochowski, *Russia and Azerbaijan: A Borderland in Transition* (Columbia University Press, New-York, 1995), pp. 75-76.

Nations to submit to the Assembly of the League an application for the admission of the Republic of Azerbaijan to the Organization.

The Secretary-General pointed out in his Memorandum of 24 November 1920 that the mandate of the Azerbaijani Delegation attending at the Paris Peace Conference derived from the Government which had been in power at Baku until April 1920. Thus, the attention in the Memorandum is distinctly paid to the fact that at the time of submission by the Azerbaijani Delegation of the application (1 November 1920) and the publication date of the Memorandum (24 November 1920) the Government of the Republic of Azerbaijan, which issued the credentials to the Delegation, was not actually in power since April 1920. It was further noted in the Memorandum that this Government did not exercise the authority over the whole territory of the country.⁵ In this context, the most important part of the mentioned Memorandum of the Secretary-General of the League of Nations relates to "Juristic observations", which reminds of the conditions governing the admission of new Members to the Organization contained in Article 1 of the Covenant of the League of Nations, including the requirement to be a fully self-governing state.⁶ The relevant documents of the League of Nations completely disprove the statements of the Armenian side claiming that the League of Nations did not admit Azerbaijan because of its alleged territorial claims to the so-called Armenian-populated territories and the refusal to recognize the control of Azerbaijan over Nagorny Karabakh. It is obvious actually that the state, considerable part of the territory of which was occupied by the time of consideration of its application in the League of Nations, and yet the Government that submitted this application was overthrown, could not be regarded as fully self-governing in terms of Article 1 of the Covenant of the League of Nations. Thus, these were just those conditions that prevented Azerbaijan from being admitted to the League of Nations.⁷

At the same time, the League of Nations did not consider Armenia itself as a state and proceeded from the fact that this entity had no clear and recognized borders, neither status nor constitution, and its Government was unstable. As a result, the admission of Armenia to the League of Nations was voted down on 16 December 1920.⁸

2. Nagorny Karabakh within the Azerbaijan SSR: Along with the above-mentioned facts on the recognition by the Allied Powers of the authority of Azerbaijan over Nagorny Karabakh, a proposition that Karabakh was not under the jurisdiction of independent Azerbaijan when it

⁵ League of Nations, *Memorandum by the Secretary General on the Application for the Admission of the Republic of Azerbaijan to the League of Nations*, Assembly Document 20/48/108, p.2. See also *The Covenant of the League of Nations (1919)*, in Malcolm D.Edvans (ed.), *Blackstone's International Law Documents* (Oxford University Press, Oxford, 6th ed., 2003), pp. 1-7, at p. 1, Article 1.

⁶ League of Nations, Assembly Document 20/48/108, p. 4.

⁷ T. F. Musayev, "Legal Aspects of Nagorno-Karabakh Conflict", <www.mfa.gov.az>, visited 12 June 2007.

⁸ League of Nations, Annex 30 B, *Future status of Armenia. Memorandum agreed to by the Council of the League of Nations*, meeting in Paris on 11 April 1920. League of Nations Document 20/41/9, p. 27. See also *Admission of new Members to the League of Nations. Armenia*. Assembly Document 209, pp. 2-3; Assembly 251.

became part of the Soviet Union refuted also by the decision of the Caucasian Bureau of the Central Committee of the Russian Communist Party (Bolsheviks), which owing to the territorial claims of Armenia did take up the problem several times and, at the meeting held on 5 July 1921, decided to retain Nagorny Karabakh within the Azerbaijan SSR. At the same time, the Azerbaijan SSR was recommended to confer Nagorny Karabakh a broader autonomy.⁹

On 13 October 1921 the Treaty of Friendship between the Armenia SSR, Azerbaijan SSR and Georgia SSR, on the one hand, and Turkey, on the other, was concluded in Kars with the participation of the RSFSR. In Article 5 of the Treaty the Governments of Turkey, Armenia and Azerbaijan expressed their consent that "the Nakhichevan oblast ... forms an autonomous territory under the protection of Azerbaijan".¹⁰

Transcaucasian Socialist Federal Soviet Republic (TSFSR) was established on 13 December 1922. The Constitution of the TSFSR confirmed that the Republic of Nakhichevan was an inseparable and constituent part of Azerbaijan in form of an autonomous unit. According to this Constitution, the status of autonomous republics and oblasts (Abkhazia, Ajaristan and South Ossetia) remained unchangeable.

Insofar as the mountainous part of Karabakh was officially recognized as an inseparable part of Azerbaijan, including by the Armenia SSR, neither the Treaty of Kars nor the Constitution of the TSFSR contained any reference to it.¹¹

3. State succession in respect of territory and boundaries in the context of restoration of the state independence of the Republic of Azerbaijan: After the collapse of the USSR, the international legal doctrine of *uti possidetis juris* underlay the international, regional and national legitimation of boundaries of the newly independent states.

According to the doctrine of *uti possidetis juris*, from the time of attainment by the Republic of Azerbaijan of its independence, the former administrative borders of the Azerbaijan SSR, which included also the NKAO, are recognized as international and protected by international law. This understanding is also confirmed in the known resolutions of the UN Security Council on the Nagorny Karabakh conflict.¹²

Regarding the proposition of the Armenian side that by proclaiming the restoration of the state independence of 1918-1920 and thus becoming the successor of the then ADR Azerbaijan allegedly forfeited a right to

⁹ Extract from the Protocol of the plenary session of the Caucasian Bureau of the Central Committee of the Russian Communist Party (Bolsheviks) of 5 July 1921. For text see *To the history of formation of the Nagorny Karabakh Autonomous Oblast of the Azerbaijan SSR 1918-1925: Documents and Materials* (Azerneshr, Baku, 1989), p. 92.

¹⁰ Treaty of Friendship between Armenia SSR, Azerbaijan SSR, Georgia SSR, on the one hand, and Turkey-on the other, concluded with the participation of the RSFSR in Kars, on 13 October 1921, *Documents of foreign policy of the USSR*, volume IV (Gospolitizdat, Moscow, 1960), p. 423, Article 5.

¹¹ *First Congress of Transcaucasian Soviets*. Zakraykom RKP edition (Military Commissariat Press, Tiflis, 1923) p. 144.

¹² Resolutions of the UN Security Council 822 of 30 April 1993, 853 of 20 July 1993, 874 of 14 October 1993, and 884 of 11 November 1993.

pretend to the borders of the Soviet period, the attention should be drawn to Article 11 of the Vienna Convention on Succession of States in Respect of Treaties, according to which "[a] succession of States does not as such affect: (a) a boundary established by a treaty....".¹³

In other words, though this provision directly applies only to external boundaries of the former USSR established by international treaties, to which it was a party, it actually represents a conceptual international legal approach provided that an existing boundary continues to exist notwithstanding the succession, so that the change of sovereignty is powerless to undermine such boundaries which achieve permanence.¹⁴

As it can be seen from above there are some legal and political issues involved in this conflict. The legal and factual result of this conflict is that 20% of Azerbaijani territories are under occupation. In its resolutions 822 (1993), 853 (1993), 874 (1993) and 884(1993) the United Nations Security Council (UNSC) while reaffirming the territorial integrity of the Republic of Azerbaijan called for the immediate, complete and unconditional withdrawal of the occupying forces from all the occupied Azerbaijani territories. These resolutions have been completely ignored by Armenia, and today Azerbaijani territories are still under foreign occupation and are exposed to various unlawful and destructive activities. The Security Council in its resolutions 822 (paragraph 4), 853 (paragraph 13), 874 (paragraph 12) and 884 (paragraph. 8) requested the Secretary-General of the United Nations, the Chairman-in-Office of the Organization for Security and Cooperation in Europe (OSCE) and the Chairman of the OSCE Minsk Conference to report to the Council on all aspects of the situation on the ground and on its development, and this provision has not been implemented either.

In the situation such as the Nagorno-Karabakh Conflict one can only imagine the level of instability of the occupied territories, amount of breaches of humanitarian and human rights law, and problems of international criminal and international humanitarian law, both in the "war" and "frozen" periods of aforementioned conflict. I want to dedicate next chapters to these issues.

¹³ Vienna Convention on Succession of States in Respect of Treaties, 22 August 1978, <untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf>, visited 12 June 2007.

¹⁴ Malcolm N. Shaw, "The Heritage of States: The Principle of Uti Possidetis Juris Today", 77 *The British Yearbook of International Law* 1996 (Clarendon Press, Oxford, 1977), pp. 75-154, at p. 90.

3 Applicable International Law

In this part of the work I would like to discuss parts of international law that are relevant to the events of the Nagorno-Karabakh Conflict and should be enforced in this particular conflict as well as in any other conflict that there may be.

3.1 Applicable International Humanitarian Law

This sub-chapter is discussing particular branch of international law (international humanitarian law) to focus attention on specific norms that will be discussed further in this work in connection with the Nagorno-Karabakh Conflict.

3.1.1 Background and history of International Humanitarian Law

The main aim of International Humanitarian Law (IHL) is to mitigate human suffering caused by war. Some scholars would call it even to “humanize” war. The philosophical background for this aim might be taken from Grotius. His work in the time of Thirty-Years War (1618-1648) coined term *temperamenta belli*, or ‘moderations of war’ – requirements of a higher, more order in war. This corresponds with many rules of humanitarian law, as we know it nowadays.

Even long way back in ancient history military leaders occasionally ordered troops to spare lives of civilians and captured enemy soldiers, treat the wounded of both sides of conflict, arrange the exchange of prisoners, etc. This shows some practice of conducting the war by the rules. It was somewhat reciprocal process and these rules cannot be even treated as customary. However, this process continued and at some point in history humanity reached the point of eliminating the uncertainty in vague customs of war. This point was XIX century.

Today IHL can be very easily tracked to such persons of XIX century as *Henry Dunant*¹⁵ and *Francis Lieber*.¹⁶ They both made almost at the same time starting contributions to the contemporary IHL. They both developed on the idea of Jean-Jacques Rousseau that war is not relationship between people, but between States, thus individuals are enemies by accident as soldiers. Soldiers then, ones they will lay down their weapons are not soldiers anymore, but individuals whose life should be spared.¹⁷

The beginning of the development of IHL as a treaty law began in 1860s. There were two conferences held in that period of time. One was

¹⁵ H. Dunant, *A memory of Solferino* (1862).

¹⁶ See, R. S. Hartigan, *Lieber's Code and the Laws of War* (Chicago, 1983).

¹⁷ H.-P. Gasser, *International Humanitarian Law, An Introduction* (Henry Dunant Institute, Geneva, 1993) p. 7.

held in 1864 in Geneva, on the fate of wounded soldiers in the battlefield. The other one was held in 1868 in St. Petersburg, on the use of explosive rifle bullets.

First conference resulted in Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864. This convention made a legal background for the army medical units on the battlefield. These units were neutralized and thus had immunity from being attacked. It also provided identification of medical establishment and personnel. All the independent States accepted this convention in relatively short period of time. It was revised in 1906 and further after World War I revised again in 1929.

Second conference resulted in the St. Petersburg Declaration of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime. This declaration prohibited the use of projectiles weighing less than 400 grammes. The reason for prohibiting such projectiles was that use of them uselessly aggravated the suffering of disabled man or made their death inevitable. This consideration of prohibition is known as very important one. It coined such principle of law of war as: “belligerents are obliged to limit the use of force in meeting a (legitimate) military objective”.¹⁸

It should also be mentioned that these two conferences led to two distinct (but never totally separate) currents in IHL. One is known as law of Geneva and concerned mostly with conditions of war victims in enemy hands (prisoners of war, interned civilians). The other known as law of The Hague and relates to the conduct of war and permissible means and methods of warfare.¹⁹

Another convention, already of the beginning of XX century, is worth mentioning here. Hague Convention No. IV of 18 October 1907 respecting the Laws and Customs of War on Land, and annexed Hague Regulations contains particular rules on the treatment of prisoners of war and conduct of military operations, also in occupied territories. Preamble of this Convention contains sentence that is of great importance by itself (even disregarding provisions of the rest of the Convention). It is so-called *Martens Clause* that provides that in cases not covered by the rules of war, “the inhabitants and belligerents remain under the protection and the rule of principles of the law of nations, as they result from the usages, established by civilized people, from the laws of humanity, and the dictates of public conscience”. Basically if there is a loophole in IHL, solution should be based on basic humanitarian principles.

Following development of IHL was delayed by World War II (WWII). This tragic event in world history gave enough experience to ICRC to work on the new four Geneva Conventions of 12 August 1949. They replaced 1929 Conventions and partially Hague Convention No. IV. These Conventions cover such already known topics in IHL as protection of the wounded, sick and shipwrecked and prisoners of war and also introduce completely new for IHL at that period of time protection to civilian persons who had fallen into the enemy hands from arbitrary treatment and

¹⁸ *Ibid.*, p. 10.

¹⁹ F.Kalshoven and L. Zegveld. *Constraints on the Waging of War. Ann Introduction to International Humanitarina Law* (ICRC, Geneva, 2001), p. 16.

violence.²⁰ Provisions of these new IHL rules on occupied territories are of the great importance, judging from the worst crimes of WWII committed on such territories. Another very important development is the provision of the protection under IHL to the victims of 'civil wars' or in other words non-international armed conflicts.

Later the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, adopted the two Protocols additional to the Geneva Conventions of 1949 in 8 June 1977.²¹ These Protocols made a giant step further in strengthening the protection of the victims of an armed conflict. Provisions of these protocols are also bringing together the laws of Geneva and of The Hague, which until then had developed apart from each other. Following years of their adoption till nowadays Geneva Conventions of 1949 became the most universal treaty law ever: they are currently ratified by 194 states.²²

Other developments of IHL brought to the world such conventions as Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 1976, Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction, The Chemical Weapons Treaty of 1993 (with total ban of chemical weapons), Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to Excessively Injurious or to have Indiscriminate Effects, and its protocols, etc.

However, talking about variety of treaties that are right now in IHL and covering most of the possible wartime situation, becoming complete with each year, one can forget about the custom as a source of law. Most of the provisions of the modern IHL are already customary rules. This is widely accepted in the world by international judicial bodies and promoted by International Committee of Red Cross in its publications on customary law rules of IHL.

There also many questions arise when it comes to the implementation and enforcement with IHL. Such factors as positive will of the states, sufficient and properly oriented training of armed forces and heavy discipline are playing very important role in the implementation and enforcement of IHL. The responsibility of the States concerned is a starting point in the case of implementation of IHL. When it comes to the action of States, they have to understand the importance of the implementation of recent development as well as basic rules of IHL for the sake of humanity and also for reciprocal treatment from opposite side. But what happens in the case where there is just pure ignorance of the rules and provisions of IHL, what follows the irrespective attitude of the States towards these rules? I will try to answer these questions further in my work on the example of the Nagorno-Karabakh Conflict.

²⁰ See, Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Naples, 1979).

²¹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977).

²² As of 2 August 2006.

Further I want to proceed with more detailed discussion of the basic rules of the IHL, following from law of The Hague, law of Geneva, recent developments in law of war and its principles.

3.1.2 The Law of The Hague

As it was mentioned before one of the currents of IHL that is a set of norms regarding some aspects of IHL generally referred to as a 'law of The Hague'. In this set of norms one should distinct between smaller groups of norms addressing issues like: combatants and their qualifications, means and methods of war, civilian protection, cultural property, etc. Here I want briefly refer to some of these norms.

