THE RIGHT TO RETURN OF NAGORNO-KARABAKH ARMENIANS REFORMULATES THEIR RIGHT TO SELF-DETERMINATION

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INTRODUCTION: A CHAOTIC BACKGROUND

1. The current situation of Nagorno-Karabakh Armenian people is widely known. In the aftermath of the military campaign of Azerbaijan to gain control of Nagorno-Karabakh region in 2020 , which resulted in the defeat of Armenia, Armenia's Prime Minister Pashinyan has agreed on 6 October 2022 that Azerbaijan territorial integrity would be restored[1], in other words that Nagorno-Karabakh territory should come under Azerbaijani control. Azerbaijan started a blockade of the remaining self-proclaimed Republic two months later. After nine months of resistance, Azerbaijan conducted a final assault, as a result of which the Armenian native population left it left forcibly by the end of September 2023 and is no longer living on its ancestral land. They left behind their land, personal and business properties, their cemeteries, and the dead who have not buried according to tradition. Humanity is now watching passively the destruction of the Artsakh's multi-secular cultural and religious national patrimony, as well as the erasing of all Armenian traces.
2. During the blockade that led to forced displacement, the Nagorno-Karabakh Republic (NKR) leadership refused to take independent initiatives and instead relied entirely on the Republic of Armenia (RA) government and/or Russian protection. Actually, the trilateral cease-fire agreement signed on 9 November 2020 does not mention the right to self-determination of Nagorno-Karabakh Armenians, nor does it mention clearly their protection.[2] Nagorno-Karabakh Armenians could have, as an ethnic community whose fundamentals rights were seriously violated during the 9-month blockade, called for United Nations Security Council (UNSC) to adopt a resolution indicating international protection measures. I personally had elaborated and submitted such a proposal based on relevant UN Charter provisions and an *ad hoc* mechanism for the community of remaining Nagorno-Karabakh Armenians to reach the UNSC. Until September 2023, the NKR authorities were still insisting that they were a legitimate state and whose people proclaimed its independence after the holding of a referendum, as provisioned by the USSR Constitution. Without challenging the legitimacy of this referendum and the independence that came out of it, the reality that no other State had ever recognised their independence was

[1] https://www.consilium.europa.eu/en/press/press-releases/2022/10/07/statement-following-quadrilateral-meeting-between-president-aliyev-prime-minister-pashinyan-president-macron-and-president-michel-6-october-2022/

[2] See the article of the author: "A Closer Look at the Trilateral Agreement to End War", November 16, 2020, https://mirrorspectator.com/2020/11/16/a-closer-look-at-the-trilateral-agreement-to-end-war/

imposing them to consider other options. To be fair, a wide spectrum of political forces and intellectuals in the Armenian world were and are still supporting the idea of speaking to the world as a State.

3. The proclaimed NKR presidency and parliament in exile are a proof that Nagorno-Karabakh Armenians don't want to lose their experience of independent state from 1991 to 2023. Actually, most of stakeholders around the world don't know that Nagorno-Karabakh Armenian people has never lived under the regime of minorities under the administration of Azerbaijan. This is probably one the main failures in the Armenian diplomatic and political communication. The stake in between the status of people and that of minority is related to the current state of the international law as for the interpretation and application of self-determination principle.[3] A national minority can only, even if they are severely discriminated and subjugated, hope for the protection and reinforcement of their right to self-determination into the existing state, *i.e.* through a democratic process. That option would have been and is illusory in any case in the context of today's Azerbaijan political regime, where there is neither rule of law nor democracy but instead a well-established dictatorship.
4. A native people like the Armenian ethnic community of mountainous region of Karabakh has different rights than that of minorities. This community existed on those lands long before the creation of the Armenian and Azerbaijani Republics in 1918. They had always benefited from relative autonomy. They were colonized during the Soviet period and the administration of the region was transferred abruptly and arbitrarily under Azerbaijan ruling in 1921.[4] But, they have been provided the status of an autonomous region ("Oblast"). Thus, has been created the Nagorno-Karabakh Autonomous Oblast (NKAO).[5] Although the administrative control of Azerbaijan over this oblast has regularly been contested by the Soviet Socialist Republic of Armenia during the soviet period, the Nagorno-Karabakh leadership waited for the major political events at the end of the 1980s and early 1990s to initiate an independence process at the occasion of Azerbaijan gaining its independence and leaving the USSR. Nagorno-Karabakh Armenian people proclaimed their independence in 1991 according to the rights and mechanisms conferred to Autonomous Oblasts in the USSR Constitution.[6]

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[3] For a rather complete legal analysis of the right to self-determination of Nagorno-Karabakh refer to Philippe Raffi KALFAYAN, "Autodétermination du Haut-Karabakh: un Pronostic Engagé ou Réservé?" *in Haut-Karabakh, Le Livre Noir*, Dir. Eric Dénécé/Tigrane Yegavian, Ed. Elipses (2022), pp. 345-362

[4] The annexation of the territory of Nagorno-Karabakh to Azerbaijan dates from 5 July 1921. This is the decision of the Caucasian Bureau of the Communist Party. It was contested from its adoption and had been continuing to be so throughout the existence of the USSR. It was not based on a logic of self-determination of the Azeri and Armenian peoples since they were not consulted. Nagorno-Karabagh was inhabited by 95% of Armenians in 1921 (75% in 1988), which should have justified an attachment to Armenia. Russia preferred to settle the ethno-religious conflicts that shook the entire Bolshevik space at the expense of Nagorno-Karabakh Armenians.

[5] It was an autonomous oblast within the Azerbaijan Soviet Socialist Republic that was created on July 7, 1923.

[6] Autonomous oblasts of the Union of Soviet Socialist Republics were administrative units created for a number of smaller nations, which were given autonomy within the fifteen republics of the USSR. According to the constitution of the USSR, in case of a union republic voting on leaving the Soviet Union,

5. Had the NKR authorities accepted to leave aside their proclaimed status of independent state, they could at least have used some diplomatic and legal levers available to them as an ethnic and indigenous group and would have affirmed their will to remain on their multi-millennial land. It would have raised awareness on the international scene. There was no guarantee to succeed in obtaining the adoption of a resolution due to the veto system.[7] Both Western permanent members and Russian Federation were already entered into open conflict with each other after the invasion of Ukraine in February 2022. All of them would have in any case refrained from taking such steps since they all without exception were supporting the re-integration of Nagorno-Karabakh into Azerbaijan. The Minsk process was reflecting this position but with one supplementary chapter in the negotiation: the formulation of rights of Nagorno-Karabakh Armenians in Azerbaijan, *i.e.* the implementation of an internal self-determination process, the only process which is widely accepted in international law.[8] The only exceptions to internal self-determination are the cases of indigenous or colonized people whose right to self-determination includes the right to claim independence from the colonial country. That also included a right to secession in exceptional circumstances.[9] The practice of States and of the International Court of Justice (ICJ) is still uncertain on those circumstances. Meanwhile, the decolonization process provides a right to independence.[10]
6. The Nagorno-Karabakh Armenians never presented themselves as an indigenous and colonized people, neither legally nor politically. The break-up of the Union of Soviet Socialist Republics (USSR) corresponded legally to the dissolution of a federation of republics, and not to a process of decolonization. The dismantling of the USSR failed to deal with the situations inherited from this period. Peoples who were colonized, forcibly displaced or under territorial administration of another nation during the Soviet period have not regained their status or territory *quo ante*.
7. Today, the new political reality imposes to behave as a native nation deprived of its right to live on its ancestral land. Hence the Armenians of Nagorno-Karabakh are protected by the international legal instruments in relation with the rights of refugees and of displaced people.

