



Jurisdiction of the European Court of Human Rights over the war crimes committed by Armenia and its agents

Based on Azerbaijan's submissions to the European Court of Human Rights

*Speech by Chingiz Asgarov, Deputy Chairman
of the Supreme Court at the hybrid seminar on
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Azerbaijan” organized by the AIR Center on
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1. Landmines

Under international humanitarian law, there are clear rules of customary international law in respect of landmines. These can be conveniently taken from the formulation in Henckaerts and Doswald-Beck Customary International Humanitarian Law Volume I: Rules published under the auspices of the International Committee of the Red Cross. This text identifies the following rules in respect of landmines as being established rules of customary international law:

- (a) Rule 81. When landmines are used, particular care must be taken to minimise their indiscriminate effects.
- (b) Rule 82. A party to the conflict using landmines must record their placement, as far as possible.
- (c) Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

Further, the customary international law principle of distinction — that is, the principle that the parties to a conflict must at all times distinguish between civilians and combatants — applies to the use of all weapons, including landmines. Attacks may only be directed against combatants; they must not be directed against civilians. Similarly, the use of any weapon is contrary to international humanitarian law if the harm caused to civilians is indiscriminate or disproportionate. Accordingly, indiscriminate use of mines is prohibited.

The relevance of this can be seen in the ECtHR's conclusion in case of *Alkin v. Turkey* that injury resulting from the use of landmines, which are indiscriminate and can affect the lives of a

disproportionate number of civilians and children, was the result of a breach of the negative obligation of Article 2.

In *Alkin* case, the applicant was severely injured after she stepped on a landmine which had been laid by security forces of the respondent State. The Court confirmed that the fact that the applicant had fortuitously survived the explosion did not render Article 2 inapplicable “since the laying of the landmine and its subsequent explosion were potentially lethal and put her life at risk”. Given that it was the security forces which had laid the landmine in this case, it directly engaged the State’s negative obligations under the substantive limb of Article 2 because “the laying of such indiscriminate and inhumane weapons as anti-personnel landmines, which affect the lives of a disproportionate number of civilians and children, amounts to intentional use of lethal force” such that the negative obligation under Article 2 was engaged and had been broken. The Court affirmed that the State had an obligation to identify and punish those responsible for the use of force against civilians.

Despite extensive efforts, demining operations faced many challenges due to Armenia’s refusal to hand over maps of the landmines’ locations. About 250 Azerbaijani residents have been killed or severely wounded in the mine blasts in the liberated lands post-2020 war.

Azerbaijan obtained minefield maps of the once-occupied Ağdam, Füzuli and Zəngilan districts from Armenia, which reportedly identify the coordinates of 189,000 anti-tank and anti-personnel mines. Armenia also provided the Azerbaijani side with mine maps of other liberated territories of Azerbaijan. Under the international pressure Armenia released some minefield records that provide information about 390 494 anti-tank and anti-personnel land mines as well as other explosive devices. Those records constitute 5% of all the liberated areas and less than [one] third of high threat areas of the [Line of Contact] reflected in UNMAS/UNDP Mine Action Assessment Report of Azerbaijan (December 2020).” The accuracy of these maps did not exceed 25 percent.

The landmines which Azerbaijan has discovered are scattered across, for example, the entrances to villages, river crossings, bridges, canals, areas around springs, and roads (in particular roads to cultural and historical monuments) were laid by Armenia. By way of example, numerous cemeteries in the Füzuli district have been found, since Armenia formally withdrew from this territory, to have been mined during the Armenian occupation

Further, as Azerbaijan has resumed control over the liberated territories, it has discovered that Armenia has *continued* to lay mines in civilian areas even as its forces have been retreating from those areas. These activities are obviously not reflected in the maps provided by Armenia in 2021. The areas mined by retreating Armenian troops have included unquestionably civilian areas, such as graveyards

The dangerousness of the mines cannot be in doubt. Once Armenia or those for whom it is responsible had laid such mines and created such a dangerous situation in the public space, Armenia became subject to an ongoing positive obligation to protect the lives of those who could be injured or killed by the mines.

The positive obligation under Article 2 entails an obligation to take appropriate measures to protect the lives of the people potentially endangered by the mines: see e.g. *Oruk v. Turkey*; *Bozkurt v. Turkey*. It involves an obligation to take all necessary measures to protect against the danger constituted by the mines: e.g. *Albekov v. Russia*; *Paşa and Erkan Erol v. Turkey*.