Starting with very important part of Hague law – norms on combatants – I need to mentioned that Hague provisions are quite clear on that persons that are entitled to commit belligerent acts are first of all members of armed forces (except military medical and religious personnel). However, Article 1 of Hague regulations also adds to the list militia and volunteer corps that fulfill the list of certain conditions, such as to be commanded by responsible person, to have fixed recognizable sign of distinction, to carry arms openly, etc. Article 2 adds another category, namely inhabitants of occupied territory that on approach of enemy are trying to resist this by taking up arms, but spontaneously without organization in the meaning of aforementioned Article 1.²³ This action is currently known as *levee en masse*. These qualifications of the combatants very revolutionary for IHL. Inclusion of militia and volunteer corps was a great step forward for IHL. It is quite obvious that now militia troops ones fallen into the enemy hands treated as combatants and thus would not be executed on the spot because they are not members of regular armed forces, made a difference.

In regard to the means of warfare there is a basic provision laid down in Article 22 of Hague Regulations that reads: "The right of belligerents to adopt means of injuring the enemy is not unlimited." Several principles were subtracted from this general one, such as prohibition of use of arms that cause "unnecessary suffering" (Article 23(e)), prohibition of use of poison or poisoned arms (Article 23(a)), etc.²⁴ Referral to 'unnecessary suffering' in Hague Regulations showed exactly the soul of basic provision in Article 22 – prohibition of means of warfare not justified by military utility. The over referral to the 'poison and poisoned arms' is also of great importance and was followed further buy such a development in Hague law as Geneva Gas Protocol of 1925. This Protocol prohibited the use of 'asphyxiating, poisonous or other gases' as means of warfare and extends this prohibition to the 'use of bacteriological methods of warfare'.²⁵

Hague Regulations are not very wide in determining the methods of war. However, there are some rules such as prohibition of treachery

²³ *International Law Concerning the Conduct of Hostilities. Collection of Hague Conventions and some other International Instruments* (ICRC, Geneva, 1996) p. 17.

²⁴ *Ibid.*, p.21-22.

²⁵ *Ibid.*, p.178-179.

towards the enemy in Article 23(b). The problem is that there is a provision in Article 24 that ruses of war are permissible. The difficulty comes usually when defining which act is treacherous and which is a ruse of war. Some other prohibitions are, to kill or wound an enemy that laid down his arms, to declare that no prisoners shall be taken, pillaging town or village even in the assault situation, etc.²⁶

As it was generally laid down in 1868 St. Petersburg declaration the only legitimate object of states during war is to weaken the military forces of the enemy.²⁷ This general rule is a solid base for the protection of civilian population in IHL. The way of how to achieve the goal mentioned in declaration is to eliminate those objects that can be considered as 'military objectives' (enemy armed forces units, their military technology and vehicles, etc.). But when it comes to such units as weapon factories and their supplements question comes in mind on what industries can be regarded as 'military objectives' and what others are not? Same also goes to bridges railroads, road intersections, etc. Unfortunately Hague Regulations do not provide answer to that.²⁸

Regarding cultural property in Hague law I should mention 1954 Hague Convention for the protection of Cultural Property in the Event of Armed Conflict. Though it was ratified by a large amount of states, there is no evidence yet that its provisions become customary. The importance of that Convention is that it provided detailed system of protection of cultural property. It defined cultural property (Article 1); it obliged states with safeguards for their own cultural property, such as marking it and storing it in the safe place (Article 3, Article 6, etc.). There is also obligation for the states provided in Article 4 of Convention to respect cultural property on their own territory as well as on the territory of other contracting states. Also, system of special protection is provided in the Chapter II of Convention, dealing with cultural property added in the International Registry of Cultural Property under Special Protection of UNESCO. Under this special protection the states are obliged to ensure immunity of the object, by refraining from any hostile act against that object (Article 9). Another interesting point here is that there might be withdrawal of such immunity according to Article 11 of Convention. This can happen in two situations: 1) violation by the state its obligation under Article 9 of Convention, 2) in case of "unavoidable military necessity".²⁹

In this part of my work I gave a brief overview of Hague law and showed some most important parts of its wide variety of IHL provisions. Further I would like to proceed with law of Geneva and treatment of victims of war.

²⁶ *Ibid.*, p. 22.

²⁷ *Ibid.*, p. 171.

²⁸ Kalshoven, *supra* note 19, p. 45.

²⁹ See, *supra* note 23, p. 31-35.

3.1.3 The Law of Geneva

The law of Geneva provides protection for those who as a consequence of war have fallen into the hands of the enemy. The main purpose of protection here is not against violence of war itself, but from the power that one side acquires over those persons of the over party that have fallen into its hands.

There four Geneva Conventions of 1949 that create a basis of law of Geneva:

1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I or GCI);
2. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II or GCII);
3. Convention Relative to the Treatment of Prisoners of War (Geneva Convention III or GCIII);
4. Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV or GCIV).

Geneva Conventions I-III are particularly dealing with persons that are directly participating in hostilities or combatants. GCIV is dealing on the other hand with certain categories of civilians. Categories falling under definition of the protected persons by Geneva Conventions I-III are referred to in Article 4 of GCIII. Persons protected by GCIV are defined in Article 4 of that convention. All four of Geneva Conventions of 1949 are applicable to international armed conflicts, except for the Article 3 common to these Conventions that provides minimal set of rules applicable to the non-international armed conflict.³⁰

The system of protection of the Geneva Conventions of 1949 rests on the fundamental principle that protected persons must be respected and protected at the all circumstances, and must be treated humanely, without any adverse distinction found on sex, race, nationality, religion, political opinions, or any other similar criteria (Article 12 of GCI and GCII, Article 16 of GCIII and Article 17 of GCIV).³¹

In GCI general protection is provided in Article 12. It declares that treatment shall be given to the wounded and sick from the Party to the conflict in whose power they may be. It prohibits to murder or to exterminate these persons, to subject them to torture or biological experiments, to leave them without medical assistance on purpose or to expose them to the infection or contagion. Further in Article 15 there is an obligation of the Parties to search for and collect wounded and sick. The same goes for the dead, that later should receive honorable interment as provided in Articles 15-17. Further Article 18 of GCI provides that wounded and sick should be respected also by the civilian population. Civilians should not harm or in any other way treat protected persons violently. GCI contains large system of protection of medical personnel their units, buildings and equipment focused on the use of distinctive sign of

³⁰ *The Geneva Conventions of August 12 1949* (ICRC, Geneva), pp. 76,155.

³¹ Kalshoven, *supra* note 19, p. 53.

red cross or red crescent on the white ground. Article 46 of GCI prohibits reprisals against wounded and sick.³²

In GCII general protection is based on the same principles as in GCI. Article 12 provides that term 'shipwreck' shall include any form of such action (for example it can be also forced landing on sea by or from aircraft). Hospital ships play a big role in GCII. They are defined as ships built or equipped specially and solely for the purpose of assisting wounded, sick and shipwrecked, their treatment and transportation in Article 22. Article 43 provides that they should be painted white with the distinctive emblem of red cross or red crescent. However, freedoms of hospital ships can be very restricted by the parties to the conflict. According to Article 31 these ships can be searched and controlled, their assistance can be refused, they can be even detained for a certain amount of time in the specific conditions. In Article 47 GCII also prohibits reprisals.³³

General rule that goes to the combatants that fall into the enemies hand is that they are prisoners of war from the moment of capture. GCIII is dealing with the prisoners of war (POWs). Article 4 of GCIII provides the list of the persons that shall be recognized as POWs. Article 13 of GCIII provides that POWs must be treated humanely at all times. Their persons and their honor should be respected in all circumstances as provided by Article 14. POWs cannot be subjected to any physical or mental torture or any other type of coercion. POWs are only obliged to give their full name, rank, date of birth, and army, regimental, personal or serial number, or failing this equivalent information (Article 17). POWs captured in the combat zone shall be evacuated from there as soon as possible and transported into the camps situated outside the danger area, where they are kept at the expense of Detaining Power. There are no provisions that make it unlawful for the POWs to try to escape. Failed attempt can only be fined with disciplinary punishment (Article 92). Detention of the POWs last until the cessation of the hostilities. After that they shall be released and repatriated without delay (Article 118).³⁴

GCIV is dealing with the civilians as the protected persons category. They are defined in the Article 4 of the GCIV. The general rule outside the scope of Article 4 is that all those who are not combatants should be treated as civilians.³⁵ Article 8 prohibits renunciation of rights provided to protected persons under GCIV. Part II of GCIV provides general protection of populations against certain consequences of war. Part III of GCIV deals specifically with status and treatment of protected persons. Furthermore, Part III in its different sections provides rules that are common for all territories of the conflict, that are specific to the aliens in the territory of the party to the conflict, that are specific to the occupied territories, that are specific for the internees.³⁶ This convention will be discussed in more

³² See, *supra* note 30, pp. 27-42.

³³ *Ibid.*, pp. 56-68.

³⁴ *Ibid.*, pp. 76-124.

³⁵ M. Sassoli and A.A. Bouvier, *How Does Law Protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, Geneva, Vol. I, 2006), p. 144.

³⁶ See, *supra* note 30, pp. 155-206.

details later in this work as it contains very important provisions related to the Nagorno-Karabakh Conflict.

3.1.4 Additional Protocols to the Geneva Conventions of 12 August 1949

Protocols Additional to Geneva Conventions of 12 August 1949 as mentioned before were adopted in 1977. Protocol I is applicable to international armed conflicts, Protocol II to non-international armed conflicts. Protocols were adopted without formal voting by consensus. Only States parties to the Geneva Conventions of 1949 can become parties to the Protocols.

First I would like to discuss some important issues regarding Protocol I. Its Preamble reaffirms provisions of the Geneva Conventions of 1949 stating that both Conventions and Protocol should be applied fully and totally in all the circumstances to all the subjects of protection given by these documents with no distinction based on nature or origin of conflict.³⁷ This reaffirmation is important because it shows that IHL doesn't distinct between the right or wrong side of the conflict. It at any time will apply equally for both parties.

Article 1 of the Protocol one also reaffirms some basic provisions of Geneva Conventions 1949, such as obligation of the parties to respect and ensure respect for its provisions in all circumstances, repeats slightly differently *Martens clause* of 1899, and includes new notion into its scope of application. This new notion is wars of national liberation and it was not included in the Geneva Conventions of 1949. Interesting situation comes with Article 1(4) that provides that people fighting in the exercise of their right of self-determination cannot become parties to the Conventions or Protocol. However, Article 96(3) of Protocol I states that authority representing such people can address declaration to the depositary stating that they undertake to apply Conventions and Protocol.³⁸

Protocol I also solves the difficulty with the recognition of the combatant that troubled Geneva Conventions of 1949. Article 43 of the Protocol I gives new and more advanced definition of armed forces and combatants. It does not distinguish between regular and irregular armed forces as it was given in Conventions before, instead it includes all enemy units, on subject matter of their organization, responsible command, etc. and on the novel that all combatants have the right to participate directly in hostilities.³⁹

Protocol I apart from issues brought by GC I-III also deals with means and methods of warfare, brings new provisions in protection of civilian population and also deals with treatment of persons in power of a party to the conflict.

³⁷ *Protocols Additional to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1977), p. 3.

³⁸ *Ibid.*, pp. 4, 70.

³⁹ *Ibid.*, p. 30.

Protocol II is contains less articles than Protocol I and repeats some of its provisions. Article 1 of Protocol II provides that this protocol develops and supplements Article 3 common to Geneva Conventions of 1949. Preamble of Protocol II puts better protection for the victims of internal armed conflicts as a basic purpose of that document. It does not apply to the situations covered by Protocol I and to the situations that are of low violence nature, such as disturbances, tensions, riots, isolated and sporadic acts of violence, etc. Protocol II differs from common Article 3 also with its field of application. It is not applicable to each and every internal armed conflict as common Article 3, only to the ones stated in Article 1(1) of this protocol (that excludes for example fighting in the country between various groups with no involvement of governmental armed forces). Article 2 of the Protocol II defines persons protected by it as all persons affected by the armed conflict defined in Article 1 and adds non-discrimination clause. Article 4(1) clearly shows that Protocol II was made to protect people that do not take direct part in belligerent acts and hostilities or have already ceased to take part in such acts (except for the part with prohibition of no quarter). Article 4(1) also brings the general principle of whole Protocol II on humane treatment at all times without any distinction.⁴⁰

Protocol II provides minimal rules for the persons detained or interned (Article 5). Part III of protocol deals with wounded, sick or shipwrecked. Article 7 guarantees the care and protection for the mentioned category of persons and Articles 9, 10 and 11 ensures respect and protection for the medical and religious personnel. Protocol II has some provisions dealing with civilian population. Article 13 for example provides principle that civilian population as well as civilians shall enjoy general protection against the dangers arising from military operations. Articles 14, 15 and 16 are prohibiting belligerent acts against several types of civilian objects including protected cultural property. Article 17 prohibits displacement of civilian population, with exception only if security of civilians is involved.⁴¹

As it was mentioned before, Protocol I contains provision that obliges state parties to respect and ensure respect to rules laid down in the Protocol I. However, Protocol II does not contain such provision. It is very weak on part of implementation and enforcement. Only provision that can be related to that and can be found in Protocol II is provision of its Article 19 that reads: "This Protocol shall be disseminated as widely as possible". This passive provision shows the attempt of drafters to link it with Protocol I.

Here I have finished my brief analysis of general provisions of IHL. Further I would like to shortly discuss basic and fundamental principles of IHL, that are very important for that work and analysis of Nagorno-Karabakh's problems and humanitarian issues.

⁴⁰ *Ibid.*, pp. 89-92.

⁴¹ *Ibid.*, pp. 93-98.

3.1.5 Basic and fundamental principles of International Humanitarian Law

There are a lot of different groups of basic principles and rules of IHL defined by different scholars. Some are grouping them by the issues addressed in different sources of IHL, such as general obligation of human treatment, rules concerning wounded, sick and shipwrecked, prisoners of war, civilians. Others are formulating them based on their historical development. For example principles that are coming from the early stages of IHL development (XIX century-beginning of XX century), principles founded in 1949 (Geneva Conventions of 1949), principles added in 1977 (Additional Protocols of 1977), etc.

However, for the purposes of this work I would like to present a list of the most important principles drafted by the group of experts from ICRC and published first in 1978. This list states some fundamental rules of IHL applicable in armed conflicts based on legal instruments of IHL and established practice:

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
3. The wounded and sick shall be collected and cared for by the party to the conflict to which has them in its power. Protection also covers medical personnel, establishments, transports and *materiel*. The emblem of red cross (red crescent) is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have their right to correspond with their families and to receive the relief.
5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he/she has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be object of attack. Attacks shall be directed solely against military objectives.⁴²

⁴² *International Review of the Red Cross* (ICRC, Geneva, 1978), pp. 248-249.

3.2 Applicable International Criminal Law

This sub-chapter is discussing particular branch of international law (international criminal law) to focus attention on specific norms that will be discussed further in this work in connection with the Nagorno-Karabakh Conflict.

3.2.1 Theory of International Criminal Law

International Criminal Law is the law that governs international crimes. Some scholars say that this branch of international law is where penal aspects of international law, including that body of law protecting victims of armed conflict known as international humanitarian law, and the international aspects of national criminal law, converge.⁴³ International Criminal Law should always be distinguished from international human rights law and national criminal law.