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autonomous republics, autonomous oblasts and autonomous okrugs had the right, by means of a referendum, to independently resolve whether they will stay in the USSR or leave with the seceding union republic, as well as to raise the issue of their state-legal status.

[7] The current system of votes at the UN Security Council provides a right to veto to the five permanent members of this Council, *i.e.* USA, France, United Kingdom, China, Russia.

[8] For a rather complete legal analysis of the right to self-determination of Nagorno-Karabakh refer to the article of the author "Autodétermination du Haut-Karabakh: un Pronostic Engagé ou Réservé ?" in *Haut-Karabakh, Le Livre Noir*, Dir. Eric Dénécé/Tigrane Yegavian, Elipses (2022), pp. 345-362.

[9] *Id.*, pp. 349-350.

[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, I.C.J. Reports 2019, p. 95, para. 177: The Court has found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State (…) It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

8. The Republic of Armenia did not transform its provisional legal victory at the ICJ[11] into a diplomatic victory at the UNSC. The Security Council resolutions are as important as the ICJ orders and judgements because the UNSC is the only UN organ that can adopt sanctions and measures to enforce effectively resolutions and judgements.[12] These measures can include military interventions.[13] More relevant for the return of Nagorno-Karabagh refugees is the precedent of the Resolution 1244 from the UN Security Council[14], which authorised an international civil and military presence in the Federal Republic of Yugoslavia and established the United Nations Interim Administration Mission in Kosovo (UNMIK). In the preamble of Resolution 1244, the Security Council regretted that there had not been compliance with previous resolutions. In the case of Iraq or Kosovo, both resolutions have been adopted thanks to the abstention of China.
9. The *Committee for the Defense of the Fundamental Rights of the People of Nagorno-Karabakh*, headed by Vartan Oskanian, claims to have been mandated to conduct a diplomatic mission by the exiled NKR parliament. In its statement it does not put forth the existence of an independent state but the right of people of Nagorno-Karabakh to return to their homeland as an essential part of building a sustainable peace between Armenia and Azerbaijan.[15] This objective is fair, reasoned, and valid politically and legally. They also declare that "the people of Nagorno-Karabakh remain resolute in their determination to return to their homeland, determine their political future, and exercise their own democratic self-governance".[16] It is unclear how this committee intends to proceed forward to convince Azerbaijan on this particular aspect of self-governance.

I – THE RIGHT TO RETURN IS LEGALLY INALIENABLE BUT AT RISK POLITICALLY

10. The right to return does not suffer any major legal hindrance in international law. This is an automatic consequential right since the forced transfer or deportation of populations is strictly prohibited by international law. That is why most countries,

[11] ICJ issued several orders indicating interim measures for the protection the Armenians in general and of Nagorno-Karabakh Armenians in particular. *Cf.* fn. 42.
[12] Right conferred by the article 94 of the UN Charter.
[13] On 29 November 1990, the UN Security Council passed Resolution 678 under the guidance of Canada, the USSR, United Kingdom and the United States,[6] which gave Iraq until 15 January 1991 to withdraw from Kuwait and empowered states to use "all necessary means" to force Iraq out of Kuwait after the deadline. The Resolution requested Member States to keep the council informed on their decisions. This later became the legal authorization for the Gulf War, as Iraq did not withdraw by the deadline.
[14] Resolution 1244 (1999), Adopted by the Security Council at its 4011th meeting, on 10 June 1999.
[15] Vartan Oskanian, "Karabakh Armenians' return under international protection key for lasting peace between Armenia, Azerbaijan", 11 July 2024, https://www.civilnet.am/en/news/785226/karabakh-armenians-return-under-international-protection-key-for-lasting-peace-between-armenia-azerbaijan-vartan-oskanian/
[16] *Ibid.*

especially USA[17], Canada[18], Russia, France and European Union[19] stress the right to return of Nagorno-Karabakh Armenians. Of course, it is quite cynical from apart of them to declare this today while they did not do anything to prevent or stop the ethnical cleansing process when it was still possible. They watched passively a suite of unlawful acts, such as terror crimes on civilians and prisoners, 9-month blockade and final assault in September 2023 – which led to an effective cleansing.[20] It is much more challenging to restore the rights of Nagorno-Karabakh people now that they are no longer living on their lands. Armenians have already experienced the same situation in the aftermath of 1915-1923 massive massacres and deportations, widely known as the Armenian Genocide. Turkey had adopted various laws preventing *de jure* and *de facto* the return of Armenian survivors and/or the restitution/compensation to their heirs.[21] Azerbaijan conducts already a similar policy, which consists in a "de facto denial of the right to return and to reconciliation".[22] "The continued detention of the former leaders of NKR, denial of Armenian history and legacy in Nagorno-Karabakh, the destruction and looting of homes, and the continuous anti-Armenian discrimination and rhetoric all clearly indicate that Azerbaijan does not intend to allow Armenians to return to their homes, regardless of their official statements."[23]

11. The right to return for Nagorno-Karabakh Armenians is nevertheless the only legal

[17] https://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=413361; https://mirrorspectator.com/2024/09/25/vice-president-harris-issues-statement-on-armenian-independence-day/

[18] https://www.canada.ca/en/global-affairs/news/2024/09/statement-by-minister-joly-one-year-after-azerbaijans-military-operation-in-the-nagorno-karabakh-region.html

[19] European Parliament resolution of 13 March 2024 on closer ties between the EU and Armenia and the need for a peace agreement between Azerbaijan and Armenia (2024/2580(RSP)) (item 14). See https://www.europarl.europa.eu/doceo/document/TA-9-2024-0158_EN.html

[20] Not less cynically and dramatically, the same countries don't take any serious step to stop the ongoing genocide against Palestinians. They claim the already UN recorded right of Palestinians to get their own state (146 countries have already recognised that state) but they don't put an end to Israel's occupation and aggression crimes aiming at removing forcibly all Palestinians from their lands, in Jerusalem, Gaza and West Bank.

[21] The rhetoric used by the Turkish government after the signing of the Treaty of Lausanne, including the letter sent by the Turkish Ministry of Foreign Affairs to the SDN Secretary-General on 25 February 1928 which is published in the annex to the Legal Opinion of MM. Lapradelle, Gidel, Le Fur, and Mandelstam on "the confiscation of property of Armenian refugees by the Turkish government" (Ed. Massis, Paris 1929) illustrates the denial. The Turkish government states that "the fate of Armenian refugees and the so-called "abandoned property" issue are not part of its commitments as they are fugitives who find themselves in a situation of guilt. The Turkish government has reserved the right to grant return under the general amnesty protocol annexed to the Treaty of Lausanne (17 July 1923) «only to those of the Ottoman subjects who had previously left the country and whose return to Turkish territory would not offer any inconvenience». The law of 23 May 1927 decrees that the Ottoman subjects, who during the War of Independence did not take part in the National struggle and stood outside Turkey and did not reintegrate the Turkish territory between 24 July 1923 and 23 May 1927, are deprived of their citizenship. The letter insists "that it is self-evident that the Armenian fugitives in question who had previously left the country fall unquestionably into this category".

[22] *Cf.* Report of International Comparative and Law Center-Armenia/Armenian Legal Center for Justice and Human Rights, "Arstsakh/Nagorno-Karabakh: a case study for ethnical cleansing", August 2024, p. 66.

[23] *Ibid.*

and political path to work on. Armenia has neither military capacity, nor political will to reconquer this historical Armenian land for now. In any case, Armenia would have no legal right to use force. But Armenians around the world have the duty to promoting and defending the right to return of Armenian people into Nagorno-Karabakh. They dispose of unchallenged legal arguments. This is a crucial and long-term battle for restoring their right to self-determination. *The right to return is reformulating the right to self-determination because it is now the first stage of the process to be completed.* Meanwhile, social and diplomatic matters challenge this goal.

