

24 STATE ACTS AND RESPONSIBILITY IN THE HUNGARIAN-AZERI-ARMENIAN TRIANGLE OF THE SAFAROV CASE

A Legal Analysis of the Transfer and Liberation of the Notorious Convict in the Hungarian-Azeri-Armenian Triangle

Csaba Törő*

24.1 INTRODUCTION: THE INCIDENT AND THE INTERNATIONAL REACTIONS

On 31 August 2012, Ramil Safarov – an Azeri military officer serving life sentence for the murder of an Armenian military officer, Gurgen Markarjan eight years before in Hungary – was transferred to Azerbaijan to continue the rest of the long prison term in his native country. Upon his arrival, the president of Azerbaijan granted him clemency and the former convict was instantly released, promoted (jumping few military ranks to become an army major) and rewarded (his incurred military salary in lump sum together with a flat) for his past difficulties endured in the years since 2004.

An otherwise routine procedure immediately turned into a highly embarrassing diplomatic predicament for Hungary as the Azeri decision instantly triggered international outrage and widespread repercussions.¹ The presidential pardon in Azerbaijan drew condemnations from many states and the officials of various European international organisations (the EU High Representative for Foreign Affairs and Security Policy,² NATO Secretary General,³ Secretary General of the Council of Europe⁴ and the Chairman of its Parliamentary Assembly⁵) as dangerous, potentially destabilising and disconcerting

* Associate professor, Faculty of Law, Karoli Gaspar Protestant University and senior research fellow, Hungarian Institute of International Affairs.

1 Row Erupts after Azerbaijan Pardons Armenian Officer's Repatriated Killer, *Radio Free Europe/Radio Liberty*, 31 August 2012

2 Statement by the spokespersons of EU High Representative Catherine Ashton and Commissioner Štefan Füle on the release of Ramil Safarov, 3 September 2012 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/132251.pdf>.

3 Speech by NATO Secretary General Anders Fogh Rasmussen at the Azerbaijan Diplomatic Academy in Baku, Azerbaijan, NATO official website, 7 September 2012. <www.nato.int/cps/en/natolive/opinions_89779.htm?selectedLocale=en>.

4 Making a Hero out of a Murder Convict Is Unacceptable – Council of Europe Secretary General, 4 September 2012, <www.coe.int/t/secretarygeneral/sg/default_EN.asp>.

5 PACE President Concerned by the Serious Deterioration in Relations between Armenia and Azerbaijan Following the Decision to Pardon Ramil Safarov, Council of Europe, 5 September 2012, <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7905&L=2>.

CSABA TÖRŐ

development for moral and political reasons alike. The deliberately provocative move was conceived as particularly worrying in a permanently combustible region with the unsettled (only frozen in the 1994 ceasefire accord) and still festering (with low intensity violence on a regular basis) Azeri-Armenian conflict.⁶

Armenia blamed Hungary for its consent to, and implementation of the transfer the cooperation which it perceived as direct assistance or contribution to the disgraceful outcome in Azerbaijan, and suspended its diplomatic relations with Hungary.

Both in Hungary and abroad, the resulting situation came under political crossfire in a fog of confusing (mis)interpretations of legal conditions, guarantees, obligations (and their breaches) and responsibilities. Although the Hungarian government made a political decision which was motivated by its policy to pursue enhanced relations with Azerbaijan as a presumably valuable economic partner, the applied procedure, the adopted measures and the moves leading to the evidently illegal act of the Azeri state cannot be correctly assessed from the distorting perspective of political interpretations. For a more accurate picture of the entire procedure and its unintended outcome from the perspective of international legality, it is necessary to examine and analyse the relevant circumstances and the applicable norms instead of political reactions and presumptions of cynical motives or reckless calculations.

24.2 THE HUNGARIAN-AZERI DIMENSION

24.2.1 *The Procedural Aspects and Conditions of the Transfer of the Azeri Convict*

The transfer of the Azeri convict took place as an example of the bilateral implementation of a multilateral framework, namely the Convention on the transfer of sentenced persons of 1983, applicable between two of its state parties.⁷ Since its entry into force, Hungary has applied the treaty provisions and transferred sentenced persons to their home state on several occasions each year. With respect to the transfer of the notorious Azeri convict, the Hungarian authorities also followed the established practice and set the same procedure into motion which had been effectively employed in various instances before.⁸ Therefore, the transfer process did not unfold either in an *ad hoc*, improvised or specific manner, but it repeated an orderly and otherwise uninteresting technical choreography of

6 Armenia and Azerbaijan: Preventing War, International Crisis Group, Policy Briefing No. 8, 2011

7 Convention on the transfer of sentenced persons, Strasbourg, 21 March 1983, Council of Europe, European Treaty Series, No. 112.

