

The Judicialization of the Armenia-Azerbaijan Conflict: Will International Courts Contribute to a Lasting Peace in the South Caucasus?

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Following the so-called '44-Day War' in late 2020, Azerbaijan and Armenia lodged reciprocal legal actions before the International Court of Justice and the European Court of Human Rights, alleging various breaches of international law. These inter-state claims encompass three decades and several claims under the UN Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights. Consequently, the judicialization of the conflict has added a new dimension in Azerbaijan-Armenia relations that was absent in the past 30 years of peace negotiations. This article analyses the ongoing inter-state legal cases and their legal and political consequences for the parties and the South Caucasus region at large. The article argues that these international legal forums can partially answer some of the transitional justice issues, but not all matters arising from this three-decades-long conflict. Despite such limitations, however, these international legal cases will likely bring more legal accountability and a 'rule-based order' between Azerbaijan and Armenia, and in the South Caucasus region, in the future.

Keywords: Armenia, Azerbaijan, ICJ, ECtHR, International Law, Human Rights, War Crimes, Reparations, Peace, Negotiations



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Introduction

Following the 44-Day War, or Second Karabakh War, of late 2020, Azerbaijan and Armenia lodged reciprocal inter-state applications before the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ). While these claims formally appear equivalent, they are qualitatively different in their material scope and the time horizons they cover. Azerbaijan accuses Armenia over the three-decades-long military occupation of its territory and continuous violation of the human rights of almost a million of its citizens who were displaced from 1991 to 2020. In addition to its diplomatic aims, Armenia seeks to represent the rights of ethnic Armenians in Azerbaijan's Karabakh region and is primarily focused on alleged human rights violations arising from the 44-Day War.

In the post-conflict phase, in the absence of a final peace treaty, relations between Azerbaijan and Armenia continue on the diplomatic, military, and judicial fronts in parallel. The judicial process is a new element in this developing paradigm, and its effect on the overall process remains to be seen. However, these inter-state claims cover only part of the legal issues arising from the conflict and do not address other key issues such as reparations for war damages or individual criminal responsibility for war crimes, crimes against humanity, and genocide committed during the conflict.

This article reviews the nature and content of these inter-state cases from legal and political perspectives and assesses their impact on the ongoing peace talks between Azerbaijan and Armenia. It argues that, regardless of the outcome, these inter-state cases will have tremendous legal and political consequences for both countries by building the groundwork for sustainable relations based on international law at the expense of the *realpolitik* that has characterized their relations over the past thirty years. Despite such positive impacts, the article also argues that the litigation has inadvertently created perverse political incentives inhibiting the negotiation and signing of a final peace treaty by, for instance, delaying political compromises for Armenia's recognition of Azerbaijan's territorial integrity. Finally, the article provides recommendations for the content of a final peace treaty, proposing, for example, the creation of an inter-state compensation commission dealing with the compensation issues arising from the conflict and accepting the compulsory jurisdiction of the ICJ and the International Criminal Court (ICC) by both countries.

Background

The 44-Day War¹ in late 2020 was not an isolated event but a continuation of the tragic inter-state armed conflict from 1986 to 1994 triggered by Armenia's territorial claims to Azerbaijan's Upper Karabakh region (the former 'Nagorno-Karabakh'),² a region populated by a majority of ethnic Armenians. A devastating war in the early 1990s resulted in Azerbaijan's heavy military defeat and Armenia's occupation of the Karabakh region and seven adjacent districts (the 'occupied territories'), and an overwhelming refugee crisis in Azerbaijan.³ The United Nations Security Council and UN General Assembly resolutions⁴ that called for the unconditional withdrawal of Armenian forces from the occupied territories remained completely disregarded by Armenia. The subsequent three-decades-long peace talks under the auspices of the OSCE Minsk Group failed to bring a peaceful resolution to the conflict, resulting in a 'no war, no peace' situation.⁵

Armenia's prolonged occupation witnessed an extensive and systematic violation of the human rights of Azerbaijani citizens, including the looting and transfer of extensive civilian infrastructure, public and private property, cultural heritage, and natural resources in the formerly