12. Time is key in the current socio-political realities. First, there are no Armenians left in Nagorno-Karabakh, hence Azerbaijan is investing very rapidly and heavily into the territory, with the help of Türkiye, for building a regional infrastructure. They also have announced the demographic recolonization of it. It is not clear who will be the settlers: native Azerbaijanis of the former oblast or new populations not originated from the region? Second, the Artsakh refugees into Armenia are living in precarious conditions, subjected to some hostile sentiments and to political control, and are emigrating rapidly toward Russia or Western countries. It is estimated that 20.000 individuals left Armenia so far and only 4.300 applied for full citizenship as of 3 September 2024.[24]
13. The diplomatic plane is not less challenging. Armenia's incumbent government has recognized without nuances the belonging of the former autonomous region of Nagorno-Karabakh to Azerbaijan. Meanwhile, there is an obvious absence of coherent strategy at the head of the state. On one side, the Ministry for Foreign Affairs and the Agent of the government for legal affairs are still defending the right of Nagorno-Karabakh Armenians to return on their lands with security guarantees respectively in diplomatic and judicial forums. The ICJ provisional measures order on 17 November 2023 has already recorded that right.[25] President Aliyev does recognize that right too but claims reciprocity for Azerbaijanis having left Armenia 30 years ago.[26] On the other side, the Armenian Prime minister and the President of the Armenian Parliament declare that the *Artsakh*[27] case is over and Armenia is no longer concerned with this issue. The Speaker Alen Simonyan even stated on 16 November 2023: "We have a big problem concerning the Artsakh Armenians. I don't see the purpose of establishing statehood or preserving and developing state institutions here [he meant in Armenia]. I consider it an imminent threat and a blow to the security of the Republic of Armenia".[28] He reiterated a negative statement on September 9, 2024: "Armenia's government does not regard Nagorno-Karabakh's

[24] https://armenpress.am/en/article/1198888
[25] https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf
[26] https://president.az/en/articles/view/62438
[27] Armenian name used for Nagorno-Karabkh
[28] https://www.panorama.am/en/news/2023/11/16/parliament-speaker/2926783

exiled leaders as legal representatives of the region and of its displaced population".[29]

14. The incumbent Armenian authorities also seem to consider, by ordering a new draft constitution, that any reference to claims about Nagorno-Karabakh being Armenian, as recalled into the Constitution's preamble[30], is now outdated and the fundamental law of the Republic of Armenia may be changed to reflect the new reality. Actually, Azerbaijan claims in echo that the removal of such references would help signing a peace treaty.[31] Both the ruling political party and its supporters in Armenia propagate such an illusory message to the people, preparing minds to a constitutional referendum that may erase the reference to Armenian *Artsakh* from it.
15. Those political realities are introduced as facts that may influence directly the elaboration of legal and political solutions. The rest of the article will delve into legal and diplomatic aspects. It will analyse the rights of Nagorno-Karabakh people in the light of international law, verify if there is opposition between the individual rights and the collective rights in the light of international law. It will also question the meaning of the right to return of Nagorno-Karabakh Armenians in the wider legal framework of their right to self-determination. It will draw a comparative analysis with the case of Palestinian people. At last, it will stress the reasons why third states may get involved in the consolidation of the right to return for Nagorno-Karabakh Armenians in the light of their international legal obligations.

II – IS THE RIGHT TO RETURN INDIVIDUAL OR COLLECTIVE?

16. In the literature, the difference between individual and collective rights is made on the manner the rights are exercised. Certain rights are exercised exclusively by an individual while the others are exercisable jointly in community with others.[32] Some national constitutions reflect that definition. International Human Rights Law provides essentially for the protection of individual rights although the preamble of the United Nations (UN)' Universal Declaration of Human Rights stresses the rights of nations and people and the article 1.1 of the International Covenant on Civil and Political Rights (ICCPR) mention the right of peoples to self-determination. The fundamental legal principle widely accepted in international law is that an individual is absolutely free to making his own choice of life and shall not be constrained by its belonging to a community, a tribe, or a people. When it comes to provisions

[29] Alen Simonyan, Session of Armenian Parliament on 9 September 2024.
[30] The founders of the Third Republic of Armenia took care of inserting a preamble to the constitution which defines the national vision. The Armenian people take as their basis the fundamental principles and national goals of Armenian sovereignty established in the Declaration of Independence of Armenia. That one (adopted on August 23, 1990) is therefore the circumstantial and visionary basis of the Constitution (adopted on July 5, 1995). The preamble refers to December 1, 1989, 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".
[31] https://www.aa.com.tr/en/asia-pacific/azerbaijan-says-peace-deal-with-armenia-impossible-while-yerevans-constitution-is-unchanged/3242606
[32] Miodrag A. Jovanović, *Collective rights, a legal theory*, Cambridge University Press (2012), Chap. 3: "Collective rights as a distinctive legal concept", p. 110.

protecting the freedom of movement of individuals, it is recalled quite clearly by international and regional instruments.[33]

17. The international courts regularly privilege the individual rights over the collective and political rights of a people or a community where such conflict exists. Even in the case of indigenous peoples or tribes, which by nature rely on community life traditions and specific social rules, the individual right is protected. In fact, the collective rights are those human rights generally recognized to be exercisable by collectives (in other words by groups of individuals) and not reducible to the individual.[34] That includes the right to self-determination. Although there is no normative definition of collective rights, the concept emerged because individual human rights do not guarantee adequate protection for indigenous peoples and other minorities exhibiting collective characteristics. These groups face various threats to their livelihoods, to their environments, to their health and to their security, and their very survival may depend upon the recognition and protection of their collective rights, especially when it relates to the lands. It is now widely recognized that secure access to lands, territories and natural resources is fundamental to indigenous peoples' self-driven development. Central to the identity of indigenous peoples is, in fact, their relationship to ancestral territories and related resources, which form the basis of their livelihoods and are often regulated by complex customary laws and governance systems. Collective rights are thus inalienable for indigenous people. Land rights must be understood from this perspective, as present generations have inherited the territory of previous ones, and are obliged to pass it on to future generations. For that reason, indigenous territory should not be classified as property but rather as inheritance or patrimony.

18. As exposed, there is no opposition of individual and collective rights but rather complementarity in the sense that some rights are exclusively exercised individually and others exercisable by a community. Hence, the right to return belongs to both the individual and to the community or group he is member of. There is however a differentiation made in the reparations scheme. The jurisprudence of the Interamerican Court of Human Rights or of the African Court of Human Rights offers many such cases. As an example, in *Communidad Sawhoyamaxa v. Paraguay*, the Interamerican court of human rights stated that the persons entitled to receive

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[33] Article 13 of the Universal Declaration reads as follows: 1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and to return to his country.
Article 12 of the ICCPR provides: 2. Everyone shall be free to leave any country, including his own. 4. No one shall be arbitrarily deprived of the right to enter his own country.
Article 8 of the European Convention on Human Rights reads as follows: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[34] Encyclopaedic Dictionary of International Law (3 ed., 2009), Edited by: John P. Grant and J. Craig Barker.