8 Közlemény Ramil Sahib Safarov Azerbajdzsán részére történt átadásáról (Statement on the transfer of Ramil Sahib Safarov to Azerbaijan), 1 September 2012, available on the official Hungarian governmental website: <www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/hirek/kozlemeny-ramil-sahib-safarov-azerbajdzsan-reszere-tortent-atadasarol>.

international cooperation in criminal matters, which in this case received a particularly avid attention after its completion.

Similar to previous cases, Hungary duly moved along the procedural stages as determined by the prescriptions of the applied convention. In line with those provisions, the “sentencing state” (Hungary) is entitled to request a prior statement from the “administering state” (Azerbaijan), identifying the legal grounds for the continued implementation of the sentence after the transfer of person to that state.⁹ The agreeable solutions for the sustained implementation of punishment imposed in the sentencing state imply either the enforcement of the original sentence immediately or through a court or administrative order, or the conversion of the sentence through an appropriate judicial or administrative procedure into a decision of the “recipient” state.¹⁰ Accordingly, in case of the transfer of any sentenced person on the basis of the invoked convention of 1983, the question to be answered unequivocally prior to the repatriation of any convict is not whether the sentenced person is going to continue to serve his/her prison term in the “administering state”. The relevant issue which needs to be decided and stated with certainty by the state requesting the sentenced person concerns the choice of legal foundation that ensures his/her sustained punishment.

After previous unsuccessful attempts, the transfer of the Azeri citizen incarcerated in a Hungarian prison since 2004 was initiated again by his own country in the summer of 2012. In the course of the formal consideration of the renewed transfer request, Hungary exercised the right of the sentencing state and called upon Azerbaijan to identify which one of the eligible procedures contained in the convention would be applied to determine the legal ground for the continuity of imprisonment.¹¹ The Hungarian government received the statement indicating the procedural solution that would uphold the sustained implementation of the imposed Hungarian sentence. (Later, the official diplomatic protest handed over by the State Secretary of the Hungarian Ministry for Foreign Affairs to the ambassador of Azerbaijan in Budapest in the aftermath of the Azeri presidential pardon expressly invoked the stated commitment of the Azeri government to continue the sentence based on the specified procedure.¹²) In the delivered statement, the competent representative of the Azeri government (the Deputy Minister of Justice) officially notified the Hungarian government that the convict requested for transfer was going to serve his remaining prison term as the continued enforcement of the original sentence passed by

9 *Supra* note 7, Art. 6(1).

10 *Supra* note 7, Art. 9(1).

11 *Supra* note 7, Art. 9(2).

12 ‘Németh Zsolt hivatalába kérte Azerbajdzsán budapesti nagykövétét’ (Zsolt Nemeth requested the Azeri ambassador to appear in the Foreign Ministry), *Kormányportál* (the official website of the Hungarian Government), 2 September 2011, <www.kormany.hu/hu/kulugyminiszterium/parlamenti-allamtitkarsag/hirek/nemeth-zsolt-hivatalaba-kerette-azerbajdzsan-budapesti-nagykovetet>.

CSABA TÖRŐ

the Hungarian court. Thereby, the Azeri party clearly made its choice and stipulated its intention to follow the procedure of direct implementation of the Hungarian court verdict without the need to resort to any adaptation or transformation of the sentence imposed by Hungary.¹³ The applied convention clearly lays out that in case the administering state opts for the solution of continued enforcement, it “shall be bound by the legal nature and duration of the sentence as determined by the sentencing state”.¹⁴ In recognition of the obligations for the receiving state to preserve the nature and length of the original sentence, the Azeri government affirmed that in cases of such a grave sanction equivalent to the Hungarian sentence (life imprisonment), the punishment of a convict can be commuted to imprisonment for a definite period or the person can be released on conditional parole after 25 years at the earliest in accordance with the Criminal Code of Azerbaijan.¹⁵

24.2.2 *An International Wrongful Act in Azerbaijan: Clemency in Contravention to the Applied International Legal Instrument*

Neither the convention (concluded in 1983) nor its additional protocol (adopted in 1997)¹⁶ placed external limitations on the parties to grant pardon, amnesty or commutation according to their national constitutional (or other legal) regulations. Actually, the respective provision of the Council of Europe convention explicitly acknowledges that its exercise remains within the sovereign competence of each state.¹⁷ Although no general restrictions or conditions were introduced in this respect, the state parties may nevertheless unilaterally and individually attach requirements or conditions to the implementation of the convention that could restrict their own sovereign decisions with regard to granting relief from criminal sentences. In accordance with the law of international treaties, any limitation instituted in the form of restrictive conditions by one of the parties with the purpose of narrowing the scope of treaty application by other parties imposes restrictions on the initiating state itself.

Exactly the same applied to the position of Azerbaijan in its relations with other state parties to the multilateral treaty framework on the transfer of sentenced persons. Upon

13 The letter (in English) of the Azeri Deputy Minister of Justice, Vilayat Zahirov was acquired and released by one of the Hungarian daily papers, Magyar Nemzet on 1 September 2012 Available on its website: <<http://mno.hu/belfold/itt-a-bizonyitek-hazudtak-az-azeriek-1102783>>.