Armenia's positive obligation continues even now that control of the territory has been passed to the Applicant. Having been responsible for the creation of the source of the danger posed by the mines, it remains subject to a positive obligation to take appropriate measures to protect those exposed to that ongoing danger.

The obligation to take appropriate measures to protect life manifestly includes an obligation to provide maps of the location of mines which have been planted by a State (or those for whom the State is responsible or the location of which it is aware) and/or otherwise to take steps to protect civilians from those mines. This is evident from the Article 2 jurisprudence by itself and is further supported by the rules of customary international law, i.e. that Armenia had to record the placement of mines, as far as possible; and is now obliged to facilitate the removal of the mines – an obligation which should inform this Court's interpretation of what is required of Armenia under the positive obligation of Article 2. Its failure to take steps to facilitate the removal of the mines for which it was responsible is a breach of Article 2 and has caused (and, unless it ceases, will continue to cause) death and injury.

Further, in respect of each such death or serious injury, the respondent State owes a duty under the investigative limb of Article 2 of the Convention properly to investigate. The respondent State is uniquely placed to carry out such an investigation given that it was in effective control of the relevant territory at the time the mines were placed and – it is to be inferred – its military forces or those for whom it is responsible planted the mines.

Armenia's conduct also entails violations of other provisions of the Convention. In particular, this failure:

- (a) interferes with Azerbaijani internally displaced persons' attempts to return to their former homes from which they were forced to flee, and therefore constitutes a continuing violation of Article 8 of the Convention;
- (b) prevents Azerbaijani internally displaced persons from having access to their possessions in the formerly occupied territories, and therefore constitutes a continuing violation of Article 1 of Protocol No. I;
- (c) prevents Azerbaijani internally displaced persons from access the formerly occupied territories, despite those territories constituting part of the territory of Azerbaijan, the State of which they are nationals, and therefore constitutes a continuing violation of Articles 2(1) and 3(2) of Protocol No. IV.

2. Bərdə, Gəncə bombing

On 4 and 5 October 2020, the armed forces of Armenia attacked residential areas in Gəncə city, the second largest city of the Republic of Azerbaijan, with a population of around 335,000 and located more than 100 km away from the conflict zone. As a result of the attack 1 civilian, Əliyev Tunar Qoşqar oğlu, born in 1999, was killed and 36 civilians were injured, including 9 children. As a result of the shelling of Gəncə on 4 and 5 October 2020, 20 two-storey buildings, as well as six one-storey buildings with 108 shops were destroyed

On 6 October Armenian forces attacked one of the largest cities of Azerbaijan, Bərdə.

On 11 October 2020, at about 2 a.m., despite the announced ceasefire agreement, the armed forces of Armenia hit residential multi-apartment buildings in the central part of Gəncə with SCUD tactical ballistic missiles. As a result of this third attack on Gəncə, the buildings were blasted into ruins, killing 10 civilians and wounding 35 others, including 6 children. Besides the destroyed building, over 10 multi-apartment buildings and more than 100 various objects were damaged. Three 31-apartment buildings were completely destroyed as a result of Armenia's missile attacks.

On 17 October 2020, at approximately 1 a.m., armed forces of Armenia hit Gəncə again with SCUD tactical ballistic missiles. The missiles hit the densely populated residential area of the city destroying 20 houses. As a result of this attack 15 civilians were killed, including 6 children, one of whom Mədinə Şahnəzərli was just 10 months old. A further 67 people were injured

On 27 October 2020 the armed forces of Armenia attacked the dense residential area of Bərdə city located approximately 40 km from the frontline. Five individuals including one 7-year-old child, died as the result of long-range artillery fire. An additional 14 people including 6 children were severely injured.

On 28 October 2020 at 2 p.m., the armed forces of Armenia launched an attack against civilians in Bərdə city. Bərdə City Central Hospital, City Polyclinic, Fire Service, Diagnostic Centre, a nine-store residential building and the so-called "New Market" area of the city were the main targets of the attack. The fact that the city centre infrastructure was targeted confirms that the sole purpose for the attack was to inflict as many casualties and as much suffering as possible among civilians. 22 people were killed (including 5 women) and more than 70 (8 children and 15 women) were injured as a result of the bombing with cluster ammunitions in the densely populated area of Bərdə city and trade facilities by Armenia armed forces.

