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**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2021**

*Public sitting*

*held on Friday 15 October 2021, at 5 p.m., at the Peace Palace,*

*President Donoghue presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2021**

*Audience publique*

*tenue le vendredi 15 octobre 2021, à 17 heures, au Palais de la Paix,*

*sous la présidence de Mme Donoghue, présidente,*

*en l'affaire relative à l'***Application de la convention internationale sur l'élimination  
de toutes les formes de discrimination raciale  
(Arménie c. Azerbaïdjan)**

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**COMPTE RENDU**

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*Present:*      President Donoghue  
                 Vice-President Gevorgian  
                 Judges Tomka  
                                 Bennouna  
                                 Yusuf  
                                 Xue  
                                 Sebutinde  
                                 Bhandari  
                                 Robinson  
                                 Salam  
                                 Iwasawa  
                                 Nolte  
Judges *ad hoc* Keith  
                                 Daudet  
  
                 Registrar Gautier

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*Présents:* Mme Donoghue, présidente  
M. Gevorgian, vice-président  
MM. Tomka  
Bennouna  
Yusuf  
Mmes Xue  
Sebutinde  
MM. Bhandari  
Robinson  
Salam  
Iwasawa  
Nolte, juges  
MM. Keith  
Daudet, juges *ad hoc*  
M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judge Abraham is unable to join us for this afternoon's sitting. The Court meets this afternoon to hear the second round of oral observations of Azerbaijan on the Request for the indication of provisional measures submitted by Armenia. I shall now give the floor to Professor Vaughan Lowe. You have the floor, Professor.

Mr. LOWE:

**I. ARMENIA'S REQUEST IS UNWARRANTED AND  
IS IMPROPERLY BEFORE THE COURT**

1. Thank you, Madam President. Madam President, Members of the Court, I shall respond briefly, and without oomph, to the points made by Professor Kolb this morning.

2. I have two main points. The first is that Armenia did not try to negotiate a solution to this dispute.

3. I ask you to read Professor Kolb's speech again. He did not deny that Azerbaijan's august proposals address matters that Armenia now says require Court intervention as a matter of extreme urgency.

4. He says that Armenia considered the proposals for two weeks and then, at the meeting of 14-15 September, "communicated" its conclusion to Azerbaijan that the proposals were rejected. No attempt to negotiate. No suggestion that some of the proposals could contain the seeds of a possible agreement, or that some other steps were needed if progress were to be made.

5. And let me put that point in context. The armed conflict occurred last autumn. It ended less than a year ago. The Foreign Ministers' letters of 11 November<sup>1</sup> and 8 December 2020<sup>2</sup> have been referred to as the start of attempts to negotiate. As you will see from the documents that track the negotiations<sup>3</sup>, the period from November 2020 to July 2021 was spent talking about the procedural modalities — talks about talks. The first substantive meeting was held three months ago.

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<sup>1</sup> Application and Request for provisional measures of the Republic of Armenia, Ann. 10, Letter from the Minister for Foreign Affairs of the Republic of Armenia to the Minister for Foreign Affairs of the Republic of Azerbaijan, dated 11 Nov. 2020.

<sup>2</sup> *Ibid.*, Ann. 6, Letter from the Minister for Foreign Affairs of the Republic of Azerbaijan to the Minister for Foreign Affairs of the Republic of Armenia, dated 8 Dec. 2020.

<sup>3</sup> See Application and Request for provisional measures of the Republic of Armenia, Anns. 10, 14, 15, 18-34, 36-46, 48-50 and 57-61.

6. Armenia put forward its claim for remedies on 15-16 July 2021; then Azerbaijan responded on 27-28 July 2021; Azerbaijan put forward counter-proposals<sup>4</sup> on 30-31 August; and then the September meeting. That is it. Armenia has not put forward *any* proposals.

7. It is true that Azerbaijan's Annex 32 was dated 9 October — but it is not disputed that the proposals to which it refers were given to Armenia on 30-31 August. And the suggestion that Armenia could not give you an accurate picture of what happened in the negotiations because of “confidentiality” considerations raises broader and more troubling questions that may have to be addressed in due course.

8. Four meetings. No discussion of Azerbaijan's proposals. That is not negotiation. The Parties must *negotiate*. Armenia simply “communicated” its rejection of the entire body of proposals that Azerbaijan had explicitly said it was willing to discuss.

9. Armenia asks how long the Parties must go on trying to negotiate. One year? Two years? Three years? Well, no. But more than the *four hours* given over to the peremptory rejection of Azerbaijan's proposals at the September meeting. How quickly did Armenia expect to find agreement, months after Azerbaijan had ended 30 years of occupation of 20 per cent of its territory?

10. Armenia says that each State may judge for itself whether negotiations have failed or are futile. So it may. But the State has a right to take a view: not a right to exercise an unreasoned veto. The Court looks at the *facts* to decide if negotiations have failed<sup>5</sup>. If the State's view is patently at odds with the evidence, the Court is entitled — and indeed bound — to say so.

11. I turn to another aspect of this question. Why does Armenia say that the negotiations failed? The reason Professor Kolb gave for the failure was that “the conditions for success were not met”.

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<sup>4</sup> Judges' folder, tab 3, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application of the Republic of Azerbaijan, Ann. 32, Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 9 Oct. 2021, No. 0612/04/21/01.

<sup>5</sup> See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2011 (I), p. 132, paras. 157-162; *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)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2019 (II), p. 601, paras. 116-121; *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, *Judgment*, I.C.J. Reports 2020, p. 111, paras. 93-94; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Judgment*, I.C.J. Reports 2012 (II), p. 446, paras. 57-59.

And what were those conditions? That Azerbaijan first accept that it had violated the Convention: “First admit you are guilty, then we will talk.”

12. He repeated the point. Azerbaijan’s proposals did not evolve from 2020: it was inflexible, he said. Azerbaijan’s proposals did not constitute recognition of breaches of the Convention; Azerbaijan refused to recognize any breach of the Convention.

13. It is one thing to offer no explanation for a supposed “failure” of negotiations; but it is quite another to offer a reason that is quite patently not simply unreasonable but entirely inappropriate. Acceptance of guilt as a threshold condition has no place in genuine negotiations.

14. Armenia never gave the negotiations a chance.

15. My second point is a brief response to Professor Kolb’s assurance that Azerbaijan will be arguing exactly the opposite case next week when it puts forward its own claim based on CERD Article 22.

16. It will not. The argument will be set out next week; but the essential point is that one State cannot block another from recourse to a dispute settlement provision in an international convention by refusing to engage in negotiations. That is a consequence of the principle that no State may profit from its own wrong. Azerbaijan tried to negotiate. The record shows that. Armenia did not. That is why they are in different positions.

17. Madam President, Members of the Court, that brings my submissions to a close. I thank you for your patient attention *and unless* I can assist the Court further, I would ask that you invite Lord Goldsmith to the lectern.

