



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [X](#) [YouTube](#) [LinkedIn](#)

Summary

Unofficial

Summary 2024/9

12 November 2024

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)

Summary of the Judgment of 12 November 2024

I. INTRODUCTION (PARAS. 31-37)

The Court recalls that Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics (the “Soviet Union”), declared independence on 21 September 1991 and 18 October 1991, respectively.

The region which Armenia calls Nagorno-Karabakh and Azerbaijan calls Garabagh was, in the Soviet Union, an autonomous entity (“oblast”) with a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties’ competing claims over that region resulted in hostilities, to which Armenia refers as “the First Nagorno-Karabakh War” and Azerbaijan refers as “the First Garabagh War”, that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Armenia calls “the Second Nagorno-Karabakh War” and Azerbaijan calls “the Second Garabagh War” (the “2020 Conflict”).

On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation signed a statement referred to by the Parties as “the Trilateral Statement”. Under the terms of this statement, as of 10 November 2020, a complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict was declared. However, the situation between the Parties remained unstable and hostilities again erupted in September 2022, and again in September 2023.

On 16 September 2021, Armenia instituted the present proceedings under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD” or the “Convention”), following the 2020 Conflict. In its Application, Armenia alleges that Azerbaijan has breached several provisions of CERD by virtue of a decades-long State policy of racial discrimination. Specifically, Armenia asserts that, as a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse. Both Armenia and Azerbaijan are parties to CERD. Armenia acceded to it on 23 June 1993 and Azerbaijan on 16 August 1996. The Convention entered into force for each Party on the thirtieth day after the date of the deposit of its instrument of accession, i.e. on 23 July 1993 and 15 September 1996, respectively. Neither Party entered any reservation to the Convention.

The Court recalls that Azerbaijan raises two preliminary objections to the jurisdiction of the Court. First, it argues that the Court lacks jurisdiction under Article 22 of CERD because the precondition of negotiation has not been satisfied. Second, Azerbaijan contends that some of Armenia's claims are not within the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

II. FIRST PRELIMINARY OBJECTION: THE PRECONDITION OF NEGOTIATION UNDER ARTICLE 22 OF CERD (PARAS. 38-59)

The Court starts by considering whether the precondition of negotiation under Article 22 of CERD has been satisfied. It recalls that, in order to meet the precondition of negotiation in the compromissory clause of a treaty, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question. Further, where negotiations are attempted or have commenced, the precondition of negotiation is satisfied only when negotiations have failed, or when they have become futile or deadlocked.

In the Court's view, whether negotiations have taken place, or whether they have failed or become futile or deadlocked, depends on the facts and circumstances of each particular case. The Court notes that the Parties began exchanging written correspondence related to the present dispute under CERD in November 2020. Armenia initiated correspondence with Azerbaijan by a letter dated 11 November 2020, in which Armenia alleged ongoing violations of multiple provisions of CERD. In its response, dated 8 December 2020, Azerbaijan "reject[ed] Armenia's allegations as set forth in its 11 November Letter". Azerbaijan also stated that it "remain[ed] open to negotiating this matter". Armenia reiterated its claims under CERD in a letter to Azerbaijan dated 22 December 2020, and Azerbaijan maintained its rejection of Armenia's allegations in its response, dated 15 January 2021. For the Court, these specific references to CERD show that the subject-matter of these exchanges related to the subject-matter of that Convention.

The Court observes that, over the subsequent months, the Parties engaged in multiple written exchanges and two rounds of virtual meetings concerning the modalities, scope and timing of negotiations regarding the substance of alleged violations of CERD. Correspondence on procedural modalities continued until the Parties reached agreement on these points through an exchange of Notes Verbales on 3 May 2021. Exchanges on the scope of the negotiations continued and, at a meeting on 31 May 2021, each Party presented a list of topics to be discussed at later meetings. The Parties engaged in further exchanges about the format in which claims would be presented and the schedule for doing so. In the Court's opinion, all these exchanges formed part of the negotiations between the Parties related to a possible settlement of the present dispute. Negotiations dedicated to the substance of alleged violations of CERD began with the face-to-face meeting on 15-16 July 2021, during which Armenia presented its claims and requested remedies. The Parties held two rounds of in-person meetings to negotiate claims and remedies: the first on 15-16 and 27-28 July 2021, and the second on 30-31 August and 14-15 September 2021. The Court observes that the Parties' respective positions remained substantially unchanged from Azerbaijan's initial rejection of Armenia's claims in December 2020 until its renewed rejection of those claims at the Parties' second substantive meeting in September 2021. The Court further notes that Azerbaijan presented certain proposals to Armenia at the 30-31 August 2021 meeting and communicated them again by letter to Armenia dated 9 October 2021. These proposals were for certain joint actions that Azerbaijan and Armenia might take, rather than proposals capable of resolving the present dispute under CERD. Against this background, the Court is not persuaded by Azerbaijan's argument that such proposals provide a basis for concluding that the negotiations had only just begun and that further negotiations could still have led to a settlement.