To better understand theory of international criminal law further I want to discuss some issues of sources and subjects of international law as well as international criminalisation process and principle of legality.

Statute of International Court of Justice of 1945 recognizes two types of sources of international law: primary and secondary (Article 38(1)).⁴⁴ Primary sources include treaties, international customs and general principles of law, all being independent and capable of producing binding rules. Writings of renowned publicists and the decisions of international courts are simply serve to interpret or ascertain primary sources, and form secondary sources of international law. Treaties are agreements between states framed by international law and binding for states only parties to particular agreement-treaty. Customary international law composed of two elements: uniform and continuous State's practice (objective) and so-called *opinio juris* (subjective). These customary rules bind all States, except for those that have consistently and openly objected to the formation of a rule from its inception. The exception to that, however, is certain part of customary rules called *jus cogens* that consists generally from fundamental human rights and rules of IHL as well as prohibition of use of unlawful armed force, and cannot be derogated from.⁴⁵ General principles of law can be found in international law itself, as well as in the domestic legal systems of States. General principles of international law such as *pacta sunt servanda* underlie both customary and treaty law. Practice of international law also proves, however, general principles deriving from national laws and systems.⁴⁶

⁴³ J.J. Paust, M.C. Bassiouni, S.A. Williams, M. Scharf, J. Gurule, and B. Zagaris (eds.), *International Criminal Law: Cases and Materials* (Caroline Academic Press, 1996), pp. 3-19.

⁴⁴ *Charter of the United Nations and Statute of the International Court of Justice* (United Nations, New York, 1994), p. 75.

⁴⁵ I. Bantekas and S. Nash, *International Criminal Law* (Cavendish Publishing Limited, London, 2003), pp. 2-3.

⁴⁶ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1987).

As to the subjects of international law, for a long time only State responsibility was recognized on the international plane. Concept of sovereignty of States stood on the way of efforts to realize individual responsibility in international law. However, it is a well-known in modern international law that State responsibility and individual criminal responsibility under international law are not the same thing. For instance, for an individual to be held criminally liable for an act of genocide under international law, he would have to be prosecuted and punished by an international criminal tribunal applying an international criminal statute.⁴⁷ In the case of State responsibility, contemporary international law only permits one State to demand that the State committing genocide cease and desist from committing genocide against nationals of the victim State; wipe out the consequences of genocide and restore the situations existing before the genocide; and provide to the victim State, in its own right and as *parens patriae* for its citizens, compensation for the damage and losses caused by another State committing genocide against the nationals of the victim State.⁴⁸

The notion of State sovereignty and its attendant ramifications was also linked to another principle that blocked some development of international criminal law – principle of legality. This is very specific principle of criminal justice.⁴⁹ This principle was codified in Article 11(2) of Universal Declaration of Human Rights that states: "No one shall be held guilty of any penal offence on account of any act of omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."⁵⁰ In accordance with principle of legality prosecution of individuals before international criminal court or tribunal means pre-existence of at least two things: 1) international recognition that individual as opposed to State could be subject to criminal punishment by an international tribunal; 2) conduct for which the individual could be guilty would have to be proscribed by the international community of States as a crime subject to international sanction, with a clear set of penalties.⁵¹ Common example of precedent of state recognition of individual being punished under international criminal law is *Lotus case* dealing with piracy (*jure gentium*).⁵² That case brought up principle that any nation may, in the interest of all, exercise jurisdiction to capture and punish piracy by law of nations, and a pirate is a subject to

⁴⁷ K. Kittichaisaree, *International Criminal Law* (Oxford University Press, New York, 2001), p.9.

⁴⁸ See, e.g. *Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 11 July 1996, ICJ, Preliminary Objections, paras. 13-14.

⁴⁹ Kittichaisaree, *supra* note 47, p. 14.

⁵⁰ *Human Rights in International Law. Basic Texts* (Council of Europe Publishing, Strasbourg, 2006), p. 83.

⁵¹ M.C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996), pp. 265-291.

⁵² *Lotus case (The Case of the S.S. "Lotus")*, 7 September 1927, PCIJ, Ser. A., No. 10, 1927, Judgment, <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/>, visited 1 October 2007.

universal jurisdiction of any State. However, pirates are tried by domestic law, not international law. No international tribunal required for these purposes. The effort to try German Emperor Kaiser Wilhelm II in 1919 for the international crimes met strong opposition of US claiming that this would violate principle of legality. Only International Military Tribunal at Nuremberg that proceeded with international criminal prosecution violated principle of legality and set first precedents for future criminal prosecutions of individuals before international tribunal applying international law.⁵³

An international offence is any act entailing criminal liability of a perpetrator and, emanating from treaty or custom. Even the heinous nature of an act, such as the extermination of an identified group, is not the sole determinant for elevating such behavior to the status of an international offence. The establishment of international offences is the direct result of interstate consensus, all other considerations bearing a distinct subordinate character. The legal basis for considering an offence to be of an international character is where existing treaties or custom consider the act as being an international crime.⁵⁴ Cherif Bassiouni after analysis of most of international crimes in treaties comes up with ten penal characteristics: 1) explicit recognition of proscribed conduct as constituting international crime, or a crime under international law, or as a crime; 2) implicit recognition of penal nature of the act by establishing a duty to prohibit, prevent, prosecute, or the like; 3) criminalisation of proscribed conduct; 4) duty or right to prosecute; 5) duty or right to punish proscribed conduct; 6) duty or right to extradite; 7) duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings); 8) establishment of a criminal jurisdiction basis (or theory of criminal jurisdiction or priority in criminal jurisdiction); 9) reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives); 10) elimination of the defense of superior orders. Bassiouni concluded that if any of the penal characteristics described above exists in convention or any other treaty that kind of agreement becomes part of International Criminal Law (ICL).⁵⁵

The importance of theory of ICL cannot be underestimated. The core principles of international law merged with fundamental human rights and basic principles of IHL predefined development of such a branch of international law as ICL. Importance of prosecution of most serious crimes that are in concern of whole international community is unarguable.

In this section I have showed the basics of theory of ICL. Discussed subjects and sources of international law and ICL, presented definition of international crime or offence, and stated the Bassiouni's theory of treaties that constitute part of ICL. Further I would like to discuss *ad hoc* International Tribunals and International Criminal Court.

⁵³ Kittichaisaree, *supra* note 47, p. 16.

⁵⁴ Bantekas, *supra* note 45, p. 5.

⁵⁵ M.C. Bassiouni (ed.), *International Criminal Law* (Dobbs Ferry, New York, 1986), pp.2-4.

3.2.2 *Ad hoc* International Tribunals and International Criminal Court

Nuremberg and Tokyo Tribunals: The creation of these tribunals was unprecedented and the legal and procedural grounds of these tribunals represented the first proper expression of international criminal law and procedure. The International Military Tribunal at Nuremberg (Nuremberg Tribunal) was set up by Great Britain, France, Soviet Union and the US to whom Germany had surrendered after WWII. It had four judges appointed by each of the aforementioned countries. Prosecutors were also appointed by them. The Charter of Nuremberg Tribunal was considered a product of exercise of the sovereign legislative power by the countries to which Germany surrendered unconditionally and the right of these countries to legislate on occupied territories was without doubt. The tribunal tried twenty-four major German war criminals. Article 6 of Nuremberg Charter demanded individual responsibility for crimes against peace, violations of the laws or customs of war, and crimes against humanity and that led to critique for violation of principle of legality. The Nuremberg tribunal also rejected the doctrine of State sovereignty in favor of that of individual criminal responsibility. Offences for war crimes were applied as *inter alia* norms of 1929 Geneva Conventions and Hague regulations, despite that these instruments contained no reference to the possibility of criminal sanctions. Crimes against humanity were absolutely new invention of Nuremberg Tribunal. Atrocities committed by Germans against their own nationals or nationals of their allied territories (Hungary, Romania, etc.) that were not technically violations of laws of war were considered to be crimes against humanity.⁵⁶

The International Military Tribunal for Far East (Tokyo Tribunal) was set up by US Supreme Commander-in Chief in Tokyo, Japan, who also appointed eleven judges. Judges were appointed from lists of names submitted by US, Australia, Canada, China, France, Great Britain, the Netherlands, New Zealand, and the Soviet Union.⁵⁷ Tokyo Tribunal was based on Nuremberg Tribunal. It proclaimed similar Charter, reasoning, proceedings, etc. All suspects were classified into three categories A, B and C. A category for suspects charged with crimes against peace, B – with conventional war crimes, C – with crimes against humanity. Only A suspects were tried in Tokyo Tribunal. All other categories were left to be tried in States where crimes were committed.⁵⁸

Both Tribunals were heavily criticized for victor's justice and violation of principle of legality. However, they left extremely valuable output of precedents and principles of international law recognized by the Charter of Nuremberg Tribunal and Judgment of the Tribunal that were

⁵⁶ Kittichaisaree, *supra* note 47, p. 18-19.

⁵⁷ B.V.A. Roling and C.F. Ruter (eds.), *The Tokyo Judgment* (University Press Amsterdam, 1977), chap.1.

⁵⁸ Bantekas, *supra* note 45, p. 335.

adopted by the UN General Assembly (UN GA) Resolution 95(1) on 11 December 1946 and formulated by ILC and accepted by UN GA in 1950.⁵⁹

The ICTY and the ICTR: The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) was established in 1993 with the UN Security Council (SC) Resolution 827. This was a major breakthrough for the role of Security Council. The establishment of ICTY on the basis of SC Resolution under Chapter VII of the UN Charter was preferred to a treaty because it was faster in procedure and did not require consent of States that would slow down process crumbling Yugoslavia.⁶⁰ Major reason of establishment was consideration by SC of widespread violations of IHL on the territory of former Yugoslavia, including ethnic cleansings to be threat to international peace and security. The ICTY is based in Hague, Netherlands and consists of sixteen permanent independent judges and a maximum at any one time of nine *ad litem* independent judges, elected by UN GA from a list of nominations received from States submitted by the SC, taking into account principle of representation of legal systems of the world. The ICTY proceedings are governed by ICTY Statute and by the Rules of Procedure and Evidence adopted by judges. According to articles 8-9 of ICTY Statute Tribunal is not subject to any national laws and has concurrent jurisdiction alongside, as well as primacy over national courts to prosecute persons for serious violations of IHL committed on territory of the former Yugoslavia since 1991.⁶¹ Subject-matter jurisdiction of ICTY consists of the power to prosecute natural persons responsible for grave breaches of the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, violations of the laws or customs of war, genocide and crimes against humanity when committed in armed conflict, which are beyond any doubt part of customary international law.⁶² Customary international law application for ICTY is crucial to avoid violation of principle of legality in a case when party to the conflict was not bound by any specific treaty at the time of the offence in question.⁶³

The International Criminal Tribunal for the Prosecution of Persons Responsible for the Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for the Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994 (ICTR) was created by SC Resolution 955 in 1994. The Prosecutor for ICTY is the same for ICTR. Provisions of ICTR Statute mirror provisions of ICTY Statute when it comes to organization of

⁵⁹ UN GA Resolution 95(1), <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf>>, visited 28 June 2007.

⁶⁰ J.C. O'Brien, "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law", 87 *American Journal of International Law*, p. 639.

⁶¹ ICTY Statute, <www.icls.de/dokumente/icty_statut.pdf>, visited 28 June 2007.

⁶² *Ibid.*, Articles 2-5.

⁶³ *Tadic case (Prosecutor v. Dusko Tadic)*, 10 August 1995, Case No. IT-94-1-T, Decision of the Defense Motion on Jurisdiction, para. 143.

Tribunal, investigation and preparation of indictment, rights of accused, penalties, cooperation and judicial assistance, etc. However there are no *ad litem* judges in ICTR. One unique characteristic of both ICTY and ICTR is that they don't have exclusive jurisdiction over crimes included in their mandates. They are created complementary to the national judicial systems. ICTR has jurisdiction only over crimes committed in internal armed conflict; ICTY jurisdiction goes also to international armed conflicts. Both tribunals have different grounds of prosecution of crimes against humanity.⁶⁴

International Criminal Court: International Criminal Court (ICC) Statute (Rome Statute) was signed on 17 July 1998 in Rome. One hundred twenty States voted in favor of the treaty, seven voted against (US, China, Libya, Iraq, Israel, Qatar, Yemen) and twenty-one abstained. Following the required sixtieth ratification, the Rome Statute entered into force on 1 July 2002. Unlike two *ad hoc* tribunals (ICTY and ICTR), the ICC according to its Statute is a permanent international criminal court established by its founding treaty (Article 1).⁶⁵ It has its own legal personality and although it is an independent judicial institution it is related with UN through special agreement.⁶⁶ The court consists of judicial, prosecutorial and administrative (registry) branches. Eighteen full time judges, elected for nine-year non-renewable term form judicial branch.⁶⁷ The ICC enjoys subject-matter jurisdiction over four core offences: genocide, crimes against humanity, war crimes and aggression.⁶⁸ Further in this section each of these crimes will be discussed in detail.

ICC shall have jurisdiction only where State is unwilling or unable to carry out the investigation or prosecution of the crimes within ICC's jurisdiction where such prosecution or investigation has been carried out but is a mere sham, where the person concerned has already been tried for conduct, or where the case is not of sufficient gravity to justify further action by ICC. Court jurisdiction covers only offences committed after 1 July 2002.⁶⁹ No person shall be tried before ICC with respect to conduct which formed the basis of crimes for which the person have been convicted or acquitted by the ICC, or tried before another court for a crime within the ICC's jurisdiction for which that person has already been convicted or acquitted by the ICC – principle *ne bis in idem* (except for the cases where proceedings in other court had an intention of merely shielding person at a trial).⁷⁰

This section shortly covered international tribunals and ICC that constitute a development line in international criminal justice. These short topics will be important further in this work to understand nature of recommendations to the development of situation with ICL in the Nagorno-

⁶⁴ Kittichaisaree, *supra* note 47, pp. 25-26.

⁶⁵ Rome Statute, < www.un.org/law/icc/statute/romefra.htm>, visited 28 June 2007.

⁶⁶ *Ibid.*, articles 2, 4.

⁶⁷ *Ibid.*, article 35.

⁶⁸ *Ibid.*, article 5.

⁶⁹ Bantekas, *supra* note 45, pp. 378-381.

⁷⁰ Rome Statute, *supra* note 65, article 20.

Karabakh Conflict. Further I would like to proceed to the discussion of major groups of international crimes.

3.2.3 International Crimes

In this part of the work I would like to discuss several international crimes that are relevant to the Nagorno-Karabakh Conflict that contains precedents of such crimes. Further in this work arguments that some these crimes took place will be presented.

Genocide: The crime known nowadays as genocide was prosecuted for the first time in Nuremberg Tribunal under heading of crimes against humanity. It was the only time this crime was prosecuted until creation of ICTY and ICTR. Crime of genocide is defined in the Convention on the Prevention and Punishment of Crime of Genocide of 1948 (Genocide Convention) and has become a part of customary international law and a norm of *jus cogens*.⁷¹ Article 2 of aforementioned convention defines genocide as 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.⁷²

These provisions are replicated by ICTY Statute (Article 4(2)), ICTR Statute (Article 2(2)), and ICC Statute (Article 6). However, not a lot of States implemented these provisions in their national legislation (even those that have ratified Genocide Convention). Genocide is one of the gravest crimes. An accused must be found guilty on the basis of his own individual criminal responsibility. However, the victim of crime of genocide is group itself and not individual.