The PRESIDENT: I thank Professor Lowe for his statement. I now invite the next speaker, Lord Peter Goldsmith, to take the floor. You have the floor, Sir.

Mr. GOLDSMITH: Thank you, Madam President.

**II. PROVISIONAL MEASURES RELATING TO ARMENIANS UNDER PROSECUTION AND TO THE PRESERVATION OF EVIDENCE SHOULD BE REJECTED**

1. Madam President, honourable Members of the Court, my few final remarks reply to Armenia’s requests that Azerbaijan release Armenian detainees and treat them in accordance with its obligations under CERD.

2. I am going to address three points. Two of them go to what Professor Murphy covered this morning — the basis for detention and the risk of mistreatment — and the third goes to an issue that he studiously tried to avoid — whether the conduct that is being alleged is racial discrimination contrary to the CERD.

**A. Azerbaijan has not violated international law  
by failing to repatriate detainees**

3. I will start by looking at the issue of the status of the detainees. Professor Murphy spent a lot of time this morning, again, on making the case that all the remaining detainees are prisoners of war. He then continued to argue that Azerbaijan’s “failure to repatriate” the detainees is a breach of the Third Geneva Convention and the Trilateral Statement<sup>6</sup>. It is easy to lose track, however, during Professor Murphy’s submissions, that these are proceedings under the CERD, and I will return to this theme shortly.

4. On the position of the status of the detainees, Armenia in fact ties itself in knots. It would have the Court believe that the hostilities did not cease on 10 November 2020, but in fact continued, so that when a group of armed Armenians was captured more than a month later on 13 December 2020, they were prisoners of war<sup>7</sup>. But then, conveniently, the hostilities suddenly ceased, such that a duty to repatriate was triggered — Armenia says apparently immediately. Without giving Azerbaijan *any* time to go through the formal process of properly investigating and bringing charges — indeed, a process which it is required to follow in order to comply with international and domestic due process requirements<sup>8</sup>.

5. Though, later in his submission, Professor Murphy did appear to accept that there is a reasonable period of time within which a State can comply with its obligation to repatriate under Article 119 of the Third Geneva Convention. He drew your attention to a decision of the

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<sup>6</sup> CR 2021/20, pp. 41-42, para. 33 (Murphy).

<sup>7</sup> See Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation); Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation).

<sup>8</sup> See Ann. 2, Criminal Procedure Code of the Republic of Azerbaijan, Art. 11 (certified translation); International Commission of Jurists, 5.5 Procedural fairness and due process of law (2018), available at <https://www.icj.org/chapter-5-standards-and-techniques-of-review-in-domestic-adjudication-of-esc-rights-2/5-5-procedural-fairness-and-due-process-of-law/>.

Eritrea-Ethiopia Claims Commission which held that a delay of three months was a violation of Article 118<sup>9</sup>. But it is clear that the Commission contemplated that there could be good causes for delay; and delay was too long in that case because it was “unexplained”<sup>10</sup>. But we do not have an unexplained delay in this case.

6. The effect of Professor Murphy’s submission this morning was that the 62 individuals captured on 13 December 2020 were POWs, but upon their capture hostilities ceased and therefore they were immediately to be repatriated unless there were already criminal indictments against them. I only have to state that to show how incredible that submission is. Of course a delay in order to investigate, and if established, pursue allegations of crime, must be allowed. Or else serious crimes discovered after liberation of an occupied territory, for example rape or murder of civilians, would go unpunished.

7. It cannot be the case that a State is denied a reasonable opportunity to exercise its criminal jurisdiction where there is credible evidence that the individuals committed an “indictable offence” —a term to which I will return. But the point now is that Azerbaijan acted with all necessary diligence in pursuing a case against the detainees. Those detainees were captured on 13 December 2020 and Azerbaijan opened a criminal case against them by February 2021<sup>11</sup>.

8. In addition, Professor Murphy suggested the words “indictable offence” in Article 119 are limited to violations of laws of war. That is wrong. There is no such limitation in the words, and according to the authoritative ICRC Commentary on the Third Geneva Convention, the term refers, as one might expect, to criminal rather than civil offences, and in that context to “a crime that can be prosecuted only by indictment”, as opposed to “summary offences (such as petty misdemeanours)”<sup>12</sup>.

9. There can be no doubt that Azerbaijan prosecuted Armenian detainees for indictable offences under its Criminal Code<sup>13</sup>. For instance, two Armenian nationals have been prosecuted and

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<sup>9</sup> Eritrea-Ethiopia Claims Commission, Prisoners of War — Eritrea’s Claim 17, Partial Award of 1 July 2003, *UNRIIAA*, Vol. XXVI, para. 163.

<sup>10</sup> *Ibid.*, para. 147.

<sup>11</sup> Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021), p. 10 (certified translation).

<sup>12</sup> Commentary on the Third Geneva Conventions (ICRC, 2020), para. 2511.

<sup>13</sup> See Ann. 1, Criminal Procedure Code of the Republic of Azerbaijan, Arts. 112, 113, 114, 115, 206, 214, 228, 276, 279, 318 (certified translation); judges’ folder, tab 5, Ann. 21, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister for Foreign Affairs, regarding Armenian detainees, dated 8 Oct. 2021, No. 14/cix65–21 (with enclosure) (certified translation).

convicted for acts of torture against Azerbaijanis<sup>14</sup>. But Professor Murphy focused exclusively on what he described as “crimes” — in quotation marks — of “illegal border crossing” and “carrying of firearms”. He wanted to leave the impression that the 62 Armenian detainees captured on 13 December 2020 were in the ordinary course of hostilities, moving around with their weaponry, and were subsequently prosecuted for those acts.

10. The Court has the full judgments against this group in evidence: they are Azerbaijan’s Annexes 6, 7, 8 and 10<sup>15</sup>. Excerpts from three of those are also in your folders, but I do, respectfully, invite the Court to read them in full. What they describe is not what Professor Murphy tried to imply. They describe evidence of Armenian nationals being recruited weeks after the cessation of hostilities on 10 November 2020, being covertly transferred to the sovereign territory of Azerbaijan, avoiding border checkpoints, being provided with ammunition, hiding in the mountains for two weeks, and eventually being captured by an Azerbaijani contingent after explosion had been caused. This was a clandestine orchestrated operation, which Azerbaijan has every right to prosecute. This is not just what Azerbaijan says. It was also confirmed in a joint press statement conference between the Russian and Armenian foreign ministers in which the Russian minister, Sergey Lavrov, confirmed that Azerbaijan “is currently holding Armenian service members who were there at the end of November after the statement entered into force, including an agreement on ending any hostile actions”. It is correct that the group was initially charged with, for instance, terrorism, but eventually convicted only for an illegal crossing of the border as an organized group, and illegal possession of firearms<sup>16</sup>. But that is not a failing of the Azerbaijani justice system. It is the opposite: it is proof that the courts carefully considered the evidence against the accused, and where it did not warrant a

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<sup>14</sup> See Ann. 11, Judgment on Behalf of the Republic of Azerbaijan, Baku Military Court, Case No. 1–1(093)–104/2021 (2 Aug. 2021) (certified translation).

