

Deutsch-Armenische Juristenvereinigung e.V.



ANALYSIS AND EVALUATION OF THE ARMED CONFLICT BETWEEN ARMENIA AND AZERBAIJAN IN THE LEGAL CONTEXT

from 12 to 16 July 2020

July 2020

FOREWORD

Deutsch-Armenische Juristenvereinigung e.V. is an non-profit association of German and Armenian lawyers who are committed to promoting legal exchange on a variety of legal matters related to the Armenian and German law, fostering cooperation between law faculties in Germany and Armenia, promoting remembrance and recognition as well as the evaluation of the legal questions related to the Armenian Genocide, advocating and campaigning for the peaceful resolution of the Nagorno-Karabakh conflict. The association was founded in Nuremberg in 2017.

The association is deeply concerned about the armed conflict between the Republic of Azerbaijan and the Republic of Armenia. It strongly shares the view that there is no alternative to peaceful negotiations and any attempt to resolve the conflict by use of force will fail.

This report provides legal analysis and evaluation of the acts of the Republic of Azerbaijan between 12 and 16 July 2020 that resulted in violations of international law.

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I. Introduction

1. In the background of the COVID-19 pandemic while the world is combating the deadly disease, targeted bombing of the Armenian border region of the Tavush began on July 12, 2020 by Azerbaijani armed forces. Despite the UN Secretary-General's appeal for a global ceasefire¹ Azerbaijan violated the ceasefire regime by resorting to heavy firing and shelling and provoking a four-day armed conflict between Azerbaijan and Armenia, This is the largest escalation between the hostile South Caucasus countries since April 2016.

Origin of the conflict

2. The conflict between Armenia and Azerbaijan can be historically and ideologically placed in the context of the state-sponsored policy of Pan-Turkism, which is characterized by radical nationalism and Turkish racism and categorically excludes the existence of a Christian-Armenian state in the South Caucasus.²
3. The conflict today is mainly about two closely related questions: On the one hand it is linked to the Azerbaijan's participation in the Turkey's continuing policy to deny the Armenian Genocide by the Young Turks regime, on the other, it is stemmed from the conflict over Nagorno-Karabakh (hereinafter: Artsakh).
4. The conflict over Artsakh has its roots in the decisions of Joseph Stalin who occupied the position of the Commissar for Nationality Affairs in the Soviet Union in the early 1920s. After the Caucasian Bureau of the Central Committee of the Russian Communist Party decided on 4 July 1920 to transfer Artsakh to the Armenian SSR. On the following day according to the Stalin's orders, the office revoked its own majority decision without providing any reasons and included Artsakh as an autonomous enclave in the Azerbaijani SSR.³

¹Guterres, “Aufruf zu einem Globalen Waffenstillstand”, 23 March 2020, at: <https://unric.org/de/guterres-aufruf-zu-einem-globalen-waffenstillstand/>; Guterres, “UN-Generalsekretär erneuert Appell zu globalem Waffenstillstand”, 3. April 2020, at: <https://unric.org/de/guterres-appell-zu-globalem-waffenstillstand/>.

² Croissant, *The Armenia-Azerbaijan Conflict*, p. 8, Mithander, *Collective Traumas*, p. 15, Kipke, *Konflikttherd Südkaukasus*, p. 37.

³ Croissant, *The Armenia-Azerbaijan Conflict*, p. 19.

5. After the pogroms of Sumgait (27 February 1988) and Baku (12 January 1990) and the collapse of the Soviet Union in 1991, the Republic of Artsakh declared independence. The war between Azerbaijan and Artsakh ended with the Bishkek ceasefire agreement, dated on 5 May 1994. Despite minor and repeated clashes, Artsakh and Azerbaijan adhered to the ceasefire regime up until 2016.

Peace negotiations

6. The (pre) negotiations between Armenia, Artsakh and Azerbaijan, headed and monitored by the Minsk Group, an institution within the framework of the OSCE's international activities to resolve the conflict, began with the ceasefire in 1994.⁴ Since then, negotiations have taken place in compliance with the principles of the peace negotiations. The parties to the conflict were not in the main negotiations yet. After several unsuccessful proposals for the (pre) negotiations, it appeared that a basic agreement had been reached, which was laid down in the Basic Principles also known as Madrid Principles in November 2007.⁵ However, the peaceful negotiations attempts have rolled back in April 2016 by pushing also the Madrid Principles into the background.
7. The four-day war in April 2016 confirmed that the existence of the Armenian population in Artsakh is at high risk from the Republic of Azerbaijan. During these four days, numerous war crimes were committed by Azerbaijani soldiers against both civilians and combatants. The investigations thereafter showed severely mutilated bodies of Armenians, including the elderly in Artsakh.⁶ In addition, the Armenian Yazidi soldier, *Qyaram Sloyan*, was beheaded during the armed conflict. This incident was celebrated in Azerbaijan and the perpetrator was honoured as a “hero”. The recordings of the beheaded soldier were actively distributed in social networks as a way of glorifying “heroic deeds”.⁷
8. As a result of the clashes in April 2016, new attempts for negotiations were launched at the Summits in Vienna and St. Petersburg, with the involvement of Armenia acting as a security guarantee for the Republic of Artsakh.

⁴ OSZE, “*Vienna declaration of the CSCE Parliamentary Assembly*”, 7 April 1995 at: <https://www.osce.org/files/f/documents/1/5/38248.pdf>.

⁵ Madrider Prinzipien, at: <https://www.aniarc.am/2016/04/11/madrid-principles-full-text/>.

⁶ Artsakh Ombudsman’s second interim report on atrocities committed by Azerbaijan during the 2016 April war, 2016, para. 11, at: https://www.artsakhombuds.am/sites/default/files/2019-12/Report_PUBLIC.pdf.

⁷ See the judgment on desecration of a human corpse. *BGH, Urteil v. 27. Juli 2017, 3 StR 57/17*.