14 *Supra* note 7, Art. 10(1).

15 The inquiry into the *Safarov* case conducted later by the Commissioner for Fundamental Rights (ombudsman) in Hungary (The report was released on 7 December 2012 in Hungarian: *Az alapvető jogok biztosának jelentése az AJB-7085/2012. számú ügyben*) confirmed the content of the official statement conveyed in the letter published by the abovementioned newspaper.

16 Additional Protocol to the Convention on the transfer of sentenced persons, Strasbourg, 18 December 1997.

17 *Supra* note 7, Art. 12.

accession to the convention, Azerbaijan attached certain reservations to its participation, one of which was meant to constrain the exercise of the right of other states to grant pardon to persons repatriated from the Azeri state. That particular reservation contained a declaration about the necessary consent of competent Azeri authorities to the adoption of decisions by other states concerning the extension of pardon or amnesty to individuals transferred to their home countries from Azerbaijan.¹⁸

In conformity with established norms and practice of international treaty-making, reservations to multilateral agreements facilitating the participation and accession of the largest possible number of state parties are formulated and issued as unilateral acts of states, but accepted and interpreted as instruments of multilateral legal effects.¹⁹ All those contracting states which do not raise objections to a reservation attached by another state to particular provisions of a treaty implicitly accept the limitations and conditions of implementation as contained therein.²⁰ The modified content of the affected provisions do not convey unilateral concessions or relief from the burden of compliance for the reserving state, but in the execution of the treaty the same curtailed or adjusted meaning must be applied, on the basis of reciprocity, to transactions with all parties not objecting to the reservation. Therefore, the reserving and accepting states exercise every entitlement and carry out each obligation with restricted content as modified by the submitted and accepted reservations “in all directions” among the parties.²¹

Applying these general rules of operation of international treaties to the transfer arrangement between Hungary and Azerbaijan, the reservations made by Azerbaijan to the transfer convention of 1983 and not objected to (*i.e.* accepted) by Hungary modified the conditions of application of the affected provisions for both countries. Consequently, the Azeri demand to consider its own consent as a precondition to the practice of clemency by other signatories with respect to persons transferred from Azerbaijan introduced reciprocal limitations on the freedom of the Azeri state to practice the same right in case of sentenced persons repatriated to Azerbaijan. In accordance with the nature and rationale of reservations to multilateral agreements among sovereign and equal state parties, the Azeri unilateral announcement of its expectation to be able to constrain the national discretion of other state parties, though recognized in the convention as sovereign competence, established the same obligation for Azerbaijan: it must seek and receive the

18 In accordance with Art. 12, of the Convention, the Republic of Azerbaijan declares that decisions regarding the pardons and amnesties of sentenced persons transferred by the Republic of Azerbaijan should be agreed with the relevant competent authorities of the Republic of Azerbaijan. Declaration Contained in the Instrument of Ratification Deposited on 25 January 2001, <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=&CL=ENG&VL=1>>.

19 1969 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155.

20 *Ibid.*, Art. 20(5).

21 *Ibid.*, Art. 21(1).

CSABA TÖRÖ

consent of a state party (not objecting to the Azeri reservation) before pardon or amnesty could be granted to a person transferred from that country.

With the above reservation attached to the treaty framework on transfer procedures, Azerbaijan excluded the possibility for itself to practice clemency within the scope of its discretion by unilateral decisions with regard to persons transferred from countries that agreed to the conditionality of Azeri consent for the exercise of their own rights in the same respect. By claiming to the prerogative to approve or disapprove sovereign decisions on pardon or amnesty in another state involving persons with sentences passed in Azerbaijan, it reciprocally extended the same prerogative to every other state party willing to accept the Azeri proposition. Inherent in “the mirror effect” of reservations, restrictive interpretations and applications of treaty provisions operate as mutual limitations – in the same respect and to the same extent – on the “reserving” and on the “accepting” states alike. Since Hungary accepted (never objected to) the reservations made by Azerbaijan on the occasion of its accession to the transfer convention, it thereby acquired the same entitlement to its indispensable assent before any clemency decision could be taken by Azeri authorities on persons transferred from Hungary. For this reason, pardon could have been granted to the repatriated convict in Azerbaijan – in compliance with the obligations imposed upon itself by the reciprocal effect of its own reservation – only after obtaining the express consent of Hungary on that matter. Without any further confirmation, this obligation placed a valid and effective limitation on the freedom of discretion that Azerbaijan could enjoy in the adoption of any decision to terminate the prison sentence of the convict handed over by Hungary.

The transfer process from the sentencing state (Hungary) to the administering state (Azerbaijan) unfolded in an orderly manner and complied with the prescriptions of the convention – with the necessary statement requested and received – until the arrival of the sentenced criminal in his own country. Once the convict had touched down on home soil, the events took a sharp turn that “derailed” the procedure when Azerbaijan abandoned the rules defined by the convention and its own reservation to it. The immediate pardon was granted by the president of Azerbaijan without the consent of Hungary which agreed to the transfer of the sentenced person, but received no request of agreement to clemency for the returned convict. In the absence of approval from Hungary, the presidential act of Azerbaijan was adopted and implemented in open contravention to the requirement of assent as the reciprocal legal consequence of the Azeri reservation to prevent other states from granting pardon without its consent.