Actus reus of genocide does not presume the actual extermination of a group. Genocide is committed ones any of the acts provided in Genocide Convention is committed with the requisite of *mens rea* and can be committed by acts or omissions.⁷³

⁷¹ *Jelisc case (Prosecutor v. Goran Jelisc)*, 14 December 1999, Case No. IT-95-10, para.60.

⁷² Convention on the Prevention and Punishment of Crime of Genocide of 1948, <www.preventgenocide.org/law/convention/text.htm>, visited 29 June 2007.

⁷³ *Akayesu case (Prosecutor v. Jean-Paul Akayesu)*, 2 September 1998, Case No. ICTR-96-4-T, para. 497; *Kambanda case (Prosecutor v. Jean Kambanda)*, 4 September 1998, Case No. ICTR-97-23-S, para. 40.

On a part of *mens rea* in order to convict an accused of genocide it must be proven that the accused had the specific intent (*dolus specialis*), or a psychological nexus between the physical result and the mental state of the perpetrator, to destroy, at least in part, a national, ethnic, racial, religious group as such, or that the accused had at least the knowledge (*conscience claire*) that he was participating in genocide, that is the destruction, at least a part, of national, ethnic, racial or religious group, as such.⁷⁴

Genocide should always be distinguished from the crime against humanity of persecution. Perpetrator of persecution selects his victims by qualification of belonging to a specific community but does not seek the destruction of that community as such.⁷⁵

Crimes against humanity: Crimes against humanity differ from genocide in the part that there is no *dolus specialis* of destruction of members of particular group needed in the case of crimes against humanity.⁷⁶ For the first time crimes against humanity were prosecuted in Nuremberg and Tokyo Tribunals' trials. Further the concept of crimes against humanity continued to develop in municipal courts of France, Israel and others.⁷⁷ In present crimes against humanity are international crimes according to customary international law and perpetrators of these crimes incur individual criminal responsibility. Crimes against humanity under customary international law in present time need not to be linked to international armed conflict (like it was required in Nuremberg and Tokyo Charters) or any conflict at all.⁷⁸

Article 7 of Rome Statute provides that crimes against humanity are the following acts when committed as a part of widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Article 7(1), or any other crime within the ICC's jurisdiction; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or mental or physical health.⁷⁹

The *actus reus* of a crimes against humanity comprises commission of an attack that is inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health and must

⁷⁴ *Jelusic*, *supra* note 71, para. 66, Oral Judgment of 19 October 1999.

⁷⁵ *Ibid.*, para. 79

⁷⁶ *Akayesu*, *supra* note 73, paras. 565-568.

⁷⁷ *Ibid.*, paras. 567-577.

⁷⁸ *Tadic*, *supra* note 63, para. 141.

⁷⁹ Kittichaisaree, *supra* note 47, p. 90.

be committed as a part of a widespread or systematic attack against members of the civilian population.⁸⁰

On the part of *mens rea* of the crimes against humanity, if we abstract from specific elements of each individual crime against humanity, the perpetrator in each case must knowingly commit the crime in the sense that he must understand the overall broader context in which his act occurs. Perpetrator must know that his acts are part of widespread or systematic attack on a civilian population, forming context of mass crimes and pursuant to the policy or plan.⁸¹ Without such knowledge the perpetrator would have *mens rea* of an ordinary crime.

War Crimes: These crimes committed in violation of IHL applicable during armed conflicts. Main principle here is that in the conduct of hostilities opposing forces should be governed by three principles: necessity, humanity, and chivalry.⁸² Not every crime committed in an armed conflict is a war crime. A war crime must be sufficiently linked to an armed conflict itself and does not need to be a part of the policy or of practice officially sanctioned or tolerated by one of the parties to conflict.⁸³

War crimes in Rome Statute are divided into four main categories. War crimes in international armed conflicts are dealt with by Article 8(2)(a), which penalizes grave breaches of the Geneva Conventions of 1949, and by Article 8(2)(b), which penalizes other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. War crimes in non-international armed conflicts are covered by Article 8(2)(c), which penalizes serious violations of common Article 3 of Geneva Conventions of 1949, and by Article 8(2)(e), which penalizes other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.⁸⁴

The list of war crimes in Rome Statute is exhaustive and no other legal document of international character contains more exhaustive list. However, Article 8 of Rome Statute provides that elements of crimes should be interpreted within the established framework of international law of armed conflict. This provision was needed as an outcome of the fact that customary IHL continues to evolve.⁸⁵

Crimes under Rome Statute include for example acts against persons and property protected by IHL, such as willful killing, torture or inhumane treatment, willfully causing great suffering or injury to body and health, destruction and appropriation of property, intentional direction of attacks against civilian population, etc.

Perpetrator of war crimes can be soldiers as well as civilians. However, for civilian to be held liable for the war crime his connection to the belligerent acts and armed forces should be proven. Each war crime

⁸⁰ *Akayesu*, *supra* note 73, para. 578.

⁸¹ *Tadic*, *supra* note 63, Judgement, paras. 626, 638, 656, 657.

⁸² L.C. Green, *The Contemporary Law of an Armed Conflict* (Manchester University Press, 1993), chaps. 2, 18.

⁸³ *Tadic*, *supra* note 63, para. 70.

⁸⁴ Rome Statute, *supra* note 65, article 8(2).

⁸⁵ T. Meron, *War Crimes Law Comes of Age: Essays* (Clarendon Press, 1998), chap. XIV.

should be considered on a case-by-case basis, taking into account the material evidence and facts.⁸⁶

For the purposes of identification of war crime difference between international and internal armed conflict should be always made. International armed conflict takes place between two or more States. Internal armed conflict breaks out on the territory of one State and can become international or be international and internal at the same time if another State intervenes with its armed forces or if some participants of internal armed conflict act on behalf of that other State.⁸⁷

Aggression: According to Rome Statute ICC has jurisdiction over crime of aggression.⁸⁸ However Article 5(2) of the Statute provides that ICC shall exercise jurisdiction over such crime only when this provision will be adopted in accordance with Articles 121 and 123 of Rome Statute, when crime will be defined and the conditions on which ICC will exercise its jurisdiction over aggression will be set. In any case this provision shall be consistent with the relevant provisions of the Charter of United Nations.⁸⁹ According to the amendment procedure of Rome Statute after the expiry of seven years from the entry into force of Rome Statute, any State Party can propose amendments to the Rome Statute that can be adopted by consensus by majority of two-thirds of all State Parties. Amendment will enter into force for all State Parties, but State Party that wished not to accept the amendment can withdraw from Statute with immediate affect.⁹⁰ Amendment of Article 5 however is exception from general rule. It will enter into force only for those State Parties that accepted the amendment.

The inclusion of the crime of aggression in the ICC's jurisdiction is obviously a desire of States to punish the similar crime that was dealt with by Nuremberg and Tokyo Tribunals under heading 'crimes against peace'. However, Nuremberg Tribunal never defined 'aggression'. It only distinguished between 'aggressive actions' and 'aggressive wars'. Further, prohibition of use of force in UN Charter obliged UN to maintain international peace and security, but still left aggression undefined. It was feared that new and progressing techniques of modern warfare will make the list of defined aggression acts incomplete and will allow for the aggressor to use this as a loophole to distort definition to its advantage.⁹¹ Finally aggression was defined in UN GA Resolution 3314 of 14 December 1974 on the Definition of Aggression.⁹² However crime of aggression was never defined. Thus it will be only possible to talk about elements of this crime when it will be actually defined. Nonetheless, further I would like to present

⁸⁶ *Kayishema and Ruzindana case (Prosecutor v. Kayishema and Obed Ruzindana)*, 21 May 1999, Case No. ICTR-95-1-T, para. 176.

⁸⁷ Kittichaisaree, *supra* note 47, p. 135.

⁸⁸ Rome Statute, *supra* note 65, article 5(1)(d).

⁸⁹ H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court", *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer, 1999), pp. 80-85.

⁹⁰ Rome Statute, *supra* note 65, article 121.

⁹¹ A.C. Carpenter, "The International Criminal Court and the Crime of Aggression", 64 *Nordic Journal of International Law* (1995), n. 35.

⁹² UN GA Resolution 3314, <jurist.law.pitt.edu/3314.htm>, visited 30 June 2007.

opinions of scholar on elements of crime of aggression based on international jurisprudence of present time.

Common understanding of *actus reus* of the crime is planning, preparing, initiating and waging of crime of aggression as will be prosecuted by ICC. Conspiracy however is not included as a mode of commission of crime of aggression. What is clear is that omission can amount to an *actus reus* of such crime. It is also agreed that *mens rea* of the crime consists from intent and knowledge. Tokyo Tribunal for example found publicist Hashimoto guilty of waging war of aggression for having been fully apprised that the war against China was a war of aggression and making all the effort for this war to be a success.⁹³

⁹³ For example see, Kittichaisaree, *supra* note 47, pp. 220-221.

4 Failure of International Law in the Nagorno-Karabakh Conflict

In this part of the work I would like to discuss process of failure of enforcement of international law in the Nagorno-Karabakh Conflict and how this affected people in the region of conflict, brought suffering to human beings and resulted in lack of justice and lasting war.

4.1 Problems of International Humanitarian Law in the Nagorno-Karabakh Conflict

This sub-chapter is discussing failure of international humanitarian law in the Nagorno-Karabakh Conflict. It analyses law applicable to the aforementioned conflict and then shows actual situation with combatants and civilians throughout the conflict. Next sub-chapter will discuss specific issues of international criminal law in the context of the Nagorno-Karabakh Conflict and will give some examples of international crimes in this conflict.

4.1.1 Law Applicable to the Nagorno-Karabakh Conflict

Azerbaijan is party to Geneva Conventions of 1949 but have not ratified Additional Protocols. Armenia is party do both of these documents.

Common Article 2 states that the 1949 Geneva Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Approximately 20 percent of the territory of Azerbaijan has been occupied by Armenia, including Nagorno-Karabakh territory itself and seven neighboring regions. Then the conduct of the Republic of Armenia is governed by Protocol I as well, applicable also to international armed conflicts. Since the Republic of Azerbaijan has not acceded to Protocol I, its conduct is not governed by Protocol I. Many of the relevant provisions of Protocol I, however, are reflective of customary international humanitarian law, which applies to all parties to the conflict.

The enclave of Nagorno-Karabakh is part of the territory of Azerbaijan as that republic was internationally recognized when it became independent of the USSR in 1991. The enclave is surrounded on all sides by territory of Azerbaijan. Although Nagorno-Karabakh has declared its independence, this has not been recognized by the international community, nor it is likely to be. Prior to the war approximately 180.000 individuals lived in Nagorno-Karabakh. Nagorno-Karabakh has an area of roughly

1.700 square miles. This armed conflict is an example of an "internationalized" internal or non-international armed conflict, that is, a civil war characterized by intervention of the armed forces of other states on behalf of rebels.⁹⁴ The Republic of Armenia has become a party to the conflict by virtue of its commitment of troops to fight in Azerbaijan against the Azerbaijani armed forces. Armenia also gives substantial assistance to the rebels.⁹⁵

The rules of war are based on an artificial distinction between international armed conflicts and non-international (internal) armed conflicts, with different rules for each. Thus a different legal scheme applies to the parties according to their legal character (whether they are States or rebels) and to the conventions to which the State parties have acceded.

The original conflict between Azerbaijan and its citizens of Armenian origin in the enclave of Nagorno-Karabakh (with support from Armenians living in the then Armenian SSR), is an internal armed conflict governed by the provisions of Article 3 common to the four Geneva Conventions of 1949. Common Article 3 expressly binds all parties to the internal conflict, including insurgents such as the militia of Nagorno-Karabakh, although they do not have legal capacity to sign the Geneva Conventions of 1949. However, as private individuals within the national territory of a State Party, certain obligations are imposed on insurgents.⁹⁶

Application of common Article 3 cannot be construed as recognition of independence or belligerence of the Nagorno-Karabakh rebels, from which recognition of additional legal obligations would flow. Nor is it necessary for any government to recognize the independence or belligerent status of these rebels for common Article 3 to apply.

As to the conflict between the Republic of Armenia and the Republic of Azerbaijan, common Article 2 to the four Geneva Conventions of 1949 states that the Conventions

"shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".

All that is required to trigger the definition of international armed conflict is the occurrence of *de facto* hostilities between Armenia and Azerbaijan, which is defined as use of members of the armed forces.

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place. The respect is due to the human person is not measured by the numbers of victims.⁹⁷

⁹⁴ H.-P. Gasser, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon", *American University Law Review* 33 (Washington, D.C, 1983), pp. 145 *et seq.*

⁹⁵ *Azerbaijan. Seven Years of Conflict in Nagorno-Karabakh* (Human Rights Watch, Helsinki, 1994), pp. 90-118.

⁹⁶ *Commentary on the Additional Protocols of 1977* (ICRC, Geneva, 1987), p. 1345.

⁹⁷ *Commentary on IV Geneva Convention* (ICRC, Geneva, 1958), p. 20-21.

This is a short introduction to the IHL applicable in the Nagorno-Karabakh Conflict. Further I would like to discuss particular problems of IHL concerning such categories of protected persons as combatants and civilian population in aforementioned conflict and also discuss some problems of customary IHL in respect to that conflict.

4.1.2 Combatants in the Nagorno-Karabakh Conflict

One principle difference between the rules applicable to internal and international armed conflicts is the treatment of captured combatants. The combatant's privilege⁹⁸ applies in international armed conflict, but not in internal armed conflicts. Captured combatants in international armed conflicts are prisoners of war. The minimum treatment they must receive is detailed in the Geneva Convention III.

Prisoners of war include the members of the armed forces of a party to the conflict as well as members of militia or volunteer corps forming part of such armed forces, who have "fallen into the power of the enemy" (Article 130 GCIII).⁹⁹ Thus the members of the Republic of Armenia armed forces who have been captured by Azerbaijani government forces are prisoners of war, and indeed the Azerbaijani government refers to them as such.

Members of the Azerbaijani armed forces captured by the Armenian armed forces are also prisoners of war. Unless the Republic of Armenia then holds them or otherwise is involved in their detention, those who are captured solely by the rebels probably do not qualify as prisoner of war under the Geneva Convention III. It appears that the rebels do treat the captured Azerbaijani forces as prisoners of war.

Nagorno-Karabakh rebels do not enjoy any special status when captured, since they are not combatants in the meaning of law and do not enjoy privilege of combatants to participate in hostilities and thus can be tried by Azerbaijani government as ordinary criminals. The Azerbaijani government is not obliged to grant captured Nagorno-Karabakh rebels prisoner of war status. It may, however, agree to treat its rebel captives as prisoner of war, and appears to have done so.¹⁰⁰ Note that the term "prisoner of war" is restricted to captured combatants and does not include civilians.

Willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health, of prisoners of war are

⁹⁸ The combatant's privilege is a license to kill or capture enemy troops, destroy military objectives and cause unavoidable civilian casualties. This privilege immunizes members of armed forces or rebels from criminal prosecution by their captors for their violent acts that do not violate the laws of war but would otherwise be crimes under domestic law. Prisoner of war status depends on and flows from this privilege. See Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice", *American University Law Review* 33 (Washington, D.C., 1953), p. 59.

⁹⁹ See, *supra* note 30, p. 131.