9. After the Vienna Summit on 16 May 2016, the co-chairs released a statement announcing that the parties were not only reaffirming “their commitment to the ceasefire and the peaceful settlement of the conflict,” but also agreed “to finalize in the shortest possible time an OSCE investigative mechanism” and “the expansion of the existing Office of the Personal Representative of the OSCE Chairperson in Office”.⁸
10. After the meeting in St. Petersburg on 20 June 2016, a statement was published in which the parties reaffirmed the agreements reached at the Vienna Summit with regard to the stabilization of the situation in the conflict area and the creation of an atmosphere that is conducive to peace. In particular, they agreed to increase the number of international observers and to introduce a monitoring mechanism to identify who was first to violate the ceasefire agreement.⁹
11. After the velvet revolution in Armenia in 2018, the Minsk group had hoped to initiate a new peace process and to help the parties to the conflict to engage in constructive peace talks. However, the current developments, particularly the attacks by Azerbaijan on the sovereign borders of Armenia have made these attempts even more challenging and difficult.

Armed conflict in 2020

12. Four years after the violent escalation along the borders of Azerbaijan and Artsakh in April 2016, in 2020 the Azerbaijani armed forces this time have crossed the state borders of the Republic of Armenia. In the course of a four-days armed conflict the Azerbaijani military forces has committed a variety of acts that was in violation of the international humanitarian law and the conduct of Azerbaijan has further amounted to war crimes.

⁸ OSZE, “Joint Statement of the Minister of Foreign Affairs of the Russian Federation, Secretary of State of the United States of America and State Secretary for Europe Affairs of France”, 16 May 2016, at: <https://www.osce.org/mg/240316>.

⁹ OSZE, “Statement by Co-Chairs of OSCE Minsk Group”, 24 June 2016, at: <https://www.osce.org/mg/248616>.

13. This report analyses and evaluates the events that occurred from July 12-16, 2020, under international law and German law with a specific focus on the following four aspects:

- Azerbaijan's aggression against the Republic of Armenia as an internationally wrongful act,
- Targeted bombing of the Armenian civilian population and civilian objects as a violation of international humanitarian law and as a war crime,
- Threat of bombing of the Republic of Armenia's nuclear power plant as an internationally wrongful act,
- Armenophobia: anti-Armenian hate rhetoric and racial discrimination

II. Aggression against Republic of Armenia as internationally wrongful act

Prohibition of the use of force

14. Since the beginning of the 20th century, warfare has not been a legitimate political tool for resolving international disputes. Article II of the 1928 Briand-Kellogg Pact forms the basis of the peaceful settlement of disputes.¹⁰ In 1945, the crime of aggression in its old formulation was based on the crimes against peace in the war crimes trial in Nuremberg.¹¹ After the Second World War, peace was in the preamble to the UN Charter as the basic philosophy of the existence of all nations in the world.¹² Accordingly, the prohibition of use of force according to Article 2 (4) of the UN Charter is *jus cogens*.¹³ Therefore, a “war” as such (*jus ad bellum*) is prohibited.

15. Pursuant to Article 1 UN Resolution 3314 (XXIX) of 14 December 1974, aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Aggression is an act that violates the principles of international law and

¹⁰ Mettraux, *Perspectives on the Nuremberg Trial*, 2008, S. 453 ff.; Yasunaki, *International Law in a Transcivilizational World*, 2017, p. 544.

¹¹ Siehe Article 6 (a) Londoner Statut, at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf, Sellars, *Crimes Against Peace' and International Law*, p. 171.

¹² Sayapin, *The Crime of Aggression in International Criminal Law*, 2014, p. 78.

¹³ ICJ, *Nicaragua v. United States of America*, Judgment 27 June 1986, § 190; BVerfG, Judgment 22 November 2001 – 2 BvE 6/99 – Rn. 77, BVerwG, Judgment 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, Rn. 114, 199.

gives rise to state responsibility according to Article 2(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).

16. On 6 July 2020, Azerbaijan President, Ilham Aliyev, sharply criticized the Minsk group's format for negotiation. He threatened to break off negotiations with the Armenian side and to start military actions.¹⁴

Aggression of Azerbaijan

17. Less than a week after these threats, namely on 12 July 2020, the latest escalation began not along the Artsakh border, but the north-eastern border of Armenia with Azerbaijan. Unlike the disputed borders between Artsakh and Azerbaijan, this part of the border is the internationally recognized and sovereign border between the Republic of Armenia and the Republic of Azerbaijan.
18. At around 12:30 p.m. on 12 July 2020, soldiers of the Azerbaijani armed forces attempted to cross the state border of the Republic of Armenia along the Tavush region with a UAZ army vehicle. After the warning from the Armenian side, the Azerbaijani soldiers left the vehicle and returned to their positions.¹⁵ After a short period, the Azerbaijan launched its military attack with artillery fire on the Armenian military positions along the Armenian-Azerbaijani border.¹⁶
19. Azerbaijan's attack on the recognized borders of Armenia was intensified by tank and artillery shelling and drone strikes,¹⁷ which lasted up until July 16.¹⁸

¹⁴ Official website of the President of the Republic of Azerbaijan, "Ilham Aliyev attended the inauguration of modular hospital for treatment of coronavirus patients opened in Khatai district of Baku", 6 July 2020, at: <https://en.president.az/articles/39491>; Eurasianet, "Azerbaijani president calls into question negotiations with Armenia", 7 July 2020, at: <https://eurasianet.org/azerbaijani-president-calls-into-question-negotiations-with-armenia>.

¹⁵ APA-OTS, "Versuch der militärischen Durchdringung Aserbaidshans im nordöstlichen Teil der armenisch-aserbaidshanschen Staatsgrenze", 17 July 2020, at: https://www.ots.at/presseaussendung/OTS_20200717_OTS0005/versuch-der-militaerischen-durchdringung-aserbaidshans-im-nordoesentlichen-teil-der-armenisch-aserbaidshanschen-staatsgrenze; Eurasian Times, "Azerbaijan-Armenia border clash: Azerbaijani soldiers killed in border clash with Armenia", 12 July 2020, at: <https://eurasianimes.com/azerbaijan-armenia-border-clash-azerbaijani-soldiers-killed-in-border-clash-with-armenia>.

