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Memorandum



Memorandum on the humanitarian and human rights consequences following the 2020 outbreak of hostilities between Armenia and Azerbaijan over Nagorno-Karabakh

Introduction

1. The present memorandum by the Council of Europe Commissioner for Human Rights (hereinafter, “the Commissioner”) addresses the humanitarian and human rights consequences following the 2020 outbreak of hostilities between Armenia and Azerbaijan over Nagorno-Karabakh.¹ While there are still pending human rights issues from the previous major outbreak of hostilities which took place from 1991 to 1994, it is not the purpose of this memorandum to deal with the entire consequences of the conflict in the 1990s.²
2. The 2020 hostilities, which lasted 6 weeks, resulted in the loss of more than 6 500 lives and severe hardship for people living in the conflict-affected areas. The Commissioner wishes to pay respect to those who died and extends deep sympathies to their families, and also acknowledges the suffering of those who have been injured and displaced. The hostilities ended with the statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation on a complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict, signed on 9 November 2020 (hereinafter, “the trilateral statement”).
3. According to her mandate, the Commissioner shall contribute to the promotion of the effective observance and full enjoyment of human rights in the member states.³ In 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1606 on areas where the European Convention on Human Rights (hereinafter, “the ECHR”) cannot be implemented.⁴ The main thrust of the Recommendation was to ensure that there are no gaps in the human rights protection system throughout the European continent. In the same vein, the Committee of Ministers adopted in 2004 the Declaration on the protection of human rights during armed conflict, internal disturbances and tensions.⁵ In the Declaration, the Committee highlighted the possible role which could be played by the Commissioner in those situations. It commended the activities already undertaken by the Commissioner with a view to the prevention of human rights violations and “encourage[d] the Commissioner to continue to pay particular attention to situations where there is a threat or where there are allegations of serious and massive violations of human rights, notably by further developing fact-finding and the formulation of targeted recommendations to which appropriate follow up should be given.”

¹ Nothing in this document can be interpreted as being contrary to the full respect of the sovereignty and territorial integrity of Armenia and Azerbaijan within their internationally recognised borders, the provisions of the 1993 UN Security Council Resolutions and the [Statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation](#) of 9 November 2020.

² This memorandum was finalised on 21 October 2021.

³ [Resolution 99 \(50\)](#) on the Commissioner for Human Rights, adopted by the Committee of Ministers of the Council of Europe on 7 May 1999 at its 104th session.

⁴ [Recommendation 1606 \(2003\)](#) on areas where the European Convention on Human Rights cannot be implemented, adopted by the Assembly on 23 June 2003.

⁵ [Declaration](#) on the protection of human rights during armed conflict, internal disturbances and tensions, adopted by the Committee of Ministers of the Council of Europe on 21 January 2004 at the 869th meeting.

4. The Commissioner closely monitored the situation before and after the signature of the trilateral statement last November. However, she regrets that so far, it was not possible for her to travel to the conflict-affected areas in order to carry out independent and impartial human rights monitoring in line with her mandate, notably due to difficulties related to access to all territories where people affected by the recent hostilities reside. This memorandum aims at serving as a basis for a renewed dialogue with the relevant authorities and builds on work carried out by the Commissioner's Office over the years in conflict and post-conflict situations. The purpose of the memorandum is to assess the human rights situation in the conflict-affected areas and to highlight humanitarian and human rights issues which require urgent attention. While there is certainly a need for political solutions which go beyond the Commissioner's mandate, several important actions should be taken to protect the human rights of the people affected by the conflict. In this context, the Commissioner formulates eight recommendations for urgent human rights protection.
5. The memorandum was prepared on the basis of the continuous monitoring carried out by the Commissioner's Office and the information received from civil society representatives and other relevant actors, including during online meetings organised between June and September 2021. In the preparation of the memorandum, the Commissioner held online consultations with the Human Rights Defender of the Republic of Armenia, Arman Tatoyan, and the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Sabina Aliyeva. The Office also sent a list of questions to the authorities of Armenia and Azerbaijan. The Commissioner would like to express her appreciation to the Armenian authorities for their written reply and she is grateful to all the stakeholders for sharing their views, knowledge and insights.
6. The memorandum begins by outlining the key issues regarding access to the areas affected by the conflict and the importance of human rights monitoring (Section I). It then explores the human rights of displaced persons and the right to return (Section II); the right to be protected against the danger posed by mines and explosive remnants of war (Section III); the right of captives to receive protection (Section IV); the right to know the fate and whereabouts of missing persons (Section V); the need for independent and effective investigations into serious human rights violations reported in relation to the conflict (Section VI); indiscriminate attacks and the right to life (Section VII) and the need to combat hate speech, promote peaceful co-existence, and initiate steps toward reconciliation among the affected communities (Section VIII). Each section starts with the Commissioner's main recommendation.

I. The need to ensure access to the areas affected by the conflict and independent human rights monitoring

Recommendation no. 1:

To ensure free and unhindered access of humanitarian assistance and international human rights missions to all areas affected by the conflict.

7. Under the rule of customary international law, the well-being of the population has to be a basic concern of those involved in a conflict.⁶ For a successful relief and recovery operation in the areas affected by the conflict, it is imperative that humanitarian actors are given access to all these areas so that assistance can reach all those in need.
8. The trilateral statement provides that economic and transport connections in the region shall be unblocked but does not foresee any specific provision regarding access to all people residing in Nagorno-Karabakh. The Commissioner observes that access to the conflict-affected territories, in particular Stepanakert/Khankendi and surrounding areas, remains very limited for organisations providing humanitarian relief, as well as for human rights monitoring missions, and that obstacles are increasingly being placed on such missions. The Commissioner has received reports indicating that both countries have stated their preferences for access to the above-mentioned areas to be

⁶ See European Commission for Democracy through Law (Venice Commission), [Opinion](#) on the Law on occupied territories of Georgia, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), para. 35. This includes allowing and facilitating rapid and unimpeded passage of humanitarian relief for civilians in need (Rule 55 of the Rules of Customary International Humanitarian Law).

considered only from the territories under their respective control and subject to various further restrictions and preconditions which amount to insurmountable obstacles being placed on the access to the conflict-affected areas. She regrets that the positions of the parties to the conflict on this issue is detrimental to civilians who are already victimised by the conflict.

9. In view of the very tense situation on the ground and recurrent incidents and lives lost at the border, there is a clear need for continuous international human rights monitoring and presence on the ground. The trilateral statement envisages that the return of the internally displaced persons and refugees to Nagorno-Karabakh and adjacent areas should be carried out under the supervision of the United Nations High Commissioner for Refugees (UNHCR). At the time of drafting of this memorandum, a continuous UNHCR presence in all areas affected by the conflict has not yet been established. More broadly, no independent monitoring mechanism has been put in place in the areas affected by the conflict allowing to systematically collect and analyse information concerning human rights and/or humanitarian law violations and to swiftly act upon them. In this context, it is important that international human rights expertise and support is made available and accessible to all people affected by the conflict, and that local human rights monitoring and capacity are supported. Both civil society and ombudsman institutions have a critical, constructive role to play in this respect.
10. The Council of Europe monitoring bodies, with their respective expertise, should be able to access all areas affected by the conflict, to assess the situation in accordance with their respective mandates. The Commissioner recalls that the Parliamentary Assembly of the Council of Europe reaffirmed “the legal obligations on Council of Europe member States to co-operate fully and in good faith with international human rights monitoring mechanisms, including those of the Council of Europe and the United Nations”⁷ and to grant unlimited access to conflict-affected territories.
11. The issue of access should therefore be resolved as a matter of priority. The Commissioner calls on all the relevant authorities to come up with effective and flexible modalities of access enabling humanitarian and human rights actors to reach out to all those in need of urgent humanitarian assistance and human rights protection. This would allow other actors playing a role in post-conflict situations to have access to areas where they are needed.