¹⁰⁰ The Azerbaijani *de facto* recognition of captured Karabakh rebels as prisoners of war precludes the need to examine whether the rebels are militia belonging to a party to the conflict, *i.e.*, Republic of Armenia, GCIII, Art, 4(A)(2).

grave breaches of the Geneva Conventions. Willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Geneva Convention III is also a grave breach (Article 130 GCIII).¹⁰¹ Prisoners of war need not to be tried at all because of the combatants' privilege, they may not be tried for military activities that do not violate the rules of war.

However, many international observers, including some humanitarian and human rights organizations were troubled by the low number of captured combatants taken by both sides relative to the level and scale of combat. After these organizations conducted survey with captured combatants from both sides it came out that they were slashed with bayonets or knives at the time of their capture. Most were beaten thereafter, sometimes to the point of unconsciousness. One released Karabakh Armenian captive reported that hot water had been poured on him while in detention. A released Azeri captive told that he and two of his comrades were beaten terribly, then tied to the outside of an armored personnel carrier and a tank and driven off. Prisoners of war in Armenia Novruz Muhammad ogly Dashdamirov and Namig Javashir ogly Garayev became mentally ill after being beaten, branded with hot objects, and hit on the head. Prisoners were sometimes subject to ridicule and scorn from civilian crowds. According to Armenian authorities, the eight Azeri men detained as a prisoners of war in Armenian camp killed a guard, took his gun, and attempted to escape, but were immediately discovered. The Armenian military procurator alleges that seven of the men then committed serial suicide with one guard's gun after the escape attempt was foiled. International observers consider this serial suicide inherently improbable and accuse Republic of Armenia in being responsible for the event. This kind of treatment of prisoners of war is inadmissible and constitutes grave breaches of IHL.¹⁰²

In 1993 both Azerbaijan and Nagorno-Karabakh authorities formed committees to deal with prisoners of war and hostages. While private trading still occurs, most observers believe these official committees handle the majority of prisoner of war and hostage exchanges. Armenian side is quite open about hostage-taking while engaging in military operations. However, hostage-taking or holding is explicitly forbidden in internal armed conflicts. Karabakh rebels have violated this prohibition during the conflict. In addition, hostages have been held in the Republic of Armenia, and there are reports that Armenian forces took hostages. Taking or holding hostages in an international armed conflict is also forbidden and constitutes a grave breach of the Geneva Conventions of 1949 that can be found in Article 147 of GCIV.¹⁰³ Thus government of Armenia that allowed this hostage-taking and holding processes are responsible for another grave breach of IHL.

The situation with wounded and sick in the Nagorno-Karabakh conflict is monitored closely by ICRC. Recent developments in this situation in Azerbaijan are following. The ICRC endeavored to ensure that

¹⁰¹ See, *supra* note 99.

¹⁰² See, *supra* note 95, p. 50.

¹⁰³ See, *supra* note 30, p. 211.

amputees and other disabled people had access to quality rehabilitation services.

Discussions continued with the new head of the Ministry of Labour and Social Protection on the functioning of the physical rehabilitation system on the basis of the findings of a joint evaluation. The ICRC's decision to phase out support to physical rehabilitation services in the country by the end of 2007 was communicated to the Azerbaijani authorities. The physiotherapy services of the Ahmedly Orthopaedic Centre in Baku were assessed, while the centre and its two branches in Ganja and Nakhichevan received support, with the last delivery of raw materials in September 2006. Additionally, 22 detainees received rehabilitation services.¹⁰⁴

On the part of the Armenian recent developments lead by ICRC training of military surgeons is only worth mentioning. As reported by ICRC four surgeons from the Ministry of Defense participated in a war-surgery seminar organized by the ICRC in Saint Petersburg, Russian Federation. Since 2002, 15 Armenian war surgeons have been trained.¹⁰⁵

This concludes the part dedicated to some issues of IHL concerning combatants in the Nagorno-Karabakh conflict. Further, I would like to refer to issues of the same nature regarding civilians.

4.1.3 Civilians in the Nagorno-Karabakh Conflict

In situations of armed conflict, generally speaking, a civilian is anyone who is not a member of the armed forces or of an organized armed group of a party to the conflict. Accordingly, "the civilian population comprises all persons who do not actively participate in the hostilities".¹⁰⁶ Basically, as it was mentioned before civilians are everyone who is not combatants (See under heading 2.1.3. Law of Geneva of this thesis). Civilians may not be subject to deliberate individualist attack since they pose no immediate threat to the adversary. Combatant persons who are otherwise engaged in civilian occupations lose their immunity from attack for as long as they directly participate in hostilities. "[D]irect participation [in hostilities] means acts of war which by their nature and purpose are likely to cause actual harm to the personnel and equipment of enemy armed forces," and includes acts of defense.¹⁰⁷ 'Hostilities' not only covers the time when the civilian actually makes use of a weapon but also the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.¹⁰⁸

¹⁰⁴ ICRC Annual Report 2006. Azerbaijan (ICRC, Geneva, 2006), p. 241.

¹⁰⁵ *Ibid.*, p. 236.

¹⁰⁶ R. Goldman, "International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua", *American University Journal of International Law & Policy* 2 (1987), p. 553.

¹⁰⁷ M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martins Nijhoff, Geneva, 1982), p. 303.

¹⁰⁸ *Commentary on the Additional Protocols of 1977* (ICRC, Geneva, 1987), p. 619.

Once their participation in hostilities ceases, that is, while engaged in their civilian vocations, these civilians may not be attacked.

However, these rules were violated by Armenian aggressors during the first period of the Nagorno-Karabakh Conflict – the actual active hostilities and step-by-step occupation of Azerbaijani territories until 1994 cease-fire agreement. International human rights and humanitarian organization report major violations of GCIV and Protocol I on the part of the protection of civilians from Armenian side especially during period of time from 1993 to 1994. Violations of the rules of war, such as indiscriminate fire, the destruction of civilian objects, the taking of hostages, and looting, were the direct result of Karabakh Armenian offensives supported by forces from the Republic of Armenia. Rather than capture the rest of Karabakh as Sarkissian predicted, Karabakh Armenian forces - with alleged Russian and Armenian military support - seized all of the Kelbajar Province of Azerbaijan in a ‘blitzkrieg’ operation that began March 27 and ended by April 5. During this offensive, they committed several violations of the rules of war, including forced displacement of the civilian population, indiscriminate fire, and the taking of hostages. In the space of a week 60.000 people were forced to flee their homes. Today all are displaced, and Kelbajar stands empty and looted. The swift and short nature of the Kelbajar offensive, the mountainous terrain with few good roads, over which it was fought, and the late winter timing of the attack left the civilian population extremely vulnerable; many were taken hostage or killed by indiscriminate fire, even though most expected a Karabakh Armenian move against Kelbajar, civilians had little or no advance warning of the actual attack and even less time to make their escape after the limited roads still available were closed by advancing Karabakh Armenian forces. The Azerbaijani army put up little resistance often melting away into the civilian population. Main Karabakh Armenian units fired on escaping civilians, sometimes mistaking them for retreating Azerbaijani forces. During this hostilities as we can see Azeri civilians were attacked and that constitutes violation of the prohibition on targeting civilians. Looting and destruction of civilian property are also prohibited but occurred frequently during the offensive. During the offensive against Agdam, Karabakh Armenian forces committed several violations of the rules of war, including hostage-taking, indiscriminate fire, and the forcible displacement of civilians. After the city was captured, it was looted and burned under orders of Karabakh Armenian authorities, another serious violation of the rules of war.¹⁰⁹

This kind of similar violations from Armenian side went all the way through the whole Nagorno-Karabakh war. It happened when Armenian forces moved towards Iranian border and captured Zanghelan, Shusha and other Azerbaijani territories. These hostilities clearly showed the whole spectrum of violations against civil population from the side of aggressors. Further I would like to discuss violations of Armenian forces as occupying Power on the occupied Azerbaijani territories since cease-fire agreement of 1994 till present time.

¹⁰⁹ See, *supra* note 95, pp. 8-28.

Situations with civilians during the period of occupation: Civilians residing in territory occupied by a party to the international conflict, in this case Azerbaijani civilians residing in Azerbaijani territory occupied by the Republic of Armenia armed forces, are entitled to extensive protection detailed in the Fourth Geneva Convention. Corporal punishment, torture, murder and brutality toward civilians are forbidden (Article 4 GCIV).¹¹⁰ Provisions of GCIV that relate to the Occupied territories in Section III start with the total ban of deprivation of persons protected by GCIV from benefits of that document in any circumstances (Article 47). Individual or mass forcible deportations are forbidden. However, temporary evacuations of some areas are allowed, but only in the case of security of population and imperative military demand (Article 49). There are limitations of compelled labor towards civil population on occupied territories. Only people over 18 years can be compelled to work only on works of public necessity of the population of the territory under occupation or needs of army of occupation (excluding any relations to the future army military actions). The work should be carried on the occupied territories and civilians cannot be compelled to serve in the army of occupation (Article 51). There is prohibition of the destruction of any property on the occupied territories by Occupying Power, unless destruction is absolutely unavoidable and necessary by military operations (Article 53). The Occupying Power cannot alter the status of public officials and judges on occupied territories (Article 54). Furthermore, it should devote special care to the well being of the children on occupied territories (Article 50). The Occupying Power should ensure the food and medical supplies to the population as well as public health and hygiene (Articles 55-56). One of most important provisions is obligation of the Occupying Power to maintain in force the penal laws of the occupied territory and abolish these rules only if they constitute threat to the implementation of provisions of GCIV (Article 64). Penal provisions enacted by Occupying Power can come into force only after their publication on occupied territory in the language of inhabitants of that territory and shall be implemented by competent courts such as non-political military courts on condition that they sit on occupied territories (Articles 65-66). Article 67 of GCIV lays down standards such courts must meet in order to administrate criminal justice. There are limitations on death penalty. For example Occupying Power can impose such highest measure only for gravest crimes espionage, intentional offences that caused death of one or more persons, sabotage of military operation, but only under condition that these acts were punishable by death under the law of occupied territory before occupation began (Article 68).¹¹¹ There are also some more rules concerning treatment of detainees, their right of appeal, etc.

However, all of aforementioned rules were breached by Armenian occupational forces during the Nagorno-Karabakh Conflict. Civilians on the occupied territories were subjected to tortures, mass murders, rape and degrading treatment. Over 20,000 civilians have been killed, and over 50 000 civilians disabled during the whole time of occupation as a result of violation of Article 4 of GCIV by Armenians. In violation of Article 49 of

¹¹⁰ See, *supra* note 30, p. 155.

¹¹¹ *Ibid.*, pp. 171-178.

GCIV more than 100,000 of civilians were forcefully removed from the territories of occupation as a part of ethnic cleansings. A lot of civilians were subjected to the forced labor under threat of being killed in violation of Article 51 of GCIV. As a result of violation of Article 53 of GCIV by Armenian occupants over 900 settlements have been plundered, burned and destroyed, 6000 industrial, agricultural and other enterprises destroyed and plundered, 150 000 residential buildings with over 9,000,000 square meters of living space, 4366 facilities for social and cultural purposes have been ruined, and 695 medical centers and institutions had the same destiny. Children have not received any protection from Armenian occupants instead cases occurred like with three-years-old boy Shovgi Aliyev who was taken hostage at the time of occupation of Agdam region on July 24, 1993. Armenian “doctors” in Khankendi removed his humerus crippling him for the rest of his life. No cases of food and medical help to population registered from Armenian side. Also penal laws of Azerbaijan are now enforced. There only “martial laws” that are working on the occupied territories dictated by the occupants. Civilian executions reported even for minor crimes.¹¹²

Though these numbers can be miscalculated and arguable this information is the one that can be obtained in the large informational vacuum on the Nagorno-Karabakh Conflict. One fact remains unarguable – that there have been a lot of innocent civilian’s deaths as the result of the war and later occupation.

It can be clearly seen that this situation is in deep breach of IHL provisions and basic rules of war. Further I would like to talk about customary IHL in the Nagorno-Karabakh Conflict.

4.1.4 Customary International Humanitarian Law in the Nagorno-Karabakh Conflict

Customary IHL plays important role in the Nagorno-Karabakh Conflict. As it was mentioned before Armenia is a part both to the Geneva Conventions of 1949 and Additional Protocols. However, Azerbaijan ratified only Geneva Conventions of 1949, but not Additional Protocols (at the same time Azerbaijan implemented almost all provisions of Protocols into it’s national legislation both criminal and administrative). It figures that in conduct of war Armenia is bound by more strict and developed rules than Azerbaijan. This, however, is not completely true. Though Azerbaijan has not ratified Additional Protocols at the same time some of the most important rules of these protocols are already Customary IHL. Here I want to discuss some rules that Azerbaijan has to follow as a part of Customary IHL in the Nagorno-Karabakh Conflict and some rules that were breached by Armenia.

One of the rules that we can be concerned with is denial of quarter that is prohibited by Article 40 of Protocol I and Article 4 of Protocol II. Both norms became part of Customary IHL. It is contained in numerous

¹¹² Statistical facts and numbers taken from The State Commission on Prisoners of War, Hostages and Missing Persons <www.human.gov.az>, visited on 22 June 2007.

military manuals and is an offence in significant number of States, including Armenia. Another rule is prohibition of attack of persons recognized as *hors de combat*. This rule is particularly important when it comes to military operations and engaging in the combats. This rule should be implemented and enforced strictly. This rule contained in Article 41(1) and Article 85(3)(e) of Protocol I and Article 4 of Protocol II. It can be found in many military manuals and is an offence in many states. From case law that relates to state practice we should mention here Germany cases (*Strenger and Cruisus case, Llandovery Castle case*), UK cases (*Peleus case, Renoth case*), US cases (*Von Leeb case, Dostler case*). This rule is acknowledged as Customary IHL rule.¹¹³

It is also known in Customary IHL that combatants must distinguish themselves from the civilian population while they are engaged in attack or in a military operation preparatory to an attack. The main reason is that if they fail to do so they lose their right to POW status. For Azerbaijani side that rule is also very important. Because unidentified resistance on the occupied territory may leave even rightful combatants unprotected by rules of IHL concerning POWs. This rule contained in Article 44(3) of Protocol I. It is also specified in many military manuals and supported by official statements and other practice. One of the most significant cases that can be found in state practice is *Swarka case*.¹¹⁴

Two very important Customary IHL rules were breached by Armenia in Nagorno-Karabakh Conflict: 1) parties to both international and non-international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of civilians is involved of imperative military reasons so demand; 2) States may not deport or transfer parts of their own civilian population into a territory they occupy. First rule was breached by major ethnic cleansings that went through occupied territories of Azerbaijan during the first years of occupation. Breach of second rule followed later when Armenia arranged flow of its civilians to settle on occupied territory. Both rules are stated in Article 85(4)(a) of Protocol I and constitute grave breach of that protocol. Many military manuals prohibit these kinds of actions. These rules also included in legislation of numerous States. Loudest case on that subject is *Case of Major War Criminals* in 1946 of International Military Tribunal at Nuremberg.¹¹⁵

And from my point of view for both states there is a rule that is particularly important for effective development in implementation and enforcement of IHL. The rule of Customary IHL that provides that obligation to respect and to ensure respect for IHL does not depend on reciprocity. These rule often misunderstood in military manuals that provide that following the rules of IHL can encourage reciprocal reaction, however these manual do not imply that respect is subject to reciprocity. Both Armenia and Azerbaijan should do their best in following IHL rules

¹¹³ For customary rules reference see, J.-M. Henckaerts and L. Doswald-Beck. *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press, Cambridge, 2005), pp. 161-165.