¹⁶ Asia Times, "Armenia-Azerbaijan escalation shakes the Caucasus", 23 July 2020 at: <https://asiatimes.com/2020/07/armenia-azerbaijan-escalation-shakes-the-caucasus/>.

¹⁷ See judgment on international drone operations, *OVG Münster, Judgment 19 March 2019, 4 A 1361/15*.

¹⁸ Asia Times, "Armenia-Azerbaijan escalation shakes the Caucasus", 23 July 2020 at: <https://asiatimes.com/2020/07/armenia-azerbaijan-escalation-shakes-the-caucasus/>.

20. Through the use of drones, tanks and artillery, Azerbaijan has unlawfully launched a military attack on a foreign territory and violated the sovereignty and territorial integrity of the Republic of Armenia. This conduct fulfils the jurisdictional conditions of the crime of aggression as defined under international law.
21. **The bombardment of the territory of the Republic of Armenia by the armed forces of the Republic of Azerbaijan constitutes an attack under Article 3 (b) and (d) of the UN Resolution 3314 (XXIX) and amounts to a breach of the Azerbaijan's international obligation not to use force, according to the Article 2 (4) of the UN Charter and the Bishkek Protocol of 5 May 1994.**
22. Azerbaijan's appeal to Article 51 of the UN Charter on individual self-defense fails to the extent that the fire was opened on 12 July 2020 by the Azerbaijani armed forces.
23. Azerbaijan's internationally wrongful military attack was launched when the national emergency in Armenia was still in effect due to the very high number of casualties in the wake of the corona crisis.
24. The Minsk Group call upon the two countries to prevent further escalation: *“The Minsk Group Co-Chairs condemn the recent ceasefire violations and call upon the sides to take all necessary measures to prevent any further escalation, including by use of the existing direct communication channels between them. The Minsk Group Co-Chairs also call on the sides to resume substantive negotiations as soon as possible and emphasize the importance of returning OSCE monitors to the region as soon as circumstances allow”*.¹⁹
25. The Secretary General of the United Nations, António Guterres, expressed deep concern about the escalation of violence along the international border between Armenia and Azerbaijan: *“The Secretary-General urges an immediate end to the fighting and calls on all involved to take immediate steps to de-escalate the situation and refrain from provocative rhetoric”*.²⁰

¹⁹ OSZE, “Press Statement by the Co-Chairs of the OSCE Minsk Group”, 13 July 2020, at: <https://www.osce.org/minsk-group/457225>.

²⁰ UN General Secretary, “Refrain from Provocative Rhetoric, Secretary-General Urges following Reported Deadly Exchanges of Fire along Armenia-Azerbaijan Border”, 13. July 2020, SG/SM/20175, at: <https://www.un.org/press/en/2020/sgsm20175.doc.htm>.

III. Targeted bombing of the Armenian civilian population and civilian objects as a violation of international humanitarian law and as a war crime

26. Not only is the aggression of the Republic of Azerbaijan internationally wrongful, but acts committed within the framework of this aggression are wrongful (*jus in bello*).
27. The military attack was aimed not only at the Armenian armed forces, but also at the residential areas of the Republic of Armenia, among others, Movses Village (~ 2046 residents), Chinari Village (~ 1256 residents), Aygepar Village (~ 1605 residents), Karmir Aghbiur Village (~ 1837 residents) and Berd City (~ 7800 residents).²¹ A total of over 10,000 people were affected by the bombings.
28. The attack on the civilian population and the civilian objects in Armenia started on 12 July 2020 with the shelling of the peaceful civilian settlements of the Movses, Aygepar and other villages in the Tavush region.²²



²¹ Official website of the Statistical Committee of the Republic of Armenia, “Figures of marz of Tavush”, at: <https://armstat.am/am/?nid=543>.

²² Official website of the Human Rights Defender of the Republic of Armenia, “The statement of the Armenian Human Rights Defender on Azerbaijani Armed Forces shelling towards the Armenian Tavush Region on July 12”, 13 July 2020, at: https://www.ombuds.am/en_us/site/ViewNews/1242.

Shelled residential building in the municipality of Aygepar

29. On 13 July 2020, the village of Chinari was also targeted. The residents reported to the Armenian Human Rights Defender that the Azerbaijani armed forces had damaged the roof of a residential building.



Aramays Hovakimyan, a resident of the municipality of Tschinari injured due to the bombing of civilian objects

30. Immediately after receiving the alarming complaints, the Armenian Ministry of Defense issued an official statement that the Azerbaijani armed forces fired seven times from 82 mm mortars and three projectiles from a 120 mm mortar towards Chinari.²³



The shelling was carried out mainly with these projectiles

31. On 14 July 2020, civilians from the city of Berd reported that the city was under fire. In this context, the Human Rights Defender, the Ministry of Defense and the Ministry of Foreign Affairs of the Republic of Armenia stated that the Azerbaijani armed forces used an unmanned combat aircraft to combat the civilian infrastructure and the civilian population of the city of Berd. Firefighters from the Ministry of Emergency Situations were dispatched to extinguish the fires. The residents were evacuated and transferred to a safe place.²⁴

²³ Official website of the Human Rights Defender of the Republic of Armenia, “*The Human Rights Defender's office received facts from shelling from Chinari village*”, 13 July 2020, at: https://www.ombuds.am/en_us/site/ViewNews/1245.

²⁴ Official website of the Human Rights Defender of the Republic of Armenia “*Residents of Berd town provided details to the Human Rights Defender on targeting the town with a combat UAV.*”, 14 July 2020, at: https://www.ombuds.am/en_us/site/ViewNews/1247.