II. The human rights of displaced persons and the right to return

Recommendation no. 2:

Persons displaced by the conflict have the right to return to their homes or places of habitual residence. Returns should be voluntary, and they should be carried out in conditions of safety and dignity. Accurate information should be provided to candidates for return in order to ensure that their choice is informed.

12. The Commissioner addressed the human rights issues of internally displaced persons (IDPs) in her report on Azerbaijan following her 2019 visit.⁸ The conflict in the 1990s produced around 700 000 IDPs in Azerbaijan. The vast majority of these IDPs originated from the seven districts surrounding the Nagorno-Karabakh area, which have now returned under Azerbaijan’s control. In her report, the Commissioner commended the important steps taken by the authorities to address the human rights situation of IDPs. She is also aware of the remarkable generosity and solidarity shown by the country’s people and civil society in responding to their needs over the past decades.

⁷ [Resolution 2240 \(2018\)](#) on Unlimited access to member States, including “grey zones”, by Council of Europe and United Nations human rights monitoring bodies, adopted by the Assembly on 10 October 2018.

⁸ [Report](#) on the Commissioner's visit to Azerbaijan on 8-12 July 2019, CommDH(2019)27, 11 December 2019.

13. The 2020 outbreak of hostilities forced tens of thousands of people living near the conflict area into temporary displacement within Azerbaijan.⁹ While most of them have returned, some are still in need of humanitarian assistance. Furthermore, the return of those displaced in the 1990s to the territories returned to Azerbaijan under the trilateral statement will continue to be an important issue. The Commissioner's interlocutors all agreed that, given the level of mine contamination¹⁰ and destruction in these territories, these returns might take time. In the meantime, the Commissioner believes that the recommendations set out in her 2019 report on Azerbaijan continue to be relevant.
14. Due to the armed conflict, around 91 000 persons (out of the total estimated population of 145 000) were forced to leave their homes in Nagorno-Karabakh and adjacent areas. Many of them moved to Armenia while others had to relocate to Stepanakert/Khankendi and nearby areas. 88% of them were reported to be women and children.¹¹ Many of them have since returned to Stepanakert/Khankendi and other areas, where Russian peacekeepers are deployed. As of May 2021, some 36,989 persons were in a refugee-like situation in Armenia.¹² 15-20 000 of them reportedly come from regions now under the control of Azerbaijan.
15. Armenian civil society and the population in general have demonstrated a strong sense of solidarity and support towards persons displaced by the conflict, including by providing shelter and necessities to them. Such efforts were all the more outstanding as at the same time the population was faced with the consequences of the COVID-19 pandemic and related economic difficulties.
16. The Armenian authorities, on their part, have launched cash support programmes, both for persons displaced by the conflict and for their hosts, as well as those who stayed in Nagorno-Karabakh, and have provided food assistance and temporary accommodation in public premises and hotels. According to the authorities, some 15 000 persons have benefitted from such accommodation, and 1 000 of them are still residing in such facilities.¹³ Specific attention has been paid to older persons and persons with disabilities. Persons displaced by the conflict have also benefitted from access to free health care, education for children and programmes of access to temporary employment and training. International support to cater for the needs of persons displaced by the conflict was coordinated through an Inter-Agency Response Plan.
17. Difficulties inherent to post-conflict situations and displacement have been compounded by the fact that a substantial share of the persons displaced by the conflict in Armenia was estimated to have special needs and specific vulnerabilities: according to monitoring carried out by UNHCR, 20% of the persons interviewed had specific needs, including persons with disabilities, single women, persons with serious medical conditions, elderly at risk, pregnant women, unaccompanied or separated children and children in extended families.
18. Moreover, many of the persons displaced by the conflict have experienced significant trauma. Children have been particularly affected by the war and their subsequent displacement and needs for psychosocial assistance are reported to be high. Instances of gender-based and domestic violence have reportedly been on the rise, and children and women are likely to be at higher risk of abuse and sexual exploitation. Access to health care adapted to the needs of the persons displaced by the conflict has been limited by the overburdening of Armenia's health care system due to the impact of the COVID-19 pandemic and the need to treat war victims. Measures to prevent the spreading of the COVID-19 pandemic have been put in place, although it is reported that they have not systematically been implemented in practice. Moreover, a lack of clear guidance and eligibility criteria in the provision of emergency housing and other assistance has been reported.
19. One year after the end of the conflict, challenges and needs faced by the population displaced by the conflict remain high. A share of the persons displaced by the conflict are unlikely to return to

⁹ UNHCR, [Urgent needs in Armenia and Azerbaijan](#) related to the Nagorno-Karabakh conflict, February 2021. In Azerbaijan, 112 000 people were found to be affected by the conflict, of whom 80 000 were temporarily displaced.

¹⁰ See below, Section III.

¹¹ Migration Service of the Republic of Armenia, quoted by UNHCR, [Armenia Protection Monitoring Mid-Year Report](#), January - June 2021, 23 August 2021.

¹² UNHCR, [Armenia Fact Sheet](#), 30 June 2021.

¹³ According to information provided to the Commissioner by the Armenian authorities.

their habitual places of residence as they come from the areas returned to Azerbaijan following the end of hostilities. Intentions among persons displaced by the conflict who are still living in Armenia to return to conflict-affected areas seem to be decreasing.¹⁴ Concerns regarding return prospects include security considerations, especially because of heavy mining, bad housing conditions and the scarce availability of livelihood opportunities and infrastructure.

20. In the Commissioner's view, it is important to acknowledge the fact that a share of the population who fled the conflict and found refuge in Armenia will neither be able nor willing to return to their previous places of residence and that they will need support to integrate locally. There is a dire need for these persons to have access to sustainable sources of income and livelihood, including employment but also agricultural land, especially as cash programmes are being scaled down. Long-term housing solutions are also needed.
21. Anyone who has been displaced due to the conflict and currently living in Armenia or Azerbaijan, including in areas affected by the conflict, should not be coerced either directly or indirectly to return to their former homes, all the more so as many of them have gone through very traumatic experiences. The Commissioner underlines that the right to return is an individual one, thus only the person concerned may elect not to exercise it. It is important to ensure that claims of a right to return are resolved fairly, that individual holders of this right are permitted freely and in an informed manner to choose whether or not to exercise it, and that returns proceed in an orderly manner, without arbitrary or unlawful time limitations. Respecting the choice of the individual displaced person has to be the guiding principle, in accordance with the 1998 UN Guiding Principles on Internal Displacement.¹⁵
22. To ensure that the choice is informed, information on mines and unexploded ordnances should be provided, as well as on the state of play as to restoration of housing and infrastructure destroyed during the conflict and access to vital services such as health care and education. As stressed by UNHCR, under no circumstances should return be encouraged or compelled to areas where the returnees' life, safety, liberty or health would be at risk.¹⁶ A sustainable return implies access to income, including jobs and agricultural land. Property rights issues will also need to be addressed in that context, with the establishment of legal processes to restore property rights or to receive compensation.¹⁷
23. At the same time, those who choose not to return should be provided with an effective opportunity to integrate in their host communities or another community of their choice. Now that the period of emergency response is over it is important to adequately assess the needs of these persons. The Commissioner considers that action plans and other relevant policy initiatives addressing the needs of the persons displaced by the conflict and their host communities should be prepared as a matter of priority. They should include concrete measures aimed at facilitating their access to housing, employment and other livelihood opportunities, as well as access to education, healthcare and their participation in the decision-making processes affecting their situation.

¹⁴ According to interviews carried out by UNHCR in the period of January-February 2021, 30% of the interviewed households expressed willingness to return to their places of origin, while in May-June 2021, this figure went down to 14%. UNHCR, [Armenia Protection Monitoring Mid-Year Report](#), January - June 2021, 23 August 2021.

¹⁵ [Guiding Principles on Internal Displacement](#), 11 February 1998.

¹⁶ UNHCR, [Key Considerations for Returns to Nagorno-Karabakh and the Adjacent Districts](#), November 2020.