In light of the above, the Court concludes that Armenia made a genuine attempt to engage in discussions with Azerbaijan with a view to resolving the dispute, as required by Article 22 of CERD.

Further, the Court is of the view that the negotiations had become futile by the date on which Armenia filed its Application. The Court recalls that evidence of a genuine attempt to negotiate or of the conduct of negotiations does not require that the parties to a dispute have in fact reached an agreement. In past cases, the Court has found that a precondition of negotiation was satisfied when the parties' basic positions had not subsequently evolved after several exchanges of diplomatic correspondence or meetings. Moreover, the Court has held that the actual number or duration of exchanges is not dispositive in this regard. In the present case, the Parties' respective positions remained substantially unaltered between the end of 2020 and September 2021. In light of these circumstances, the Court considers that negotiations had become futile because there was no realistic possibility, at that stage, of a bilateral negotiated settlement of the disagreement between the Parties.

For these reasons, the Court concludes that the precondition of negotiation under Article 22 of CERD is satisfied in the circumstances of the present case. It therefore considers that Azerbaijan's first preliminary objection must be rejected.

III. SECOND PRELIMINARY OBJECTION: JURISDICTION

***RATIONE MATERIAE* (PARAS. 60-104)**

A. Introduction (paras. 60-68)

The Court then examines Azerbaijan's second preliminary objection, which concerns the Court's jurisdiction *ratione materiae*. The Court recalls that, in accordance with Article 22 of CERD, this jurisdiction covers "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention".

The Court notes that Azerbaijan does not object to the Court's jurisdiction *ratione materiae* over most of Armenia's claims under CERD. The second preliminary objection is limited to the claims that Azerbaijan has breached its obligations under Articles 2 (1), 4 (a) and 5 (b) of CERD by engaging in the murder, torture and inhumane treatment of ethnic Armenians, and the claims that Azerbaijan has breached its obligations under Articles 2 and 5 (a) of CERD by engaging in practices of arbitrary detention and enforced disappearance of ethnic Armenians, respectively, during the 2020 Conflict and subsequent hostilities.

B. The scope of CERD and its applicability in armed conflict (paras. 69-78)

The Court recalls that, when it is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State party for the breach of obligations under the treaty, it must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty.

The Court further recalls that, in determining whether it has jurisdiction *ratione materiae*, it does not need to satisfy itself that the acts of which Armenia complains actually constitute "racial discrimination" within the meaning of Article 1, paragraph 1, of CERD. Such a determination concerns issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by Armenia, and is thus properly a matter for the merits, should the case proceed to that stage. At present, the Court must ascertain merely whether the alleged acts of murder, torture, inhuman treatment, arbitrary detention and enforced disappearance, if established, are capable of constituting violations of CERD, and thus fall within the scope of the Convention.

The Court observes that Article I, paragraph 1, of CERD provides that

“the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Accordingly, in order for claims to come within the Court’s jurisdiction *ratione materiae* under CERD, the applicant must allege acts that, if established, are capable of amounting to a differentiation of treatment based on one of the prohibited grounds under Article 1, paragraph 1, with the purpose or effect of nullifying or impairing the enjoyment of rights on an equal footing by members of the protected group. The Court recalls that, pursuant to Article 1, paragraph 2, of CERD, distinctions based on citizenship or current nationality, as opposed to national or ethnic origin, do not fall within the scope of the Convention. However, in the present case, the Parties concur that Armenian national or ethnic origin constitutes a prohibited ground for discrimination under the Convention, and the Court agrees with this characterization.