One of the civilian vehicles damaged by Azerbaijani UAVs in a housing estate

32. Admittedly, the above-mentioned housing estates are close to the border. However, this does not mean that the civilian population and civil objects can be targeted as a military object. Since drones observe the border airspace, the Azerbaijani armed forces have the opportunity to differentiate between military and civilian objects. The military positions of the Armenian militants are located far from the housing estates. An incorrect calculation of the attacks was hardly possible.
33. The bombing also damaged several civilian objects. On 14 July 2020 at around 11:00 a.m., the Tavush textile factory was targeted. Azerbaijani armed forces opened fire on the factory during working hours. The director of the factory, Mikael Ezekyan, said there were no material losses. According to Ezekyan, the shots were fired from a grenade launcher with a calibre of 120 millimetres. The employees were evacuated immediately. The textile factory is located in the village of Choratan near the city of Berd and has also produced face masks in the wake of the Corona crisis and the national emergency in Armenia.²⁵

²⁵ EVN Report, “*Updates from the Armenia-Azerbaijan State Border*”, 14 July 2020, at: <https://www.evnreporticlecom/politics/updates-from-the-armenia-azerbaijan-state-border>; Official website

34. On 16 July Azerbaijani forces continued to open fire on civilian objects by firing grenade launchers and 122mm howitzer (D-30) into the villages of Aygepar and Movses. A kindergarten in the village of Aygepar was also affected.²⁶



A kindergarten in the municipality of Aygepar shelled by the Azerbaijani armed forces

International humanitarian law

35. The basis of modern international humanitarian law are the Hague Conventions of 1899 and 1907, the four Geneva Conventions adopted in 1949 and the Additional Protocols to the Geneva Conventions adopted in 1977 and 2005. While the Hague Conventions primarily codified laws of war (Hague law), the Geneva Conventions contain, in particular provisions

of the Human Rights Defender of the Republic of Armenia, “*The NA President and the Human Rights Defender discussed the results of fact-finding activities on shelling of civil settlements of Tavush region*”, 17 July 2020, at: https://www.ombuds.am/en_us/site/ViewNews/1254.

²⁶ Public Radio of Armenia, “*Kindergarten in Armenian village comes under Azerbaijani shelling*”, 16 July 2020, at: <https://en.armradio.am/2020/07/16/kindergarten-in-armenian-village-comes-under-azerbaijani-shelling/>.

for the protection of the wounded, prisoners of war and civilians in armed conflicts (Geneva law). If these obligations are violated, the states are held responsible.²⁷

36. An armed conflict in the sense of international law only occurs between states, not between peoples.²⁸ The civilian population is therefore subject to special protection.²⁹ While Article 51 of the GC Additional Protocol I (GC AP I) protects the civilian population against targeted attacks,³⁰ Article 52 of the GC AP I protects the civilian objects that are not used for military purposes.
37. The targeted attacks on the civilian population and objects constitutes a violation of Article 51(2) and Article 52(1) of the GC AP I. The Republic of Azerbaijan has not joined the GC AP I. However, this does not exempt the state from its international responsibility for the acts of its organs as protecting civilians and civilian objects is a norm of customary international law applicable in international and non-international armed conflicts.³¹
38. **According to Article 12 ILC Articles, states have obligations not only from the perspective of the positive law, but also from customary international law.³² The protection of civilians³³ and the civilian objects³⁴ form the core of international humanitarian law and are therefore a customary international obligations of the Republic of Azerbaijan.**

²⁷ See. *Article 3 Hague Convention 1907, Article 51, Geneva Convention I, Article 131 Geneva Convention III, Article 148 Geneva Convention IV*: „No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article”.

²⁸ Bothe, *Friedenssicherung und Kriegsrecht*, in: Graf-Vitzthum (Hrsg.), *Völkerrecht*, 2001, pp. 603-67, Rn. 62.

²⁹ Klein, *Der Schutz der Menschenrechte in bewaffneten Konflikten in MRM 2004/1*, p. 11.

³⁰ Bradley, *Protecting Civilians in War*, 2016, pp. 75-76.

³¹ See Commentary to Article 12 ILC-Articles, para. 4, at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; see also *Rule 149 ICRC*, at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>; Henckaerts/Doswald-Beck, *Customary International Humanitarian Law*, 2005, p. 530.

³² Bodansky, *The Concept of Customary International Law*, in *Michigan Journal of International Law* 1995/16/3, p. 671.

³³ *Rule 1 ICRC*, at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

³⁴ *Rule 7 ICRC*, at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

39. The International Criminal Tribunal for the former Yugoslavia (ICTY) stated that “*the civilian population as such shall not be the object of attack. This fundamental principle of international customary law is specified in Articles 51 (2), and 51 (3) of Additional Protocol I.*”³⁵

40. According to Article 8 (2)(b)(ix) of the Rome Statute, deliberate attacks on educational facilities constitute war crimes according to the Statute. Even though Azerbaijan is not a member to the Rome Statute, but the destruction or deliberate damage to educational institutions is also prohibited under customary international law.

German criminal law

41. The targeted attack on the civilian population and objects is not only an internationally wrongful act, but also a war crime under German law. As part of the implementation of the Rome Statute, Germany has agreed to prosecute international crimes regardless of the crime scene, by adopting the International Criminal Code (VStGB), which came into force on 30 June 2002 and is based on the universal jurisdiction (§ 1 S. 1 VStGB). In cases where the suspect is in Germany, an investigation must be initiated (see § 153 f (1) 1 StPO).³⁶ A statute of limitations for international crimes is excluded according to § 5 VStGB (in implementation of Article 29 of the Rome Statute).

42. The above-mentioned methods of war are also punishable under German law. § 11 VStGB prohibits methods of warfare. The shelling of the civilian population by the Azerbaijani military fulfils the conditions of a criminal offense set out in § 11 (1) 1 no. 1 of the VStGB. According to this paragraph a sentence of imprisonment not less than three years is to be imposed on anyone who attacks civilian population or against individual civilians in the context of an international conflict who do not have direct participation in the hostilities. The provision is based on Article 8 (2)(b)(i) and (iv) of the Rome Statute. It aims to penalize the attack on the civilian population as an unlawful method of waging war.

³⁵ ICTY, *Prosecutor v. Dario Kordic and Mario Erkez* (Case No. IT-95-14/2-A), *Judgment*, 17. December 2004, § 48.