reparation are the indigenous Sawhoyamaxa Community and its members.[35] The Interamerican Commission had submitted that (i) the violations have been in detriment of an Indigenous Community that, due to its cultural identity, must be considered from a collective and an individual standpoint; (ii) the reparations reach a special dimension due to the collective nature of the rights that the State has violated, in detriment of the Community and its members. The internationally wrongful act of the State has affected not only the victims as individuals, but the existence of the Community itself.[36] The separate opinion of Judge García Ramírez explains the interpretation of the two forms of guarantee of rights. While the judgment's terminology refers to members of Aboriginal groups and not necessarily to a group taken as a unique subject of law, the Convention's [note of the author: American Convention of Human Rights] approach does not imply denial or exception of collective rights. It is generally accepted that individual rights, which constitute human rights under the San José Pact, are born and acquire existence, effectiveness and meaning in the context of collective rights. Protecting the former is a way to preserve the latter, and conversely protecting collective rights helps to understand and promote the preservation of individual rights. It concludes that if the subject of law remains the individual, as member of the community, and not the community as such, the two forms of guarantee of rights are not in conflict with each other but are on the contrary in total complementarity.[37] It implies a differentiated treatment at the stage of reparations: the Interamerican Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the *restitutio in integrum* principle. Therefore, the Court orders that Paraguay shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands.[38] On an individual plane, reparations are granted for pecuniary and non-pecuniary damages.[39]

19. In the context of Nagorno-Karabakh, this collective aspect may reveal particularly relevant. The whole ethnic group has been forced massively to leave by Azerbaijan, *i.e.* the state controlling effectively the territory since November 9, 2020.[40] In such situations, the right to return is both an individual and collective right, since a homogenous group of individuals has been subjected to serious violations of its enjoyment of fundamental rights, including its right to self-determination, because

[35] *Communidad Sawhoyamaxa v. Paraguay*, Interamerican court of human rights, Judgment 29 March 2006, Serie C n° 146, para. 204.
[36] *Id.*, para. 201.
[37] *Id.*, Separate Opinion of Judge Sergio Garcia Ramirez, para. 11.
[38] *Id.* Judgment, para. 210
[39] *Ibid.*, paras. 216 et s.
[40] After the 9th November 2020 cease-fire agreement and until the end of September 2023, it is a fact that the remaining territory of NKR was no longer autonomous since it was surrounded for a while and blockaded for the last 9 months. Hence NKR Armenians were under effective control of Azerbaijan.

of racial discrimination.[41]

20. Consequently, looking for individual restitution and/or compensation for lost property and assets does not harm the defense and consolidation of the collective right to return of the Armenian people and the right to protection of national patrimony and heritage of Artsakh. Actually, the ICJ ordered interim measures of that nature in the ongoing interstate proceeding (*Armenia v. Azerbaijan*) in the light the application of the International Convention on Elimination of Racial Discrimination (ICERD).[42]
21. When individual applications are being or to be filed at the European Court of Human Rights (ECtHR), the petition must anticipate the right to reparation to be conceived as a right to return on native land and restitution of one's home. Actually, an ECtHR case law exists for the Armenian and Azerbaijani displaced nationals during the first Nagorno-Karabakh war (1992-1994). In *Sargsyan v. Azerbaijan*, the European Court considers that the applicant's complaint raises two issues: firstly, whether the Government [Azerbaijan] are under an obligation to grant him access to his house and land in Gulistan and, secondly, whether they are under a duty to take any other measures to protect the applicant's property right and/or to compensate him for the loss of the use of the property.[43] It concludes to the continuing violation of the rights of the applicant to return to Gulistan and to enjoy his property or alternatively to be provided compensation by Azerbaijan.[44] The ECtHR confirmed the same reasoning in judgements in favour of Azerbaijani citizens against Armenia, whose reference judgment is *Chiragov v. Armenia*.[45] The execution of both judgements, issued the same day, is still pending. The Committee of Ministers of the Council of Europe, which is the supervision body for the execution of the judgments, regularly states that none of individual and general (having a collective character) measures have been enforced since 2015. In the course of the consultations between the Azerbaijani authorities and the Secretariat of the Committee of Ministers, and also between the Armenian authorities and the Secretariat concerning the execution of the *Chiragov v. Armenia* case, the possibility was discussed of the authorities of Azerbaijan and Armenia each signing a Memorandum of Understanding (MoU) with the Council of Europe providing for the simultaneous payment of the just satisfaction owing in the *Sargsyan* and *Chiragov* (just satisfaction) judgments through a Council of Europe

[41] Racial discrimination in its wide meaning is defined in the Convention on Elimination of Racial Discrimination at article 1.1: "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.
[42] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia V. Azerbaijan)*, indication of provisional measures, Order 17 November 2023, para. 69.
[43] ECtHR, *Sargsyan v. Azerbaijan*, Grand Chamber Judgment (Merits) 16 June 2015, Application No. 40167/06, para. 228.
[44] *Id.*, paras. 241 and 260 asserting respectively the continuing violations of article 1, Protocol 1 and of article 8.
[45] ECtHR, *Chiragov v. Azerbaijan*, Grand Chamber Judgment (Merits) 16 June 2025, Application No. 13216/05.

bank account. Draft MOUs were therefore prepared by the Secretariat and sent to both governments. By a letter dated 3 November 2022 and most recently in the course of consultations in May 2024, Azerbaijan indicated readiness to sign, but only if this was reciprocated by Armenia. The Azerbaijani authorities informed the Committee that they require more time for assessment of the possible implications and ramifications of the MoUs, and they ask the Committee to postpone its examination of the case as well as that of Chiragov to one of its meetings in 2025.[46] Most recently, by a letter of 23 August 2024[47], the Armenian authorities have also confirmed in writing their readiness to sign the MoU.[48] At its latest meeting reviewing the execution of *Sargsyan* on 17-19 September 2024, the Committee of Ministers strongly underlined the unconditional obligation under Article 46 § 1 of the Convention on respondent states to fully and effectively execute all judgments against them, including their unconditional obligation to pay the sums of just satisfaction awarded by the European Court and therefore, in the event that the consultations on the draft MoUs do not rapidly produce concrete results, encouraged the authorities of Azerbaijan to proceed with the payment of the sums owing under the *Sargsyan* directly to the applicant's next-of-kin.[49]

22. One can make two observations on those two emblematic cases. First of all, the European Court judgments' execution process is clearly influenced by the diplomatic negotiations including the current ongoing ones in relation with the Peace Treaty, since reciprocity and simultaneity are the rules. Second, the individual and general measures are interrelated. If the execution of individual payment measures can be executed separately, others individual measures are depending on general measures. The Court applied in both *Sargsyan* and *Chiragov* among other international legal provisions the "Pinheiro Principles".

23. The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, known as the "Pinheiro Principles"[50], are the most complete standards on the issue, though considered as soft law. These principles provide that "All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal" (article 2.1), "States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution."

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[46] CM/Notes/1507/H46-5, H46-5 Sargsyan v. Azerbaijan (Application No. 40167/06) Supervision of the execution of the European Court's judgments.

[47] (DH-DD(2024)960)

[48] *Ibid.*

[49] CM/Del/Dec(2024)1507/H46-5 on 19 September 2024, items 3 and 4.

[50] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 28 June 2005, E/CN.4/Sub.2/2005/17, Annex.