No state authority of Azerbaijan tried to consult and attain Hungarian consent to the intended pardon. During the entire transfer process, only the requested and received official Azeri statement about the chosen procedure for the continued implementation of the sentence offered any indication of the intention of Azerbaijan regarding the aftermath of the repatriation of its convicted citizen. The presidential clemency for the transferred

24 STATE ACTS AND RESPONSIBILITY IN THE HUNGARIAN-AZERI-ARMENIAN TRIANGLE

convict was granted in Azerbaijan entirely unilaterally without any attempt to obtain the acquiescence of the Hungarian government.

The morally unacceptable and politically dangerous case of the instantly liberated, compensated and celebrated murderer is more than just a deplorable and provocative example of the diverted implementation of a multilateral framework designed to help sentenced people of foreign nationality to serve prison terms in their own countries. The confusion about the legal nature of the Azeri state act and the moves leading to the eventual outcome may be best illustrated by the resolution of the European Parliament adopted in the wake of widespread international condemnations of the immediate release and glorification of the repatriated criminal in Azerbaijan. In a disappointingly cautious formulation, the resolution determined that while the Azeri presidential pardon “complies with the letter” of the applied convention, it “runs contrary to the spirit of that international agreement” and violated “the diplomatic assurances given to the Hungarian authorities”.²² It probably expressed the common political stance of the parliamentary majority necessary for the passage of that resolution, but it is certainly not an accurate legal characterization of the Azeri deviation from the intended purpose and correct implementation of the underlying convention. Essentially, the presidential act of liberation constituted more than an abuse of law. More precisely, Azerbaijan accomplished a discernible breach of international obligation, because the unilateral pardon by the head of state conflicted not only with the object and purpose of the applied treaty basis, but also with the requirement of prior foreign state consent to an Azeri decision on clemency as the binding consequence of its own reservation to that treaty.

24.2.3 *Foreseeable Azeri Breach of Obligation?*

As reflected in the recurrent challenges and dilemmas of assurances and other means to induce compliance with international agreements, breaches of treaty provisions cannot be prevented or suppressed efficiently in advance even if their probabilities may be predicted to various extent based on the patterns of state conduct. Even in cases of higher probability of violation of rules, the commission of an infringement should not be considered necessary or inevitable, because it always depends on the final account of cost-benefit analysis of the options of compliance or defiance.

Although certain politicians and officials in Azerbaijan considered the premeditated murder of the Armenian officer in Hungary a “patriotic act” ever since its commission, this shameful distortion of the true nature and gravity of the crime fortunately has not been

²² European Parliament Resolution on Azerbaijan: the Ramil Safarov case (2012/2785(RSP)), European Parliament, paras 3 and 4, <www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2012-428&language=EN>.

CSABA TÖRÖ

adopted as the official position represented by successive governments of the country.²³ Nevertheless, it did seem conceivable that the Azeri state authorities may act arbitrarily and take measures to terminate the imprisonment of the transferred convict. For this very reason, the Hungarian government continued to insist on the terms of the transfer convention and demanded a prior official written statement of Azerbaijan undertaking to sustain the implementation of the Hungarian sentence. Naturally, no official statement was able to preclude the later breach of international obligation by Azerbaijan, but it made unambiguous that the parties embarked on their bilateral transaction in accordance with the conditions and procedures laid down in the relevant multilateral convention.

The possibility of release once the convict had been brought under Azeri jurisdiction could not be excluded in practice, but the lawful discharge of any “act of liberation” was firmly conditional upon its express Hungarian approval in line with the provisions of the convention (with the Azeri reservation included) as the mutually recognized set of operational rules applicable to their transfer cooperation. During the administration of the transfer process, it remained only a theoretical contingency, because the government representatives of Azerbaijan did not even hint at the consideration of clemency in their exchanges with Hungarian authorities. The actual interest or purpose of Azerbaijan in the whole repatriation process was revealed only later, but very plainly, by the immediate presidential pardon as the instrumental preparatory avenue to the performance of a well-staged political act in violation of international legal and transnational moral norms as well.

24.2.4 *Reckless Trust in Good Faith or Mistaken Calculation of Risk?*

By virtue of the delivery of the requisite statement for the application of the transfer convention between the two state parties, Azerbaijan formally and properly manifested its intention to comply with the provisions of the relevant multilateral agreement. Following the supply of this written undertaking of implementation, any explicit doubt about the conduct of Azeri state authorities after the repatriation of the convict would have openly questioned the trustworthiness and honesty of the official commitments of Azerbaijan. For the adoption of its decision on the approval or rejection of the Azeri request, Hungary practically had to make a choice between two options:

- Suspecting different ulterior motives, Hungary might have called the stipulated intention of Azerbaijan into doubt in spite of the provision of a formal ministerial statement on the continued enforcement of the Hungarian sentence. This would have been

²³ T. de Waal, ‘Viewpoint – Setback for Peace in the Caucasus’, *BBC News*, 4 September 2012, <www.bbc.co.uk/news/world-europe-19477043>.

tantamount to an open display of distrust and denial of the credibility of the Azeri government.