³⁶ See Safferling/Petrossian, *Kriegsverbrecher unter den Flüchtlingen - Der Umgang der deutschen Justiz mit verdeckt nach Deutschland einreisenden Völkerrechtsverbrechern*, in: JA 2019/51, p. 401 ff.

43. The military attacks on residential buildings, kindergartens and the mask factory are punishable under § 11 (1) 1 no. 2 VStGB. According to this paragraph, a sentence of imprisonment not less than three years is to be imposed on anyone who uses military means in the context of an international armed conflict to attack civilian objects, in particular, inter alia, villages, residential areas and buildings that serve educational purposes. The provision is based on Article 8(2)(b)(ii), (v) and (ix) of the Rome Statute.
44. The Azerbaijani armed forces who carried out the aforementioned illegal orders can be prosecuted during their stay in Germany.³⁷ Insofar as a suspect of a foreign act is not in Germany and such a stay is not expected, criminal prosecution in Germany will not be very promising in practice due to § 153 f (1) StPO.³⁸
45. This provision allows a remarkable degree of discretion to the Federal Public Prosecutor's Office (GBA) to carry out the persecution to the extent possible - possibly also in view of a request for legal assistance that may be expected later - or to refrain from it (the so-called Opportunitätsprinzip).
46. If the suspect is in Germany, the proceedings can only be dispensed if no German national is suspected of having committed the offence, the offence was not committed against a German national, no suspect is or is expected to be staying in Germany, the offence is being prosecuted by an international court of court or by a state on whose territory the offence was committed, a citizen of which is either suspected of the offence or was injured by the offence.
47. If the persecution is carried out by a primarily appointed international or foreign jurisdiction and a foreign suspect is in Germany, his extradition or transfer to the jurisdiction responsible for the persecution has priority over the subsidiary German law enforcement interest.

³⁷ Vgl. BGH Judgment, 20 December 2018 - 3StR 236/17; BGH, Decision, 17 November 2016, AK 54/16; KG Berlin, 2a. Strafsenat Judgment, 1. March 2017 (2A) 172 OJs 26/16 (3/16); BGH, Judgment, 27. July 2017, 3 StR 57/17; OLG Stuttgart, 11 August 2018 - 6 - 32 OJs 9/17; BGH, 3 StR 149/18 - Judgment. 23 August 2018; BGH, Decision, 4 April 2019, AK 12/19.

³⁸ Siehe Bungenberg, *Extraterritoriale Strafrechtsanwendung bei Verbrechen gegen die Menschlichkeit und Völkermord in Archive des Völkerrechts*, 2001/39, pp. 177-178; MüKoStPO/Teßmer, StPO § 153f, Rn. 8-9.

However, this can only apply if the extradition of the person concerned is permitted and is actually intended.³⁹

48. However, there are considerable legal concerns about the admissibility of extraditing the perpetrators to Azerbaijan. In the event of a request for extradition from the Republic of Azerbaijan, if the perpetrators are transferred by the German authorities, it cannot be assumed that the extradition will ever achieve the objective of making the perpetrators responsible.

49. Reference is to be made to the ECtHR Judgment on 26 May 2020, *Makuchyan, Minasyan v. Hungary, Azerbaijan*, Application No. 17247/13. In the case of Safarov, Azerbaijan violated the European Convention on Human Rights by releasing an extradited officer who used an axe to murder an Armenian soldier during the training in Hungary:

Para. 164. "However, instead of continuing to enforce R.S.'s prison sentence - as stipulated in the letter from the Azerbaijani Government to the Hungarian Government that was sent during negotiations regarding R.S.'s transfer, immediately upon his return, R.S. was set free.

Para. 172. In view of the foregoing, the acts of Azerbaijan in effect granted R.S. impunity for the crimes committed against his Armenian victims. This is not compatible with Azerbaijan's obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

*Para 173. There has thus been a violation of Article 2 of the Convention by Azerbaijan under its procedural limb".*⁴⁰

50. If Azerbaijani war criminals are staying in Germany, the German authorities would in principle have an obligation to arrest the perpetrators and initiate criminal proceedings, since it can be reasonably assumed that criminal proceedings would not take place in Azerbaijan in the case of extradition, and therefore the preconditions for requirement according to § 153 f (2) 2 StPO would not be given.

³⁹ See the principle *aut dedere, aut judicare*: Safferling/Petrossian, *Kriegsverbrecher unter den Flüchtlingen - Der Umgang der deutschen Justiz mit verdeckt nach Deutschland einreisenden Völkerrechtsverbrechern*, in: JA 2019/51, p. 404.

⁴⁰ ECtHR, Judgment, 26 May 2020, *Makuchyan, Minasyan v. Hungary and Azerbaijan* No. 17247/13, at: <http://hudoc.echr.coe.int/eng?i=001-202524>; ECtHR, Press Release: ECHR 140 (2020), 26 May 2020.

51. A stay in Germany means if the suspect - even temporarily - is present in Germany. The presence in transit is sufficient.⁴¹ The accused only has to stay in Germany for as long as is necessary for his arrest. It does not matter whether the presence in Germany is voluntary or involuntary. The so-called principle of universal jurisdiction also applies in France, Great Britain, Belgium, Finland, Ireland, Spain, Sweden, the Netherlands, Switzerland and Austria.
52. Accordingly, the soldiers of the Azerbaijani armed forces who were involved in the war crimes committed from the 12th to 16th July 2020 may be persecuted and punished in Germany and in another European country where the universal jurisdiction applies to war crimes.⁴²

IV. Threat of bombing the Republic of Armenia's nuclear power plant as an internationally wrongful act

53. After the most serious fighting on the border between the Republic of Armenia and the Republic of Azerbaijan in four years, the Ministry of Defense of Azerbaijan threatened on 16 July 2020 that they could bomb the Armenian nuclear power plant in Metsamor, Armenia: *"The Armenian side should not forget that the latest missile systems in our army's arsenal allow it to hit the Armenian nuclear power plant with high accuracy, which can lead to a major catastrophe for Armenia"* said Azerbaijan's Defense Minister Vagif Dargahli, Chief of Press.⁴³
54. With regard to threats and acts in connection with nuclear facilities in the context of an armed conflict, international law only contains declarations and prohibitions that can only provide effective protection and prevent humanitarian, environmentally hazardous disasters if the international community acts together.⁴⁴

⁴¹ MüKoStPO/Telßmer, *StPO*, § 153f, Rn. 18.