<sup>15</sup> Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation); Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation).

<sup>16</sup> Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation); Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation).

conviction, for instance, because of lack of evidence as to *mens rea*, they dropped the charges. The Court will see that on looking at the judgments, as I have respectfully suggested they should.

11. And just to correct one statement made this morning. Azerbaijan can confirm that the defendants' counsel have appealed the first-instance judgments, and those appeal proceedings are ongoing. That is another false statement about the status of the trials in Azerbaijan. As to the claim that Mr. Vicken Euljekjian is a civilian detainee, tab 26 of your folders, has photographs of him from a public Facebook page. He is wearing army fatigues and carrying military grade weaponry. Those are not the photos of a civilian. The story that Armenia has told over the last two days does not provide a firm basis for you to grant the far-reaching interim measures it seeks.

12. That is all I say about detainee status.

**B. Armenia did not show an imminent risk of irreparable prejudice to Armenia's rights under the CERD**

13. Let me now move to the second issue: that Armenia did not show an imminent risk of irreparable prejudice to Armenia's rights under the CERD.

14. The picture that Armenia tried to paint is one of a State-wide condoning of torture and mistreatment by the Azerbaijani authorities. Indeed, Professor Murphy this morning suggested boldly that Azerbaijan has a "track record of torturing prisoners". Much of his focus was on certain videos, which Armenia has put before this Court, showing, it is said, abuse of Armenian persons on the battlefield. But Armenia ignored the fact that Azerbaijan was actively investigating those cases.

15. I return to the example of mistreatment that Armenia described at length yesterday in a video showing alleged abuse of several Armenian detainees, including Mr. Ludvig Mkrtichyan. That is Armenia's Annex 69. But, if the Court would kindly look at tab 4 in your folders, I will just spend a few moments on this<sup>17</sup>. This is a letter from Azerbaijani's Prosecutor General's Office, confirming the steps it has taken to investigate allegations of torture and mistreatment against Azerbaijani servicemen. The first few pages are a narrative summary of certain proceedings, and the second part of the document headed "Reference" sets out steps taken specifically to investigate certain video evidence.

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<sup>17</sup> Judges' folder, tab 4, Ann. 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 Oct. 2021, No. 14/çix67-21(with enclosures) (certified translation).



16. Video No. 7, I mentioned this yesterday, is described as showing violent actions against Mr. Ludvig Mkrtichyan and five other Armenian servicemen. The Prosecutor General's Office ("PGO") then sets out concrete steps that have been taken during the investigation:

- (a) First, the Office sent an order to the State Security Service to confirm the identities of the Azerbaijani servicemen, and that was done.
- (b) Second, the **PGO Prosecutor's Office** then interrogated several Azerbaijani servicemen, including two lieutenant-colonels.
- (c) And third — and this is almost hidden in the headline — on 23 July 2021 the **PGO Prosecutor** launched a criminal case against the perpetrators.

17. So it is wrong for Armenia to suggest that Azerbaijan is condoning the treatment recorded on the video. But this is just one example where Azerbaijan has taken active steps to investigate its own servicemen.

18. May I take you through one other example. At the beginning of that same document, pages 1-2, there is a detailed description of an investigation against Azerbaijani servicemen suspected of desecrating corpses of Armenian dead. Within two weeks of the acts, they were detained as suspects — that was on 4 November 2020, even before hostilities ended, and charged a day later. They were placed under house arrest and later subject to a restraining order. The investigations by Azerbaijani authorities included review of videos and material collected from social media, examination of mobile phones, numerous witness interrogations, examination of the crime scene, forensic examinations, and review of documentary evidence. The proceedings did not stop there. Because contrary to what Professor Murphy stated this morning, the servicemen have been referred to military courts for prosecution, just recently on 29 September ~~2021~~<sup>18</sup>. The second case summarized in this Annex is also now with the military court<sup>19</sup>, and later in the document you can see that Videos No. 5 and 6 are also subject of a criminal case.

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<sup>18</sup> Judges' folder tab 4, Annex 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 October 2021, No. 14/çix67-21(with enclosures), p. 2 (certified translation).

<sup>19</sup> *Ibid.*

19. To give this Court a more comprehensive picture of Azerbaijan's efforts to prosecute and investigate, we have prepared a summary document which you can find at tab 25 of your folders<sup>20</sup>. It sets out a list of various allegations raised by Armenia, both in the course of its oral submissions and in its Application, and the corresponding investigations and criminal proceedings launched by the Azerbaijani authorities. It shows clearly that Azerbaijan firmly stands behind its commitment not to engage in or condone torture and other mistreatment.

20. There is no need to rely just on Azerbaijan's commitment in assessing the risk facing the remaining 45 detainees. Because Azerbaijan has ensured that independent bodies, such as the International Committee of the Red Cross and its Ombudsperson, have regular access to the detainees, and are able to monitor their condition<sup>21</sup>. I referred to this yesterday and Members of the Court have at tab 7, Annex 19, an important statement of this.

21. Madam President, before I turn to my final point, I will say a few words about the relief that Armenia seeks. It has been unable to point the Court to any international precedent for the extraordinary request for release of the detainees in circumstances like the present — a measure which goes, we say, far beyond the bounds of Article 41 of the Court's Statute.

22. *So* yesterday, I explained the practice of international courts of rejecting provisional measures applications for the release of detainees who have been charged or convicted pursuant to a State's legitimate exercise of criminal jurisdiction. I also noted the very important fact that, very recently, Armenia made an identical request (to the present) to the European Court of Human Rights, and that Court, applying rules of international law, rejected the request as inappropriate and going

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<sup>20</sup> Judges' folder, tab 25, Cross-Reference for Allegations cited in Armenia's Submissions & Azerbaijan's Investigation and Prosecutions.

<sup>21</sup> See e.g. judges' folder, tab 7, Ann. 19, Letter from Ogtay Mammadov, Acting Head of Penitentiary Service Major-General of Justice, to Sabina Aliyeva, Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan, regarding dates of ICRC visits to detainees, dated 17 September 2021, No. 17/4 16399 (certified translation); judges' folder, tab 8, Ann. 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation); judges' folder, tab 9, International Committee of the Red Cross, *Nagorno-Karabakh conflict: Offering a lifeline to families of detained people* (24 Aug. 2021), available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-connecting-families-detainees>; judges' folder, tab 10, Ann. 23, Letter from Sabina Aliyeva, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 6 October 2021, No. 1/23943-21 (with enclosure) (certified translation); Ann. 27, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *Report of the Azerbaijani Ombudsperson on the Ad-hoc visit to examine the treatment towards the members of armed group of Armenia detained in Azerbaijan*; Ann. 28, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *The Ad-hoc Report on the examination by the Azerbaijani Ombudsperson of the treatment towards the members of the armed group of Armenia detained in Azerbaijan* (19 May 2021).

beyond the scope of provisional measures<sup>22</sup>. The Court found that the appropriate measure was monitoring under the auspices of the ICRC and similar mechanisms. As I explained yesterday, those very mechanisms are engaged in this case.