(article 2.2), “Everyone has the right to be protected from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status.” (article 3.1), “States should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims.” (article 12.1), and “All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.” (article 21.1)

24. The International Humanitarian Law provides some provisions too. The right of displaced persons “to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist” is regarded as a rule of customary international law (namely the Rule 132 in Customary International Humanitarian Law[51]) that applies to any kind of territory.[52] State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The right to return applies to those who have been displaced, voluntarily or involuntarily, on account of the conflict and not to non-nationals who have been lawfully expelled.
25. In the specific context of refugee return, the Committee on the Elimination of Racial Discrimination (CERD) has commented: “All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.”[53] The UN Human Rights Commission has emphasized too that refugees have a right to return and to property restitution.[54] The right to return and the right to property restitution are complementary, but they rely on separate provisions and principles of international law. The right to return is now understood to encompass not merely returning to one's country, but to one's home as well. Indeed, housing restitution is an indispensable component of any strategy aimed at promoting,

[51] ICRC, International Humanitarian Law Databases, Volume II, Chapter 38, Section D, Rule 132, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132.
[52] Id. *Chiragov*, para. 97.
[53] Committee on the Elimination of Racial Discrimination, General Recommendation XXII on art. 5 of the Convention on Refugees and Displaced Persons 2(c) (1996).
[54] UN Human Rights. Commission Res. 2003/34 ("Reaffirming that, pursuant to internationally proclaimed human rights principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation").

protecting and implementing the right to return.[55] Each right can stand alone, but they also support one another and in practice, are highly intertwined, especially as a remedy to the *composite violation*[56] of population displacement.

26. As the Pinheiro principle recalls "The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor by the non-return of refugees and displaced persons entitled to housing, land and property restitution". This specific principle has been applied in *Sargsyan v. Azerbaijan*. The Committee of Ministers explains that the authorities [Azerbaijan] are not in a position to guarantee safe access to the village of Gulistan and consider that other individual measures are closely linked to the general measures. For an example, the principles and modalities of the establishment of an efficient property claims mechanism are considered general measures, in particular the category of persons who should be entitled to bring claims. The authorities consider that, in the context of the *Sargsyan* case, "others in the applicant's situation" includes persons of Armenian ethnicity who had to flee their homes and properties during the active military phase (1992-94) of the conflict and who, like the applicant, formerly lived in Gulistan village or and possibly other settlements inhabited by ethnic Armenians situated in proximity to the former contact line.[57] The Court indicates that "pending a comprehensive peace agreement it would appear particularly important to establish a property claims mechanism allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment".[58]
27. As a conclusion, the right of return is both an individual and collective right, especially when it concerns the reparation measures. However, as it appears hereinabove, the diplomatic issues and bilateral relations between Armenia and Azerbaijan have effects on the execution of the general measures decided by the European Court of Human Rights, which by consequence affect the execution of individual measures. That is why it is appropriate to raise the question of the best forum for defending the collective rights, in particular the right to return. Are the Interstate proceedings the most suitable and the International Court of Justice, as the tribunal adjudicating disputes between nations, the most adequate forum to settle the disputes?

III – IS INTERSTATE PROCEEDING THE MOST SUITABLE FOR FIXING THE RIGHT TO RETURN?

28. There exist at least two non-judicial options for consolidating the right to return at states' level. They are of conciliatory nature and transaction based. The first one

[55] *Pinheiro Principles*, Paulo Sergio Pinheiro, The Return of Refugees' or Displaced Persons' Property 11 (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 54th Session Working Paper, E/CN.4/Sub.2/2002/17 (June 12, 2002)), paras 22-28.
[56] The "composite violation is defined *infra*.
[57] CM/Notes/1507/H46-5, H46-5 Sargsyan v. Azerbaijan (Application No. 40167/06)
[58] CM/Notes/1507/H46-5, H46-5 Sargsyan v. Azerbaijan (Application No. 40167/06)

suggests that Armenia and Azerbaijan sign a peace treaty which foresees a transitional justice framework that will deal with a complete set of mutual reparation measures. The obligation of cessation of the forced displacement of Nagorno-Karabakh Armenians would be the first reparation measure. The second option supposes that both countries agree to the establishment of a joint claims commission that will arbitrate mutual claims and reparations. Those two options would imply that (i) Armenia accept to represent the interests of Nagorno-Karabakh Armenians and their right to return and more widely their right to self-determination, (ii) Azerbaijan put an end to its hate speech and racial discrimination campaign against Armenians, otherwise there is no conciliatory framework possible and (iii) there is a sincere will to sign a peace agreement with such conditions. For the time being, no one has ever heard about such options being discussed between Armenia and Azerbaijan because the tensions are still high between the two states. The balance of power between the parties is clearly in favour of the 2020 war's victor country, Azerbaijan. That latter does not have a compromising attitude but rather an aggressive and dominant ambition. In this context, the peace treaty agreement is regularly postponed and the rebuilding of trust between the two states and their people will take decades. Hence, the left option is the judicial one. Since the right to return is less a legal matter than a diplomatic battle, it can be best defended by interstate claims provided that states embark with such proceedings and that the judgments are supported by resolutions of the UNSC.

29. The ICJ, as the principal judicial organ of the United Nations (Art. 92 of the UN Charter) is the *ad hoc* forum. The right to return of forcibly displaced people is not questionable in international law and Armenia would be legitimate to advocate for it. Nevertheless, one must wonder if the Armenian state is ready to support and lead successfully that diplomatic and legal battle. The statements from the incumbent leaders in Armenia indicate that they are ready to put an end to the ongoing proceedings against Azerbaijan on a reciprocal basis provided that it will end up in the signature of a peace treaty between the two countries. Prime Minister Nikol Pashinyan noted the possibility of withdrawing applications against Azerbaijan as an integral part of the negotiations over the possible peace treaty.[59] Azerbaijan official sources did not report directly on this matter. Only media close to the government elaborated on Armenian statements.[60] Further, the Armenian government favours the resettlement of Artsakh people in the rural and border parts of Armenia. The principle to stop ongoing proceedings against promised peace would be a normal step if Azerbaijan were a sincere partner in its will to sign a fair peace treaty and if the violations of international law already accepted as plausible were concerning only citizens of the Republic of Armenia. None of those two conditions are met.

30. The long-running debate about whether seeking justice for grave international crimes interferes with prospects for peace is not recent. As a matter of fact, the accountability for serious human rights violations often depends on the political narratives and the

[59] https://armenpress.am/en/article/1132863
[60] https://www.dia-az.info/8/print:page,1,417535-revan-mehkeme-iddialarindan-imtina-etmeli-olacaq.html

political will of a State, whose nationals and those under its effective control fell victims of these violations. This may include scenarios, where the State is more inclined to withdraw the inter-state application as a precondition for concluding a peace treaty. However, the lack of accountability on inter-state level may be a greater detriment to the protection of victim's rights than an absence of legal mechanisms to bring to responsibility perpetrators. This is specifically the case, when the victims heavily rely on the State's support for communicating the violations of their rights to international judicial bodies through interstate claims (European Court of Human Rights and International Court of Justice).

31. If the inter-state applications lodged before the ECtHR and ICJ are withdrawn, the victims of the serious human rights violations in Nagorno-Karabakh may be stripped of the opportunity to claim for the redress of their individual rights before the international jurisdictions – for an example admissibility issues may be raised by the ECtHR (because of the non-compliance with the four-month time limit rule pursuant to the date of the violation for filing an application by the ECtHR). It would harm their right to an effective remedy. The imperative of ensuring the rights and freedoms enshrined in the European Convention and the principles of rule of law shall not be subordinated to the political process, otherwise Azerbaijan is given opportunity to escape state responsibility for the international wrongs and the subsequent obligations of cessation, reparation and guarantees of non-repetition.