Regarding the applicability of CERD in situations of armed conflict, the Court further observes that it is common ground between the Parties that CERD applies in situations of armed conflict, and that the applicability of international humanitarian law to conduct in an armed conflict does not preclude the applicability of CERD. In particular, both Parties acknowledge that conduct that may be incompatible with international humanitarian law can simultaneously implicate obligations under CERD, provided that such conduct conforms to the requirements for establishing a claim under that Convention.

The Court notes that the prohibition of racial discrimination, an essential part of international human rights law, is also a fundamental element of international humanitarian law. It recalls that it has previously acknowledged that allegedly discriminatory acts taking place in the context of armed conflict appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law. It further recalls that the protection offered by human rights conventions does not cease in case of armed conflict and that the Convention contains no general restrictions relating to its applicability in situations of armed conflict, nor does it provide for derogation in such circumstances. Indeed, it observes, some of the most extreme forms of racial discrimination occur in the context of armed conflict.

Accordingly, the Court concludes that the protection against racial discrimination provided by CERD continues to apply in armed conflict. In that sense, CERD and international humanitarian law are complementary. The Court emphasizes, however, that its jurisdiction in the present case is limited by Article 22 of CERD to Armenia’s claims under that Convention.

For these reasons, in the Court’s view, acts of murder, torture, inhuman treatment, arbitrary detention and enforced disappearance allegedly carried out on the basis of the national or ethnic origin of the victim are capable of constituting violations of obligations under CERD, including in an armed conflict. In light of this, the Court must ascertain whether the specific acts complained of by Armenia are capable of establishing discriminatory treatment based on the victims’ Armenian national or ethnic origin.

C. Alleged violations of CERD (paras. 79-103)

1. Murder, torture and inhuman treatment (paras. 79-95)

The Court then considers the arguments put forward by Azerbaijan against Armenia's claims that Azerbaijan has subjected ethnic Armenians, who are civilians or members of Armenia's armed forces, to acts of murder, torture, and inhuman treatment on the basis of their Armenian national or ethnic origin, in violation of Article 2, paragraph 1, as well as Articles 4 (a) and 5 (b) of CERD.

The Court recalls that, unlike international humanitarian law, CERD does not distinguish between members of armed forces and civilians. In light of this, the Court considers that Armenia's claims concerning the discriminatory treatment on the basis of national or ethnic origin of both members of armed forces and civilians fall within the scope of CERD.

The Court is of the view that the acts alleged by Armenia are capable of constituting discrimination against members of armed forces and civilians "based on" their Armenian national or ethnic origin carried out with the purpose or effect of interfering with rights protected under Articles 2 (1), 4 (a) and 5 (b) of CERD. This includes the treatment of ethnic Armenians who reside in Nagorno-Karabakh.

With respect to whether a claim is excluded from the Court's jurisdiction *ratione materiae* under CERD if some alternative explanation or interpretation of the harm alleged by Armenia is available, the Court considers that it need not reach this question at the jurisdictional stage. It must only determine whether the acts alleged are capable of constituting violations of CERD, and thus fall within the scope of the Convention.

The Court further observes that racial discrimination can be a highly contextual phenomenon, and identifying racial discrimination may require careful assessment of the facts and their implications. Whether the material submitted by Armenia in support of its claims is sufficient to demonstrate that the alleged acts of discrimination in question were in fact based on the national or ethnic origin of the victims is a matter for the merits and cannot be determined at this stage of the proceedings.

Similarly, the Court is not required at this stage to review specific statements or evidence submitted by Armenia to determine whether allegedly inflammatory language used by Azerbaijani nationals in a particular context establishes hostility toward Armenians on the basis of ethnic origin or another prohibited ground. It is for Armenia to prove at the merits stage by convincing evidence that the acts in question constitute racial discrimination under Article 1, paragraph 1, of CERD, and Azerbaijan will be entitled to dispute this contention at that time.