¹⁷ In the cases of [Sargsyan v. Azerbaijan](#) (application no. 40167/06, Grand Chamber judgment of 16 June 2015, para. 238) and [Chiragov and Others v. Armenia](#) (application no. 13216/05, Grand Chamber judgment of 16 June 2015, para. 199), the European Court of Human Rights indicated that "it would appear particularly important to establish a property-claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment."

III. The right to be protected against the danger of mines and explosive remnants of war

Recommendation no. 3:

To ensure effective protection of the people residing in the conflict-affected areas from unexploded and abandoned mines and explosive remnants of war. To facilitate this process, all parties should declare what type of weapons and ammunition were used, when and where, and provide those in charge of their clearance with all the mine maps in their possession.

24. The region in and around Nagorno-Karabakh is among the areas most contaminated with mines in the world. There have been more landmine accidents per capita in Nagorno-Karabakh than anywhere else globally, with children comprising a quarter of the victims.¹⁸ Most of the mines were planted during the conflict in the early 1990s. 25 years after the conflict, the mission of the International Committee of the Red Cross (ICRC) in Nagorno-Karabakh had registered 747 cases of landmine victims, of which 59% were civilians.¹⁹ Following the recent outbreak of hostilities, the region was left full of remnants of weapons used during the conflict, including air-dropped weapons and shot down drones, unexploded cluster munitions and unexploded incendiary munitions. In addition, new mines were reportedly laid by retreating Armenian forces at the end of the 2020 hostilities.
25. The Commissioner is aware of the high level of contamination of the region by mines and regrets that many persons, including civilians, have been killed or seriously injured due to the explosion of mines, since the cessation of the hostilities. Between 10 November 2020 and June 2021, 27 persons were killed on the Azerbaijani side, and 115 others were injured as a result of explosions of various types of mines and explosive remnants of war.²⁰ Among the total 142 landmine victims, 49 were civilians.²¹ Over the same period, 5 mine-related incidents took place in Nagorno-Karabakh, resulting in 5 persons being injured.
26. The unexploded ordnances, mines, trenches, conflict debris and toxic remnants of war pose a risk not only to returning civilians but also to the peacekeepers and observers, as well as humanitarian workers. Children, farmers and shepherds are particularly exposed and have often been the victims of landmines and explosive remnants of war. The Commissioner therefore wishes to emphasise the urgent need to clear and remove the explosive remnants of war in the affected areas, so that those living in these areas can return to normal life and displaced persons can go back home as soon as possible.
27. The Commissioner welcomes the fact that demining work on all territories affected by the conflict started immediately after the signature of the trilateral statement, in November 2020. The United Nations Development Programme (UNDP) is supporting the Azerbaijan National Agency for Mine Action (ANAMA) with technical expertise, equipment, capacity development and funding. ANAMA reported that since 10 November 2020 and up until 2 October 2021, it has found and cleared 11 062 pieces of unexploded ordnance, 9 835 pieces of anti-personnel mines and 4 175 pieces of anti-tank mines, with a cleared territory representing 5 537 hectares.²² Azerbaijani officials have given varying timelines as to how long clearing will take, while ANAMA's head of operations estimated that it could take up to 10 years to completely demine the territory.²³ Demining activities in Nagorno-Karabakh are currently carried out by the Russian peacekeeping forces and the local duty-holders in charge of demining as well as the HALO Trust (a British charity). Since 23 November 2020, demining units

¹⁸ The HALO Trust, [Our work, Nagorno Karabakh](#).

¹⁹ ICRC, [Nagorno-Karabakh conflict: Landmines, a disturbing reminder of war](#), 31 May 2019.

²⁰ [Ad Hoc Report](#) of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Mine problems in the liberated areas, June 2021, p.8.

²¹ *Ibid.* According to the [press service](#) of the Prosecutor General's Office, 23 civilians were killed and 36 were injured between 10 November 2020 and 11 August 2021, as a result of mine explosions in Azerbaijan.

²² ANAMA, Informative report report about the areas released and the items found during the humanitarian demining operations, 4 October 2021.

²³ [Azerbaijan clears mines from areas freed in Karabakh](#), Anadolu Agency, 29 November 2020.

of the Russian peacekeeping forces have cleared more than 683 kilometers of roads and more than 2 281 hectares of territory and have discovered and destroyed 25 803 explosive objects.²⁴

28. Until the affected areas are fully cleared of mines and explosive remnants of war, they should be clearly marked, fenced and monitored to protect the population. The Commissioner notes in this regard that the European Court of Human Rights has found positive obligations to arise under Article 2 of the European Convention on Human Rights, protecting the right to life, in the context of a state's failure to locate and deactivate mines. The Court indicated that, in order to discharge its positive obligation under Article 2 of the ECHR, a state has to make efforts to locate and deactivate mines, to mark and seal off the area concerned so as to prevent anybody from entering it freely, and to comprehensively warn the residents of the location of the mines and the risks involved.²⁵
29. The Commissioner calls on the parties to co-operate and proceed to the necessary exchange of data so as to enable swift demining. In this respect, the Commissioner welcomes the handing over by Armenia to Azerbaijan of a map showing almost 100 000 landmines in the Agdam region on 12 June 2021 and of maps of 92 000 mines in the Fuzuli and Zangilan districts on 3 July 2021. She hopes that this process will continue until all maps are made available to those in charge of the demining activities.
30. International co-operation and assistance are needed for the urgent clearance and destruction of remnants of war. This is crucial to prevent further losses of life and severe injuries, eliminate the dangers associated with the presence of explosive remnants of war and mines and speed up the process of recovery of missing bodies. Appropriate awareness raising campaigns among the population, including children, about the risks presented by the mines and unexploded remnants of war are also of the utmost importance to protect civilians.
31. Finally, the Commissioner takes note of the fact that neither Armenia nor Azerbaijan have ratified key international legal instruments which are relevant in this regard. She therefore calls on the Armenian and Azerbaijani authorities to ratify the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) and its relevant protocols,²⁶ which prohibit or restrict the use of certain conventional weapons, such as antipersonnel mines or cluster munitions.

IV. The right of captives to receive protection

Recommendation no. 4:

To respect the human rights of all persons detained in relation to the conflict, in particular their right to life and the prohibition of torture and ill-treatment, and to facilitate their release and return.

32. The trilateral statement requires the parties to "exchange prisoners of war, hostages and other detained persons, and dead bodies."²⁷ The release of captives started on 14 December 2020 and since then several individuals, including civilians, have been handed over by both sides. Both Armenia and Azerbaijan have announced that they have released all prisoners of war. However, the issue of captives, in particular of Armenian captives in Azerbaijan, remains a contentious one which exacerbates the already tense relations between the two countries.

²⁴ Russian peacekeepers have cleared more than 180 hectares of territory in the Martuni district near the demarcation line of the parties in Nagorno-Karabakh, Ministry of Defence of the Russian Federation [News](#), 10 September 2021.

²⁵ ECtHR, [Albekov and others v. Russia](#), judgment of 9 October 2008, para. 88.

²⁶ Protocols II and V to the [CCW](#) regulate the duties of the state parties to the conflict to clear the areas they control after the cessation of hostilities and to facilitate the clearance of explosive remnants of war caused by their munitions in areas they do not control. It requires the parties to locate, mark, fence, remove and destroy all unexploded and abandoned ordnance. In areas not controlled by the party to the conflict the Protocol also requires the provision of detailed information on all munitions used and the provision of assistance to clear explosive remnants of war from such territory.

²⁷ [Statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation](#), signed on 9 November 2020, para. 8.