23. *And* the Court ~~will~~ *would* kindly note that Armenia has not denied that the ICRC has access to the detainees, nor denied that the ICRC has, for example, facilitated communications between the detainees and their families<sup>23</sup>. Nor has Armenia denied that the ombudsperson has been monitoring the detainees' access to food, healthcare and other necessities<sup>24</sup>. All that Professor Murphy has said is that ICRC monitoring is not perfect. *Well* that is speculative, and in any event not a basis for the Court to exercise a jurisdiction which, in our respectful submission, it does not possess.

24. As I explained yesterday, Armenia's reliance on the *Hostages* case is misconceived, and cannot justify its request. This morning, Professor Murphy argued that in the *Hostages* case, this Court ordered the "release of a detainee as an interim measure". But reading the case — with respect: it is completely different. It is not concerned with obligations in respect of POWs, but the obligation towards the United States under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. Nor was the case concerned with the release from the custody of Iran, as opposed to release from detention by a mob.

25. Professor Murphy also sought to support Armenia's case based on the assertion that "th[is] Court in fact ordered Iran to accord [the hostages] immunity . . . from any form of criminal jurisdiction". That, with respect, is another misstatement. What the Court did was to affirm that diplomats — because that is what the case was concerned with — were immune from criminal suit

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<sup>22</sup> Ann. 17, *Armenia v. Azerbaijan*, ECHR Application no. 42521/20, Letter ECHR-LE2.1aG from Johan Callewaert, Deputy Grand Chamber Registrar, to Mr. Çingiz Əsgərov, Agent of the Government of the Republic of Azerbaijan, dated 9 June 2021; emphasis added.

<sup>23</sup> Judges' folder, tab 7, Ann. 19, Letter from Ogtay Mammadov, Acting Head of Penitentiary Service Major-General of Justice, to Sabina Aliyeva, Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan, regarding dates of ICRC visits to detainees, dated 17 September 2021, No. 17/4 16399 (certified translation); judges' folder, tab 8, Ann. 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation); judges' folder, tab 9, International Committee of the Red Cross, *Nagorno-Karabakh conflict: Offering a lifeline to families of detained people* (24 Aug. 2021), available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-connecting-families-detainees>.

<sup>24</sup> Judges' folder, tab 10, Ann. 23, Letter from Sabina Aliyeva, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 6 October 2021, No. 1/23943-21 (with enclosure) (certified translation); Ann. 27, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *Report of the Azerbaijani Ombudsperson on the Ad-hoc visit to examine the treatment towards the members of armed group of Armenia detained in Azerbaijan*; Ann. 28, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *The Ad-hoc Report on the examination by the Azerbaijani Ombudsperson of the treatment towards the members of the armed group of Armenia detained in Azerbaijan* (19 May 2021).

under the Vienna Conventions. That is not the position here. Of course, the detainees are not entitled to immunity.

**C. Armenia did not show that it is plausible that its rights under the CERD would be breached**

26. Madam President *and* Members of the Court, finally I move to the point which Professor Murphy skirted around this morning: whether the acts alleged against Azerbaijan constitute racial discrimination under the CERD.

27. CERD, Article 1, as the Court well knows, states that the act of racial discrimination requires a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”<sup>25</sup>. The words “distinction, exclusion, restriction or preference” require a comparison. A finding that person A is treated differently from person B, and that the differential treatment is “based on”, for instance, ethnic origin<sup>26</sup>.

28. But the comparison that Armenia pointed to, and thus apparently its case on racial discrimination, seems to be that some Armenian detainees have been treated differently from other Armenian detainees. Well, that in itself shatters Armenia’s case under CERD. If it is so, then by definition the difference in treatment would have been “based on” something else, not the detainees’ Armenian ethnicity.

29. Indeed, as I tried to explain yesterday, the difference in treatment was indeed “based on” something else: primarily the nature of the charges against them, but also their personal circumstances. For instance, several Armenian detainees have been released on humanitarian grounds, or because investigation into their conduct revealed that there was not a sufficient basis to charge and prosecute:

(a) I invite the Court respectfully to take, for example, Artur Davidyan, who went missing on 22 August 2021 on the border between Azerbaijan and Armenia<sup>27</sup>. According to Armenia’s Minister of Defence, the senior lieutenant abandoned his permanent location without official

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<sup>25</sup> CERD Convention, Art. 1.

<sup>26</sup> See CERD Committee, *General Recommendation No. 32 on the meaning and scope of special measures*, doc. CERD/C/GC/32 (2009), para. 8.

<sup>27</sup> “OSCE MG welcomes Azerbaijan’s release of Armenian serviceman”, *Azernews* (9 Oct. 2021), available at <https://www.azernews.az/nation/184216.html>.

leave on 22 August around 21:00 and wandered into Azerbaijani territory<sup>28</sup>. Rather than hold Mr. Davidyan “hostage” in exchange for landmine maps — as Armenia would like you to believe is Azerbaijan’s practice — Azerbaijan released Mr. Davidyan on 6 October after determining he crossed the border by mistake<sup>29</sup> — an action that was commended by the OSCE Minsk Group<sup>30</sup>.

(b) Take, too, the case of Mr. Artur Kartanyan. He was detained on 8 June 2021 in the Lachin region and was returned the very same day after an investigation determined that he was not on Azerbaijani territory for the purpose of committing any offence<sup>31</sup>.

30. The Court will note that these releases happened without any *quid pro quo* from Armenia.

31. But Armenia does allege that on other occasions Armenian detainees were used by Azerbaijan as “bargaining chips”, which it says is arbitrary and somehow engages CERD. This seems to go to the second element of the definition of racial discrimination in Article 1 of CERD: that the purpose or effect of an impermissible differential treatment is to “nullify[] or impair[] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms”<sup>32</sup>. Professor Murphy mentioned several times that the “failure to repatriate is a denial to persons of Armenian origin of their rights under the CERD to equality before the law”<sup>33</sup>.

32. It is extraordinary for Armenia to suggest there has been any wrongdoing, when it is *Armenia* who is treating its nationals as a pawn in a political game of chess. Allow me to quote from Mr. Pashinyan’s remarks on his recent state visit to Lithuania: “I am ready to take with me to the meeting all [landmine] maps we have and I call on the Azerbaijani president to bring with him all captives.”<sup>34</sup>

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<sup>28</sup> “Armenian military reports losing contact with officer”, *ArmenPress* (23 Aug. 2021), available at <https://armenpress.am/eng/news/1061427/>.