With respect to Armenia's claimed evidence regarding generalized anti-Armenian animus, the Court notes that it has previously acknowledged that rhetoric promoting racial hatred and incitement to racial discrimination can generate a pervasive racially charged environment, particularly when employed by high-ranking officials of the State, and increase the risk of bodily harm to members of the protected group. The Court notes that Azerbaijan has not objected to the Court's jurisdiction in respect of Armenia's claims relating to its alleged glorification of racially motivated violence or hate speech against ethnic Armenians. The Court considers that the alleged pervasive atmosphere of racially discriminatory speech and sentiment is relevant to its assessment of Armenia's assertion that certain acts complained of are capable of violating obligations under CERD. It emphasizes, however, that the extent to which such generalized "anti-Armenian sentiment", if proven, can be invoked to demonstrate that specific acts were "based on" prohibited grounds under Article 1, paragraph 1, of CERD, is not a question that the Court needs to determine at this stage of the proceedings.

Accordingly, the Court concludes that Armenia's claims of alleged racially motivated murder, torture and inhuman treatment of ethnic Armenians fall within the scope of Article 2, paragraph 1, Article 4 (a) and Article 5 (b) of CERD.

2. Arbitrary detention and enforced disappearance (paras. 96-103)

The Court then turns to its analysis of arbitrary detention and enforced disappearance. Taking into account the reasons set forth in its analysis of murder, torture, and inhuman treatment, the Court is of the view that the acts alleged by Armenia in relation to arbitrary detention and enforced disappearance of ethnic Armenian civilians are also capable of constituting discriminatory treatment "based on" Armenian national or ethnic origin, carried out with the purpose or effect of interfering with rights protected under Article 2 and Article 5 (a) of CERD. This includes the treatment of ethnic Armenians who reside in Nagorno-Karabakh.

Accordingly, the Court concludes that Armenia's claims regarding the alleged racially motivated arbitrary detention and enforced disappearance of ethnic Armenians fall within the scope of Article 2 and Article 5 (a) of CERD.

*

The Court thus concludes that Azerbaijan's second preliminary objection to the Court's jurisdiction must be rejected.

OPERATIVE CLAUSE (PARA. 105)

For these reasons,

THE COURT,

(1) By sixteen votes to one,

Rejects the first preliminary objection raised by the Republic of Azerbaijan;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aureescu, Tladi; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* Koroma;

(2) By fifteen votes to two,

Rejects the second preliminary objection raised by the Republic of Azerbaijan;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aureescu, Tladi; *Judge ad hoc* Daudet;

AGAINST: *Judge* Yusuf; *Judge ad hoc* Koroma;

(3) By fifteen votes to two,

Finds that it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, to entertain the Application filed by the Republic of Armenia on 16 September 2021.

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi; *Judge ad hoc* Daudet;

AGAINST: *Judge* Yusuf; *Judge ad hoc* Koroma.

*

Judge YUSUF appends a dissenting opinion to the Judgment of the Court; Judge IWASAWA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* KOROMA appends a dissenting opinion to the Judgment of the Court.

Dissenting opinion of Judge Yusuf

1. Judge Yusuf disagrees with the Court's decision to reject the second preliminary objection of Azerbaijan relating to the jurisdiction *ratione materiae* of the Court. In particular, he does not think that Article 22 of CERD can serve as a basis of jurisdiction for most of the claims of Armenia in the present case. In his view, the Court should have used this opportunity to reject the practice of using CERD as a "fourre-tout" for jurisdictional purposes and upheld the objections of Azerbaijan.

2. For Judge Yusuf, the main issue which divides the Parties at this jurisdictional phase of the dispute is not the applicability of CERD in situations of armed conflict in general. Rather, the issue is whether the conduct complained of by Armenia in the instant case falls within the scope of CERD. Such conduct can only implicate CERD if it involves racial discrimination as defined in Article 1 (1) of CERD and, consequently, "conforms to the requirements for establishing a claim under that Convention".

3. As Judge Yusuf notes, the requirements under Article 1 (1) of CERD, which have been indicated by the Court in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* are (a) differentiation based on prohibited grounds, such as ethnic or national origin; and (b) having the purpose or effect of nullifying or impairing the human rights of an individual or group of individuals as compared to others. However, Judge Yusuf observes that the Judgment does not examine the alleged breaches by Azerbaijan of the provisions of CERD, as claimed by Armenia, in light of these two fundamental requirements. Moreover, the requirement of nullification of rights or of putting the individuals or groups concerned in a disadvantageous position as compared to others, which involves a comparator standard, receives no analysis whatsoever in the Judgment. In the absence of those requirements, racial or ethnic discrimination, as defined by CERD, cannot be said to exist.