33. The Commissioner recalls that international humanitarian law protects persons deprived of liberty as a result of armed conflict. The third 1949 Geneva Convention provides that prisoners of war must be released and repatriated without delay after the end of hostilities,²⁸ and that they must be treated humanely in all circumstances. Prisoners of war are protected against any act of violence, as well as against intimidation, insults, and public curiosity.
34. The Commissioner notes that several applications claiming violations of the ECHR, notably in respect of Article 5 (right to liberty and security) and Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) have been lodged before the European Court of Human Rights. The application of Rule 39 (interim measures) of the Rules of the Court was requested in relation to 265 individuals (249 Armenians and 16 Azerbaijanis) allegedly captured by both sides of the conflict.²⁹ Between December 2020 and March 2021, the Court decided to apply Rule 39 with respect to 229 of the 249 Armenians. As regards the other 20 individuals, the examination under Rule 39 was suspended or no decision was taken because the individuals concerned had been repatriated in the meantime. In all these cases, the Court had invited the Azerbaijani government to provide information on the individuals concerned, in particular whether they have been captured, under what conditions they are being held, including any medical examinations or treatment they have undergone, and whether, in view of the exchange of prisoners of war and other detainees envisaged in the ceasefire agreement signed on 9 November 2020, any measures to repatriate the captives have been taken or planned.
35. On 16 March 2021, the Court decided to notify the Committee of Ministers of the Council of Europe of the measures it had taken, having regard to the Azerbaijani Government's failure to respect the time-limits set by the Court for the submission of information on the individuals concerned and the rather general and limited information provided by them.³⁰
36. According to information received by the Commissioner from multiple sources, up to 45 persons appear to be still detained in Azerbaijan and may qualify for a release under the terms of the trilateral statement. The ICRC has access to these detainees and is engaged in ensuring communication between the detained persons and their families, through the organisation of calls or pre-recorded videos. The Ombudsman of Azerbaijan informed the Commissioner that she or her team also regularly visits all those kept in the detention facilities in Azerbaijan. The exact number of remaining captives in Azerbaijan is however unclear. According to the Armenian authorities, 103 Armenian captives had been repatriated as of 5 August 2021 and 106 or 107 persons remain in captivity. The Commissioner regrets that the Azerbaijani authorities have not revealed the exact number of captives, leaving room for speculation and distress for the families concerned. She calls on the Azerbaijani authorities to disclose a full list and locations of Armenian captives.
37. Since the end of the conflict, a number of Armenian citizens have furthermore been arrested and detained by the Azerbaijani military forces along the border for alleged illegal border crossings. This includes 62 Armenian soldiers who were arrested in December 2020 in the Hadrut area. The Commissioner notes that the status of these persons is disputed: while the Armenian authorities consider them as prisoners of war and have asked for their immediate release, the Azerbaijani authorities contend that these persons have committed criminal offences and should serve their sentence in Azerbaijan, as they are not covered by the trilateral statement. The Commissioner notes that these arrests took place in a context of recurrent border incidents while the issue of border demarcation is yet to be settled. These men were subsequently put on trial. More than 60 Armenian captives were convicted in July and August 2021 and sentenced to six months to 20 years in prison on charges including espionage, illegal border crossing and illegal possession of weapons. 15 of them, who were sentenced to six months in prison, were released and repatriated to Armenia on 13 June and 3 July 2021. 5 others were reportedly repatriated to Armenia on 19 October 2021.

²⁸ [Geneva Convention](#) relative to the treatment of prisoners of war of 12 August 1949, Article 118.

²⁹ ECtHR, [The interim measure indicated in the case of Armenia v. Azerbaijan and Rule 39 proceedings with regard to alleged captives to remain in force](#), 16 December 2020. These requests have been brought by the Armenian and Azerbaijani Governments within the framework of two inter-State applications: *Armenia v. Azerbaijan* (no. 42521/20) and *Azerbaijan v. Armenia* (no. 47319/20), as well as by relatives of alleged captives in individual applications.

³⁰ ECtHR, [Armenia v. Azerbaijan and alleged captives: notification to the Committee of Ministers of interim measures indicated](#), 16 March 2021.

38. In addition, the Rapporteur of the Parliamentary Assembly of the Council of Europe, Paul Gavan, compiled a list of 31 individuals allegedly held captive in Azerbaijan.³¹ The list was drawn up on the basis of alleged evidence, including videos, photographs and information on the place and circumstances of their capture and their identities, and handed over to the Prosecutor General and to the Ombudsman of Azerbaijan. To date, the whereabouts or fate of these persons remain unknown.
39. This is all the more worrying in the light of the numerous allegations that prisoners of war and other captives in Azerbaijan have been subjected to inhuman treatment and torture in detention. The Commissioner is dismayed by the credible reports of ill-treatment of prisoners she has received.³² Among others, Human Rights Watch documented several cases in which Azerbaijani forces used violence to detain civilians and subjected them to torture and inhuman and degrading conditions of detention.³³ The Commissioner calls on the Azerbaijani authorities to ensure that all those still in captivity are provided with all protections guaranteed under international humanitarian and human rights law. She joins the call of the Rapporteur of the Parliamentary Assembly that these captives should be released without delay.

V. The right to know the fate and whereabouts of missing persons

Recommendation no. 5:

To co-operate at the international level by providing mutual assistance in the form of information sharing in order to establish the fate of missing and disappeared persons.

40. The Commissioner deplores that 3 945 Armenian and 2 907 Azerbaijani military servicemen as well as over a hundred of civilians died during the 2020 outbreak of hostilities. Death toll estimates are however made difficult by the fact that there are a number of people whose fate is unknown and who are missing. Many families still bear the brunt of the conflict, especially those who have lost a family member or whose relatives remain missing. It is therefore of paramount importance to place the families of missing persons, their legal and practical needs, and their right to know the truth at the centre of all actions concerning this issue.
41. Approximately 3 890 persons are still considered missing in Azerbaijan and around a thousand in Armenia as a result of the conflict in the 1990s.³⁴ The ICRC continues to work with the authorities to clarify their fate and provide answers to the families. There is a new dynamic around these issues in areas returned under Azerbaijan's control and stakeholders from Nagorno-Karabakh have met Azerbaijani authorities to provide information regarding graves or remains of Azerbaijanis killed during the 1990s conflict.³⁵ On 12 February 2021, the remains of 7 bodies presumably belonging to citizens of Azerbaijan who went missing during the 1990s conflict were handed over by the Armenian authorities to Azerbaijan.³⁶
42. As a result of the 2020 outbreak of hostilities, the number of missing people has increased. As of 24 August 2021, 243 servicemen and 28 civilians are reported to be missing on the Armenian side. According to the Ministry of Foreign Affairs of Azerbaijan, 7 servicemen were still considered missing in August 2021.

³¹ Parliamentary Assembly of the Council of Europe, [Report](#) "Humanitarian consequences of the conflict between Armenia and Azerbaijan", Doc. 15363, 13 September 2021, para. 32.

³² See below under Section VI.

³³ Human Rights Watch, [Survivors of unlawful detention in Nagorno-Karabakh speak out about war crimes](#), 12 March 2021.

³⁴ ICRC, [Nagorno-Karabakh: Families of missing persons have the right to know](#), 15 December 2015.

³⁵ International Crisis Group, [Post-war Prospects for Nagorno-Karabakh](#), Europe Report n° 264, 9 June 2021.

³⁶ [Information](#) of the State Commission of the Republic of Azerbaijan on Prisoners of War, Hostages and Missing Persons, 13 February 2021.