⁴² This includes the war crimes committed in 2016, see "Artsakh Ombudsman's second interim report on atrocities committed by Azerbaijan during the 2016 April war, public and restricted versions, 2016", at: http://www.ombudsnkr.am/en/docs/Report_PUBLIC.pdf.

⁴³ Forbes, "Azerbaijan Threatens Chernobyl-Style 'Catastrophe' In Caucasus Drone War", 17 July 2020, at: <https://www.forbes.com/sites/davidhambling/2020/07/17/threat-of-chernobyl-style-catastrophe-in-caucasus-drone-war/#20a0da597946>.

⁴⁴ See Krell, *Umweltstrafrecht*, 2017, p. 16.

Nuclear Terrorism Convention

55. The International Convention for the Suppression of Acts of Nuclear Terrorism was signed in New York on 13 April 2005.⁴⁵ The contracting parties also include Armenia and Azerbaijan. According to Article 2 (1) (b) ‘any person commits an offense within the meaning of the Convention if that person unlawfully and intentionally uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material’. According to Article 2 (2) (a) ‘any person also commits an offence if that person threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b) of Article 2’.

56. The threat of damage to a nuclear facility alone violates the international convention to combat nuclear terrorist acts.

57. According to Article 4 (2) of the Convention on Nuclear Terrorism, the activities of armed forces during an armed conflict within the meaning of international humanitarian law and activities undertaken by military forces of a State in the exercise of their official duties are not governed by this Convention⁴⁶

58. The Azerbaijan armed forces also threatened the attack, so that the provisions of the Nuclear Terrorism Convention are not fulfilled.

59. Pursuant to Article 4 (1), the Convention does not affect the other rights, obligations and responsibilities that arise for states and individuals from international law, in particular the aims and principles of the UN Charter and international humanitarian law. According to Article 4 (3) of the Nuclear Terrorism Convention, Article 4 (2) should not be interpreted as if it would otherwise excuse illegal acts or be lawful.

⁴⁵ BGBl. II Nr. 33 v. 30. Oktober 2007, S. 1586.

⁴⁶ See C. Joyner, Countering Nuclear Terrorism in K. Samuel, N. White, Counter-Terrorism and International Law, 2017, p. 230.

60. The preamble to the Nuclear Terrorism Convention therefore expressly emphasizes that excluding certain acts of the armed forces from the scope of the Convention does not mean that otherwise illegal acts will be excused or are lawful, or that criminal prosecution under other laws will be prevented.

61. In order to establish that the Azerbaijan Ministry of Defense's threat to attack the Armenian nuclear power plant is contrary to international law, international norms outside of the framework of the Convention on Nuclear Terrorism must be considered.

Rome Statute

62. According to Article 8 (2)(b)(iv) of the Rome Statute, the following acts amount to war crimes: *'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.'*⁴⁷

Geneva Convention Additional Protocol I

63. According to Article 35 (3) of the GC AP I, it is prohibited to use methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.⁴⁸

64. According to Article 55 (1) of the GC AP I, in warfare it must be ensured that the natural environment is protected against widespread, long-term and serious damage. This protection includes the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby endanger the health or survival of the population. According to Article 55 (2) of the GC AP I, attacks against the natural environment by way of reprisals are also prohibited.

⁴⁷See Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict*, 2008, p. 202.

⁴⁸ See United Nations, "Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972", at: <https://digitallibrary.un.org/record/523249>; Allan, *The international crime of ecocide*, 1996 in California Western International Law Journal 215, p. 26.

65. According to Article 56 (1) of the GC AP I, nuclear power plants may not be attacked even if these objects are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population. According to Article 56 (4) of the GC AP I it is also prohibited attacking nuclear power plants by way of reprisals.

International customary law

66. In the absence of ratification of the Rome Statute and GC AP I by Azerbaijan, customary international law must be considered. State practices as far as it concerns methods of warfare and the use of conventional weapons, show a widespread and practically uniform acceptance of the customary nature of the rules of Article 35 (3) and 55 (1) of the GC AP I,⁴⁹ also bound by Azerbaijan. It provides that States are generally prohibited to launch an attack or employ means and methods of warfare that cause long-term, widespread and serious environmental damage in times of international armed conflict. However, this cannot easily be applied for the threat to launch an attack.

67. The resolutions of the United Nations General Assembly and the General Conference of the International Atomic Energy Agency are applicable to the threat of attack on nuclear facilities.

UN Charter

68. Nuclear terrorist attacks have been on the United Nations agenda in the past. A case from 1983 in which the United Nations General Assembly had to deal with the question of the threat of attack and the destruction of nuclear facilities is relevant. After an unexpected Israeli airstrike on 7 June 1981, during which an Iraqi nuclear reactor under construction was destroyed 17 kilometers southeast of Baghdad, the United Nations General Assembly adopted Resolution 38/9 on 10 November 1983.⁵⁰

69. In § 3 of the Resolution, it explicitly stated that any threat to attack and destroy nuclear facilities in Iraq and other countries is in violation of the UN Charter. At the same time, the General Assembly urged Israel to withdraw immediately the threat of attacking and

⁴⁹ See *Rule 45 ICRC*, at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁵⁰ UN General Assembly, Resolution 38/9, 10 November 1983.

destroying nuclear facilities in Iraq and other countries, and urged the UN Security Council to take the necessary measures to prevent Israel from carrying out such attack on nuclear facilities.