<sup>29</sup> “OSCE MG welcomes Azerbaijan’s release of Armenian serviceman”, *Azernews* (9 Oct. 2021), available at <https://www.azernews.az/nation/184216.html>.

<sup>30</sup> OSCE Minsk Group, *Statement by the Co-Chairs of the OSCE Minsk Group* (8 Oct. 2021), available at <https://www.osce.org/minsk-group/500524>.

<sup>31</sup> Ministry of Defense of the Republic of Azerbaijan, *Information of the Ministry of Defense* (8 June 2021), available at <https://mod.gov.az/en/news/information-of-the-ministry-of-defense-36245.html>.

<sup>32</sup> CERD Convention, Art. 1.

<sup>33</sup> CR 2021/20, pp. 41–42, para. 33 (Murphy). See also CR 2021/20, p. 31, para. 2 (Murphy).

<sup>34</sup> See press release on the website of the Prime Minister of the Republic of Armenia, *Sovereignty of Armenia, protection of the rights of the Armenians of Nagorno-Karabakh, including right to self-determination are among our priorities. Prime Minister*. (3 Oct. 2021), available at <https://www.primeminister.am/en/press-release/item/2021/10/03/Nikol-Pashinyan-visit-to-Lithuania/>.

33. Secondly, in any event, there is nothing unusual about such agreements between States. Azerbaijan has every right, as a sovereign State, not to pursue prosecutions and release detainees, whether in the context of a “deal” with Armenia or as a goodwill gesture. But, at the same time, it has a sovereign right to enforce its criminal laws and, for that purpose, detain persons suspected or convicted of criminal offences, regardless of whether they are POWs or not<sup>35</sup>.

34. Whether Azerbaijan exercises such right, and prosecutes the detainees, or chooses to release the detainees, has nothing to do with “equality before the law”. So, Madam President, Members of the Court, where are the fundamental human rights, allegedly impaired by Azerbaijan’s continued detention of certain criminal suspects and convicts?

35. We submit that at its core, Armenia does not have a coherent case of discrimination under the CERD. Rather, what is happening is Armenia is trying to square a circle and dress up alleged breaches of international humanitarian law as racial discrimination. This is a key point: even if Armenia could show that Azerbaijan breached international humanitarian law or the Trilateral Statement, that would not amount to a breach of the CERD. In the absence of evidence of discrimination “based on” ethnic origin, Armenia has no case and no basis to request the extraordinary provisional measures which they urge the Court to grant.

36. Madam President, distinguished Members of the Court, it has been an honour to appear before you. I thank you for your kind attention, and now invite you to call on Ms Catherine Amirfar.

The PRESIDENT: I thank Lord Goldsmith for his statement. I now invite the next speaker, Ms Catherine Amirfar, to take the floor.

Ms AMIRFAR: Thank you, Madam President.

### **III. THE THIRD, FOURTH AND FIFTH MEASURES SHOULD BE REJECTED**

1. Madam President, honourable Members of the Court, I will explain why Armenia’s third, fourth and fifth requested measures should be rejected.

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<sup>35</sup> See “*Enrica Lexie*” Incident (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 182, paras. 29, 141; GC III.

### **A. Hate speech and the closure of Trophies Park**

2. Turning first to the question of hate speech, Armenia's Request for provisional measures focused almost exclusively on one request for relief: the suspension or closure of the Trophies Park, because of its objection to the mannequins of Armenian soldiers displayed there. This was the sole concrete request in its third requested measure<sup>36</sup>.

3. But the mannequins have already been removed. Contrary to the statement by Dr. Salonidis this morning<sup>37</sup>, Azerbaijan's Agent confirmed yesterday that the mannequins have been "permanently removed"<sup>38</sup>. And as Professor Boisson de Chazournes also demonstrated yesterday, there is nothing remaining in the Park that could possibly implicate rights under CERD. The request is therefore moot<sup>39</sup>, as the Court has considered an undertaking or declaration of an Agent sufficient to remove the element of necessity required for the Court to order provisional measures<sup>40</sup>.

4. Quite simply, in light of Azerbaijan's steps with regard to the Trophies Park, Armenia's request has no purpose, let alone any urgently required action that would warrant the indication of provisional measures. Mr. Martin tried to save the requested measure by suggesting that the *Park* "remains as a conspicuous symbol of hate" and "a celebration of Armenia's defeat"<sup>41</sup>. But even if that speculation were true, that argument just underlines the fact that the measure requested has no link to a CERD right; that is, the measure requested — to suspend or close the Park — would do nothing to remedy the harm now alleged to have been suffered, even if remedying past wrongs were a proper purpose of provisional measures, which it is not.

5. And there is an even more fundamental point: Armenia would have the Court believe that the undertaking and the actions taken do not matter, or even that they should be assumed to be a "manoeuvre"<sup>42</sup>, when it was the very basis for the provisional measures relief sought by Armenia. It is a puzzling argument: as the Court has said, the validity of such "statements and their legal

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<sup>36</sup> Application and Request for provisional measures of the Republic of Armenia, para. 131.

<sup>37</sup> CR 2021/22, p. 14 *et seq.* (Salonidis).

<sup>38</sup> CR 2021/21, p. 14, para. 11 (Mammadov).

<sup>39</sup> CR 2021/21, pp. 37-40 (Boisson de Chazournes).

<sup>40</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, paras. 71-72.

<sup>41</sup> CR 2021/20, p. 58, para. 11 (Martin).

<sup>42</sup> CR 2021/20, p. 30, para. 19 (Salonidis).

consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States”<sup>43</sup>. It would create a perverse incentive indeed, if States that proactively take steps to reduce inflamed tensions and otherwise engage constructively, in good faith, and in accordance with obligations under CERD, received the message that such actions do not matter. In that case, what prevents States from requesting the extraordinary relief afforded by the Court through provisional measures just to score political points?

6. With the very basis of the third requested measure removed, far from withdrawing the request, Armenia instead pivoted yesterday and this morning to a generalized request that Azerbaijan “refrain from espousing hatred of people of Armenian ethnic or national origin”<sup>44</sup>. But that request does not state a specific concrete relief linked to, in the words of the Court, “a real and imminent risk” of irreparable harm<sup>45</sup>. Rather, it just restates the obligations under Articles 2 and 4 of CERD. And such an order here would indeed be unnecessary: as the Agent of Azerbaijan made clear, these are obligations that Azerbaijan accepts and is “dedicated to upholding”<sup>46</sup>. Azerbaijan also has reiterated before the Court that it does not condone “statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group”<sup>47</sup>.