4. Finally, according to Judge Yusuf, the finding that the Court has jurisdiction under CERD, and that the Convention is applicable to the alleged acts of murder, torture, inhumane treatment, arbitrary detention and enforced disappearance, in the context of an armed conflict between two States, and most often in the midst of a battlefield, without showing that the requirements of Article 1 (1) of CERD are even superficially met, undermines the objectives and integrity of CERD. It opens the gates of CERD to all kinds of claims that have nothing to do with its provisions or its object and purpose. It may also give the wrong signal about the exercise of the jurisdiction of the Court for those trying to bring cases before it for which proper jurisdictional grounds are not available. The Court should have, and could have, avoided such an unsatisfactory outcome.

Separate opinion of Judge Iwasawa

In his opinion, Judge Iwasawa elaborates on his views regarding the test used by the Court in determining its jurisdiction *ratione materiae*.

Judge Iwasawa is of the view that the test used by the Court to determine its jurisdiction *ratione materiae*, whether the applicant's claim falls within the scope of the treaty in question, must be understood against the background of the Court's overall jurisprudence. He points out that, in *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that, in order to establish its jurisdiction *ratione materiae*, the applicant must establish "a reasonable connection" between the treaty and its claims.

In the present case, the Applicant focuses on the term “capable” and argues that its claims are “at the very least” “capable of” constituting violations of obligations under CERD. In the view of Judge Iwasawa, the Court’s use of the term “capable of” in articulating the test should not be understood to imply that the Court has jurisdiction *ratione materiae* as long as there is even the slightest possibility that the facts are “capable” of constituting violations of obligations under the treaty.

Dissenting opinion of Judge *ad hoc* Koroma

In his dissenting opinion, Judge *ad hoc* Koroma stated that he was constrained to dissent from the majority conclusion reached, as the Court should not exercise jurisdiction in this case and should have found the Application inadmissible. The principal reason is that the subject-matter of the dispute between the Applicant and the Respondent is not in concordance with Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, which purports to serve as the jurisdictional basis of the Application but is not in this case.

In Judge Koroma’s view, the majority should have upheld the teachings and jurisprudence of the Court, as stated in the *Nuclear Tests* case, that a dispute must concern the subject-matter of the relevant convention. The Court’s first duty is to “ascertain the true subject of the dispute, the object and purpose of the claim”. Any “dispute brought before the Court cannot be separated from the situation in which it has arisen, and from further developments which may have affected it”.

As mentioned in the Judgment, the subject-matter of the Application concerns the status of the region of Nagorno-Karabakh/Garabagh (a territorial dispute), which has experienced several periods of armed hostilities over the years between the Parties. Yet, the Convention and its jurisdictional clause invoked as the jurisdictional basis for bringing the claim before the Court has as its purpose and object the elimination of racial discrimination. It is Judge Koroma’s opinion that invoking the jurisdictional clause of the Convention does not transform a dispute about the territory’s status into a disagreement about the interpretation and application of the Convention.

The Judge further pointed out that a State’s activity can only be adjudicated based on its consent and under the relevant treaty to which it is a party. In other words, the Court cannot exercise jurisdiction in a dispute for which consent has not been given.

Judge *ad hoc* Koroma underscored that the majority should have observed and adhered to the distinction between the preliminary objection phase of an Application — which has its own rules and laws — and the merits phase, to avoid premature conclusions in the interest of justice.

Finally, in the Judge’s opinion, the majority’s conclusion should not have been influenced by how the issues have been framed, particularly at this preliminary objection phase. In other words, if a less eristic approach had been taken, even with the allegations of “discriminatory” murder, “ethnic cleansing”, “torture”, etc., a different conclusion on jurisdiction or on whether to find the Application admissible would have been reached at this phase of the proceedings, taking into account the procedural and substantive preconditions embedded in the jurisdictional clause invoked and the fact that for close to 30 years prior, there had been no diplomatic contact between the Parties.

Judge *ad hoc* Koroma considers that the Court would have had solid jurisprudential grounds to uphold the preliminary objections for want of jurisdiction and to find the Application inadmissible.