70. In accordance with Article 35 (1) of the UN Charter, Armenia can draw the UN Security Council or the UN General Assembly's attention to the nuclear threat by Azerbaijan to determine whether the situation threatens the maintenance of international peace and security.
71. Under Article 11 (2) of the UN Charter, the General Assembly may discuss any issue relating to the maintenance of international peace and security that a member of the United Nations addresses under Article 35 of the UN Charter.
72. Under Article 39 of the UN Charter, the Security Council determines whether there is a threat or a breach of the peace or an act of aggression; makes recommendations or decides which measures are to be taken on the basis of Articles 41 and 42 of the UN Charter in order to maintain or restore world peace and international security.

IAEA Statute

73. The International Atomic Energy Agency (IAEA) has set the objective of accelerating and increasing the contribution of nuclear energy to peace, health and prosperity worldwide, in accordance with Article 2 of the IAEA Statute. The organization shall within its means ensure that the assistance it provides either at its request or under its supervision or control is not used to promote military purposes.
74. The IAEA, of which Azerbaijan is a member, said in several resolutions between 1985 and 1990 that it considered both an attack and the threat to attack to a nuclear facility to be contrary to international law.
75. Pursuant to § 2 of Resolution GC (XXIX)/RES/444⁵¹ on the Protection of Nuclear Installations for Peaceful Purposes against Armed Attacks of 27 September 1985, the IAEA

⁵¹ IAEA, GC, Protection of Nuclear Installations devoted to Peaceful Purposes against Armed Attacks, GC/XXIX/RES/444, 27 September 1985.

considers that any armed attack on or threat of nuclear facilities will violate the principles of the United Nations Charter, international law and the Agency's Statute.

76. Furthermore, in the preamble to Resolution GC (XXX3)/RES/475⁵² of 5 October 1987 on measures to strengthen international cooperation for nuclear safety and radiological protection, the Agency's General Conference expressed serious concerns: *"An armed attack on a nuclear facility could lead to the release of radioactive materials with serious consequences inside and outside the state borders that were attacked"*.

77. In § 3 of Resolution GC (XXXIV)/RES/533 of 21 September 1990 on the prohibition of all armed attacks against core installations developed for peaceful purposes, whether under construction or in operation, the General Conference recognizes that an armed attack or the threat to an armed attack on a secure nuclear facility that is in operation or under construction creates a situation in which the United Nations Security Council should act immediately in accordance with the provisions of the UN Charter.

Azerbaijani criminal code

78. In the Criminal Code of the Republic of Azerbaijan, the attack on nuclear facilities during confrontations is a crime.

79. According to Article 116.0.2 of the Criminal Code of Azerbaijan it is to be imposed a sentence of imprisonment ten to twenty years or a life sentence for anyone who deliberately causes widespread, long-term and serious environmental damage in violation of norms of international humanitarian law during an armed conflict.⁵³

80. The same penalty exists according to Article 116.0.12 of the Criminal Code of Azerbaijan in the case of an attack on structures, the destruction of which can lead to large losses among civilians or cause considerable damage to civilian objects.

⁵² IAEA, GC, Measures to Strengthen International Co-Operation in Nuclear Safety and Radiological Protection, GC(XXX3)/RES/475, 5 October 1987, see also IAEA, General Conference, GC (XXXI)/832, 25. September 1987, (c).

⁵³ See criminal code of Azerbaijan at: <https://www.wipo.int/edocs/lexdocs/laws/en/az/az017en.pdf>.

81. **Since the threat of Azerbaijan to bomb the Armenian nuclear power plant is already contrary to international law, the international community is required to send a political signal in the form of a corresponding resolution in the institutions of the United Nations, of the IAEA, of the Council of Europe and the European Union.**

V. Armenophobia: Anti-Armenian hate rhetoric and racial discrimination

82. The internationally wrongful acts of the Republic of Azerbaijan and war crimes committed by the armed forces apart from political interests, have their origin in Armenophobia, which is deeply rooted both in Azerbaijani society and in the political elite. Racism, xenophobia and hatred of Armenians are an important part of the country's domestic and foreign policy agenda through state-sponsored propaganda.
83. It is necessary to refer to historical events in which state-sponsored racial discrimination has led to serious humanitarian consequences. The Nuremberg Racial Laws and the "*Der Stürmer*" bulletin formed the basis of racial discrimination during the Nazi era. The International Military Tribunal in Nuremberg characterized the bulletin "*Der Stürmer*" as poison which was injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination.⁵⁴
84. During the genocide in Rwanda, radio played a vital role in promoting the atrocities. The radio station "Radio-Télévision Libre des Milles Collines" (RTLM), also called Hate Radio, was the most important instrument for the propaganda and the dissemination of the instructions to a largely illiterate population and crucial for the coordination of the Hutus massacre of the Tutsis. The title "Radio Machete" was assigned to the channel because of its completely uninhibited calls for violence and hatred.⁵⁵
85. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (ICERD)⁵⁶ designates racial discrimination as any

⁵⁴ *IMT, Office of Chief of Counsel for the Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Judgment, 1947, § 56.*

⁵⁵ *ICTR, Prosecutor v. Nahimana et al. (Media Case), Urteil, Verfahrenskammer, 3. December 2003, § 1025.*

⁵⁶ BGBl. 1969 II S. 961.

distinction, exclusion, limitation or preference based on race, color, race, national origin or ethnicity which has the aim or the result of preventing or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms in political, economic, social, cultural or any other area of public life.⁵⁷

86. Armenians form an independent ethnic group, which differs in history, religion, language and genetics from other ethnic groups. Discrimination occurs when a person or group of Armenian origin is treated disadvantageously because of their race or ethnicity.⁵⁸

87. Under Article 2 (1) of the ICERD, the State Parties condemn racial discrimination and undertake to immediately pursue through all appropriate means, a policy to eliminate racial discrimination in all forms and promote understanding among all races.

88. According to Article 4 of the ICERD, the contracting states are obliged to undertake immediate and positive measures to eliminate any incentive to racial discrimination and all racially discriminatory acts. For this purpose, they take account of the principles laid down in the Universal Declaration of Human Rights and the rights enshrined in Article 5 of the ICERD.⁵⁹

89. Article 14 of the ECHR prohibits the Member States to discriminate on grounds of sex, race, skin color, language, religion, political or other belief, national or social origin, belonging to a national minority, or wealth, birth or other status.