¹¹⁴ *Ibid.*, pp. 384-385.

¹¹⁵ *Ibid.*, pp. 457-463.

disregarding negative actions of other side, avoiding putting them in the position of excuse for violations of IHL. This Customary IHL rule was part of such cases as Martić case and Kupreskić case in International Criminal Tribunal for the Former Yugoslavia.¹¹⁶

Further I would like to proceed to the next part of this work to problems of International Criminal Law in the Nagorno-Karabakh Conflict.

4.2 Problems of International Criminal Law in the Nagorno-Karabakh Conflict.

This section of the work does not set a goal to accuse anyone in international crimes. Person can be found guilty of international crime only by competent court or tribunal (such as international court or tribunal or domestic court exercising universal jurisdiction). This section only brings attention to the events during Nagorno-Karabakh that are from the point of view of author are clearly containing elements of international crimes and sets ground for the recommendations for investigation and prosecution of such events.

Further in this section I would like to group and discuss aforementioned cases in groups of crimes as they are contained in Rome Statute.

4.2.1 War Crimes in the Nagorno-Karabakh Conflict

As it was mentioned above in this work there was a large amount of grave breaches of IHL during the Nagorno-Karabakh Conflict and their number is growing from day to day. However, grave breaches and serious violations of IHL according to the Rome Statute are war crimes.¹¹⁷ It is impossible to talk about all the crimes committed during the Nagorno-Karabakh Conflict due to the large number of such events. In this work, however, I would like to bring most serious and common to of the war crimes in the Nagorno-Karabakh Conflict.

One of the most common crimes to the Nagorno-Karabakh Conflict is willful killing. Willful killing is war crime according to Rome Statute.¹¹⁸ *Actus reus* of that offence is the taking lives of protected persons by any means. It can be committed by an act or an omission, provided that the conduct is beyond any doubt substantial cause of the death of the victim.¹¹⁹ *Mens rea* of the crime is demonstration of intention on the part of the

¹¹⁶ *Ibid.*, pp. 498-499.

¹¹⁷ Rome Statute, *supra* note 65, article 8(2).

¹¹⁸ *Ibid.*, article 8(2)(a)(i).

¹¹⁹ *Celebici case (Prosecutor v. Delalic, Mucic, Delic & Landzo)*, 16 November 1998, Case No. IT-96-21-T, para. 431.

accused to kill, or inflict serious injury, in reckless disregard of human life.¹²⁰ Large numbers of persons protected by IHL were killed during Armenian attacks when conquering presently occupied territories of Azerbaijan. Willful killing of prisoners of war and civilian population were reported during attacks on Kelbajar, Agdam, Qubatli, Djabrail, Fuzuli, Zangelan, and other parts of Azerbaijani territory.¹²¹ This kind of crime is common to most of the armed conflicts and represents one of the gravest crimes as it undermines whole principle of protection of IHL.

Another common crime for the active part of the Nagorno-Karabakh Conflict is taking of hostages. Taking of hostages is a war crime according to Rome Statute.¹²² Hostages are non-combatants on the occupied territory unlawfully deprived of their liberty, often arbitrarily and sometimes under threat of death, seized and held as an anticipatory precaution against the enemy or in order to secure a promise from the enemy (for example using them as a shield against the enemy for operations of own forces or killing them in order to terrorize resistance movements).¹²³ Their detention can be lawful only when it is necessary for the protection of civilians or other reasons of security. To find someone guilty of that crime, facts have to be established by prosecution that at the time of detention condemned act was committed with a goal of gaining a concession or an advantage.¹²⁴ Taking of hostages were reported in large numbers during Nagorno-Karabakh War. Almost in every military operation taking of hostages took place. Later hostages were traded for the hostages from the other side and POWs.¹²⁵ Taking hostages is a very serious crime as it endangers lives of innocent people by using them in military operations.

Another war crime common to the Nagorno-Karabakh Conflict and recognized by Rome Statute is intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹²⁶ The *actus reus* of this offence is the launching of an attack to cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment in the violation of principles of necessity and proportionality. However, such attack can be legitimate if takes place far away from populated areas and would not affect civilian population.¹²⁷ *Mens rea* of such offence is the intent to launch the attack in the knowledge (certainty) that it will be disproportionate to the military advantage anticipated in the circumstances.¹²⁸ Indiscriminate fire by Armenians against civilian

¹²⁰ *Ibid.*, para. 437-439.

¹²¹ See, *supra* note 95, pp. 8-34.

¹²² Rome Statute, *supra* note 65, article 8(2)(a)(viii).

¹²³ Green, *supra* note 82, pp. 272-273.

¹²⁴ *Blaskic case (Prosecutor v. Tihomir Blaskic)*, 3 March 2000, Case No. IT-95-14-T, para. 158.

¹²⁵ See, *supra* note 95, pp. 51-58.

¹²⁶ Rome Statute, *supra* note 65, article 8(2)(b)(iv).

¹²⁷ Green, *supra* note 82, pp. 149-150.

¹²⁸ Kittichaisaree, *supra* note 47, p. 162.

population and civilian objects of Azerbaijan was very common for the beginning of the Nagorno-Karabakh Conflict and takes place eventually in present time. These actions constitute one of ways to commit aforementioned crime, because indiscriminate fire is clearly one of the types of attack launched to cause incidental loss of life or injury to civilians and damage to civilian objects. Such cases were reported during attacks on Kelbajar, Agdam, Qubatli, Djabrail, Fuzuli, Zangelan, and other parts of Azerbaijani territory.¹²⁹

One of the most serious war crimes recognized by Rome Statute¹³⁰ and committed by Armenians in the Nagorno-Karabakh Conflict is the transfer directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. Article 49 of GCIV prohibits individual of mass deportations or transfers of all or parts of protected person from occupied territories to the territory of Occupying Power or to that of any other country, occupied or not, regardless of motive. Article 85(4)(a) of Protocol I makes it a grave breach to transfer by Occupying Power parts of its own civilian population into the territory it occupies or the deportation or transfer in violation of Article 49 of GCIV. Transfer needs to be interpreted in accordance with the relevant provisions of IHL. The word indirectly in the name of the offence suggests that population of the Occupying Power need not to be physically forced or otherwise compelled to be transferred to occupied territory, but may be induced or facilitated to be transferred there.¹³¹ During the Nagorno-Karabakh Conflict more than 450.000 Azerbaijanis were forced by Armenian occupation to move from occupied territories.¹³² In addition Armenians are transferring some parts of its civilian population to territories they are occupying to settle them there and create problems when it comes to the settlement of the conflict. This crime brought, probably, most pain and suffering to the civilian population. Such large number of displaced civilians constitutes the clear example of forcible transfers as a type of aforementioned crime.

Another crime common to the Nagorno-Karabakh Conflict is pillaging a town or place, even when taken by assault. The ICTY held in *Celebici case* that the concept of pillage in the traditional sense implies an element of violence; whereas the offence of plunder embraces all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches in international law, be it committed with or without violence. Therefore, 'plunder' includes those acts traditionally described as 'pillage'.¹³³ Appropriations of enemy property justified by military necessity, and not by private or personal use, cannot constitute the crime of pillaging. . Pillaging, plundering or simply – looting cases were and still are common to the Nagorno-Karabakh Conflict. In any seizure of any Azerbaijani town or village by the Armenians pillaging cases were

¹²⁹ See, *supra* note 95, pp. 8-34.

¹³⁰ Rome Statute, *supra* note 65, article 8(2)(b)(viii).

¹³¹ Kittichaisaree, *supra* note 47, p. 168.

¹³² See, *supra* note 95, pp. 58-62.

¹³³ *Celebici*, *supra* note 119, para. 591.

reported. Civilian property lost in pillaging estimated up to several hundreds of thousands of US dollars.¹³⁴

Numerous amounts of other war crimes were committed during Nagorno-Karabakh Conflict and continue to be committed today. For example such crimes are: torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, attacking or bombarding, by whatever means towns, villages, dwellings or buildings which are undefended and which are not military objectives, killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion, and others.

4.2.2 Genocide of Azerbaijanis in the Nagorno-Karabakh Conflict

During Nagorno-Karabakh Conflict Armenians committed several acts of genocide against Azerbaijani population on the occupied territories and against Azerbaijani population in Armenia. These acts were committed with the intention to destroy parts of Azerbaijani national group living on aforementioned territories. Thus according to the definition of genocide in Genocide Convention and Rome Statute, that was discussed above in this work, these acts were committed as genocide of parts of ethnical group. Ethnical group is one whose members share a common language and culture. An ethnic group may identify or distinguish itself as such, or maybe identified as such by others, including perpetrators of genocide.¹³⁵ Further I would like to proceed with facts of genocide starting from the beginning of conflict and till present time as some acts of genocide are continued to be committed.

Since January 1988, the Armenians began to implement into life the policy of “Armenia without Turks”. The government of Armenia, nationalistic organizations “Karabakh” and “KrunK”, and representatives of the church of Echmiezdin committed thousands of bloody crimes under the protection of the administration of the USSR in the process of forcible deportation of the Azerbaijanis from Armenia.

As a result of first ethnic cleansings 185 Azerbaijani settlements were emptied, over 250,000 Azerbaijanis were compelled to leave their houses; 217 Azerbaijanis were murdered and 49 of them froze in the mountains when escaping to save their lives, 41 of them were beaten to death, 35 of them were tortured to death, 115 of them were burnt, 16 of them were shot, 10 of them died of heart attacks unable to endure the tortures, 2 of them were murdered by physicians in the hospital, some people were drowned in the water, some were hung, some were electrified to death, and some were beheaded.¹³⁶

¹³⁴ See, *supra* note 95, pp. 8-34.

¹³⁵ *Akayesu*, *supra* note 73, para. 513.

¹³⁶ See, <<http://www.human.gov.az>>, visited 3 July 2007.

For the purposes of this work it is important to show the examples of genocidal acts of Armenians against Azerbaijanis. Presenting some facts and drawing the actual picture of some events that took place in the Nagorno-Karabakh Conflict will help me to argue further that these events were genocide.

One of the most horrible events of the Nagorno-Karabakh Conflict is the genocide in Khojali. It is like the genocides committed in Khatyn, Lidisia, Oradur reflected in the history of mankind. In the early hours of February 26, the armed forces of Armenia, the armed Armenian militants of the Nagorno-Karabakh, and Motor-Infantry Battalion 366 of the former Soviet Union dislocated between Askeran and Khankendi occupied the town and committed genocide against the Azerbaijanis. Preparation for Khojali attack began in the evening of February 25 when the military equipment of Motor-Infantry Battalion No 366 began to take positions around the city.

The assault of the city began with the 2 hours firing by tanks, armored cars and guns with the missile "Alazan". Khojali was blocked from three sides and people tried to escape in Askeran direction. Parts of the population trying to escape the violence encountered ambushes on the way out of the town and were murdered. Very soon they understood that it was the ominous trap. The organized nature of the extermination of the population of Khojali was evident from that the killing took place in prepared in advance ambushes on peaceful inhabitants who fled the town in desperation to save their lives. For example, Elman Mamedov, chief of administration in Khojali, reported that a large group of people who had left Khojali came under intensive fire from Armenian positions near the village of Nakhichevanik. It is reported that near Nakhchivanik village the Armenian armed forces were prepared in advance to open fire on the unarmed people. Just here, in Askeran-Nakhchevanik shallow gully many of the children and women, elders, frostbitten and weaken in the snow of forests and mountain passes became the victims of the brutality of Armenian armed forces.

Those days Azerbaijani forces couldn't burst through to help the population of Khojali, and there was also no ability to take away the dead bodies. At the same time special groups of Armenians in white camouflage cloaks using helicopters searched the people in the forests, groups of people who came out the forest were shot or taken as hostages and subjected to tortures. That event also shows the intent of Armenians to exterminate the rest of Azerbaijani population of Khojali at any cost.¹³⁷

Episodes of Khojali genocide are terrifying. Antiga, the resident of Khojali, was burned alive because she did not say: "these places are part of Great Armenia". Khojali resident Sariya Talibova told: "heads of 4 meskhetis and 3 Azeris were cut off over Armenian grave. Then they extracted eyes of 2 Azeris". Khazangul Tavakkul qizi Amirova said: "My family was wholly taken hostage by the armed Armenians when Khojali was occupied. They shot and killed my mother Raya, my seven-years old sister Yegana, and my aunt Goycha. They poured petrol on my father Tavakkul and set him on fire".

¹³⁷ See, <http://www.nuhun.net/xocali/index_en.html>, visited 3 July 2007.

The night, in which the Armenians committed the genocide in Khojali, 613 peaceful residents were murdered with a special cruelty, tortured, beheaded, and blinded. Pregnant women were bayoneted; same destiny reached 63 children, 106 women and 70 old men.

The genocide was committed with the participation of Motor-Infantry Regiment No. 366 commanded by Major Seyran Mushegovich Oganyan (at present he is the "defense minister" of the illegal Nagorno-Karabakh regime), companies and platoons of the same battalion commanded by Eugenie Nabokikhin, chief of headquarters of the first battalion Valeri Isayevich Chitchyan and over 50 officers and senior personnel of the Armenian nationality.¹³⁸

Another event of genocide acts of Armenians against Azerbaijanis is evident from the April 1, 1993 when Armenian military formation began large-scale attacks over Kelbajar region. During this operation a new radio network was used operating on frequency of 6721 kHz, in order to implement coordination of the operation and general control.

Materials obtained as a result of radio intelligence service during the operation on the 6-7-th of April 1993 witness that the order was given by the head quarter radio station placed in Vardenis region of Armenia ("GSM-7") to the head radio station in the region of military operation ("Uragan") to liquidate and burry quickly all the captives and hostages including old people, women and children in Kelbajr region. The cause of that act was to sweep off all the evidences of ethnic cleansings against Azerbaijanis from the representatives of international organizations including journalists who arrived at the region of the military operation at that time and at the same time exterminate as many Azerbaijanis as possible.¹³⁹

The genocide acts in Khojali and Kelbajar is only one piece of a pattern of destruction and ethnic cleansings methodically carried out by the Armenian armed forces against Azerbaijani population. The similar events were taking place in diffeent parts of occupied territories.

Actus reus of the crimes can be seen from the facts above. *Mens rea* of crimes is however less clear, but there are a lot of details like ambushes prepared by Armenians in advance in Khodjali, following refugees on helicopters and orders given by radio in Kelbajar that suggest that *mens rea* was formed prior to the commission of an act of genocide. Pre-formed *mens rea* is one of the necessary elements of crime of genocide.¹⁴⁰ The other qualification that perpetrator must choose the victim not because of his individual identity, but because of membership in specific group (in our case Azerbaijanis),¹⁴¹ is also very clear as there were no Armenians killed in the events of Khojali or Kelbajar or other. It was clearly Azerbaijanis who were chosen to be a victim of genocidal acts. Another requirement for *mens rea* of crime is that perpetrator must intent to destroy a large portion of the group¹⁴² in our case is also quite obvious. Azerbaijanis against who genocide was attempted were quite a large share of population of that

¹³⁸ See, *supra* note 136.