- Accepting the persistent risk of an arbitrary change in the Azeri position, Hungary did not doubt the credibility of the delivered statement of Azerbaijan and considered it a credible announcement of intention to follow dutifully the indicated procedure and respect the resulting commitments under the convention.

The Council of Europe transfer agreement determines neither the reasons nor the need to justify the rejection of a request for transfer leaving the decision to the deliberation and discretion of the state parties. However, when the formal requirements are fulfilled, the unwillingness of one of the contracting states to agree to the proposed application of the convention in a bilateral transaction with another contracting state is the manifestation of a prevailing distrust between the parties. The absence of trust becomes conspicuous when the rejection for formal reasons (for example, no official statement is given by the administering state) may not be justified any more after the provision of the procedural requisite of cooperation. Harmful impacts on bilateral relations between any pair of states can be quite confidently predicted when one of the countries evidently do not consider the other a credible partner acting in good faith.

The Hungarian government did not intend to question the credibility and reliability of a country with which it had aspired to significantly extend economic, trade and energy relations for the past few years. Intended as a friendly and supposedly valuable gesture of good will and cooperation, Hungary conceded to the reiterated Azeri appeal for the transfer of its imprisoned citizen. The Hungarian government deemed the statement of the Ministry of Justice of Azerbaijan – in combination with the obligation stemming from the Azeri reservation to the convention underpinning the bilateral transfer arrangement – a sufficient formal assurance of implementation. Unfortunately, even an orderly transfer procedure together with the attendant and necessary statement undertaking the continued enforcement of the Hungarian court ruling was in itself not enough to eliminate the risk inherent in the return of the sentenced person to Azeri jurisdiction.

Only the complete suspension or exclusion of the implementation of the convention would have offered a “waterproof” solution to prevent or avoid an unwanted and unlawful outcome in contradiction with the object and purpose of the applied treaty basis. In the Hungarian-Azeri context, solely the rejection of the official request of Azerbaijan implying the insufficient credibility of its issued statement could have guaranteed the safety and comfort of effectively preventing a possible Azeri defiance of its own acknowledged commitment. In its decision to approve the repatriation of the Azeri convict, Hungary relied on a standard procedure embedded in the applied multilateral agreement as well as on the presumption of compliance and cooperation in good faith by the other party until the contrary is proven. Unfortunately, the presidential act of clemency did prove otherwise

right upon the arrival of the transferred criminal in Baku. It revealed unmistakably, but only *a posteriori* that the statement on the continued enforcement of imprisonment was deployed only for the sake of deception to ensure the cooperation of Hungary as the necessary precondition of the accomplishment of Azeri domestic and foreign policy aims. The consequences of the breach of international obligation and assurances in the form of damages to its international credibility in general, and also to its bilateral relations with Hungary seemed an affordable price for Azerbaijan which was evidently not considered high enough to deter its president from the unscrupulous act of liberation aggravated by the disgraceful glorification of the returning murderer.

As the crude reality of the unlawful pardon demonstrated, not even the applied set of binding multilateral norms exerted sufficient effect to restrain Azerbaijan and prevent its arbitrary action in breach of the prescribed conduct after the transfer of the convict. The risk of potential Azeri deviation from its voluntarily and officially undertaken commitments was recognized, but obviously underestimated and taken into account only as a distant danger in the deliberations of the Hungarian government leading to its assent to the repatriation of the convict.²⁴ Consequently, the truly revolting surprise was delivered not by the presidential pardon itself, but rather by its immediate implementation in a flagrantly illegal and immoral fashion.

Regardless of the actual manner of its execution, the unilateral termination of the sentence constituted a breach of the international obligation introduced by the Azeri reservation to the convention. Even if the presidential pardon had been implemented discretely and cautiously (without publicity, gradually moving towards his release or only after the passage of some time still spent in prison), but without the express consent of Hungary, it would have constituted a violation of the norms of the applied multilateral legal framework anyway. The circumstances of the conceivable, but not truly predictable “liberation” of the transferred convict were not the decisive features of the international *delict* of Azerbaijan, but certainly intensified the international attention and enhanced the political and diplomatic gravity of the consequences generally and for Hungary specifically. The manner of the release and the broadest possible publicity aggravated by the official moral and material gratification altogether ensured the most provocative implementation of the presidential pardon with financial rewards granted for the returning criminal. In a spectacular act of disregard for international obligations, the complete liberation of the transferred convict of all consequences of his grave crime committed abroad constituted a flagrant infringement by Azerbaijan of multilateral undertakings applied in its bilateral transaction with Hungary.