43. Recovery operations of bodies remaining in the battlefields began soon after the signature of the trilateral statement. Since the end of the hostilities, the Azerbaijani military together with the Russian peacekeeping forces and the local emergency service from Nagorno-Karabakh, with the assistance of ICRC, have been involved in retrieval operations to recover the remains of dead people from territories returned under Azerbaijan's control. Since 13 November 2020, the remains of 1 647 persons have been found during search operations and returned to Armenia, and the remains of 395 Azerbaijani dead have been returned by Armenia.³⁷
44. Search operations were sometimes complicated by weather conditions and difficulties accessing conflict-affected areas, including due to mine contamination. The expectations from families of missing persons however remain high and they have been holding protests outside governmental buildings in Armenia to get the attention of the authorities and demand a full list of missing people. A growing lack of trust around DNA tests and a general lack of information has also been reported.
45. In Azerbaijan, the State Commission on Prisoners of War, Hostages and Missing Persons is responsible for the development of measures for the search for missing persons and supervises their realisation. It also collects information about citizens of Azerbaijan who are missing and creates the relevant database for the registration and systematisation of this information. In Armenia, an Interagency Commission on Prisoners of War, Hostages and Missing Persons was established and recently discussed issues pertaining to legislative changes, search operations, DNA analysis, psychological support and the provision of financial assistance to the families of missing servicemen. The International Commission on Missing Persons (ICMP) is extending technical assistance to the Armenian authorities for the identification of mortal remains using DNA.
46. The Commissioner commends the efforts made to address the issue of missing persons and retrieve bodies from the battlefields. However, there is a need for more engagement with both sides to promote communication, establish a common database, and increase the chances of location and identification of mortal remains. A uniform system would also facilitate the reporting and exchange of information between the two parties.
47. The Commissioner would like to recall that under customary international humanitarian law, each party to a conflict must take all feasible measures to account for persons reported as missing as a result of the conflict and must provide their family members with any information it has on their fate and whereabouts. All parties to the conflict must therefore make their best efforts to search, and facilitate the search, for persons reported missing due to a conflict, and ensure that the mortal remains of missing persons are located, exhumed, identified, respected and returned to families. Such searches should continue without any time limit until all feasible measures to account for the missing persons have been taken. Victims' associations and non-governmental organisations (NGOs) working on missing persons must be involved in the work of relevant national or other mechanisms dealing with these issues.
48. Failure to disclose information on the fate and whereabouts of missing persons and refusal to hand over the remains of the deceased may amount to enforced disappearance. In this regard, the Commissioner notes with satisfaction the ratification by Armenia of the International Convention for the Protection of All Persons from Enforced Disappearance. This Convention was also signed but not yet ratified by Azerbaijan and the Commissioner therefore recommends that Azerbaijan ratify it. The Convention explicitly establishes the right of every person not to be subjected to enforced disappearance as a non-derogable right. In addition, it affirms that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity with the legal consequences attached to it, and that it is not subject to statutory limitations. Article 17 of the Convention also provides that no one shall be held in secret detention.

³⁷ Parliamentary Assembly of the Council of Europe, [Report](#) "Humanitarian consequences of the conflict between Armenia and Azerbaijan", Doc. 15363, 13 September 2021, para. 16.

49. The European Court of Human Rights has dealt with a number of applications related to missing persons and enforced disappearances in several Council of Europe member states. In all cases of enforced disappearance adjudicated so far, the Court has found a violation of Article 5 of the ECHR (right to liberty and security). The Court applies a presumption of violation of Article 2 of the ECHR (right to life) when the victim has last been seen alive in life-threatening circumstances and the respondent state fails to provide convincing explanations as to his or her fate and whereabouts.
50. In two such cases, the Court found a continuing violation of Article 2 on account of the failure to conduct an effective investigation aimed at clarifying the whereabouts and fate of missing persons who disappeared in life-threatening circumstances.³⁸ The Court also declared an on-going violation of Article 5 and considered Article 3 violated in respect of the families of missing persons, assessing that the silence of the authorities in the face of the real concerns of relatives attained a level of severity that could be categorised as inhuman treatment. Furthermore, the Court provided certain useful indications on the nature of required measures to redress the systemic failure to investigate disappearances, and most notably with a view to eliminating the suffering of the relatives of the victims, in another judgment delivered in 2012.³⁹
51. In the Issue Paper “Missing persons and victims of enforced disappearance in Europe”,⁴⁰ the Commissioner provided detailed observations and recommendations to Council of Europe member states on various aspects of looking into and acting on all cases of missing persons and enforced disappearances, including the strengthening of domestic legislation and the eradication of impunity for enforced disappearance. The Issue Paper also includes an overview of good practices and initiatives undertaken worldwide, in particular with reference to programmes of exhumations; identification and return of mortal remains; the adoption of legislation, including on the rights of victims and relatives of victims of enforced disappearances; thorough investigation and prosecution of those responsible for acts of enforced disappearance; and the provision of reparations to victims. The Commissioner believes that the Issue Paper can also provide useful guidance in the current context.

VI. The need for independent and effective investigations into serious human rights violations reported in relation to the conflict

Recommendation no. 6:

To carry out thorough, prompt, independent and impartial investigations into allegations of serious human rights violations committed during the conflict and its aftermath in order to hold perpetrators to account and provide adequate and effective reparations to the victims.

52. The Commissioner has received a number of reports from NGOs and victims about breaches of international humanitarian law as well as serious violations of human rights by both sides of the conflict. These testimonies range from ill-treatment, torture, decapitation, mutilation or other forms of despoliation of dead bodies, indiscriminate or disproportionate use of force⁴¹ to extrajudicial, summary or arbitrary executions.⁴² In addition, there were many videos and photos published on social media depicting summary executions, humiliating treatment and torture. All of these alleged acts, some of which may amount to war crimes, need to be effectively and promptly investigated, the perpetrators brought to justice and if found guilty after a fair, independent and impartial trial, sentenced and punished.

³⁸ ECtHR, [Cyprus v. Turkey](#), Grand Chamber judgment of 10 May 2001, para. 136; ECtHR, [Varnava and Others v. Turkey](#), Grand Chamber judgment of 18 September 2009, para. 194.

³⁹ ECtHR, [Aslakhanova and Others v. Russia](#), judgment of 18 December 2012.

⁴⁰ Commissioner for Human Rights, Issue Paper [Missing persons and victims of enforced disappearance in Europe](#) (2016).

⁴¹ See below, Section VII.

⁴² There are also allegations relating to the use of mercenaries during the recent conflict. The UN [Working Group on the use of mercenaries](#) is looking into these allegations to ascertain possible links to mercenary-related activities.

53. The Ombudsman institutions in Armenia and Azerbaijan have shared with the Commissioner reports providing evidence of torture and inhuman and degrading treatment committed against prisoners of war and captives during the conflict.⁴³
54. Several NGOs have collected a wealth of material about all of the above-mentioned allegations. Field missions conducted by the International Partnership for Human Rights (IPHR) and Truth Hounds between October 2020 and January 2021 have revealed numerous cases of torture and cruel, inhuman or degrading treatment of Armenian prisoners of war and civilians by Azerbaijani authorities.⁴⁴ IPHR/Truth Hounds also documented at least seven cases of torture and cruel, inhuman or degrading treatment of Azerbaijani prisoners of war by Armenian/Nagorno-Karabakh military personnel and eight instances of despoliation of the dead perpetrated by the military personnel of Armenia/Nagorno-Karabakh.⁴⁵
55. In addition, Human Rights Watch reported about cruel and degrading treatment and torture of prisoners of war either when they were captured, during their transfer, or while in custody at various detention facilities.⁴⁶ Human Rights Watch also documented two cases where detainees died in Azerbaijan in captivity, including one alleged extrajudicial execution.⁴⁷
56. In a 2020 report, Amnesty International analysed 22 videos that depict extrajudicial executions, the mistreatment of prisoners of war and other captives, and desecration of the dead bodies of enemy soldiers by members of the Armenian and Azerbaijani armed forces.⁴⁸ Two verified videos show decapitations by Azerbaijani military members. Amnesty International also examined and verified 11 videos showing inhuman treatment by Armenian forces. Armenian soldiers are seen cutting the ear off a dead Azerbaijani soldier, dragging a dead Azerbaijani soldier across the ground by a rope tied around his feet, and standing on the corpse of a dead Azerbaijani soldier. In other videos, Azerbaijani soldiers are seen humiliating and ill-treating Armenian prisoners.
57. According to information released by the Prosecutor General's Office of Azerbaijan, all videos of alleged abuses by Azerbaijani armed forces were analysed and studied by the Prosecutor General's Office and the Military Prosecution Office of Azerbaijan.⁴⁹ They concluded that most of these videos were fake. At the same time, the Prosecutor General's Office launched criminal proceedings against four Azerbaijani servicemen for desecration of graves and outrages against dead bodies.⁵⁰ To date, there is however no indication that any of the other incidents documented above have been independently, promptly, publicly and effectively investigated by the relevant authorities. There is also no information about any investigations or prosecutions by Armenian authorities in relation to those allegations. The Commissioner would be grateful to receive further information from the authorities about steps taken to investigate allegations of serious human rights violations committed by their own nationals and invites the Ombudsman institutions to follow closely this issue in their respective countries.