After both the attack on Gəncə on 17 October 2020 and the attack on Bərdə on 28 October 2020, Armenia published allegedly legitimate military targets in those cities. But this was a transparent pretext. Armenia did not even attempt to explain why these were legitimate military targets, did not provide proof that it had actually been targeting them (which is impossible to believe, given that the attacks in fact occurred in exclusively civilian areas), and did not establish what (if any) military advantage it was allegedly pursuing by carrying out these attacks. For example, although Armenia referred to "Azerbaijani Defense Ministry's military air base" in Gəncə as a legitimate military target, Gəncə's airport did not actually suffer any damage during Armenia's attacks, indicating that Armenia

was not targeting it at all. The plain truth is that Armenia publishing details of these alleged military targets was an unconvincing, retrospective attempt to justify attacks that were obviously unlawful. Indeed, Human Rights Watch has carried out independent investigations which affirmed that Armenian forces “repeatedly launched missiles, unguided rockets, and heavy artillery into populated cities and villages in violation of the laws of war”. Further, by publishing these lists immediately after the attacks, Armenia implicitly admitted that the attacks were carried out by them, putting beyond doubt that it bears international responsibility for the attacks and that this Court can exercise jurisdiction over Azerbaijan’s complaints.

Public statements by officials of both Armenia and the “NKR” have confirmed that Armenian forces deliberately attacked civilian targets during the hostilities of 2020. For example, on 5 October 2020, Vagram Poghosyan, the press secretary to the purported “President” of the “NKR”, stated on his official Facebook page: “A few more days and I am afraid that even archaeologists will not be able to find the place of Ganja”.

Further, on 9 October 2020, the chief adviser to the Prime Minister of Armenia and now the current Minister of Defence of Armenia stated in a television interview that Armenia’s goal was to “strike at peaceful settlements in order to cause panic”.

Under IHL, even where an attack is directed against a military target, it will nonetheless be unlawful if it causes indiscriminate and disproportionate harm to civilians

Armenia’s repeated use of weapons that are inherently indiscriminate means that its attacks were unlawful under both IHL and Article 2 of the Convention.

Most notably, Armenia used Scud missiles in attacking residential areas of Gəncə. For example, on 11 October 2020, Armenia carried out a missile strike on a residential area in the Azerbaijani city of Gəncə with R-17 Elbrus (Scud) ballistic missiles, as could be ascertained from the engraving found on the rocket reads 8K14. Seven civilians were killed and 34 others were wounded when the residential apartment buildings which Armenia had targeted were destroyed. A BBC news reporter who visited the scene in Gəncə confirmed that there were no military targets nearby. On 17 October 2020, Armenia again used SCUD missiles to attack Gəncə, destroying 20 houses, killing 15 civilians and injuring scores more.

The Scud-B missiles used by the armed forces of Armenia have a CEP of 450 meters, indicating a high degree of imprecision. Given the long distances over which these missiles were fired and the fact that they were directed into densely populated cities, Armenia could not have been unaware that its use of these weapons would lead to many civilian casualties.

In the course of its attack on Bərdə on 28 October 2020, Armenia used cluster munitions, as confirmed by reputable international human rights organisations Amnesty International and Human Rights Watch, as well as by *New York Times* reporters who were in Bərdə at that time. The strike was carried out against a residential neighbourhood and killed 21 civilians, injuring an estimated 70 more.

Human Rights Watch and Amnesty International declared that Armenia's attack on Azerbaijani civilian population centres constituted international war crimes.

3. IHL Conventions

Armenia's attacks occurred in the context of an international armed conflict, meaning that international humanitarian law ("IHL") applied throughout those attacks. IHL, or what used to be termed the laws of war or the laws of armed conflict, concerns in essence the regulation of the conduct of hostilities. Although IHL is primarily derived from a number of international conventions, some of these represent in whole or in part rules of customary international law, and in addition a number of customary international law principles exist over and above conventional rules. Key instruments include the 1907 Hague Convention IV and Regulations on the Laws and Customs of War on Land ("the Hague Convention" and "the Hague Regulations", respectively), which are regarded as declaratory of customary law, the Four Geneva 'Red Cross' Conventions of 1949 ("the First–Fourth Geneva Conventions", respectively, and together "the Geneva Conventions"). In 1977, two Additional Protocols to the 1949 Conventions ("Additional Protocol I" and "Additional Protocol II", respectively) were adopted. These built upon and developed the earlier Conventions and many of its provisions may be seen as reflecting customary law. Under Article 50(1) of Additional Protocol I a civilian is defined as any person not a combatant, and in cases of doubt a person is to be considered a civilian. The Fourth Geneva Convention provides a highly developed set of rules for the protection of such civilians, as enumerated further below. The Fourth Geneva Convention comes into operation immediately upon the outbreak of hostilities or the start of an occupation and ends at the general close of military operations.