1 Socor, V., "Armenia's 44-Day War: A self-inflicted trauma", *The Jamestown Foundation*, Eurasia Daily Monitor Volume: 18 Issue: 3, January 6, 2021, available at: <https://jamestown.org/program/armenias-44-day-war-a-self-inflicted-trauma-part-one> (Accessed: August 25, 2022)

2 Declaration of Independence of the Republic of Armenia, August 23, 1990, available at: <https://www.gov.am/en/independence/> [Preamble refers to the "joint decision of the Armenian SSR Supreme Council and the Artsakh National Council on the 'Reunification of the Armenian SSR and the Mountainous Region of Karabakh'" based on the December 1, 1989, resolution]; Sanjian, A., "The Armenian diasporan press on Mountainous Karabakh", *Entries of the Society for Armenian Studies*, 6 January 2021, available at: <http://entriessas.com/articles/armenian-diaspora> (Accessed: September 10, 2022)

3 See, e.g., De Waal, T., "The Nagorny Karabakh conflict in its fourth decade", *Carnegie Europe*, December 24, 2019, available at: <https://carnegieeurope.eu/2019/12/24/nagorny-karabakh-conflict-in-its-fourth-decade-pub-80791> (Accessed: September 20, 2022); Gureyeva-Aliyeva, Y. and Huseynov, T., "Can you be an IDP for twenty years?", *The Brookings Institution*, December 2011, available at: https://www.brookings.edu/wp-content/uploads/2016/06/12_idp_host_communities_azerbaijan.pdf (Accessed: November 30, 2022)

4 United Nations, Security Council Resolutions 822 (1993), 853 (1993), 874 (1993), 884 (1993); United Nations General Assembly Resolution 62/243 (2008)

5 Bryza, M., "Armenia-Azerbaijan ceasefire revives 'Basic Principles' and demonstrated Putin's continued sway", October 10, 2020, available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/armenia-azerbaijan-ceasefire-revives-basic-principles-and-demonstrates-putins-continued-sway/> (Accessed: September 10, 2022)

Armenia's prolonged occupation witnessed an extensive and systematic violation of the human rights of Azerbaijani citizens, including the looting and transfer of extensive civilian infrastructure, public and private property, cultural heritage, and natural resources in the formerly occupied territories.

occupied territories.⁶ For instance, according to Human Rights Watch, about 750,000–800,000 Azerbaijanis became internally displaced persons (IDPs)⁷ and had to abandon approximately 150,000 private properties in the occupied territories.⁸ The UN estimated the total economic damage to Azerbaijan, including public and private property damage due to Armenia's occupation, at approximately US\$53.5 billion (US\$88 billion adjusted for inflation).⁹ In this context, Azerbaijan's inter-state application before the ECtHR mainly deals with the legacy of Armenia's occupation policies from 1991 to 2020, including the material and moral damage to the Azerbaijani IDPs.

Considering the jurisdictional limitation of the ICJ under the UN Convention on Elimination of Racial Discrimination (CERD) and the ECtHR under the European Convention on Human Rights (European Convention), these inter-state claims only partially cover legal issues arising from the former Armenia–Azerbaijan conflict.¹⁰ For instance, other key issues arising from Armenia's occupation, e.g., an evaluation of complete damages and reparations for military occupation, are beyond the scope of this litigation, leaving them to a political agreement or local court actions.

Besides these legal platforms, the parties have the right to bring claims before the ICJ under the Convention on the Prevention and Punishment of the Crime of Genocide, which both countries ratified in 1993. However, this is more relevant to Azerbaijan, considering the

6 BBC, "Who won the Karabakh War", March 28, 2021, available at: https://www.youtube.com/watch?v=7lsq8db5-8I&lc=UgxAkP50rq1_8vKEh8t4AaABAg (Accessed: September 20, 2022); "Report of the OSCE Minsk Group co-chairs' field assessment mission to the occupied territories of Azerbaijan surrounding Nagorno-Karabakh", March 24, 2011, available at: <https://www.osce.org/files/f/documents/7/d/76209.pdf> (Accessed: September 20, 2022)