⁴³ The Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Report on the facts of torture against Azerbaijani soldiers by the armed forces of Armenia, 17 July 2021 (not public); The Human Rights Defender of the Republic of Armenia, [Ad hoc public report](#), Responsibility of Azerbaijan for torture and inhuman treatment of Armenian captives: evidence-based analysis (the 2020 Nagorno Karabakh war), September 2021.

⁴⁴ IPHR/Truth Hounds/Global Diligence, [When embers burst into flames, International Humanitarian Law and Human Rights Law violations during the 2020 Nagorno-Karabakh War](#), May 2021.

⁴⁵ *Ibid.*, p. 95. At least two Azerbaijani soldiers are accused of committing similar offences against deceased Armenian/Nagorno-Karabakh soldiers.

⁴⁶ Human Rights Watch, [Azerbaijan: Armenian POWs Abused in Custody](#), 19 March 2021.

⁴⁷ Human Rights Watch, [Survivors of Unlawful Detention in Nagorno-Karabakh Speak Out about War Crimes](#), 12 March 2021.

⁴⁸ Amnesty International, [Armenia/Azerbaijan: Decapitation and war crimes in gruesome videos must be urgently investigated](#), 10 December 2020.

⁴⁹ Prosecutor General's Office of the Republic of Azerbaijan, [Four servicemen accused of insulting bodies of Armenian servicemen and tombstones belonging to Armenians](#), 14 December 2020.

⁵⁰ *Ibid.*

58. The Commissioner emphasises that states have the legal obligation under international humanitarian law and the European Convention on Human Rights to hold those responsible for war crimes and serious human rights violations accountable. This should involve not only low-level perpetrators but also their commanders. Impunity for serious human rights violations is a major impediment to building lasting peace and reconciliation. Furthermore, the Commissioner observes a pattern displayed on both sides of the conflict consisting in attributing responsibility for any past or on-going human rights abuses to the opposite side. The Commissioner has also repeatedly stressed the need to address shortcomings and ensure a genuinely independent and impartial review by the judiciary in Armenia and Azerbaijan of complex violations of human rights. In this context, she believes that further steps should be taken to establish individual legal responsibility for the serious abuses committed. This should be done through an independent and credible process.
59. As regards any investigations at the domestic level into the cases of serious human rights violations, including the right to life and the right not to be subjected to torture or inhuman and degrading treatment, they should comply with the general principles established in the case-law of the European Court of Human Rights: first and foremost, independence should be ensured. Furthermore, investigations must be thorough, and all reasonable steps must be taken to secure evidence concerning the incidents in question, including identifying and interviewing the alleged suspects and eyewitnesses. The investigation must be comprehensive and seek to shed light on all significant events and circumstances related to the case. It must also be capable of leading to the identification and punishment of those responsible. Investigations must also be conducted in a prompt and reasonably expeditious manner, without unjustifiable delays. In addition, there should be sufficient public scrutiny of the investigation, and in all cases, the victim or the victim's survivor(s) must be involved in the procedure to the extent necessary to safeguard their interest. These obligations are reiterated in the Council of Europe Guidelines on Eradicating Impunity for serious human rights violations.⁵¹
60. The Commissioner notes that Azerbaijan and Armenia lodged inter-State applications before the European Court of Human Rights⁵² containing allegations of widespread violations of the ECHR, including executions, ill-treatment and mutilations of combatants and civilians. They have also instituted proceedings before the International Court of Justice with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
61. Armenia and Azerbaijan are not States Parties to the Rome Statute of the International Criminal Court (ICC). Armenia has signed but not ratified the Rome Statute and Azerbaijan has neither signed nor acceded to it. Article 8 of the Rome Statute defines war crimes as being grave breaches of the Geneva Conventions and other serious violations of the laws and customs of war, including willful killing, torture, injury to body or health, destruction and appropriation of property, directing attacks against a civilian population, as well as attacks against buildings dedicated to religion, art and historic monuments⁵³ that are not used for military purposes, and wounding or killing a prisoner of war.
62. The ICC is complementary to national courts, meaning that it acts when national courts are unwilling or unable to investigate and prosecute crimes under its jurisdiction. The Commissioner notes that the ICC could be seized through a declaration under article 12.3 of the Rome Statute, which allows non states parties to accept the jurisdiction of the ICC in relation to specific incidents. Such a step would help ensure accountability for the alleged serious human rights violations committed in 2020, while providing guarantees for the legitimacy and credibility of the investigations and prosecutions. The Commissioner furthermore underscores that ratification of the Rome Statute by both countries would be a strong signal of commitment to prevent and prosecute any serious human rights

⁵¹ [Council of Europe Guidelines on Eradicating Impunity for serious human rights violations](#), adopted by the Committee of Ministers in 2011.

⁵² *Armenia v. Azerbaijan* (no. 42521/20) and *Azerbaijan v. Armenia* (no. 47319/20). Armenia also lodged an inter-State case against Turkey (*Armenia v. Turkey*, no. 43517/20).

⁵³ On the impact of the conflict on the cultural heritage of the region, see Parliamentary Assembly of the Council of Europe, [Report](#) "Humanitarian consequences of the conflict between Armenia and Azerbaijan", Doc. 15363, 13 September 2021, para. 115-127.

violations in the future. In the meantime, the Commissioner stresses that other tools to collect and secure evidence and testimonies about the serious human rights violations committed in 2020, such as an independent international Commission of Inquiry, could usefully be considered.

63. In addition to access to justice, all victims of serious human rights violations have the right to adequate, effective and prompt reparation for the harm suffered, in line with the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁵⁴ As detailed in the principles, reparations should be proportional to the gravity of the violations and harm suffered by the victims and should include measures to ensure restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
64. The Commissioner is aware of the fact that the Armenian and Azerbaijani authorities have implemented several compensation measures. This includes allowances to the relatives of civilians killed during the hostilities as well as subsidies for those who suffered a long-term injury during the conflict.
65. The Commissioner stresses the need to put in place effective policies and mechanisms at the national level to ensure effective reparations for the victims and their families, developed in consultation with them. This should include programmes of assistance to survivors of serious human rights violations, including ill-treatment, and their families, striving to ensure their rehabilitation to the highest extent possible.

VII. Indiscriminate attacks and the right to life

Recommendation no. 7:

To renounce the use of cluster munitions and to ensure effective investigations into violations of international humanitarian law, such as indiscriminate and/or disproportionate attacks, identify and bring those responsible to account, and provide adequate and effective reparation to the victims.