¹³⁹ See, <<http://www.khojali.org.az/kelb.html>>, visited 3 July 2007.

¹⁴⁰ *Kayishema and Ruzindana*, *supra* note 86, para. 91

¹⁴¹ *Akayesu*, *supra* note 73, paras. 521-522.

¹⁴² *Jelusic*, *supra* note 71, para. 81-82.

ethnic group presented in currently occupied territories and on territory of Republic of Armenia.

On the first group of acts committed as a killing of the group, as a part of Genocide Convention, I want to set example of ICTR ruling that 'killing' is homicide committed with the intent to cause death. By its constituent physical elements, the very crime of genocide necessarily entails premeditation.¹⁴³ Rome Statute makes it clear that the act of killing or causing death forms essential element of crime of genocide, where 'causing death' means intentional omission that leads to death of the victim. All of these requirements are clearly present in genocide acts of Armenians.

Causing serious bodily or mental harm is another way to commit genocide also present in the Nagorno-Karabakh Conflict. A large number of acts of torture, inhumane and degrading treatment, rape, sexual violence, etc. and serious injuries to the health of victims of genocide in the Nagorno-Karabakh Conflict formed another group of acts of genocide of Azerbaijanis by Armenians. These aforementioned acts form one of the groups of acts of genocide according to the international criminal practice. In addition, harm done by these acts need not to be permanent or irremediable.¹⁴⁴ The fact that all the requirements are there on their places can be seen from the information on genocide acts provided above.

4.2.3 Crimes Against Humanity in the Nagorno-Karabakh Conflict

As it was mentioned above in this work definition of crimes against humanity provides that they can be committed against 'any civilian population'. This means that crimes against humanity can be committed against stateless persons or civilians of the same nationality of the perpetrator as well as against foreign citizens.¹⁴⁵ In our case the fact that crimes against humanity can be committed against own civilian population of the perpetrator is very important. This fact is the only one that differs crimes against humanity of Armenians from war crimes committed by them against civilian population of Azerbaijan.

As it was mentioned above in the beginning of the Nagorno-Karabakh Conflict Armenians organized widespread attacks directed against Azerbaijani civilian population living on the territory of modern Republic of Armenia. These attacks resulted in murder of several parts and deportation of the rest of Azerbaijani population from Armenia.

As there is not much to tell about murder as a part of crimes against humanity committed by Armenians, as its conduct is quite clear, the deportation should be defined. Rome Statute proscribes deportation of population and defines it forced displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully

¹⁴³ *Akayesu*, *supra* note 73, para. 501.

¹⁴⁴ *Ibid.*, para. 504.

¹⁴⁵ *Tadic*, *supra* note 63, para. 626.

present, without grounds permitted under international law.¹⁴⁶ In other words deportation is forcible removal of persons to the territory of another State. The provision ‘without grounds permitted by international law’ suggests that conduct is unlawful.

Azerbaijanis that have been leaving on the territory of Republic of Armenia were Armenian citizens and there were no grounds under international law for their removal from Armenian territory. This means that Armenians committed crimes against humanity in murdering parts and deporting other parts of Azerbaijani population from Republic of Armenia; against their own nationals at that time. As result of these crimes 250,000 Azerbaijanis were deported from Armenia and 217 were killed.¹⁴⁷

¹⁴⁶ Rome Statute, *supra* note 65, article 7(1)(d).

¹⁴⁷ See, <<http://www.human.gov.az>>, visited 3 July 2007.

5 Reasons of Failure of International Law in the Nagorno-Karabakh Conflict and Possible Solutions

In this part of work I would like to explain the main reasons of failure of international law in Nagorno-Karabakh Conflict, focusing on the implementation and enforcement of international humanitarian and international criminal law, propose possible solutions of the situation and finish with conclusions.

5.1 Lack of Implementation and Enforcement of International Law in the Nagorno-Karabakh Conflict

This sub-chapter argues lack of implementation and enforcement of international law to be one of the main reasons of failure on international law in regard to the conflict in focus.

5.1.1 Implementation and Enforcement of International Humanitarian Law in the Nagorno-Karabakh Conflict

Many scholars agree that instruction and education are the most effective methods of implementation of IHL rules.¹⁴⁸ Other methods proved themselves useless unless combined with instruction and education. Soldiers cannot respect the rules of war if adequate information has not reach them in advance. 1899 Hague Convention is one of the first examples of obligation of the states to instruct their armed forces as way of implementation of Convention (Article 1).¹⁴⁹ Articles 47, 48, 127 and 144 of four Geneva Conventions of 1949 respectively oblige contracting states to disseminate text of Conventions as widely as possible among their populations and include their studying in military programmes and if possible to civil instructions.¹⁵⁰ Article 25 of the 1954 Hague Convention contains similar rule.¹⁵¹ Article 80(2) of Protocol I obliges states to supervise the execution of the Geneva Conventions of 1949 and it's Protocol I. Further in Article 83 Protocol I reinforces the obligation of the state on wide dissemination of rules of IHL. Article 82 comes up with interesting instrument of

¹⁴⁸ Kalshoven, *supra* note 19, p. 70.

¹⁴⁹ See, *supra* note 23, p. 173.

¹⁵⁰ See, *supra* note 30, pp. 42, 68, 130, 210.

¹⁵¹ See, *supra* note 23, p. 40.

dissemination. It obliges states to ensure availability of legal advisers in the army to advise military commanders at the appropriate level of implementation and enforcement of rules of IHL.¹⁵² This regulation cannot be underestimated as it proved its usefulness in numerous situations when commanders were more adequately informed and that lead to great improvement of implementation of IHL. It all comes from the same simple rule: “the better the rules of IHL are known – the better they will be respected in practice”. Red Cross and Red Crescent societies are doing their best to fill in information gaps on IHL in countries all around the world.

One of the methods of the enforcement of IHL rules is collective and individual responsibility for the violations of aforementioned rules. Basic manifestation of idea of collective responsibility is known as negative reciprocity (when one party to the conflict considers itself not bound by the rules of war anymore, because of the violations from the other side of the conflict). This action considered unlawful in Article 1 common to Geneva Conventions of 1949 that obliges parties to respect rules of IHL in all circumstances.¹⁵³ Similar provision excludes such conduct of States in Protocol I Article 1(1).¹⁵⁴ Reprisals would come as a second example here. They constitute acts of intentional breach of IHL rules by one party as an answer for the breach of the same or other rules of war by opposing party to the conflict. From my point of view prohibition of reprisals shows best in Protocol I Article 20 and opening articles in Part IV that supplemented prohibitions already embedded in the Geneva Conventions of 1949 and prohibited reprisals against wounded, sick and shipwrecked and civilian population.¹⁵⁵

There is a large system of individual responsibility for “grave breaches” of four Geneva Conventions of 1949. It was even more enlarged and supplemented by Additional Protocols of 1977. I want to leave discussions of individual responsibility for war crimes to the other parts of this thesis where I will be talking about war crimes in International Criminal Law.

External pressure can be very serious stimulator for states to comply with and implement rules of IHL. Such external pressure can come from public opinion (that is where role of NGOs is powerful), governments of other states, regional or international organizations, ICRC, etc. After all IHL is widely known for being in common interest of the states.

Also Protocol I possesses some additional measures of implementation and enforcement of IHL rules. For example Article 81 of Protocol I deals with activities of Red Cross and other humanitarian organizations. It basically obliges states parties to the conflict to provide Red Cross and other humanitarian organization with all needed facilities to ensure protection and assistance to victims of conflicts and with thus support implementation of IHL rules. In addition Protocol I contains Article 7 that concerned with meetings of contracting parties to consider general problems of implementations and enforcement of Geneva Conventions of

¹⁵² See, *supra* note 37, pp. 61-62.

¹⁵³ See, *supra* note 30, pp. 23, 47, 75, 153.

¹⁵⁴ See, *supra* note 37, p. 4.

¹⁵⁵ *Ibid.*, pp. 17, 34.

1949 and Protocol I. Other provision in Article 89 of Protocol I ensures the cooperation of States with each other and United Nations in situations of serious violations of Geneva Conventions of 1949 and Protocol I.¹⁵⁶

Further I would like to discuss issues of enforcement of International Criminal Law in the Nagorno-Karabakh Conflict.

5.1.2 Enforcement of International Criminal Law in the Nagorno-Karabakh Conflict

International enforcement action against persons suspected of having committed violation of ICL can be direct or indirect. Indirect enforcement is carried out generally through diplomatic actions of the governments of the states (refusal of entrance to the country, declaration of person – *persona non grata*, etc.). Here for the purposes of this work I want to concentrate only on the direct enforcement. Direct enforcement means prosecutorial and judicial action against persons suspected of having committed an international crime. This is generally done by the international courts and tribunals discussed above in this work.

However, it is not only international tribunals that possess power to take direct enforcement action but also domestic criminal courts. Domestic courts have power to exercise wide-ranged extraterritorial jurisdiction, such as universal jurisdiction over piracy *jure gentium*, war crimes and crimes against humanity. Then they are also acting as international tribunals as they are directly enforcing ICL. The prosecution of cases subject to universal jurisdiction in particular, where the forum State does not have any connection to the elements of the offence, necessarily implies that the domestic courts assume more than an international character; they are discharging that states obligation to the whole of international community, in protecting and enforcing fundamental human rights (*erga omnes* obligations).¹⁵⁷ As it is commonly known in international law – all States have legal interest in protecting fundamental human rights worldwide.¹⁵⁸

Thus, in the Nagorno-Karabakh Conflict both States should be interested in the enforcement of ICL. However, for this enforcement to be effective some developments needed to be done in both legal and judicial systems of aforementioned States.

Both Azerbaijan and Armenia should make sure that their national legislation contains criminal responsibility for war crimes, crimes against humanity and genocide. Thus though both Azerbaijan and Armenia joined Genocide Convention and International Convention on the Suppression and

¹⁵⁶ *Ibid.*, pp. 8, 61, 66.

¹⁵⁷ Bantekas, *supra* note 45, p. 9.

¹⁵⁸ *Barcelona Traction case (Case Concerning The Barcelona Traction, Light And Power Company, Limited)*, 1970, ICJ, Judgment, <www.javier-leon-diaz.com/humanitarianIssues/barcelonaTraction.pdf>, visited 6 July 2007.

Punishment of the Crime of Apartheid, they have to make sure that genocide and apartheid are included in their criminal legislation as crimes.

Both Azerbaijan and Armenia should ensure that the international offences such as war crimes and crimes against humanity are prosecuted and persons responsible for these crimes are brought before the domestic courts of the countries. These measures will for sure stimulate further implementation of ICL. As ICL itself serves to prevent, prosecute and punish offenders of international crimes, failure of one of these objects will lead to the failure of the whole ICL system of protection. That is why it is so important to enforce ICL first of all on the national level.

On the international level it is important for the international community to become concerned with the Nagorno-Karabakh conflict. Thinking that there is a chance that Armenian offenders of such crimes as genocide, crimes against humanity and even aggression would be prosecuted in their home country is far more than just naive. That is why I recommend creating *ad hoc* tribunal for the Nagorno-Karabakh Conflict that will have retrospective jurisdiction to prosecute war crimes, crimes against humanity, genocide and aggression that have been committed in during Nagorno-Karabakh Conflict. As a template for such tribunal can become ICTY and ICTR. Both ICTY and ICTR have retrospective jurisdiction, both consist of international set of judges. These can be also done for *ad hoc* tribunal for the Nagorno-Karabakh Conflict. The differences can be that its charter shall be based on Rome Statute rather than of the Charters of ICTY and ICTR, as ICC Statute is a document of better progress in ICL. Also the definition of crime of aggression that was proposed above in this work can be used in the Charter of such *ad hoc* tribunal.

Suggested *ad hoc* tribunal can really make a difference in enforcement of ICL in the Nagorno-Karabakh Conflict. It can help to bring people that caused so many losses of lives and great suffering to large amount of people to final justice and restore belief in fairness.

Further I would like to make a summary of recommendations on implementation and enforcement of International Law in the Nagorno-Karabakh Conflict.

5.2 Recommendations on Effective Implementation and Enforcement of International Law in the Nagorno-Karabakh Conflict

Recommendations to Azerbaijan Republic:

- To insure implementation of all the rules of Geneva Conventions of 1949 into local legislation.

Only by following this recommendation it is possible to create a legal background for the effective enforcement of international humanitarian law. Though Azerbaijani legislation contains some of

the rules of IHL it does not contain large amount of rules that are needed for the effective implementation of rules of IHL.

- To ratify Additional Protocols to Geneva Conventions of 1949 and to implement them into local legislation.

Ratification of aforementioned Protocols will allow the rules that they contain to be automatically considered part of Azerbaijani legislation and thus set the obligation to follow these rules. Rules of IHL contained in the Protocols are newer and answer the demands of current situation better than previous ones.

- To enforce implementation of the rules of IHL that are currently present in local legislation and with that follow the principle *pacta sunt servanda*.

Enforcement of the rules that are currently present in the legislation will allow Azerbaijan to follow its international obligations and answer the demands of international law, improving situation with the Nagorno-Karabakh Conflict from one side. Waiting until all norms of IHL reach the domestic legislation through implementation and starting enforcement from the scratch can only worsen situation and slow down the improvement process.

- To ensure instruction and education of norms and principles of IHL among population, through military educational programmes, civil instructions, publications (such as manuals, brochures, books), TV and radio programs, and other methods of dissemination.

As it was mentioned above in this work, the most of effective way of implementation of IHL is education and dissemination of information. Azerbaijan lacks this method very much. Following this recommendation will allow avoiding one of the main reasons of failure of international law – lack of knowledge.

- To cooperate closely with ICRC, Red Cross and Red Crescent societies, other humanitarian organizations, non-governmental human rights organizations, etc. on development of situation with implementation of IHL.

Cooperation with aforementioned organization will help all victims of the conflicts from both sides and will insure support to human rights activities and monitoring the situation with international law in the conflict.

- To investigate and prosecute any violation of IHL and punish violators with disciplinary, administrative, and in cases of “grave breaches” criminal sanctions.

The punishment of persons responsible for the breaches of IHL is strongly needed to keep impunity at bay during the atrocities and in peaceful times. Azerbaijani legislation contains criminal prosecution for the offences such as war crimes. These legislative norms should be used for the purposes of following aforementioned recommendation.

- To support research and studies of IHL by local scholars and contribute to common international IHL studies.

This recommendation calls for the concern of government with legal science that deals with IHL. The educational input by the legal science is very important for the developments in the situation with the implementation and enforcement of international law.

Recommendations to Republic of Armenia:

- To insure implementation of all the rules of Geneva Conventions of 1949 and Additional Protocols into local legislation.

Only by following this recommendation it is possible to create a legal background for the effective enforcement of international humanitarian law. Though Armenian legislation contains most of the rules of IHL it does not contain several rules that are needed for the effective implementation of rules of IHL.

- To enforce implementation of the rules of IHL that are currently present in local legislation and with that follow the principle *pacta sunt servanda*.

Enforcement of the rules that are currently present in the legislation will allow Armenia to follow its international obligations and answer the demands of international law, improving situation with the Nagorno-Karabakh Conflict from one side. Waiting until all norms of IHL reach the domestic legislation through implementation and starting enforcement from the scratch can only worsen situation and slow down the improvement process.

- To ensure instruction and education of norms and principles of IHL among population, through military educational programmes, civil instructions, publications (such as manuals, brochures, books), TV and radio programs, and other methods of dissemination.