7 Hrw.org, "Azerbaijan: Seven years of war in Nagorno-Karabakh", Human Rights Watch Report, December 1, 1994, p. 99, available at: <https://www.hrw.org/report/1994/12/01/seven-years-conflict-nagorno-karabakh> (Accessed: August 22, 2022)

8 Ministry of Internal Affairs of Azerbaijan, "Facts about the occupied territories of Azerbaijan", available at: <https://m.mia.gov.az/?/en/content/karabakh/> (Accessed: September 12, 2022)

9 United Nations, *Azerbaijan Human Development Report*, March 9, 2001, p.52, available at: <https://hdr.undp.org/system/files/documents//azerbaijan2000enpdf.pdf> (Accessed: September 20, 2022)

10 See, e.g., Heiko Krüger, *Nagorno-Karabakh Conflict: A Legal Analysis*, 2010

Khojaly genocide¹¹ committed by the Armenian forces in 1992 remains uninvestigated and unpunished by Armenia, which is against the intent and purpose of the Genocide Convention.

Inter-state Cases before the ECtHR and the ICJ

ECtHR

In its application to the ECtHR, Azerbaijan accuses Armenia of material breaches of the European Convention for indiscriminate attacks on civilians as well as civilian and public property and infrastructure, including the use of ballistic missiles against civilian settlements;¹² executions, ill-treatment, and mutilations of combatants and civilians; the capture and continued detention of prisoners of war (POW); and the forced displacement of the civilian population in areas affected by the recent war, including the destruction of cultural and religious property in the de-occupied territories.¹³ Azerbaijan additionally alleges that Armenia has *continuously* violated the European Convention from 1991 to 2020 by occupying and displacing about one million Azerbaijanis from the occupied territories,¹⁴ including violating their property rights. In this regard, Azerbaijan's case is similar to the *Georgia v. Russia (II)* and *Ukraine v. Russia* cases before the ECtHR regarding continuing military occupation and massive violation of human rights.

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Armenia's claim is mainly focused on alleged human rights violations during the 44-Day War and protection of the rights of ethnic Armenians in the occupied territories who were allegedly displaced and lost access to their property in the latest war, including the property and

11 Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, New York University Press, 2003, pp.169–172

12 Hrw.org, *Armenia: Unlawful Rocket, Missile Strikes on Azerbaijan*, Human Rights Watch Report, December 11, 2020, <https://www.hrw.org/news/2020/12/11/armenia-unlawful-rocket-missile-strikes-azerbaijan> (Accessed: September 20, 2022)

13 Azerbaijan invokes Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect private and family life), 9 (freedom of thought, conscience and religion), 13 (right to an effective remedy), 14 (prohibition of discrimination) of the Convention, Article 1 of Protocol No. I (protection of property) and Articles 2 (1) (freedom of movement) and 3 (2) of Protocol No. IV (prohibition of expulsion of nationals).

14 In addition to Upper Karabakh and seven adjacent regions, the occupied territories also include seven villages of the Gazakh district and parts of the Nakhchivan region of Azerbaijan.

infrastructure financed mainly by Armenian diaspora organizations in the settlement areas, which returned to Azerbaijani sovereignty.¹⁵ In this respect, a critical qualitative difference between the parties' claims is that Azerbaijan's application covers the continuing violations of human rights in the occupied territories from 1991 to 2020, and the scale of damages applies to almost a million Azerbaijani citizens.

The ECtHR is closely familiar with this conflict and has already developed a framework,¹⁶ espoused in *Chiragov and Others v. Armenia* and *Sargsyan v. Azerbaijan*, decided in 2015,¹⁷ and the just satisfaction judgments in the same cases in 2017.¹⁸ These cases will likely constitute the conceptual foundations for the ECtHR's approach to the admissibility and the merits of the current cases.