66. International humanitarian law imposes a duty on all parties to a conflict to protect civilians and respect the distinction between military targets and civilian objects. Indiscriminate attacks which do not attempt to distinguish between military targets and civilians or civilian objects, as well as attacks aimed at legitimate military targets, but with a disproportionate impact on civilians, are prohibited.
67. The Commissioner is particularly concerned by reports of indiscriminate shelling, by both sides of the conflict, of populated areas resulting in deaths and serious injuries to civilians. During the 2020 outbreak of hostilities, 101 Azerbaijani civilians were killed, while 423 were injured, and 81 Armenian civilians were killed and 163 injured. Many children were killed or injured during the hostilities, while others suffered from the psychological impact of exposure to rocket and missile attacks.
68. According to IPHR/Truth Hounds, at least 32 incidents can be qualified as indiscriminate and/or disproportionate attacks on civilians, of which 23 were perpetrated by the Azerbaijani armed forces, including multiple bombings of Stepanakert/Khankendi, and 9 were perpetrated by the military personnel of Armenia/Nagorno-Karabakh, including the bombing of civilian settlements in Ganja and Barda.⁵⁵ Amnesty International documented several strikes resulting in civilian casualties from both Armenian and Azerbaijani forces on civilian residential areas far from the frontlines, where often there did not seem to be any military targets.⁵⁶

⁵⁴ The [UN Basic Principles and Guidelines](#) were adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

⁵⁵ IPHR/Truth Hounds, [When embers burst into flames, International Humanitarian Law and Human Rights Law violations during the 2020 Nagorno-Karabakh war](#), May 2021, p. 24.

⁵⁶ Amnesty International, [In the line of fire](#), Civilian casualties from unlawful strikes in the Armenian-Azerbaijani conflict over Nagorno-Karabakh, 2021. See also Human Rights Watch, [Azerbaijan: Unlawful Strikes in Nagorno-Karabakh](#), 11 December 2020.

69. It has further been reported that both Armenia and Azerbaijan have used different types of prohibited weapons resulting in civilian casualties. Human Rights Watch collected evidence of use by Azerbaijani and Armenian military of cluster munitions,⁵⁷ which are inherently indiscriminate weapons and are as such prohibited. Armenian forces reportedly employed ballistic missiles, unguided artillery and multiple launch rocket systems (MLRS). Azerbaijani forces reportedly used unguided artillery and MLRS, as well as loitering munitions and missiles launched by drones.⁵⁸ In addition to cluster munitions, there were also allegations of the use of incendiary munitions, including white phosphorus.
70. There have also been reports of deliberate targeting of sites which are protected under humanitarian law, such as schools, hospitals, medical transport and medical personnel. IPHR/Truth Hounds documented five incidents of what appear to be deliberate attacks by Azerbaijani armed forces against hospitals and medical personnel,⁵⁹ including one attack on the Republican Hospital in Stepanakert/Khankendi which destroyed the newly built maternity ward. Armenian armed forces reportedly fired rockets that damaged at least four medical centres in Azerbaijan.⁶⁰ At least 71 schools on the Armenian side and 54 Azerbaijani schools were damaged or destroyed, as well as dozens of kindergartens.⁶¹
71. Both the Armenian and Azerbaijani authorities have denied launching indiscriminate strikes against civilian areas or targeting key civilian infrastructures and using cluster munitions. To the Commissioner's knowledge, no independent, prompt, public and effective investigations into these attacks have been carried out so far.
72. The Commissioner recalls that, under international humanitarian law, civilians shall never be the direct object of an attack.⁶² This was also the premise for the adoption in 2008 of the Convention on Cluster Munitions, ratified by 110 countries, which prohibits cluster munitions and requires the clearance of cluster munition remnants and assistance to victims of the weapons. Neither Armenia nor Azerbaijan is a party to this treaty. The Commissioner therefore calls on the Armenian and Azerbaijani authorities to swiftly ratify the Convention on Cluster Munitions.
73. Civilian casualties resulting from indiscriminate or disproportionate bombing also amount to a violation of the right to life protected by Article 2 of the ECHR. In applying that provision in the context of security/military operations, the European Court of Human Rights has made some relevant findings consistent with the principles of international humanitarian law. The Court has considered that an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 paragraph 2 of the ECHR or with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.⁶³ The Court has also held that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from State agents has killed a civilian. It may also be engaged where the military has undertaken insufficient precautions to protect the lives of the civilian population.⁶⁴

⁵⁷ Human Rights Watch, [Azerbaijan: Cluster Munitions Used in Nagorno-Karabakh](#), 23 October 2020; [Armenia: Cluster Munitions Used in Multiple Attacks on Azerbaijan](#), 15 December 2020; [Technical Briefing Note: Cluster Munition Use in the Karabakh Conflict](#), 15 July 2021.

⁵⁸ Amnesty International, [In the line of fire](#), p. 5.

⁵⁹ IPHR/Truth Hounds, op. cit., p. 101. See also Human Rights Watch, [Unlawful Attacks on Medical Facilities and Personnel in Nagorno-Karabakh](#), 26 February 2021.

⁶⁰ Safeguarding Health in Conflict, [Violence Against or Obstruction of Health Care in Nagorno-Karabakh in 2020](#), May 2021, p. 5.

⁶¹ See Human Rights Watch, [Lessons of War, Attacks on schools during the Nagorno-Karabakh war](#), 8 September 2021.

⁶² [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#), 8 June 1977, Article 51, and Rule 1 of the Rules of Customary International Humanitarian Law on the principle of distinction between civilians and combatants.

⁶³ ECtHR, [Benzer and Others v. Turkey](#), judgment of 12 November 2013, para. 184.

⁶⁴ ECtHR, [Ergi v. Turkey](#), judgment of 28 July 1998, para. 81. See also the [Guidelines](#) on investigating violations of international humanitarian law from the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights, September 2019.

74. In addition, the Court has attached particular weight to the procedural limb of Article 2 of the ECHR. According to its case-law, the obligation to protect the right to life under Article 2 requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.⁶⁵
75. In light of the above, the Commissioner considers that the parties should not only under all circumstances take precautionary measures and avoid or minimise harm to civilians and civilian objects, but also carry out an effective investigation into the circumstances surrounding the attacks which resulted in civilian casualties during the 2020 outbreak of hostilities.

VIII. The need to combat hate speech, promote peaceful co-existence, and initiate steps toward reconciliation among the affected communities

Recommendation no. 8:

To take resolute action to prevent and combat hate speech and support initiatives that promote peaceful co-existence and reconciliation.

76. The Commissioner remains concerned by the high level of hate speech against Armenians in Azerbaijan and also against Azerbaijanis in Armenia. The public debate in both countries has increasingly been marked by toxic, hostile, intolerant, and downright disrespectful communication. This is visible in public statements by politicians and other public figures, articles in traditional media, as well as comments by the public on the internet and on social media. The constant rhetoric of “aggression” or the use of words such as “enemies” to designate the other side only contributes to perpetuating animosities between the people living on the different sides of the dividing lines.
77. The 2020 outbreak of hostilities was also accompanied by the use of inflammatory language. Hate speech and the glorification of violence definitely fueled the level of severity of attacks, inhuman treatment and torture against combatants and captives as well as vandalism and destruction of property. This is compounded by rampant impunity and the absence of condemnation by the public authorities of such acts.
78. The European Court of Human Rights has made it clear in its case-law that any statement directed against the ECHR’s underlying values of justice and peace, such as speeches gratuitously offensive or insulting, inciting disrespect or hate, falls outside the scope of the protection afforded by the right to freedom of expression guaranteed by Article 10 of the ECHR. The Court stressed in particular that statements which may be held to amount to hate speech or to glorification of or incitement to violence cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the ECHR.⁶⁶
79. In a statement published in October 2020, the Commissioner insisted on the need to avoid political rhetoric designed to fuel tension between the two countries.⁶⁷ This means that the authorities in both countries should take action against any use of hate speech in the media and promote mutual understanding and trust. As has been stressed by the Parliamentary Assembly of the Council of Europe in its Resolution on the role of political leaders in combating hate speech and intolerance, political leaders bear a specific responsibility in this regard.⁶⁸
80. The Commissioner observes that there is an acute need to promote understanding for all the victims of the conflict and to encourage tolerance and reconciliation between communities. This is essential to prevent future violence. The media have a central role to play in this context, notably by refraining from fanning hostility and hatred. The European Commission against Racism and Intolerance

⁶⁵ ECtHR, [Ergi v. Turkey](#), judgment of 28 July 1998, para. 82.