24 The Hungarian Prime Minister reportedly acknowledged at a press conference later that no aspect of the outcome of the transfer process came as a surprise in itself, because all possible contingencies had been taken into consideration. Source: ‘Orbán döntött, Jereván megdöbbsent’ (Orban decided, Yerevan was shocked), *Index*, 11 September 2012, <http://index.hu/belfold/2012/09/11/orban_dontott_jerevan_megdobbent/>.

24 STATE ACTS AND RESPONSIBILITY IN THE HUNGARIAN-AZERI-ARMENIAN TRIANGLE

24.3 HUNGARIAN-ARMENIAN DIMENSION

24.3.1 *The Armenian Position on the Role of Hungary: Mistaken and Exaggerated*

Besides the domestic political purposes, the Azeri presidential pardon accomplished its primary foreign policy aim and deeply hurt the national pride of Armenia. Unsurprisingly, the demonstrative show of contempt by the glorification of a common murderer in Azerbaijan understandably caused general outrage and dismay in Armenia and also within the Armenian diaspora worldwide. The sense of deep offence and fury among Armenians propelled the immediate search for those responsible by all available means. In the haste of retaliation and through the haze of anger, the adopted countermeasures were misdirected as the main political criticism and the deployed diplomatic means of response took aim at Hungary instead of Azerbaijan. The protestations and condemnations addressed to Hungary seemed obviously misguided and unjustified since the actual decision on the termination of imprisonment was clearly attributable to Azerbaijan and not to Hungary. The sequence of events leading to the unlawful release after repatriation emerged as the result of acts of two different states. Hungary collaborated in the preceding procedure, but did not participate in the exercise of clemency. On the contrary, that was granted in violation of the self-imposed obligation which bound Azerbaijan to attain the consent of Hungary as the sentencing state.

The Armenian presidential statement issued in response to the instant release of the Azeri convict complained about the sudden reverse in the previously held Hungarian position and the retraction of earlier assurances of Hungarian politicians and government representatives.²⁵ Undoubtedly, Hungary resisted previous Azeri attempts to reach an accord on the transfer of the Azeri citizen on the ground of unsatisfactory guarantees for the continued implementation of his sentence after repatriation. Equally unquestionably, the Hungarian government, similar to any other government of a sovereign state, is entitled to change its position as long as it does not contravene an international obligation. In case of the renewed transfer request, the government of Hungary took a decision – though carrying potential diplomatic risks, but permissible and lawful – within its own sovereign competence based on national considerations and priorities of its foreign relations. Since Armenia could not deny the right of Hungary to make its national choice in conformity with international commitments, it questioned the motives and reasons of the surprising turn in the Hungarian stance.

25 Remarks by the President of the Republic of Armenia Serzh Sargsyan at the Meeting with the Heads of Diplomatic Missions Accredited in the Republic of Armenia, 31 August 2012, <www.president.am/en/statements-and-messages/item/2012/08/31/President-Serzh-Sargsyan-speech-ambassadors/>.

CSABA TÖRÖ

According to the official Armenian interpretation, Hungary did not simply commit a consequential political mistake on the basis of some reckless or irresponsible assumption about the Azeri compliance with its international duties, but the Hungarian government made a (presumably sinister) deal with Azerbaijan. Already on the day of the pardon granted in Baku, the president of Armenia described the repatriation of the Azeri convict as a “perfidious development” and his release as the “joint action” of the authorities of Hungary and Azerbaijan in a dramatic statement in front of the assembled heads of foreign missions in Yerevan.²⁶ Essentially, the same interpretation was repeated later by the Armenian foreign minister who made unveiled references to some hidden motive that is supposed to explain the fundamental shift in the official Hungarian approach to the Azeri transfer appeal.²⁷ In fact, Hungary openly strived to strengthen and extend relations with Azerbaijan perceived as its (hopefully) increasingly important future economic partner in the Caspian and Caucasian region. These publicly pursued aspirations cannot be regarded as dishonest or wrongful state conduct only because they were developed with a country hostile to Armenia. In so far as the aims, the means or the implementation of their collaboration conflict neither with international legal norms nor do they pursue illegitimate goals, bilateral arrangements and transactions between Hungary and Azerbaijan cannot be qualified as perfidious or illegitimate by any measure of objective assessment.

24.3.2 *Hungarian Responsibility for the Azeri Decision and Its Implementation?*

The Armenian president condemned the transfer arrangement from Hungary to Azerbaijan without giving much consideration to the factual and legal separation of events contributing to the unlawful outcome or without requesting official explanation and clarification from the competent Hungarian authorities. In his statement, the Armenian head of state together with the government quickly jumped to their conclusions leaving any further fact-finding, information and deliberation aside. In the official Armenian understanding, represented from the beginning and presented to the broadest possible international audience, the entire sequence of acts and events should be perceived as a coherent set of moves implemented jointly by Hungary and Azerbaijan in their unity of will and intention. Armenia depicted and denounced Hungary as an accomplice to, or, at least, a facilitating partner in the commission of an unlawful and undeserved clemency.