The ECtHR recognized Armenia's effective control over Azerbaijan's Karabakh region and seven adjacent districts in *Chiragov* and also in the cases of *Zalyan and Others v. Armenia*¹⁹ and *Muradyan v. Armenia*.²⁰ The ECtHR regarded Armenia's 'administrative practice' of continuous denial of access to the property and lack of due compensation as a violation of the property rights of six Azerbaijani Kurdish families displaced from the Lachin district in 1992. By extension, following the principles espoused in the *Chiragov*, *Zalyan*, and *Muradyan* cases, the ECtHR will likely reaffirm Armenia's effective control over the occupied territories and its responsibility for continuous denial of access to the property of a million Azerbaijani IDPs from 1991 to 2020 and other rights.²¹ However, the scope of the alleged violations

15 Sargsyan, L., "Armenia v. Azerbaijan: On the frontlines of the law", *EVN Report*, February 14, 2021, available at: <https://evnreport.com/spotlight-karabakh/armenia-v-azerbaijan-on-the-frontlines-of-the-law/> (Accessed: September 28, 2022)

16 Milanovic, M., "Nagorno-Karabakh cases", *Ejiltalk*, June 23, 2015, available at: <https://www.ejiltalk.org/the-nagorno-karabakh-cases/> (Accessed: September 22, 2022)

17 *Chiragov and Others*, App. No. 13216/05, Grand Chamber; Judgment 16 June 2015; *Sargsyan v Azerbaijan*, App. No. 40167/06 Grand Chamber; Judgment 16 June 2015

18 *Chiragov and Others v. Armenia*, Grand Chamber; Judgment (Just Satisfaction) 12 December 2017; *Sargsyan v. Azerbaijan*, Grand Chamber; Judgment (Just Satisfaction) 12 December 2017.

19 *Muradyan v Armenia*, App. No. 11275/07, 24 November 2016

20 *Zalyan and Others v Armenia*, App. Nos. 36894/04 and 3521/07

21 Mustafayev, N., "Azerbaijan v. Armenia before the European Court of Human Rights: The protection of property rights in occupied territories", *Opinion Juris*, August 6, 2021, available at: <https://opiniojuris.org/2021/08/06/azerbaijan-v-armenia-before-the-european-court-of-human-rights-the-protection-of-property-rights-in-occupied-territories/> (Accessed: September 10, 2022)

of the European Convention in these inter-state cases is significantly broader. It extends to alleged mistreatment of POWs and the effects of the latest military operations, including using long-range artillery and ballistic missiles to target the population centres of Azerbaijan.²² These new issues will be at the intersection of the European Convention, international humanitarian law, and the laws of the war regarding this conflict, which will significantly stretch the interpretation of the European Convention in the context of international armed conflicts.

Notably, following the 44-Day War and after Azerbaijan liberated the occupied territories, significant new evidence emerged relating to Armenia's armed forces' entrenched presence (boots on the ground)²³ and the massive scale of destruction of civilian infrastructure, cultural heritage and private property in the occupied territories.²⁴ These facts were not available for the ECtHR's assessment when *Chiragov* was decided in 2008–2015.

The new evidence suggests that Armenia had positioned the majority of its armed forces and hardware in the formerly-occupied territories; this fact, discounted in *Chiragov*, indicates that Armenia not only had 'overall control' of the occupied territories but was in full-scale military occupation.²⁵ For instance, in the post-war period, field reports

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22 Mustafayev, N., "The Legality of Use of Ballistic Missiles on Cities: The Case of Armenia-Azerbaijan Conflict", *EJIL: Talk!*, February 8, 2022, available at <https://www.ejiltalk.org/the-legality-of-use-of-ballistic-missiles-on-cities-the-case-of-armenia-azerbaijan-armed-conflict/> (Accessed: September 10, 2022)

23 Oryx, "The fight for Nagorno-Karabakh: Documenting losses on the side of Armenia and Azerbaijan", available at: <https://www.oryxspioenkop.com/2020/09/the-fight-for-nagorno-karabakh.html> (Accessed: September 10, 2022)

24 AzStudies, "Documenting destruction of Azerbaijani cultural heritage", December 19, 2020, available at: <https://azstudies-editor.medium.com/documenting-destruction-of-azerbaijani-cultural-heritage-16cff8f3648b> (Accessed: September 15, 2022)

25 Mustafayev, N., "Azerbaijan v. Armenia before the European Court of Human Rights: Revisiting the Effective Control Test after the "44-Day-War", *Opinio Juris*, April 8, 2022, available at: <https://opiniojuris.org/2022/04/08/azerbaijan-v-armenia-before-the-european-court-of-human-rights-revisiting-the-effective-control-test-after-the-44-day-war/> (Accessed: September 11, 2022).