32. Promised peace treaty is far from becoming a reality if we rely on Azerbaijan ever growing conditions to sign it. It was all the more surprising to witness Armenia's Prime Minister discuss publicly that matter. Both the unilateral evocation and the debate about this eventuality are harming the cause of justice, the struggle against impunity for international crimes, the credibility of Armenia as an international subject of law, and finally the diplomatic efforts of Armenia. Abandoning the interstate proceedings at the ICJ would be a hard blow to the Artsakh cause, a wrong signal sent to the world, since state impunity for crimes against humanity will be once again reinforced. Such a move would endanger the temporary legal victory obtained at the International Court of Justice (ICJ orders), put an end to one of the very few good initiatives of the incumbent Armenian government for none of former governments did ever engage in interstate proceedings. It would also damage the interstate proceedings at the ECtHR, whose judges, very sensitive to political settlements between high contracting parties, would always privilege a consensual judgment rather than seeking justice for claimants from both countries. As far as the actions engaged by Civil Society Organizations at the International Criminal Court, they are in theory immune from diplomatic interferences since criminal liability concerns individuals. However, in reality one can witness how the ICC prosecutor office is subjected to external pressures to abandon arrest warrants against leaders of powerful countries, although this does not prevent him from acting. In the past, we experienced the abortion of arrest warrants against President G.W. Bush or Ariel

Sharon. The strategic alliances make little case of international justice and pave the way to the application of double standards, depending on the state concerned.[61] Accountability for serious international violations of international law must prevail in all situations.

IV – PEACE BUILT ON THE OBLIVION OF GROSS VIOLATIONS OF HUMAN RIGHTS IS NOT SUSTAINABLE

33. Accountability is a principle that is crucial for identifying and exposing underlying structural and systemic drivers of serious human rights abuses, together with the impunity that we so often see attached to them. That was the purpose of the application made by Armenia against Azerbaijan at the ICJ, basing it on the violations of the International Covenant on the Elimination of Racial Discrimination (ICERD). ICJ already released orders pointing to the plausibility of Armenia's allegations and indicating temporary measures of protection to prevent irreparable harm.[62] The ICJ order on November 17, 2023 concludes that "Azerbaijan must ensure that persons who have left Nagorno-Karabakh after September 19, 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded and expeditious manner." It also recalls Azerbaijan's undertaking "to protect and not to destroy registration, identity and/or private property documents and records found in Garabagh".[63]
34. If Armenian state withdraws from the application at the Hague, it will cancel the value of those orders, since the final judgment on the merits is supposed to confirm the first assessments that justified the temporary measures and it will considerably harden the diplomatic efforts. And last, but not the least, the sustainability of the peace wanted at any rate would be challenged, since the causality of all Azerbaijani wrongs is the official racial discrimination and its associated hate speech and crimes against Armenians. Racial discrimination is identified as the key systemic root of the gross violations committed against Armenians by Azerbaijan. Putting an end to the ongoing inter-state proceedings as a precondition to signing a peace treaty will not address the cause of the serious violations of international human rights law against Armenians in general. Horrific crimes of torture and arbitrary execution have been committed against Armenian citizens too. All too often a peace agreement that confers impunity for the most serious international crimes is not sustainable. Even worse, it sets a precedent of impunity for atrocities that encourages future abuses. Peace premised on a "blanket amnesty" may be a short-lived respite before the resumption of further armed conflict and its attendant crimes.

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[61] See the arrest warrants of ICC against B. Netanyahu and Y. Gallant. https://www.euronews.com/2024/08/23/icc-prosecutor-insists-court-has-power-to-issue-warrants-for-israeli-leaders-linked-to-gaz https://www.middleeasteye.net/news/us-lobbying-uk-block-icc-move-netanyahu-arrest-warrant

[62] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Request for the indication of provisional measures, Orders 7 December 2021, 21 January 2022, 12 October 2022, 22 February 2023, 17 November 2023.

[63] ICJ Order 17 November 2023, para. 69.

35. Accountability for international serious crimes is thus a guarantee of non-repetition in its definition under international law on state responsibility. A peace between two countries, such as Armenia and Azerbaijan cannot last long if this guarantee, among others, is not established. Accountability contributes to a broader sense of justice, both within and outside affected societies. It also prevents the recurrence of violations, through deterrence of future crimes. It helps to address the root causes of conflict. The identification and the implementation of corrective and transformative measures in the laws of the concerned state remedy those causes. In the longer term, absence of accountability can be fertile ground for those who seek to manipulate history, practice revisionist speeches, and hence sow seeds of new conflict and new hate crimes.

V - THE LAW ON STATE RESPONSIBILITY

36. If the forcible transfer of Artsakh's population is recognized in the final judgement of the ICJ as a violation of international law, then it entails the responsibility of Azerbaijan as a state, the consequence of which is an obligation to redress the wrongs done. The International Law Commission has codified and adopted the principles ruling the state responsibility in 2001: the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[64] They reflect binding rules.
37. The ARSIWA define the international state responsibility, the wrongs and their attribution, but also the core legal consequences of an internationally wrongful act for the injured and for the liable but also for third states. Those consequences are formulated by obligations for the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused (art. 31). Full reparation for the injury shall take the form of restitution (art. 35), compensation (art. 36) and satisfaction (art. 37), either singly or in combination. Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law[65], the breach may entail further consequences both for the responsible State and for other States.[66] In particular, all States in such serious cases have the obligations to cooperate to bring the breach to an end[67], not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).[68] Although there is no established list of wrongful acts constituting

[64] Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.
[65] In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.
[66] ARSIWA, art. 40.
[67] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion on 19 July 2024, paras. 278-279.
[68] *Ibid.*

serious breaches[69], it is generally agreed that the prohibition of aggression, genocide, torture, war crimes, and non-respect of the principle of self-determination enter this category.

38. The article 35 provides that a state responsible for a wrongful act "is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed[70] The only exceptions to this obligation are if restitution would be "materially impossible"[71] or if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."[72]
39. An internationally wrongful act entailing state responsibility may also consist in a composite violation. The concept of *composite violation* is defined in the ARSIWA (art. 15). Roberto Ago, one of the rapporteurs having worked on the drafting of the articles had defined the composite violation as follows: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act." Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character.
40. In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed. In certain circumstances, property violations may constitute a crime against humanity if they are fundamental and take place in the context of other violences. Hence, this concept of composite wrongful act is worth being considered in the case of Artsakh collective right to return in the light of systemic violations of norms prohibiting racial discrimination and attendant violations.
41. The concept of a composite violation is important as a background in designing a remedy. Although property claims can easily be thought of as essentially individualized private issues, one of the arguments for restitution in the Israel/Palestine situation, as an example, is that the remedy must reverse, as much as possible, ethnic displacement. Both refugee return and house restitution are critical to remedy the forced displacement and property dispossession that occurred together

[69] A "serious" breach is defined as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach. Serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.
[70] *Id.* ARSIWA, art. 35, commentary 1.
[71] *Id.* ARSIWA, art. 35.a
[72] *Id.* ARSIWA, art. 35.b

in 1948 and 1967. Addressing only the property issue or only the displacement would fail to completely remedy the full violation endured by the refugees.