²⁶ *Ibid.*

²⁷ Edward Nalbandian’s Statement and Answers at the Joint Press Conference with Jean Asselborn, the Luxembourg Deputy Prime Minister and Foreign Minister, Press Conference, Ministry of Foreign Affairs of the Republic of Armenia, 11 September 2012, <http://mfa.am/en/press-conference/item/2012/09/11/luxemb_conf/>.

This interpretation promoted internationally by Armenia holds Hungary responsible for its collaboration which preceded and, in the Armenian perception, permitted the adoption and execution of the presidential pardon in Azerbaijan. The relevant provisions in the draft articles on the contours and content of state responsibility prepared by the International Law Commission determine the conceivable cases and circumstances of the responsibility of one state for a wrongful act of another.²⁸ The possible examples which may be understood as examples of indirect or implied responsibility include “aid or assistance in the commission of an internationally wrongful act”,²⁹ “direction and control exercised over the commission of an internationally wrongful act”³⁰ or “coercion of another state”.³¹ With regard to the Armenian claim of implied Hungarian responsibility for the illegal outcome, only the presumption or perception of possible aid or assistance from Hungary in the commission of an internationally wrongful act by Azerbaijan deserve clarification, because the two other modes of connected responsibility obviously do not apply to the examined case.

In case of the unlawfully pardoned Azeri convict, his transfer and release took place at two sequential, but distinct stages. The transfer process was carried out in an orderly bilateral transaction fully in line with the rules of the applied multilateral agreement. The termination of the sentence conveyed – together with the sentenced person – to Azerbaijan was abruptly and unilaterally decided and instantly executed without any trace of the legally required consent from Hungary.

There was no causal link between the transfer procedure and the act of clemency – that is the two separate occurrences did not transpire in the form of events connected as cause and consequence of each other. Although the repatriation of the Azeri convict from Hungary preceded and thereby formally expedited the breach of international duty in Azerbaijan, nevertheless the later infringement ensued from the transfer process not as an inevitable or necessary consequence but as the intentional result of an Azeri state act diverting the benefit of lawful collaboration to unlawful effect. The decision on the diversion to an illegal liberation was taken and carried out exclusively by the Azeri authorities. The unlawful unilateral exploitation of an opportunity created by the proper discharge of internationally regulated form of cooperation remains the sole responsibility of the state party which abuses its positional advantage for an illegal purpose or in violation of prescribed procedural conditions. In the incident of the presidential pardon in Azerbaijan, the immediate release (aggravated by his glorification) of the sentenced person right upon

28 Chapter IV (Responsibility of a State in connection with the act of another State), Responsibility of States for Internationally Wrongful Acts, 2001, *Yearbook of the International Law Commission, 2001*, Vol. II, New York – Geneva, United Nations 2005.

29 *Ibid.*, Art. 16.

30 *Ibid.*, Art. 17.

31 *Ibid.*, Art. 18.

CSABA TÖRÖ

his arrival as soon as he was firmly within Azeri jurisdiction could not be averted by the “sending state”, because all responsibility for compliance was conferred onto the “recipient state” upon the “delivery” of the convict together with the effective control over his personal status and enforcement of his imprisonment.

In fact, that act of clemency at the highest state level clearly violated a binding limitation on Azeri state sovereignty with regard to Hungary and the Azeri infringement of the applied multilateral treaty framework established the international responsibility of Azerbaijan towards Hungary. On the basis of the nationality of the victim in the heinous crime for which the transferred person should have stayed in prison, Armenia can claim to remain an interested third party, but the release of the transferred convict constituted a breach of obligation *inter pares* between Hungary and Azerbaijan. Therefore, international legal responsibility can be invoked by Hungary for an act attributable to Azerbaijan.

24.3.3 *Armenian Countermeasure: Suspension of Diplomatic Relations with Hungary*

Despite the discernible separation of the two phases (transfer and clemency) and the identifiable responsibility of Azerbaijan for the deeply unsettling incident, Armenia maintained its swiftly adopted conclusion on the combined or collective responsibility of Hungary and Azerbaijan for the unlawful result of their perceived collusion. The response of Armenia was formulated accordingly and directed against only Hungary. (As a matter of fact, Armenia practically has no effective means to retaliate against Azerbaijan due to the lack of any direct relations between the two countries which are *de jure* still involved in armed conflict with each other.) As its chosen means of retaliation, Armenia announced its decision to suspend diplomatic and all other forms of state relations with Hungary.³² The Armenian president (later confirmed by the Armenian Parliament as well) underlined that the suspension extends to every state institution which cultivated contacts with Hungarian partners. Adopted as countermeasures of Armenia in response to the unlawful and immoral act of liberation in Azerbaijan for which Hungary bears no responsibility, the freezing of bilateral interstate relations was applied as a spectacular expression of the Armenian sense of injury and as an embarrassing political price exacted on Hungary for an incident beyond its control. Since the suspension of all official nexus was decided unilaterally by Armenia, those relations will stay dormant as long as it does not wish to revive their operation. Hungarian proposals or gestures may restore some of the confidence lost and underline its intention to resuscitate working relations. The resumption of a normal diplomatic *modus operandi* remains a distant possibility until the revision of Armenian position.