by the *New York Times*,²⁶ the *Wall Street Journal*,²⁷ the BBC,²⁸ and Euronews,²⁹ and recent reports by international organizations,³⁰ have revealed that most of the formerly-occupied territories were stripped of all cultural heritage, private property, and civilian infrastructure during Armenia's occupation. The scale of such destruction indicates that these acts were not of a sporadic nature but rather a systematic attempt to make the occupied territories uninhabitable for the returning IDPs. Such significant evidence was unavailable for the ECtHR's purview in *Chiragov*, which could largely explain the limited approach to evaluating damages and just satisfaction.

This emergent evidence will add a new dimension to these inter-state cases and require a significant revision of the ECtHR's doctrine of state responsibility for military occupation, massive human rights violations in the formerly occupied territories, and just satisfaction under the European Convention.

ICJ

Concurrently with the ECtHR applications, the parties lodged reciprocal claims before the ICJ under the Convention on Elimination of Racial Discrimination (CERD),³¹ which intersects with international human rights law, humanitarian law, and the laws of war. The ICJ faces

26 Gall, C. and Troianovski, A., "After Nagorno-Karabakh war, tragedy, trauma, devastation", *The New York Times*, December 2020, available at: <https://www.nytimes.com/2020/12/11/world/europe/nagorno-karabakh-armenia-azerbaijan.html> (Accessed: October 25, 2022)

27 Simmons, A.M., "Azeris wrestle over return to abandoned towns, decades after first Nagorno-Karabakh conflict with Armenia", *The Wall Street Journal*, February 15, 2021, available at: <https://www.wsj.com/articles/azeris-wrestle-over-return-to-abandoned-towns-decades-after-first-nagorno-karabakh-conflict-with-armenia-11613400489> (Accessed: October 25, 2022)

28 BBC, "Who won the Karabakh War", March 28, 2021, available at: https://www.youtube.com/watch?v=7lsq8db5-8I&lc=UgxAkP50rql_8vKEh8t4AaABAg (Accessed: October 25, 2022)

29 Euronews, 'Agdam', December 1, 2020, available at: <https://www.youtube.com/watch?v=IMQFCKYOUuA&t=16s> (Accessed: October 25, 2022)

30 Council of Europe's Parliamentary Assembly, "Humanitarian consequences of the conflict between Armenia and Azerbaijan," December 13, 2021, available at: <https://pace.coe.int/en/files/29483> (Accessed: November 30, 2022)

31 Application Instituting Proceedings (Azerbaijan v. Armenia), 23 September 2021, available at: <https://www.icj-cij.org/en/case/181>, (hereinafter "Azerbaijan's Application"); Application Instituting Proceedings (Armenia v. Azerbaijan), 16 September 2021, available at: <https://www.icj-cij.org/en/case/180>, (hereinafter "Armenia's Application").

unprecedented questions and a major test: how to interpret Armenia's ethnically motivated policies in the occupied territories of Azerbaijan from 1991 to 2020 under CERD? Unlike Uganda's occupation of Kenya and Russia's occupation of Georgia and Ukraine, Armenia's occupation of Azerbaijan involved strong "ethnic-national" component. These broad-based claims, with some novel aspects, will test the CERD's interpretation in this uncharted territory.

Azerbaijan and Armenia's applications are not factually or legally equivalent.³² Despite some similarities, a substantive difference between these cases lies in Armenia's alleged violations of CERD arising from its transformative occupation policies in the Armenian-occupied territories over the past 30 years. Azerbaijan raises four sets of claims under CERD relating to Armenia's campaigns of anti-Azerbaijani ethnic cleansing, cultural erasure, environmental depredation, and hate speech and disinformation. In this respect, Azerbaijan's application is not a response to Armenia's claims. It raises distinct claims under CERD, which is broader regarding the scope of alleged violations and the historical period that it covers.³³