7. Yesterday and again this morning, to support this generalized request, Armenia largely invokes statements by Azerbaijan’s President. We have provided you with the missing context for statements invoked by Armenia in its Request in tab 23 of your folder, which makes clear the context of armed conflict and post-occupation in which these statements were made and that they were directed towards the Armenian Government and its unlawful policies. The same is true for the statements cited this morning. At tab 28 of your folder are the same speeches cited this morning that Armenia appended as tab 2 of their folder, with that context underlined in red.

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<sup>43</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 269 para. 51.

<sup>44</sup> Application and Request for provisional measures of the Republic of Armenia, para. 131.

<sup>45</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II), p. 1168, para. 83.

<sup>46</sup> CR 2021/21, p. 13, para. 10 (Mammadov).

<sup>47</sup> CR 2021/21, p. 13, para. 10 (Mammadov).



8. Notably, the Court has observed that “declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD”<sup>48</sup>. The difficult exercise of drawing the line between permitted free speech — even where “controversial” or “critical” — and unlawful hate speech is precisely why Armenia’s selective litany of examples raise merits issues and are not susceptible to determination in the context of provisional measures.

9. This takes me to another fundamental point: the requested measure cannot be so vague as to make it virtually impossible to monitor compliance. Again, Azerbaijan is already taking the measures to combat hate speech that I just discussed<sup>49</sup>, and again, a general measure of the kind requested by Armenia serves no purpose.

## **B. Cultural heritage**

10. I move to the fourth and fifth requested measures, concerning cultural heritage sites in the formerly Occupied Territories.

11. Despite *three* attempts now — in its papers, yesterday and this morning — Armenia has failed to satisfy the requirements for a grant of interim relief. Today, I make three brief points.

### **1. Armenia’s request does not seek to protect plausible rights under CERD**

12. *First*, Armenia cannot identify a link between the measures it seeks and a plausible right under CERD.

13. Yesterday, Armenia urged the Court to dismiss wholly<sup>50</sup> the Ministry of Culture’s affirmation of Azerbaijan’s commitment to protect, restore and uphold cultural heritage sites, including Armenian heritage sites, regardless of ethnic origin<sup>51</sup>. But Professor d’Argent’s argument for doing this puts into sharp relief what Armenia actually seeks in the guise of provisional measures under CERD: he argued that the affirmation should be disregarded because Azerbaijan does not commit to “rebuild” a church spire on the Gazanchi Church, which was damaged during the Second

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<sup>48</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021, I.C.J. Reports 2021*, para. 112.

<sup>49</sup> See *supra*, Amirfar, para. 3.

<sup>50</sup> CR 2021/21, p. 48, para. 14 (d’Argent).

<sup>51</sup> See Application and Request for provisional measures of the Republic of Armenia, Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 Oct. 2021.

Garabagh War<sup>52</sup>. To be clear, this would require removing the dome already installed on the Gazanchi Church in the repair and restoration. But “rebuilding” is not a provisional measure in any sense. Armenia is not asking to preserve the status quo. Instead, it seeks an order permitting it to dictate the specifications of Azerbaijan’s reconstruction work on Azerbaijan’s own territory.

14. Again, this morning, Armenia has identified no right under CERD that would permit it to seek such relief as a matter of provisional measures. In fact, on its own case, Armenia is not seeking to protect any Article 5 right under CERD. Nothing in Azerbaijan’s restoration efforts, for example, prevents Armenians from practicing their religion or participating in cultural activities on the basis of national or ethnic origin<sup>53</sup>.

15. What Armenia is really seeking is found nowhere in CERD’s provisions, which are focused on combatting racial discrimination.

## **2. Armenia cannot show imminent risk of irreparable harm**

16. *Second*, Armenia cannot show an imminent risk of irreparable harm. In its Request and presentations over the course of two days, Armenia still did not identify with any specificity any sites that it asserts will be destroyed imminently unless the Court issues provisional measures. Instead, Armenia continues to insist that past harm requires the Court to infer future risk as a general matter. As Mr. Donovan will explain, that proposition ignores the legal burden on Armenia to justify its requested measures.

17. But it is also wrong with respect to the underlying facts, when the past harm occurred in the context of armed conflict, and the request for provisional measures is made in the fundamentally different context of post-conflict reconstruction. Armenia again tried to claim that the Court should draw a bright line after the signing of the Trilateral Statement on 9 November 2020 and conclude that damage occurring after that date was done not in the context of armed conflict, but as part of a deliberate policy for purposes of reconstruction. But Armenia purposely ignores that the context of armed conflict is not defined by a single date, but by the underlying circumstances. As Armenia’s own submissions confirm, virtually all of the incidents Armenia has raised occurred, whether damage

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<sup>52</sup> CR 2021/21, p. 48, para. 14 (d’Argent).

<sup>53</sup> CERD Convention, Arts. 5 (d) (vii) and 5 (e) (vi).

that occurred during active hostilities (such as the damage to the Gazanchi church) or in the aftermath (such as the allegations and charges of vandalism *by Azerbaijani servicemen*)<sup>54</sup>. These are circumstances that cannot be imputed to the current context of restoration works.

18. In addition, it is clear in both word and deed<sup>55</sup> that Azerbaijan does not have a discriminatory policy or practice with respect to its reconstruction. For these purposes, Armenia relies exclusively on alleged damage to cemeteries in the course of Azerbaijan's reconstruction works<sup>56</sup>. But Armenia provides no evidence that any such damage was intentionally targeted at Armenian sites, as would be required to implicate CERD. To the contrary, regrettable damage to heritage sites also has been caused in the course of reconstruction to a mosque (as discussed in Azerbaijan's Annex 30)<sup>57</sup>. The point remains: all cemeteries and cultural sites are protected on an equal basis under Azerbaijani law<sup>58</sup>, and Azerbaijan has taken concrete steps by prohibiting, investigating, prosecuting and condemning such acts<sup>59</sup>. In fact, Azerbaijan has publicly condemned and prosecuted the kind of vandalism of Armenian cemeteries that Armenia highlighted in its presentation to the Court yesterday<sup>60</sup>.

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<sup>54</sup> See CR 2021/20, p. 45, para. 6 (d'Argent); Armenia's day 1 presentation, Slide PD-2; (Gazanchi Church, in Armenia's submissions, Ghazanchetsots Cathedral); "Serzh Sargsyan: Armenia Fired Iskander Missiles at Shushi", *USC Dornsife Institute of Armenian Studies: News in Context* (16 Feb. 2021) available at <https://armenian.usc.edu/serzh-sargsyan-armenia-fired-iskander-missiles-at-shushi/> (Ghiz Monastery, in Armenia's submissions, St. John Baptist Church); Armenia's day 1 presentation, Slide PD-9 (Gravestones); Armenia's judges' folder, day 1, tab 5 (Yegish Arakel Temple, referred to in Armenia's submissions as St. Yeghische Church); Armenia's judges' folder, day 1, tab 9 (Cemetery in Taghavard, referred to in Armenia's submissions as Taghavard); Armenia's judges' folder 1, tab 11 (Cross-Stone in Arakel, referred to in Armenia's submissions as Arakel); CR 2021/20, p. 49, para. 18 (d'Argent).