As it was mentioned above in this work, the most of effective way of implementation of IHL is education and dissemination of information. Armenia lacks this method as much as Azerbaijan does. Following this recommendation will allow avoiding one of the main reasons of failure of international law – lack of knowledge.

- To ensure availability of legal advisors to the military commanders through training such advisors and employing them in military governmental structures.

Armenian military structures have not yet established an institute of legal advisors that would be advising on the IHL issues to the military commanders. Azerbaijan has this institute established already. It is very important for Armenia to develop such institute, as it is one of the obligations that Armenia has submitted to under international law. This institute will allow better understanding of the rules of war by military commanders and with that may prevent a lot of unnecessary violence during military operations.

- To cooperate closely with ICRC, Red Cross and Red Crescent societies, other humanitarian organizations, non-governmental human rights organizations, etc. on development of situation with implementation of IHL.

Cooperation with aforementioned organization will help all victims of the conflicts from both sides and will insure support to human rights activities and monitoring the situation with international law in the conflict.

- To investigate and prosecute any violation of IHL and punish violators with disciplinary, administrative, and in cases of “grave breaches” criminal sanctions.

The punishment of persons responsible for the breaches of IHL is strongly needed to keep impunity at bay during the atrocities and in peaceful times. Armenian legislation should contain criminal prosecution for the offences such as war crimes. These legislative norms should be used for the purposes of following aforementioned recommendation.

- To support research and studies of IHL by local scholars and contribute to common international IHL studies.

This recommendation calls for the concern of government with legal science that deals with IHL. The educational input by the legal science is very important for the developments in the situation with the implementation and enforcement of international law.

Recommendations to both Parties to the Nagorno-Karabakh Conflict (must be followed by both Parties together to be effective) and to the international community:

- For Azerbaijan Republic and Republic of Armenia to implement all provisions of ICL into their criminal legislation ensuring responsibility for all the international crimes.

To achieve effective enforcement of ICL and to effectively punish persons responsible for international crimes it is first needed to implement international offences as crimes under national law – with that ensuring the impossibility of impunity for international offenders.

- For Azerbaijan Republic and Republic of Armenia to ensure prosecution of all international offences by their domestic courts.

It is crucial to ensure effective prosecution of international offences first by domestic courts – as they are sometimes unwilling or unable to prosecute such crimes especially if the cases are against of national of the country. Effective prosecution will demonstrate impartial justice and will reduce the chances of negative reciprocity.

- For Azerbaijan Republic and Republic of Armenia to ratify Rome Statute to create possibility of prosecution of further breaches of ICL by International Criminal Court.

As the Nagorno-Karabakh Conflict is still present there is a possibility that more international crimes can take place. Submission of the new cases of international offences to the ICC may be demanded in future. However, this will be only possible and effective if both countries will ratify Rome Statute.

- For the international community to take concern over situation with ICL in the Nagorno-Karabakh Conflict.

International community cannot stay away from this conflict anymore. It is obvious that this situation is a threat to peace and security in the world and thus international community must take action.

- For the UN Security Council to take action under Chapter VII of UN Charter and establish *ad hoc* tribunal for the Nagorno-Karabakh Conflict with retrospective jurisdiction based on the previous ICTY and ICTR experience.

As I have mentioned above in this work, I am asking for justice to the victims of the Nagorno-Karabakh Conflict. The only way to achieve it is through the court of law. As the ICC is not an option because of its jurisdictional limits to cases only from year 2002 and further, following this recommendation can bring that justice and restore peace.

5.3 Avoiding Such Situations in Future – Conclusions

It is really impossible to disregard the role of international law in Nagorno-Karabakh Conflict. Above I have discussed serious violations of IHL during the active part of the conflict (Nagorno-Karabakh War) and passive occupation of Azerbaijani territories that lasts in present time. These violations lead to enormous amount of suffering of whole population of region that is influenced by the conflict. The numbers of civilian population murdered, tortured, driven from their homes, forced to refugee conditions, suffered from discrimination and violence as a result of that conflict comes by its numbers up to more than one million. Lives of soldiers that fought at that war, that could have been saved, were lost forever, because of the simple ignorance to the rules of war from both State parties to the conflict. Development of both countries slowed down as much as it leads to degradation of certain social and economical factors of countries passively creating even more suffering. Even information spread by media on violations of IHL that happened during conflict leaves inerasable tracks in souls of population of both countries.

A lot of suffering caused by this conflict, however, was avoidable. Implementation of the rules of war by both countries could have saved many lives of innocent people and reduce amount of suffering caused by war to adequate minimum. The mere ignorance of these rules, that countries voluntarily accepted, led to irreparable consequences. The conflict however is still there and is likely to cause more suffering and more dangers to the humanity. Continuation of this conflict will be a test of attitude of the States engaged in conflict towards victims of war. States in their activity related to the Nagorno-Karabakh Conflict should never forget about who is really suffering as a result of war. They should not forget about soldiers on the field and civilians on occupied territories. At the same time they should understand sometimes blinded by striving towards justice in conflict solution that IHL does not have rights or wrongs in the conflict. These rules protect all the victims of war no matter on which side they are – be it

aggressors recognized in accordance with Charter of United Nations, or victims of aggression using force in self-defense. The sole purpose of rules of war is to mitigate human suffering as a result of war, to restrain parties from unnecessary cruelty during that war, and to make parties understand that they are not unlimited in the choice of means and methods of war because international community agreed on certain behavior and deviance from that would be unacceptable. Above in this work I showed the connections of IHL to Nagorno-Karabakh Conflict. The amount of work to do on implementing and enforcing IHL in this conflict though seems enormous is a noble and just labor for the sake of victims of that terrible event.

The importance of ICL in Nagorno-Karabakh Conflict is also more than obvious. Above I have tried to show some of the international offences committed in the Nagorno-Karabakh Conflict. The numbers of these of offences of course are several times higher than the ones I have related to. The Conflict is still there even now and there more crimes that are being committed every day. Amount of suffering caused by these crimes cannot be counted in anyway it can only be felt when looking at the victims of such crimes. I am talking about victims of war crimes, crimes against humanity, genocide and generally aggression – murdered, tortured, sexually violated, deported and displaced from their homelands, from their history, deprived from their pride, dishonored, treated more than just inhumanely... Is it fair to leave offenders of these people unpunished, free from any obligations to the international community, sure in their total impunity?

As I mentioned before in this work one of the objectives of ICL is to prevent international crimes. Effective implementation of rules of ICL would be the answer to that problem. This means effective investigation and prosecution on the case-by-case basis without ignoring any event that might be suspected of being international crime. Only with such methods it would be possible to prevent, prosecute and punish offenders of international crimes.

States should understand their responsibility for actions of their citizens. They should understand that international community is far from the days of closing its eyes on the actions of the States when it comes to the conflict situation where the victims of disputes are innocent human beings. It is impossible now in the time of such globalization to leave in the world next to impunity causing more and more human suffering.

States such as Azerbaijan and Armenia should take all appropriate measures to avoid impunity in the Nagorno-Karabakh Conflict. Prosecution of the international criminals in the conflict is first of all responsibility of the States concerned in the conflict. However, if the states are *nolle prosequi* this should become a concern of international community, as I have mentioned before that protection of fundamental human rights even by prosecuting the offenders is common interest of all States in the world. Thus international community has to make measures to prosecute offenders even against the will of the State concerned. In our modern world we already have a lot of examples: Germany and Japan after WWII, Former Yugoslavia, Rwanda and recently situation in Darfur and also a lot of situations concerning universal jurisdiction. Thus there are some ways for

international community to intervene and take situation that concerns whole world under control.

With this I want to call both Azerbaijan and Armenia to follow their international obligations. To implement and enforce IHL rules that they bound with by international agreements. To make their best to refrain from negative reciprocity, reprisals and other actions that undermine noble goal of IHL. To always think about victims of the conflict before the irreparable actions. With this kind of attitude it will be possible to reduce suffering that may be brought by continuation of the Nagorno-Karabakh Conflict to minimum.

In this work I also call both Azerbaijan Republic and Republic of Armenia to implement and enforce ICL rules and with that to prevent, prosecute and punish international offenders; to create better grounds for justice in the region. I call for the international community not to stay blindfolded and unconcerned with situation in the Nagorno-Karabakh Conflict. To take measures to help to restore justice and make States comply with the rules of ICL and with relevant provisions of UN Charter, especially when it comes to use of force.

This Conflict should be seen as an example to the failure of international law. All States should take that into account and follow recommendations presented in this work to avoid similar situations in future.

For the rest it is only left to hope for the fastest final settlement of the Nagorno-Karabakh Conflict, to the restoration of justice, and at least some compensation to the victims. Also, for what is even more important, to hope for the precedent like this Conflict to never happen again in the history of human kind.

Bibliography

Books

1. I. Bantekas and S. Nash, *International Criminal Law* (Cavendish Publishing Limited, London, 2003).
2. M.C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996).
3. M.C. Bassiouni (ed.), *International Criminal Law* (Dobbs Ferry, New York, 1986).
4. M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martins Nijhoff, Geneva, 1982).
5. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Naples, 1979).
6. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1987).
7. H. Dunant, *A memory of Solferino* (1862).
8. H.-P. Gasser, *International Humanitarian Law, An Introduction* (Henry Dunant Institute, Geneva, 1993).
9. L.C. Green, *The Contemporary Law of an Armed Conflict* (Manchester University Press, 1993).
10. R. S. Hartigan, *Lieber's Code and the Laws of War* (Chicago, 1983).
11. J.-M. Henckaerts and L. Doswald-Beck. *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press, Cambridge, 2005).
12. F.Kalshoven and L. Zegveld. *Constraints on the Waging of War. Ann Introduction to International Humanitarina Law* (ICRC, Geneva, 2001).
13. K. Kittichaisaree, *International Criminal Law* (Oxford University Press, New York, 2001).
14. T. Meron, *War Crimes Law Comes of Age: Essays* (Clarendon Press, 1998).

15. J.J. Paust, M.C. Bassiouni, S.A. Williams, M. Scharf, J. Gurule, and B. Zagaris (eds.), *International Criminal Law: Cases and Materials* (Caroline Academic Press, 1996).
16. B.V.A. Roling and C.F. Ruter (eds.), *The Tokyo Judgment* (University Press Amsterdam, 1977).
17. Malcolm N. Shaw, "The Heritage of States: The Principle of Uti Possidetis Juris Today", 77 *The British Yearbook of International Law* 1996 (Clarendon Press, Oxford, 1977).
18. M. Sassoli and A.A. Bouvier, *How Does Law Protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, Geneva, Vol. I, 2006).
19. T. Swietochowski, *Russia and Azerbaijan: A Borderland in Transition* (Columbia University Press, New-York, 1995).
20. *Azerbaijan. Seven Years of Conflict in Nagorno-Karabakh* (Human Rights Watch, Helsinki, 1994).
21. *Commentary on IV Geneva Convention* (ICRC, Geneva, 1958).
22. *Commentary on the Additional Protocols of 1977* (ICRC, Geneva, 1987).

Articles

1. A.C. Carpenter, "The International Criminal Court and the Crime of Aggression", 64 *Nordic Journal of International Law* (1995).
2. H.-P. Gasser, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon", *American University Law Review* 33 (Washington, D.C, 1983).
3. R. Goldman, "International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua", *American University Journal of International Law & Policy* 2 (1987).
4. H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court", *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer, 1999).
5. T. F. Musayev, "Legal Aspects of Nagorno-Karabakh Conflict", online: <www.mfa.gov.az>.

6. K. Makili-Aliyev, "Problems in Implementing and Observing the Law of War in the Central Caucasus", 1 (37) *Central Asia and the Caucasus* (2006), Lulea, Sweden.
7. K. Makili-Aliyev, "Некоторые аспекты международного гуманитарного права на Южном Кавказе", 2 *Renessans* (2005), Baku, Azerbaijan.
8. K. Makili-Aliyev, "Некоторые аспекты личной ответственности в международном гуманитарном праве", 3-4 *Самартали / Право* (2006), Tbilisi, Georgia.
9. K. Makili-Aliyev, "О применении международного уголовного права", *Dirçalış - XXI əsr* (2007), Baku, Azerbaijan.
10. J.C. O'Brien, "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law", 87 *American Journal of International Law*.

Legal Documents

1. Additional Protocols to the Geneva Conventions of 12 August 1949.
2. Charter of the United Nations and Statute of the International Court of Justice.
3. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949, Geneva.
4. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949, Geneva.
5. Convention Relative to the Treatment of Prisoners of War of 1949, Geneva.
6. Convention Relative to the Protection of Civilian Persons in Time of War of 1949, Geneva.
7. Convention on the Prevention and Punishment of Crime of Genocide of 1948.
8. League of Nations, *Memorandum by the Secretary General on the Application for the Admission of the Republic of Azerbaijan to the League of Nations*, Assembly Document 20/48/108.
9. League of Nations, Annex 30 B, *Future status of Armenia. Memorandum agreed to by the Council of the League of Nations*, meeting in Paris on 11 April 1920. League of Nations Document 20/41/9.

10. Protocol of the plenary session of the Caucasian Bureau of the Central Committee of the Russian Communist Party (Bolsheviks) of 5 July 1921.

11. Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9).

12. Treaty of Friendship between Armenia SSR, Azerbaijan SSR, Georgia SSR, on the one hand, and Turkey-on the other, concluded with the participation of the RSFSR in Kars, on 13 October 1921.

13. UN General Assembly Resolution 95(1).

14. UN Security Council Resolution 822 of 30 April 1993.

15. UN Security Council Resolution 853 of 20 July 1993.

16. UN Security Council Resolution 874 of 14 October 1993.

17. UN Security Council Resolution 884 of 11 November 1993.

18. Universal Declaration of Human Rights of 1948.

19. Vienna Convention on Succession of States in Respect of Treaties, 22 August 1978.

Other Documents

1. *ICRC Annual Report 2006. Azerbaijan* (ICRC, Geneva, 2006).

2. *International Review of the Red Cross* (ICRC, Geneva, 1978).

3. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977).

Table of Cases

1. *Akayesu case (Prosecutor v. Jean-Paul Akayesu)*, 2 September 1998, Case No. ICTR-96-4-T.
2. *Barcelona Traction case (Case Concerning The Barcelona Traction, Light And Power Company, Limited)*, 1970, ICJ, Judgment.
3. *Blaskic case (Prosecutor v. Tihomir Blaskic)*, 3 March 2000, Case No. IT-95-14-T.
4. *Celebici case (Prosecutor v. Delalic, Mucic, Delic & Landzo)*, 16 November 1998, Case No. IT-96-21-T.
5. *Jelusic case (Prosecutor v. Goran Jelusic)*, 14 December 1999, Case No. IT-95-10.
6. *Kambanda case (Prosecutor v. Jean Kambanda)*, 4 September 1998, Case No. ICTR-97-23-S.
7. *Kayishema and Ruzindana case (Prosecutor v. Kayishema and Obed Ruzindana)*, 21 May 1999, Case No. ICTR-95-1-T.
8. *Lotus case (The Case of the S.S. "Lotus")*, 7 September 1927, PCIJ, Ser. A., No. 10, 1927, Judgment.
9. *Tadic case (Prosecutor v. Dusko Tadic)*, 10 August 1995, Case No. IT-94-1-T, Decision of the Defense Motion on Jurisdiction.