Azerbaijan accuses Armenia of engaging in 'discriminatory acts' against Azerbaijanis on the basis of their 'national and ethnic origin' in Armenia proper and the Armenia-occupied territories in Azerbaijan from 1987 to 2020. It attributes this 'policy of ethnic cleansing and systematic violations of CERD' to Armenia's policy of discrimination on the basis of national or ethnic origin to achieve a mono-ethnic state. The origin of such a policy is Armenia's racist nationalist project, the so-called '*Tseghakron* ideology,' which excludes any place for ethnic Azerbaijanis in Armenia and Azerbaijan's Karabakh region.³⁴

32 Becker, M., "Well that didn't take long. After #Armenia initiated an #ICJ case against #Azerbaijan last week re #CERD violations, Azerbaijan said it would respond in kind. Yesterday, Azerbaijan filed its own case against Armenia, also under the CERD and also seeking provisional measures. 1/35", September 24, 2021, available at: <https://twitter.com/mabecker17/status/1441419333406584846> (Accessed: August 26, 2022); Wang, Y., "From warfare to lawfare under CERD: Armenia v. Azerbaijan and Azerbaijan v. Armenia", *Opinion Juris*, November 9, 2021, available at: <https://opiniojuris.org/2021/11/09/warfare-to-lawfare-under-cerd-armenia-v-azerbaijan-and-azerbaijan-v-armenia/> (Accessed: August 23, 2022)

33 Azerbaijan invokes Articles 2 (not to engage in act or practice of racial discrimination), 4 (ban propaganda on racial superiority or racial hatred), 5 (prohibit and eliminate all forms of discrimination and guarantee rights to everyone in its territory), 6 (investigate or punish acts of racial discrimination) and 7 (take immediate and effective measures to combat prejudices which lead racial discrimination).

34 Azerbaijan's Application, para. 5.

On the factual aspects, Azerbaijan asserts that, between 1987 and 1994, Armenia’s state-sponsored ‘ethnic discrimination and cleansing’ policy resulted in the expulsion of nearly one million Azerbaijanis from the territory it controlled, including more than 200,000 from Armenia and over 700,000 from the then-occupied territories. As a result of Armenia’s violence against Azerbaijanis during the armed conflict, more than 30,000 ethnic Azerbaijanis perished. This includes the

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massacre of more than 600 Azerbaijani civilians in the town of Khojaly in 1992, which has been condemned internationally as an act of genocide.³⁵

In Azerbaijan’s telling, Armenia continued its discriminatory policies against Azerbaijanis throughout the occupied territories from 1994–2020 by preventing a million Azerbaijani IDPs from returning home. As part of its occupation policy, Armenia simultaneously pursued an overarching policy of ‘cultural erasure’ in the occupied territories

in an effort to remove any trace of Azerbaijani ethnicity or traditions by resettling Armenians in areas from which Azerbaijanis had been expelled, razing Azerbaijani districts, and renaming others with Armenian labels; looting and destroying Azerbaijani cultural heritage sites; and conducting propaganda campaigns denying and distorting Azerbaijani history, culture, and ethnic identity.³⁶

A novel aspect of Azerbaijan’s application is that it considers Armenia’s habitat destruction in the occupied territories as damage to its cultural heritage under CERD. For instance, it asserts that Armenia’s environmental destruction has threatened the extinction of the *Xarı Bülbul* (Khari Bulbul), *Ophrys caucasica*, a flower representing peace for the Azerbaijani people and the official Azerbaijani flower of the Karabakh region.³⁷

Azerbaijan claims that, despite Azerbaijan’s liberation of most of the occupied territories, Armenia’s ethnic cleansing policy nonetheless continues by preventing displaced persons from returning to their homes, failing to disclose landmine maps, and fomenting hate speech and propaganda that stokes anti-Azerbaijani sentiment in Armenia.³⁸ The recent hostilities in late 2020, including indiscriminate attacks on

35 Ibid., para. 10.

36 Ibid., para. 11.

37 Ibid., para. 11 and 68.

38 Ibid., para. 17 and 18.

the major Azerbaijani cities of Ganja, Barda, Tartar, and others, resulted in civilian deaths and the execution and torture of POWs. Azerbaijan claims that Armenia has committed numerous war crimes motivated by ethnic hatred, in violation of CERD.