VI – THE CASE OF PALESTINE: LINKING RIGHT TO RETURN AND RIGHT TO SELF-DETERMINATION

42. The case of Palestine is emblematic because it is one of the world's longest and most sensitive unresolved case of ethnic displacement and violence. Palestinian refugees, who now number in the millions (in Gaza, West Bank, Jordan, Lebanon, Syria), have long sought restitution along with the right to return to homes inside Israel that belonged to them before the establishment of the State of Israel in 1948. The Palestinian case in the Israel occupied territories (Gaza, West Bank) is somewhat different, since it relates to the violations of international humanitarian law rules that govern the occupation regime.
43. Meanwhile, the ICJ recalls that, under the first paragraph of Article 49 of the Fourth Geneva Convention, "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". The terms of this provision distinguish between "transfers" on the one hand and "deportations (…) from occupied territory to the territory of the Occupying Power or to that of any other country", on the other hand. Under the ordinary meaning of these terms, all forcible transfers of protected persons are prohibited, including transfers within the occupied territory.[73]
44. The Article 49 protects an occupied population against any transfer that is involuntary in character. The preparatory work of the Fourth Geneva Convention confirms that the term "forcible" was intended to exclude from the scope of the prohibition transfers that might be effectuated with the consent of the protected persons.[74] Consequently, transfer may be "forcible" – and thus prohibited under the first paragraph of Article 49 – not only when it is achieved through the use of physical force, but also when the people concerned have no choice but to leave.[75] Therefore, the absence of physical force does not exclude the possibility that the transfer in question is forcible.[76]
45. Further, as the Court observes, evacuation of an area is permissible exceptionally if, pursuant to the second paragraph of Article 49, "the security of the population or imperative military reasons so demand". Even in such cases, however, this paragraph provides that the evacuated persons "shall be transferred back to their homes as soon

[73] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion on 19 July 2024, para. 144.
[74] *Cf.* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, section A, Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, p. 827.
[75] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment of 22 March 2006, para. 279.
[76] *Id.* ICJ Advisory opinion 19 July 2024, para. 145.

as hostilities in the area in question have ceased". This indicates that evacuations are conceived as a temporary measure, to be reversed as soon as the imperative military reasons subside. By contrast, evacuations of a permanent or indefinite character breach the prohibition of forcible transfer. Therefore, they are not covered by the exception set out in the second paragraph of Article 49.[77]

46. At the occasion of World Refugee Day on 20 June 2023, UN experts issued a statement, where we can read: "Since 1948, both the General Assembly and the Security Council have consistently called upon Israel to facilitate the return of Palestinian refugees and provide reparations. Despite these repeated appeals, Palestinian refugees have been systematically denied of their right to return and forced to live in exile under precarious and vulnerable conditions outside the borders of Palestine. The right of return constitutes a fundamental pillar of the Palestinian people's right to self-determination."[78] The eight special procedures "urgently call upon the international community to adopt a rights-based approach that addresses the root causes of violence and prioritises the individual and collective right of return for refugees and internally displaced persons, over political considerations."[79]
47. The first of Palestine-specific resolutions adopted by the UN General Assembly in 1948 recognized both the refugee right to return and the refugees' right to reclaim property.[80] Paragraph 11 of this resolution resolves: "that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible". Authors assume that return means return to specific places of origin ("to their homes"), not just to Israel in general. The drafting history of Resolution 194 shows that the right to restitution is essential because the right to return was conceived as a right to return to one's home, which necessitates restitution. Thus, restitution is implicit. The same paragraph 11 instructs the Conciliation Commission to facilitate the repatriation, the resettlement and the economic and social rehabilitation of the refugees and the payment of compensation.
48. Israel's confiscation of Palestinian refugee property formed part of a composite violation of illegal forced population transfer in which non-Jews were forced from their homes and their land transferred to Jewish control. This composite violation began, at least, with the first forced expulsions of refugees in the 1947-1948 war and included the Israeli decisions in 1948 to prohibit non-Jewish refugee return and to confiscate refugee property.[81] The composite violation also includes Israeli policies

[77] *Ibid.*, para. 146.
[78] https://www.ohchr.org/en/statements/2023/06/right-return-palestinian-refugees-must-be-prioritised-over-political
[79] *Ibid.*
[80] UN General Assembly Resolution 194 (III) (1948), para. 11.
[81] Israel enacted legislation in 1948 to create a Custodian of Absentee Property to administer "abandoned" property. In September 1953, the Israeli Custodian of Absentee Properties transferred

in the post-1967 occupied territories, where Israel has systematically confiscated land for illegal settlements.[82] The violation continues today because refugees are still displaced and dispossessed in West Bank and in Gaza. The Custodian of absentee property continues to confiscate property because the property has been administered by the Israel Lands Administration primarily for the benefit of Jews.

49. The fragmentation of the Palestinian people, both geographically and politically, through administrative methods of control based on residency and race, tantamount to apartheid, has obstructed the realisation of the right to return and self-determination. These practices serve the settler-colonial project pursued by Israel.
50. The prolonged character of Israel's unlawful policies and practices aggravates the violation of the right of the Palestinian people to self-determination. As a consequence of Israel's policies and practices, which span decades, the Palestinian people has been deprived of its right to self-determination over a long period, and further prolongation of these policies and practices undermines the exercise of this right in the future. For these reasons, in its recent advisory opinion, the ICJ is of the view that Israel's unlawful policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination.[83]

51. The Palestinian case illustrates the link between the right to return and the right to self-determination as far as the Palestinians who have been forcibly transferred with and without the use of physical and non-physical forces from their former native land in 1948 and 1967 (current Israel and Jerusalem). The transfer was followed by a set of laws dispossessing the Palestinians from their land and properties, and enabling the settlement of Jewish colonies, measures taken to prevent *de jure* and *de facto* the return of refugees. The same situation may happen soon to Nagorno-Karabakh Armenians if there is no diplomatic strategy to rapidly act against the politics of *fait accompli*. Azerbaijan might use the same legal path as Türkiye and Israel. In addition, their open racial discrimination policy aims at erasing all multi-millennial traces of Armenians. The violation of the right to self-determination of Nagorno-Karabakh Armenians and associated crimes constitute internationally wrongful acts in the light

"ownership" of all Palestinian lands under his control to the Israeli Department of Construction and Development (IDCD), the "price" which IDCD retained as a loan. Meanwhile, the Custodian conveyed "ownership" of Palestinian houses and commercial buildings in cities to JNF affiliate Amidar, a quasi-public Israeli company founded to implant settlers and thus established an unbroken pattern of guaranteeing control of confiscated properties exclusively to those of "Jewish race or descendance." By 1953, those properties had been transferred at least three times, thus hampering the restitution, return and other forms of reparation to which the refugees and internally displaced persons (IDPs) remain entitled. For the historical background *cf. Housing and Land Rights Network*'s report "Reparation in the Case of Palestine", Response to the Questionnaire on transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts addressed to Mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

[82] Kagan, Michael (2007) "Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict," *Florida Journal of International Law*: Vol. 19: Issue 2, Article 2., p. 460.

[83] ICJ, advisory opinion 19 July 2024, para. 243.

of international law. Third states do have *erga omnes*[84] obligations toward the right to self-determination of Nagorno-Karabakh Armenian people, in particular to make cease the forced displacement and guarantee their safe return.

VII – THE VIOLATION OF THE RIGHT TO RETURN ENTAILS ERGA OMNES OBLIGATIONS TO THIRD STATES

52. The article 48 of ARSIWA provides a legal standing to states in relation to violations of *erga omnes* obligations[85] if one of the two following conditions is met: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. The item 2 of this article entitles any State invoking responsibility to claim from the responsible State the (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition[86] and (b) performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. In the case of Nagorno-Karabakh, the beneficiaries would be the Armenian people native from this territory.
53. The *erga omnes* obligations have to be "collective obligations", *i.e.* they must apply between a group of States[87] and have been established in some collective interest.[88] Obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. In that case, such obligations have sometimes been referred to as "obligations *erga omnes partes*".[89] They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[90] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, the International Law Commission (ILC) quotes that it is not the function of the ARSIWA to provide an enumeration of such interests but this would include situations in which States, attempting to set general standards of protection

[84] In Latin, it means "towards all". In international law, they are defined as Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community.
[85] ARSIWA, Art. 48.1
[86] In accordance with art. 30 of the ARSIWA.
[87] The expression "group of States" does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character (see ARSIWA, art. 42, Commentary N°11).
[88] ARSIWA, art. 48, Commentary N°7.
[89] *Id.* Art. 48, Commentary N°6.
[90] As example, see Permanent Court of International Justice, *S.S. "Wimbledon"* Case, August 17th, 1923, p. 23. The Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind".