⁶⁶ ECtHR, [Gündüz v. Turkey](#), decision of 13 November 2003.

⁶⁷ Commissioner’s [statement](#) “Nagorno-Karabakh: The escalation of the conflict is posing a serious threat to human rights”, 1 October 2020.

⁶⁸ Parliamentary Assembly of the Council of Europe, [Resolution 2275 \(2019\)](#) “The role and responsibilities of political leaders in combating hate speech and intolerance”, adopted on 10 April 2019.

(ECRI) in its General Policy Recommendation n°15 on Combating Hate Speech also recommended “to combat misinformation, negative stereotyping and stigmatisation as these can provide the foundation on which the use of hate speech is based.”⁶⁹ In this respect, all the media working in the conflict-affected areas and/or reporting about the conflict, its origins and consequences should ensure the highest level of ethical reporting, provide objective and unbiased information and avoid stigmatising and prejudiced characterisations. Furthermore, media should clearly explain the rights of all victims of the conflict, including the right to access justice, the right to truth and the right to reparations.

81. The Commissioner recalls that media coverage and access to information are crucial means of providing accurate, timely and comprehensive information, particularly in times of crisis.⁷⁰ In line with the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis,⁷¹ all parties should guarantee freedom of movement, allow accredited media professionals access to crisis areas and ensure that journalists reporting from the conflict-affected areas are safe. The Commissioner is however concerned by the fact that journalists have been denied access to Nagorno-Karabakh. While international journalists were able to cover the hostilities, although their work was made more complicated by the declaration of martial law in both Armenia and Azerbaijan at the end of September 2020,⁷² the Commissioner notes that since November 2020 it has been increasingly difficult to gain access to Nagorno-Karabakh.⁷³
82. Accurate and balanced media coverage should be accompanied by state-led, good-faith, processes of memorialisation about the conflict, which should include cross-border dialogue. As pointed out by the Commissioner, efforts to deal with the past should now become the priority to ensure the path towards reconciliation and lasting peace for all people affected by the conflict, particularly bearing in mind the wellbeing of the future generations of Azerbaijan and Armenia.⁷⁴ Adversarial narratives or dehumanizing or humiliating displays can only further intensify and strengthen long-standing hostile sentiments and hate speech, and multiply and promote manifestations of intolerance.
83. While there is no unique package of measures for dealing with past or on-going serious human rights violations, history shows that durable solutions cannot be achieved unless they encompass a holistic approach involving all four traditional pillars of transitional justice, namely criminal justice, reparations, truth, and guarantees of non-recurrence, in accordance with states’ obligations under international law. In a recent report,⁷⁵ the UN Special Rapporteur on the promotion of truth, justice reparations and guarantees of non-recurrence highlighted in particular the need for vigorous, active and multidimensional memory policies, including literature, the arts, academia, the catalytic work of truth commissions, state apologies, the observance of days to commemorate disappeared persons, and school textbooks, in order to respond adequately to past crimes and prevent their recurrence. He underlined that “without the memory of the past, there can be no right to truth, justice, reparation, or guarantees of non-recurrence. For this reason, memory processes in connection with serious violations of human rights and international humanitarian law constitute the fifth pillar of transitional justice.”⁷⁶

⁶⁹ ECRI, [General Policy Recommendation n°15 on Combating Hate Speech](#), adopted on 8 December 2015.

⁷⁰ See the Commissioner’s [statement](#) “Nagorno-Karabakh: The escalation of the conflict is posing a serious threat to human rights”, 1 October 2020.

⁷¹ Council of Europe [Guidelines on protecting freedom of expression and information in times of crisis](#), adopted by the Committee of Ministers of the Council of Europe on 26 September 2007.

⁷² [Annual report](#) of the Council of Europe Platform for the Protection of Journalism and the Safety of Journalists, April 2021, p. 64.

⁷³ According to Reporters Without Borders (RSF), at least ten foreign journalists have been denied entry by the Russian peacekeeping troops controlling access to Nagorno-Karabakh from Armenia. Other journalists reportedly made highly controlled visits from Azerbaijan to areas affected by the conflict and were not able to report freely. RSF, [Russian peacekeepers deny foreign reporters access to Nagorno-Karabakh](#), 9 April 2021.

⁷⁴ See the Commissioner’s [letter](#) to the President of Azerbaijan on the inauguration of the ‘Trophy Park’ in Baku, published on 27 April 2021. The Azerbaijani authorities have since taken concrete steps by removing mannequins and helmets from this Park and undertaking not to display them in the new Memorial Museum.

⁷⁵ Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice, [A/HRC/45/45](#), 9 July 2020.

⁷⁶ *Ibid.*, para. 21.

84. The Commissioner notes with concern that, to date, memory initiatives by the authorities of both Armenia and Azerbaijan, including memorials and history books, have tended to vilify the other party and fed hostility and resentment. Such approaches have a deleterious effect on societies and risk prolonging conflict. Memorialisation is a long-term process and can be effective only if it pursues the political goal of establishing democracy and a culture of peace. Memorialisation policies must be developed in compliance with human rights, namely ensure the participation of victims, avoid hate speech or discriminatory messages, and leave no place for the denial of serious human rights violations.
85. Civil society plays an important role in memory policies and reconciliation processes. This was also the message of ECRI in a statement adopted in March 2021 in the context of confrontations and unresolved conflicts in Europe, which called upon all stakeholders, in particular those at the highest political level, “to engage in confidence-building measures, possibly with the involvement of civil society, media and other relevant non-political actors (including, where appropriate, equality bodies and national human rights institutions) and to involve the youth to the greatest possible extent in the promotion of peaceful and inclusive societies.”⁷⁷ The Commissioner wishes to underscore that national human rights institutions (NHRIs) have an important role to play in addressing human rights issues in post-conflict situations and in encouraging peace-building. In this regard, the Commissioner draws attention to the guiding principles for effective engagement developed by the European Network of NHRIs and its members.⁷⁸ The Commissioner also believes that a gender perspective should be integrated into any conflict prevention and resolution, peacekeeping and peace building activities in line with the UN Resolutions on Women, Peace and Security and the Committee of Ministers’ Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building.⁷⁹
86. Some cross-border initiatives bringing together young people from Armenia and Azerbaijan for a respectful dialogue already exist and should be supported. Yet, the Commissioner notes that following the recent hostilities those NGOs or human rights activists who have raised concerns about xenophobia or tried to promote a message of dialogue and reconciliation have been coming under increased pressure and intimidation. They are reportedly regularly stigmatized by state officials, as attempting to destabilise the country concerned or working on behalf of foreign interests, with politicians questioning the legitimacy of NGO work in this area. The Commissioner calls upon the authorities to create an enabling environment for NGOs or civil society representatives wishing to engage in cross-border initiatives.
87. To conclude, the Commissioner would like to acknowledge an important and constructive role that the international community can and should play in assisting parties to the conflict to overcome any lingering antagonisms and the rhetoric of persisting mutual accusations and move instead forward on the path towards reconciliation. There is a pressing need to provide unwavering and continuous support to a wide range of measures aimed at building trust and confidence first and foremost between the parties to the present conflict, but also, more broadly, in the regional context in order to ensure a more peaceful and prosperous future for the generations to come. She trusts that this memorandum and the recommendations it contains will contribute to providing a roadmap for this path.

⁷⁷ ECRI, [Statement](#) on preventing and combating ultra-nationalistic and racist hate speech and violence in the context of confrontations and unresolved conflicts, adopted by ECRI at its 85th plenary meeting (30-31 March 2021).

⁷⁸ European Network of National Human Rights Institutions, [Guide on the Role of National Human Rights Institutions in \(Post-\)Conflict Situations](#), September 2020.

⁷⁹ [Recommendation CM/Rec\(2010\)10 on the role of women and men in conflict prevention and resolution and in peace building](#), adopted by the Committee of Ministers on 30 June 2010.