In addition to asking for various reliefs (e.g., positive measures to prevent racial discrimination),³⁹ Azerbaijan requests the ICJ to require Armenia to make full financial reparation for the harm suffered by Azerbaijan and its people for various CERD violations.

Unlike Azerbaijan's extensive set of claims that cover 30 years, Armenia's specific claims are mainly dedicated to the alleged CERD violations during the so-called 44-Day War in late 2020 and the post-war situation. In particular, Armenia alleges numerous violations of the CERD by Azerbaijan during the 2020 war directed at the ethnic Armenians in the Karabakh region.⁴⁰ Armenia further alleges that Azerbaijan subjected Armenian POWs and detainees to abuse and mistreatment, and has created a 'military trophy park' in violation of the CERD.⁴¹

These broad ranges of claims at the intersection of the CERD, international human rights law, humanitarian law, and the laws of war will require revisiting the ICJ's existing conservative approach. These cases may provide an opportunity for the ICJ to apply the CERD in prolonged territorial-national conflicts and transformative military occupation.

Parties' Goals and Strategies: Continuation of War through 'Legal Means'?

The parties' political strategies behind these inter-state claims and how a final peace treaty should look appear fundamentally different. These different approaches will likely stretch the current interpretations of the European Convention and CERD significantly.

It is apparent that Azerbaijan's primary goal is to achieve international judicial recognition of Armenia's three-decades-long military occupation and its massive human and material consequences. In Azerbaijan's view, the ICJ and ECtHR's recognition of such legal violations will create a considerable cost and prevent the repetition of the same aggression by Armenia in the

39 Azerbaijan's Application, para. 99.

40 Armenia's Application, para. 6.

41 Ibid., para. 7.

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future. It could legally strengthen Azerbaijan's territorial integrity and block Armenia's indirect territorial claims to Azerbaijan's Karabakh region, and is one of the conditions contained in Azerbaijan's five principles for a peace treaty.⁴² Additionally, these legal cases will likely increase Azerbaijan's chance of obtaining significant reparations from Armenia for the massive destruction of civilian infrastructure and private property in the formerly occupied territories, which the UN estimates to be valued at about US\$88 billion.⁴³

Azerbaijan's unwillingness to bring these claims when Armenia had physical control over the occupied territories remains an interesting point. Arguably, this move was motivated by Azerbaijan's goal to not irreversibly damage the ongoing peace processes before 2020. However, such a postponed legal action has created a false moral equivalence between the two cases in the international arena, despite the cases being fundamentally different.

On the other hand, Armenia's political goal behind its legal claims is to achieve a 'Kosovo scenario' in Azerbaijan's Karabakh region. The expectation is that the ICJ and ECtHR ruling in its favour would potentially strengthen Armenia's political position on the right of secession of ethnic Armenians in the Karabakh region from Azerbaijan.⁴⁴ Although international law does not recognize exceptions to the principle of territorial integrity, in Armenia's view, the ICJ's finding of a violation of CERD could potentially keep its covert territorial claims to Azerbaijan's Karabakh region alive. This is one of Armenia's proposed six principles for a peace treaty.⁴⁵ Thus, Armenia's allegations are packaged to link all grievances to racial discrimination under CERD. This is likely to be one of the critical reasons behind Armenia's delay in starting negotiations on a peace treaty, which will likely contain Armenia's explicit waiver of any

42 Ministry of Foreign Affairs of the Republic of Azerbaijan, No:117/22, "Head of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan Leyla Abdullayeva answers the media's question", March 14, 2022, available at: <https://www.mfa.gov.az/en/news/no11722> (Accessed: September 25, 2022)

43 United Nation, supra note, 9.

44 Hetq.am, "Armenia's Foreign Minister: Rights of Artsakh Armenians remains issue in Azerbaijan", March 15, 2022, available at: <https://hetq.am/en/article/142256> (Accessed: September 25, 2022)

45 Jam News, "Armenia add six principles for peace talks with Azerbaijan", May 5, 2022, available at: <https://jam-news.net/opinion-from-baku-armenias-6-responses-to-5-proposals-of-azerbaijan-what-to-expect-next/> (Accessed: September 22, 2022)

territorial claims to the Karabakh region of Azerbaijan.