<sup>55</sup> CR 2021/21, pp. 47-48, paras. 11-12 (Amirfar).

<sup>56</sup> See CR 2021/20, p. 49, para. 18 (d'Argent); Application and Request of the Republic of Armenia, paras. 115-116.

<sup>57</sup> See Ann. 30, JAM News Facebook post regarding 18th century mosque, @jamnewscaucasus (15 Apr. 2021) (certified translation).

<sup>58</sup> See Ann. 4, Law of the Republic of Azerbaijan On Protection of Historical and Cultural Monuments; Ann. 1, Criminal Code of the Republic of Azerbaijan, Art. 245.

<sup>59</sup> See Ann. 1, Criminal Code of the Republic of Azerbaijan, Art. 245; Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 Oct. 2021; Ann. 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 Oct. 2021, No. 14/çix67-21 (with enclosures); Office of the Prosecutor General of the Republic of Azerbaijan, "Detained Four Servicemen Accused of Insulting Bodies of Armenian Servicemen and Tombstones Belonging to Armenians" (14 Dec. 2020), available at <https://genprosecutor.gov.az/az/post/3272>.

<sup>60</sup> Compare Armenia's day 1 presentation, Slide PD-9 with Prosecution Summary in Azerbaijan's day 1 judges' folder, tab 4.

### **3. The measures Armenia seeks would require the Court to prejudge the merits**

19. *Finally*, the relief that Armenia seeks and the tasks it asks the Court to undertake effectively prejudge the merits.

20. Much of Armenia's claims focus on its contention that provisional measures are required to prevent so-called "alteration"<sup>61</sup>. As already noted, these are complex, highly technical and disputed issues that are inextricably intertwined with the merits of the case; they cannot be resolved on the sparse and self-contradictory record Armenia has submitted and without impermissibly prejudging the merits<sup>62</sup>. The CERD and this Court's authority to indicate provisional measures should not be leveraged by parties to race to the courthouse to resolve — or seek an advantage in — the dispute over the "original condition" of such sites.

21. Even a cursory review of Armenia's evidence reveals the challenges inherent to the evidence submitted in support of its request. In addition to the example provided yesterday with respect to the church in Hunarli subject to inconsistent assertions spanning 500 years<sup>63</sup>, Armenia also notably does not rely on government sources as evidence substantiating its request. For example, multiple images on Slide 11 of Armenia's opening presentation are sourced to "Azeriwarcrimes.org", which cannot be said to be an independent, reliable source<sup>64</sup>.

22. Further, Professor d'Argent referenced my statement of "alleged" Armenian heritage sites to suggest that there may be a question as to whether Azerbaijan recognizes the existence of such heritage sites<sup>65</sup>. There is no question. As made clear repeatedly, Azerbaijan recognizes its CERD obligations and has committed publicly and repeatedly to protect, restore and uphold cultural heritage regardless of ethnic or religious origin<sup>66</sup>, and heritage and cultural sites referenced by Armenia are

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<sup>61</sup> See also Application and Request for provisional measures of the Republic of Armenia, paras. 4, 7, 70, 77, 117, 127 and 131.

<sup>62</sup> CR 2021/21, p. 50, para. 18 (Amirfar).

<sup>63</sup> CR 2021/21, p. 50, para. 19 (Amirfar).

<sup>64</sup> Armenia's day 1 presentation, Slide PD-5 (citing "Azerbaijan's Attacks on the St. Ghazanchetsots Cathedral of Shushi, Artsakh", AzeriWarCrimes (11 Jan. 2021), available at <https://azeriwarcrimes.org/2021/01/11/azerbajians-attacks-on-the-st-ghazanchetsots-cathedral-of-shushi-artsakh/>).

<sup>65</sup> CR 2021/22 (d'Argent).

<sup>66</sup> See e.g. Azerbaijan's judges' folder, tab 17, Compendium of Statements by the Republic of Azerbaijan, Regarding Commitment to Protect all Heritage Sites on an Equal Basis. See also Ann.25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 Oct. 2021.

included in its State Registry<sup>67</sup>. The point was that the merits phase, should this case proceed, necessarily involves fact-intensive determinations of the nature of the sites. So, for example, while Armenia referenced the church in Jabrayil in its submissions<sup>68</sup>, it failed to mention the inconvenient fact that, by the church pastor's own admission<sup>69</sup>, the church was not built as an open place of worship for Armenians. Rather, it was built four years ago as part of an Armenian military compound, for the exclusive use of Armenian soldiers illegally operating in Azerbaijan's territory<sup>70</sup>.

23. In sum, Azerbaijan should not be prevented from continuing to undertake its vital reconstruction and restoration work on this kind of evidence and where it entails an impermissible prejudgment of the merits. And as Mr. Donovan will address, there is no irreparable harm when disputes over Azerbaijan's reconstruction and restoration work can be remedied or reversed by further works after the merits stage.

24. On the fifth measure, I will be very brief, because Armenia does not appear to be in a position to support its contention that provisional measures are required to ensure that Azerbaijan facilitates preservation of heritage sites with any facts. There can be no dispute that Azerbaijan is ready to welcome a technical visit by UNESCO: as the correspondence submitted makes clear, what Azerbaijan maintains is that such a visit should proceed on an equal and impartial basis, including not only the sites highlighted by Armenia, but also all of the cultural property in the formerly Occupied Territories damaged or destroyed during the last 30 years.

25. For all these reasons, Armenia's third, fourth and fifth requested measures should be rejected.

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<sup>67</sup> See Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 Oct. 2021; Application and Request for provisional measures of the Republic of Armenia, paras. 115-116.

<sup>68</sup> See Application and Request for provisional measures of the Republic of Armenia, para. 115.

<sup>69</sup> "Destroyed Armenian church in Artsakh's Jabrayil was built with soliders' assistance", News.Am (25 March 2021), available at <https://news.am/eng/news/635675.html>.

<sup>70</sup> See "Destruction of Zoravor Surb Astvatsatsin Church in Mekhakavan", *Monument Watch* (4 May 2021), available at <https://monumentwatch.org/alerts/destruction-of-zoravor-surb-astvatsatsin-church-in-mekhakavan/>; Ministry of Foreign Affairs Press Release No. 104/21, Commentary of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan about unfounded claims by Armenia on committing "cultural crimes" in the liberated territories of Azerbaijan, available at <https://mfa.gov.az/en/news/no10421-commentary-of-the-press-service-department-of-the-ministry-of-foreign-affairs-of-the-republic-of-azerbaijan-about-unfounded-claims-by-armenia-on-committing-cultural-crimes-in-the-liberated-territories-of-azerbaijan>.