for a group or people, have assumed obligations protecting non-State entities.[91]

54. ILC considers that establishing a list of *erga omnes* obligations would be only of limited value, as the scope of the concept will necessarily evolve over time. But the ICJ has nevertheless given useful guidance: in its *Barcelon Traction* judgment (1970), it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[92] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[93] It confirmed it in its advisory opinion of 9 July 2004 (*The Wall*). The ICJ found "the right of peoples to self-determination" to be a right *erga omnes*.[94] The finding referred to article 22 of the Covenant of the League of Nations.[95]

55. Recently there have been multiple proceedings engaged by third states based on the *erga omnes* principle. In *Gambia (v. Myanmar)* acting for the account of Rohingyas. Gambia's Application against Myanmar "concerns acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group, a distinct ethnic, racial and religious group that resides primarily in Myanmar's Rakhine State."[96] In *South Africa (v. Israel)* acting for the account of Palestinians (other states will intervene in this case. So far, Mexico, Libya, Colombia, Palestine, Spain, Türkiye and Chile), the South Africa's Application against Israel "concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group".[97] In *Nicaragua (v. Germany)* acting for the account of Palestinians, the Nicaragua's Application against Germany "refers to the serious breaches of peremptory norms of international law, both conventional and customary, taking place in the Occupied Palestinian Territory (OPT) particularly in the Gaza Strip, and the obligations derived therefrom on the international community".[98] All three applications bear the interests of victim groups who are not a State formally recognized by UN. All those cases are relevant for Nagorno-Karabakh Armenians in the sense that their rights as a people can be defended by third states because *erga*

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[91] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it.

[92] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 3, at p. 32, para. 34.

[93] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 102, para. 29.

[94] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, at para. 155.

[95] The article 22 of the Treaty of Versailles is related to those colonies and territories which as a consequence of the WWI have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.

[96] Application instituting proceedings and Request for the indication of provisional measures, 11 November 2019, para. 1.

[97] Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, para 1.

[98] Application instituting proceedings and request for the indication of provisional measures, 1 March 2024, para. 2.

omnes obligations are concerned.

56. Very recently a new impetus was provided by the ICJ to the *erga omnes* obligations. The UN General Assembly through its resolution of 30 December 2022 had requested the Court to pronounce itself about "the legal consequences that arise for all States" from the status of occupation of the Palestinian territory by Israel.[99] After having found that Israel's policies and practices of prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967 were in breach of international law and that the continued presence of Israel in the Occupied Palestinian Territory (OPT) was also illegal, the Court addresses the matter of the legal consequences for "other States".[100] The Court observes that the obligations violated by Israel include certain obligations *erga omnes*.[101] As the Court indicated in *Barcelona Traction* reference case, such obligations are by their very nature "the concern of all States" and "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[102] With regard to the right to self-determination, the Court considers that, while it is for the General Assembly and the Security Council to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination, all States must co-operate with the United Nations to put those modalities into effect.[103] The ICJ refers to the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, where is mentioned that "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".[104] The principle of Self-Determination has been defined in UN Resolution 1514 (XV).[105] ICJ considers that,

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[99] UN General Assembly Resolution 77/247, Adopted at the 56th (resumed) plenary meeting, on 30 December 2022. The Assembly "Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004: (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures? (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

[100] ICJ, Advisory Opinion 19 July 2024, paras. 273-279

[101] *Id.*, para. 274.

[102] *Barcelona Traction, Light and Power Company, Limited*, p. 32, para. 33.

[103] ICJ, Advisory Opinion 19 July 2024, para. 275.

[104] UN General Assembly Resolution 2625 (XXV), Adopted on 24 October 1970

[105] Resolution adopted on 14 December 1960

although this resolution is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.[106] The ICJ further comments that the wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that "all peoples have the right to self-determination". Its preamble proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and its first paragraph states that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights and is contrary to the Charter of the United Nations".[107]

CONCLUSION

57. The Nagorno-Karabakh Armenians are in a situation comparable to Palestinians who have been forced to leave their home and ancestral lands by Israel in 1947 and 1967. The Palestinians have been granted a right to return and a right to restitution by numerous UN General Assembly resolutions and UN Security Council resolutions. It has been recalled and recorded in the advisory opinions of the International Court of Justice in 2004 and 2024. The Armenians of Nagorno-Karabakh are no longer on their lands and the right to return is a new pillar of their right to self-determination.
58. Due to the radical stance taken by Azerbaijan and the continuation of racial discrimination and hate speech in the Azerbaijani society, Nagorno-Karabakh Armenians have no other choice than adopting a rights-based approach that will address those root causes of serious violations they have been victims of, and prioritises the individual and collective right to return. Those causes are known and are the subject of the application filed by the Republic of Armenia against Azerbaijan before the International Court of Justice in 2021. There cannot be peace and reconciliation if racial discrimination and its attendant crimes don't cease and are not sanctioned appropriately by a judgement of the ICJ.
59. Nagorno-Karabakh Armenians must envisage to fight for their rights independently from the actions undertaken by the Republic of Armenia, whose interests are not necessarily theirs. The hypothesis of Armenian government withdrawing the application against Azerbaijan at the ICJ must be anticipated seriously and it obliges Nagorno-Karabakh Armenians to reorganize and present themselves as an ethnical group that has been forced to leave its ancestral lands.
60. Azerbaijan has blatantly violated the fundamental right to self-determination of the Armenian people from Nagorno-Karabakh. This right is *erga omnes* and third parties, *i.e.* all states members of UNO, hold *erga omnes* obligations to intervene on behalf

[106] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, Advisory Opinion, paras. 150-152. The resolution 1514 was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self- determination. Certain States justified their abstention on the basis of the time required for the implementation of such a right.
[107] *Ibid.*

of Nagorno-Karabakh Armenian people, as they have been displaced forcibly by Azerbaijan. All states are obliged to not recognise this unlawful situation, and to act for its cessation. The continuation of internationally wrongful acts of Azerbaijan threatens the collective interest of nations and international peace since the absence of adequate measures to put an end to Azerbaijan's hatred politics against Armenians and to deter them from repeating their attendant crimes cannot result in a sustainable peace between Armenia and Azerbaijan and in a reconciliation between their respective people.

61. Establishing the internationally wrongful acts and attributing them to Azerbaijan entail the responsibility of this latter and generate obligations of reparation. The International Court of Justice remains the most suitable forum since the Court has already decided about the plausibility of claims and ordered subsequently interim measures aiming at the protection of the individual and collective rights of Nagorno-Karabakh Armenians from irreparable harms. A judgment on the merits from this court would definitely order the cessation of the forced displacement and its associated racial discrimination acts, confirm the conditions of return for Nagorno-Karabakh Armenians, the right to restitution of their homes and properties, the compensation for pecuniary and non-pecuniary damages, the release of all arbitrarily detained persons, the protection of the historical and patrimonial legacy of *Artsakh*, and corrective and transformative measures in Azerbaijan laws to guarantee the security and the rights of Armenians returning to their native region.
62. Demanding for such guarantees in the current negotiations between Armenia and Azerbaijan has little chance of success due to the imbalance of diplomatic and military powers. The establishment of a joint claims commission or an arbitral tribunal are not realist options too. A decision of the International Court of Justice may help reestablishing some balance. It will further legitimate calling upon the UN Security Council to adopt more stringent resolutions in case Azerbaijan does not enforce the judgment.

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