In effect, the judicialization of the conflict has created contradictory political incentives. In the absence of the international courts' final judgments, the parties will be unable to make political concessions on specific contentious points on which they accuse the other party. On the one hand, the fact that Armenia is unwilling to agree to border delimitation or explicitly recognize the Karabakh region as part of Azerbaijan in a final peace treaty before the ICJ rules, as it expects, in its favour may keep its indirect territorial claim to the Karabakh region alive. On the other hand, Azerbaijan cannot give up its claim for multi-billion-dollars' worth of reparations claims as part of peace talks if the ECtHR finds Armenia to be in breach of the European Convention and obliges it to pay compensation to a million Azerbaijani IDPs.

In this author's view, these judicial processes will prevent the signing of a final and comprehensive peace treaty within the next ten years – the time, it is expected, it will take these international courts to make final decisions. This is a key, and often overlooked, reason why negotiations on a peace treaty do not produce any tangible results even on the basic issues, even though the armed conflict ended in 2020. Consequently, even if the parties sign a peace treaty within the next two to three years, it will likely not be comprehensive and will not touch on issues that are subject to ongoing litigation at this stage of the contentious relationship.

Regardless of the outcome, the court's decisions will significantly impact long-term Azerbaijan–Armenia relations and the South Caucasus region at large. The absence of enforcement of international law, particularly of the UN Security Council's resolutions, in this conflict has created a sense of unaccountability and legal nihilism in the region over the past thirty years. Unlike Iraq's invasion of Kuwait or Russia's invasion of Ukraine, Armenia did not bear any legal consequences for occupying Azerbaijan and disregarding the UN Security Council's resolutions for the past thirty years. This created perverse political incentives and led to the political belief that territorial conquest is sufficient for the acquisition of the legal title to that territory, and to not taking peace negotiations seriously. The climate of lawlessness in the region created a sense that politics was not limited by international law, but was driven by hard power and broader geopolitics. In this respect, these judicial decisions will likely increase political accountability, limit hard power, and impose a high cost for violating international law. This evolution will form the pillar of a new regional order and a new relationship between Armenia and Azerbaijan.

Conclusion and Recommendations

The existing and proposed principles for a potential peace treaty are necessary, but not sufficient, to address all the key issues arising from this conflict. In addition to the proposed five or six principles, the parties should establish an inter-state compensation commission authorized to award material and moral damages to almost a million Azerbaijani IDPs and thousands of ethnic Azerbaijani-Armenians who may have suffered property and livelihood damages. Although the ECtHR upheld the importance of such a commission in *Chiragov* and *Sargsyan*, no inter-governmental action has so far been undertaken. This has grave consequences for almost a million IDPs. The proposed mechanism, similar to the Iraq–Kuwait Compensation Commission, should be a part of a final peace treaty and should include broad authorities in line with the property and reparation rules of the United Nations and the Council of Europe.

Importantly, one of the guarantees of the sustainability of a final peace treaty would be for both parties to accept the ICJ’s compulsory jurisdiction regarding the peace treaty’s enforcement and to accede to the Rome Statute of the International Criminal Court. The availability of recourse to such international law could eliminate the current jurisdictional limitations of these forums and broaden the scope of inter-state claims. In this respect, these international judicial bodies will add a critical legal dimension to their fractured political relationship and create a balance between the parties, regardless of changing regional politics.

A final peace treaty between Azerbaijan and Armenia will involve the national security of both parties, which involves political and military matters that go beyond what international law can realistically govern. In this respect, the judicialization of the conflict has already added a new formal dimension to the potential peace treaty, but it is unlikely to determine the treaty’s content.

A critical positive outcome of the judicialization process is that the parties will be cognizant of an international judicial action if either party breaches the peace treaty or international law. This will potentially eliminate the past legal unaccountability for gross violations of international law, in particular, military occupation and ethnic cleaning. The emerging new legal framework could mark a break from the past ‘Hobbesian’ political order and a move to a ‘Lockean’ reality based on international law: both between the conflicting states, and in the South Caucasus region at large.