90. In violation of these international law obligations, the Azerbaijani government takes all possible measures to not only prevent racial discrimination, but orchestrates the policy of racial discrimination against Armenians.⁶⁰

⁵⁷ Since 1996 is Azerbaijan member to the convention.

⁵⁸ See National Research Council, *Division of Behavioral and Social Sciences and Education, Committee on National Statistics, Panel on Methods for Assessing Discrimination, Measuring Racial Discrimination*, 2004, pp. 40-41.

⁵⁹ See also ECtHR, *Timishev v. Russland*, Judgment, 13 December 2005, § 58.

⁶⁰ See UN Committee on Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, 14 April 2005, CERD/C/AZE/CO/4. 14 April 2005, § 10.

91. The European Commission against Racism and Intolerance (ECRI) confirmed in 2016: *“Politicians, educational institutions and the media continue to use hate speech against Armenians. A whole generation of Azerbaijanis has grown up with this hateful rhetoric. Human rights defenders working for, among other things, reconciliation with Armenia have been sentenced to heavy prison terms for controversial allegations and there are serious concerns that provisions against hate speech against the Talysh minority have been abused”*.⁶¹ A corresponding policy change towards Armenians has not been implemented in Azerbaijan.⁶²
92. The promotion of Armenophobia in the Republic of Azerbaijan was also addressed in the judgment of the European Court of Human Rights on 26 May 2020.⁶³ The Court noted that the testimony of a number of the Azerbaijani officials glorifying Ramil Safarov's actions and granting pardon was particularly worrying. It also expressed a strong disapproval of the fact that a large majority of officials expressed particular support for the fact that the crimes were directed against Armenian soldiers and therefore congratulated Ramil Safarov for his actions and called him a patriot, a role model and a hero.⁶⁴
93. On 15 July 2020, thousands of people took to the streets in Azerbaijan and called to start a war against Armenians.⁶⁵ On 6 July 2020, Azerbaijan President Aliyev named Armenia as *"a country of criminals, thieves and bribes"*.⁶⁶ The case of Safarov, the glorification of Safarov and the awards of the war criminals of 2016 as heroes⁶⁷ had previously provided sufficient breeding ground for Armenophobia in Azerbaijan.

⁶¹ European Commission against Racism and Intolerance, *ECRI Report on Azerbaijan*, 17 March 2016, CRI(2016)17, p. 9.

⁶² Ibid, § 29: *“ECRI reiterates its recommendation that the Azerbaijani authorities ensure that public officials at all levels refrain from hate speech towards Armenians”*; European Commission against Racism and Intolerance, *ECRI Conclusions on the Implementations of the Recommendations in respect of Azerbaijan, Subject to Interim Follow-up*, 3. April 2019, CRI(2019)22, p. 5.

⁶³ ECtHR, *Judgment*, 26 May 2020, *Makuchyan, Minasyan v. Hungary, Azerbaijan*, Application No. 17247/13, §§ 213-221., at: <http://hudoc.echr.coe.int/eng?i=001-202524>.

⁶⁴ Ibid. § 216.

⁶⁵ Deutsche Welle, *“Demonstranten in Aserbajdschan verlangen Militäroffensive gegen Armenien”*, 15 July 2020, at: <https://www.dw.com/de/demonstranten-in-aserbajdschan-verlangen-milit%C3%A4roffensive-gegen-armenien/a-54187032>.

⁶⁶ Official website of the President of the Republic of Azerbaijan, *“Ilham Aliyev attended the inauguration of modular hospital for treatment of coronavirus patients opened in Khatai district of Baku”*, 6. July 2020, at: <https://en.president.az/articles/39491>; Eurasianet, *“Azerbaijani president calls into question negotiations with Armenia”*, 7 July 2020, at: <https://eurasianet.org/azerbaijani-president-calls-into-question-negotiations-with-armenia>.

⁶⁷ See e.g. Erməni zabitin başını kəsən döyüşçü: "Hər şey bir göz qırpmında baş verdi" at:

94. It comes therefore not as a surprise that Jeyhun Bayramov, who had promoted state-Armenophobia in kindergartens and schools during his time as the Minister of Education, was appointed as the new Foreign Minister of Azerbaijan during the armed conflict with Armenia on 16 July 2020.⁶⁸
95. **The above aspects show that the Republic of Azerbaijan continues to violate its international legal obligation to implement the ECRI recommendations and to combat racial and racist propaganda.**

VI. Conclusion

96. The use of force is fundamentally prohibited. Azerbaijan's attack on the Republic of Armenia, which is internationally wrongful act, is an aggression in accordance with Article 2 (4) of the UN Charter.
97. The targeted fire on the civilian population and civilian objects is a violation of international humanitarian law and therefore give rise to a state responsibility of the Republic of Azerbaijan.
98. Violations of international humanitarian law also lead to individual criminal responsibility of the perpetrators under criminal law. The actions of the Azerbaijani armed forces represent war crimes according to § 11 VtGB and are therefore also punishable in Germany.
99. The threat of Azerbaijan to attack on the Armenian nuclear power plant is an act contrary to international law, urging the United Nations institutions to act.
100. The state-sponsored propaganda in promoting Armenophobia in the form of racism and xenophobia is a violation of Azerbaijan's obligations under international law.

https://big.az/310550-ermeni_zabitin_basini_kesen_doyuscu_her_sey_bir_goz_qirpiminda_bas_verdi.html.

⁶⁸ ArtsakhPress, “Artsakh Ombudsman: New Azerbaijani FM used to be Edu Minister when kindergartens were teaching kids to hate Armenians”, at: <https://artsakhpress.am/eng/news/129515/artsakh-ombudsman-new-azerbaijani-fm-used-to-be-edu-minister-when-kindergartens-were-teaching-kids-to-hate-armenians.html>.