War crimes are essentially serious violations of the rules of customary and treaty law concerning IHL, being essentially those crimes which have become accepted as criminal offences for which, in addition to State responsibility, there is individual responsibility. For example, Article 6(b) of the Nuremberg Charter included war crimes within the jurisdiction of the Tribunal, while the concept of grave breaches of the Geneva Conventions of 1949 recognised certain violations as crimes subject to universal jurisdiction. More recently, the Rome Statute of the International Criminal Court ("ICC") has provided a list of war crimes over which the ICC has jurisdiction, many of which reflect acts for which individual criminal responsibility can exist under customary international law.

The application of IHL does not affect the application of the Convention during the period in question; to the contrary, the Convention's human rights guarantees continue to bind Contracting States even during armed conflict. Depending on the character of the guarantees in question, they may fall to be interpreted or applied in light of applicable rules of IHL as the relevant *lex specialis*. See eg ICJ case of Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*.

Armenia breached Article 2 and relevant IHL norms because it failed to abide by fundamental rules of IHL requiring parties to an armed conflict to distinguish between combatants and civilians, and between military and civilian objects, when carrying out attacks. With flagrant disregard for

these rules, Armenia deliberately and indiscriminately bombed and shelling areas which were not legitimate military targets, including by using indiscriminate means of warfare such as ballistic missiles and multiple launch rocket systems. Armenia further failed to abide by the rule of IHL that it must take sufficient precautions to protect the lives of the civilian population.

There are three closely related principles of IHL which relate to the protection of civilian lives – namely: (i) the principle of distinction, which prohibits making civilians the object of attack; (ii) the prohibition on attacks which cause indiscriminate or disproportionate harm to the civilian population; and (iii) the obligation to take sufficient precautions to minimise harm to civilians resulting from the conduct of hostilities.

First, the heart of international humanitarian law is the principle of distinction, according to which the parties to a conflict must at all times distinguish between civilians and combatants.

Article 25 of the Hague Regulations attached to the Convention Respecting the Law and Customs of War on Land 1907 (regarded as part of customary international law) prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended”.

The principle of distinction is now codified in a number of provisions of Additional Protocol I. Article 48 (declared to constitute “the basic rule”) states that:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

Article 51(2) of Additional Protocol I further states that:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Article 85(3) of Additional Protocol I identifies further acts which “shall be regarded as grave breaches ... when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health”, including “(a) making the civilian population or individual civilians the object of attack”.

The centrality of the principle of distinction in the law of armed conflict is reflected in other international instruments. Article 8(2)(b)(i) of the Rome Statute identifies as a war crime “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” – a provision that reflects a rule of customary international law which establishes individual criminal responsibility for such conduct.

Secondly, in addition to the prohibition on attacks directed against civilians, there exists a prohibition on attacks which indiscriminately or disproportionately harm civilians. Article 51(4) of Additional Protocol I states:

“Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”

Article 51(5) lists examples of attacks which “are to be considered as indiscriminate”, and these include:

- “(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Article 85(3) of Additional Protocol I makes clear that violations of the prohibitions on attacks causing indiscriminate or disproportionate harm to civilians are war crimes, stating that acts capable of constituting “grave breaches” of Additional Protocol I include: “(b) launching an indiscriminate attack affecting the civilian population ... in the knowledge that such attack will cause excessive loss of life [or] injury to civilians.”

Reflecting rules of customary international law to this effect, Article 8(2)(b) of the Rome Statute defines as war crimes “[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives”, and the use of certain weapons “which are inherently indiscriminate in violation of the international law of armed conflict”.

Thirdly, parties to a conflict are obliged under IHL to endeavour to limit harm to civilians by taking certain precautions in attack. Article 57(1) of Additional Protocol I states that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. Articles 57(2)(a) and 57(2)(c) stipulate certain measures that must be taken in order to comply with this rule, including that those who plan or decide upon an attack must: “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects ... but are military objectives”; “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life [and] injury to civilians”; “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be

excessive in relation to the concrete and direct military advantage anticipated". According to Article 57(2)(b) an attack that is underway must be terminated if it becomes apparent that the objective is not a military one or that the attack would cause disproportionate civilian harm.

Finally the **ECtHR jurisprudence** puts beyond doubt that a State's failure to comply with rules of IHL intended to protect civilian lives – including the principle of distinction, the prohibition on attacks causing indiscriminate or disproportionate civilian harm, and the obligation to take sufficient precautions to protect civilians – also amount to violations of the right to life under human rights law. See eg ee *Abuyeva and Others v. Russia*, 2010; and *Isayeva v. Russia*, 2005