³² *Supra* note 25.

24.3.4 *Hungarian Satisfaction to Armenia?*

Hungary did not breach any norm of international treaty law or customary rules in the course of the transfer of the Azeri convict to his country of nationality. It is demonstrated by the fact that Armenia has not been able to identify even one example of infringement of obligations by Hungary related to the transfer and the later release of the convict. The Armenian state (together with its citizens) understandably feels humiliated and acts as a state injured by the unjust exploitation of the possibility extended to Azerbaijan by the Hungarian collaboration in the repatriation of the Azeri criminal. Nevertheless, the violation of a binding commitment took place with regard to the right of Hungary to decide whether the enforcement of the sentence imposed within its own jurisdiction can be terminated in another national jurisdiction. The Azeri violation of its duty – contained in the specific legal instrument attached to the applied international agreement – was committed in the wake of a bilateral transaction with Hungary in contravention of the Hungarian entitlement of Hungary to exercise discretion over the (supposedly continued) foreign enforcement of the sentence of its court.

Since Armenia did not participate in the bilateral transaction that defined the allocation of rights and duties in this concrete instance of a transfer arrangement under the applied multilateral agreement, it could not have a rightful claim to legal standing as an injured party. The internationally wrongful act was (the breach of obligation) committed by Azerbaijan and not by Hungary, and that obligation was owed to Hungary and not to Armenia. Therefore, no Armenian expectation of reparation by Hungary has legal basis according to the international norms of state responsibility for injuries to legitimate state interests or entitlements.

Hungary condemned the wilful failure of Azerbaijan to respect its express commitment to the continued enforcement of the Hungarian sentence and imparted to Armenia that the Azeri act occurred against its intention, without its consent and much to its regret. With respect to Armenia, Hungary could and did provide its assurances of sympathy and understanding, but it must be circumspect and conscious with regard to the form and content of conveyed diplomatic messages. These statements carry legal weight and significance for the perception and attribution of state responsibility for the illegal and unilateral exploitation of the opportunity created by an orderly repatriation process in line with the applied multilateral framework. For this reason, Hungarian apology for the resulting unlawful outcome emerged in the aftermath of the transfer cannot be given to Armenia, because that would amount to satisfaction as moral reparation by the responsible state for an injury it caused to another state.³³ Practically, the delivery of an apology by Hungary could be rightly interpreted as the admission of wrongful conduct in recognition of responsibility for an act committed by the head of a foreign state.

³³ Art. 37, Responsibility of States for Internationally Wrongful Acts, 2001.

CSABA TÖRŐ

24.4 SUMMARY CONCLUSIONS

The political emotions in the Caucasus inflamed by the release of the transferred Azeri convict and the ensuing international condemnations drew broad diplomatic attention and publicity to a complex, sensitive and contradictory situation. For its proper understanding, the legal, diplomatic and political aspects of events leading to the regrettable and revolting outcome should be distinguished and examined accordingly.

The rapid and irreversible conversion (*fait accompli*) of an orderly transfer process into a public evasion of justice with presidential assistance scandalously demonstrated how an otherwise routine and technical example of interstate cooperation in criminal matters could become a politically highly charged incident with true potential to increase tension in a combustible region. An overview of the moves, decisions and acts of the parties involved present the divergence of legality and legitimacy when a lawfully implemented procedure with recognisable political and moral risk unintentionally gives rise to an opportunity easily exploited for flagrantly unlawful and unjust purpose. As the immediately implemented Azeri presidential pardon underlined, a country determined to adopt and carry out its political decision with unscrupulous efficiency may effortlessly abuse the advantages of interstate cooperation if it can be arranged with a partner state willing to take risk in pursuit of beneficial closer relations. Any illegal exploitation of intergovernmental transactions carried out in good faith could seem an affordable deviation from lawful conduct when no effective retaliation is expected or possible, and when no potential damage to international credibility is considered too high a price for the pursued advantages.

The responses to the release of the transferred criminal also highlighted that it was not Azerbaijan, the country in breach of international legal obligation, but rather Hungary, the state party acting in compliance with multinational treaty norms while inadvertently opening the possibility for an unlawful exit to “liberation”, which sustained the most unpleasant diplomatic and political costs. An important lesson for Hungary – and for any other state ready to enter into the treacherous landscape of Caucasian conflicts – is that a mistake in the assessment of political risks can trigger moral and diplomatic damages even when a lawfully implemented international agreement ensures the foundations for the legitimate purposes of an intergovernmental transaction.