26. Madam President, honourable Members of the Court, that concludes my observations before you for today. I thank the Court for its kind attention and request that the Court invite Mr. Donovan to the podium.

The PRESIDENT: I thank Ms Amirfar for her statement and I invite the next speaker, Mr. Donald *Francis* Donovan, to take the floor.

Mr. DONOVAN:

#### IV. CONCLUDING OBSERVATIONS

1. Madam President, Members of the Court, it is my honour to address you once again on behalf of the Republic of Azerbaijan.

2. Yesterday, you heard Mr. Martin describe the Court's power to indicate provisional measures as "extraordinary"<sup>71</sup>. You heard him invoke the Court's well-settled doctrine that its provisional measures power will be exercised "*only* if there is urgency, in the sense that there is a *real and imminent risk* that irreparable prejudice will be caused before the Court gives its final decision"<sup>72</sup>. You also heard him clarify that "not just *any* irreparable prejudice counts"<sup>73</sup>.

3. We agree. Those principles, which come directly from the Court's provisional measures jurisprudence, underscore the rigour and discipline by which the Court approaches provisional measures. But having accepted the high bar for the indication of provisional measures, and the need to prove urgency, in both its dimensions<sup>74</sup>, one would have expected Armenia to prove to this Court why its Request is truly urgent. Armenia failed to do so yesterday, and we heard virtually nothing on the matter today, because the facts are just not there.

4. Urgency, as Professor Lowe explained yesterday, has two dimensions<sup>75</sup>. *First*, timing. Armenia must prove why each measure must be issued now and why it cannot await a full and fair presentation by the Parties on the merits. *Second*, necessity. Armenia must prove why each measure

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<sup>71</sup> CR 2021/20, p. 63, para. 31 (Martin).

<sup>72</sup> CR 2021/20, pp. 55-56, para. 3 (Martin) (emphasis added).

<sup>73</sup> CR 2021/20, p. 56, para. 4 (Martin) (emphasis added).

<sup>74</sup> See CR 2021/21, p. 18, para. 14 (Lowe).

<sup>75</sup> CR 2021/21, p. 18, para. 14 (Lowe).

is necessary to preserve specific rights that are at real and imminent risk of irreparable harm. Those dimensions do not operate in the abstract. It is simply not enough to suggest, as Armenia seems to think, that a measure would be generally helpful in the spirit of CERD.

5. Rather than seeking to identify how CERD rights are at *imminent* risk of *irreparable* prejudice by a *real* threat in *specific* circumstances, all that Armenia offered, in effect, were cherry-picked examples of past conduct — some of it a year ago and during active hostilities — to support a conclusion that the situation is now somehow urgent and would be assisted by the Court issuing to Azerbaijan, as we said yesterday, legally binding, but duplicative, reminders to adhere generally to obligations under CERD.

6. Take, for example, the third requested measure on speech. Dr. Salonidis essentially reduced the object of this measure to just two concerns: *first*, the Military Trophies Park, and *second*, what he described as “[o]fficial hate speech”<sup>76</sup>. As Ms Amirfar just pointed out, the former is now moot given that the helmets and mannequins have been permanently removed, and nothing implicating CERD remains in the park. And on the latter, as she also pointed out, all that Armenia offers are out-of-context political statements in a highly-charged political context, some of them from 2020.

7. Take, as another example, Armenia’s fourth and fifth requested measures on cultural property. As Ms Amirfar also pointed out, Armenia has failed to identify a *single* example of a *particular* property that faces a real or *specific* threat of irreparable damage. Hence, this is *not* a case like *Temple of Preah Vihear* where a sacred temple was positioned in an area of armed conflict and the Court had found that armed clashes might reoccur<sup>77</sup>.

8. Armenia is obviously alive to these flaws in its Request and Dr. Salonidis tried to do some repair this morning. He argued that “a provisional measure that reaffirms Azerbaijan’s existing obligations *can* constitute an appropriate provisional measure”<sup>78</sup>. And in support of that proposition, Armenia cites three cases<sup>79</sup>. But Dr. Salonidis did not discuss them in his oral submissions. They are cited in the written version. All of them are inapposite. I will take them in reverse order.

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<sup>76</sup> CR 2021/22, p. 14, para. 2 (Salonidis).

<sup>77</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 537.

<sup>78</sup> CR 2021/22, p. 14, para. 3 (Salonidis).

<sup>79</sup> CR 2021/22, pp. 14-15, para. 3, fn. 17 (Salonidis).

9. First, *United States of America v. Iran*, the *Tehran Hostages* case, which Lord Goldsmith also had occasion to discuss<sup>80</sup>. The reliance on that case is puzzling. That was a case in which over 50 United States diplomatic and consular staff were being held hostage in the United States Embassy in Tehran in stark and basically uncontested violation of the Vienna Conventions on Diplomatic and Consular Relations. The Court ordered Iran to immediately release the hostages<sup>81</sup>. It would be hard to imagine a case in which the precise connection between the applicable treaty and the specific situation might be clearer.

10. Second, the *Bosnia and Herzegovina v. Serbia and Montenegro* case<sup>82</sup>. There, the Court ordered Serbia and Montenegro to take all measures to prevent the commission of genocide on the basis of an express finding by the Court that there was a “grave risk of acts of genocide being committed” based on the evidence submitted to it<sup>83</sup>. There again, the precise application of the treaty to the specific situation was crystal-clear.

11. Third, *Georgia v. Russian Federation*<sup>84</sup>. There, the Court ordered *both* parties to refrain from racial discrimination.

12. The order was indicated in the face of allegations of ongoing ethnic cleansing and on the basis of express findings that the situation in South Ossetia, Abkhazia, and adjacent areas was unstable; and that, as a result, ethnic Georgian, ethnic Ossetian and ethnic Abkhazian populations were vulnerable. In other words, yet again, the precise connection between the legal obligation and the specific conduct at issue was clear.

13. Dr. Salonidis then tried to dismiss Azerbaijan’s submissions on the basis that it had not provided authority to prove a negative<sup>85</sup>. With respect, it is elementary to the indication of provisional measures that the measure can be indicated, as Armenia accepted, *only* if there is urgency, in the

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<sup>80</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures, Order of 15 December 1979*, I.C.J. Reports 1979, p. 21.

<sup>81</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures, Order of 15 December 1979*, I.C.J. Reports 1979, p. 21, para. 47 (1) (A) (ii).

<sup>82</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993, p. 24.

<sup>83</sup> *Ibid.*, p. 22, para. 45.

<sup>84</sup> *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Provisional Measures, Order of 15 October 2008*, I.C.J. Reports 2008, p. 398.

<sup>85</sup> CR 2021/22, p. 15, para. 3 (Salonidis).



specific sense that there is a *real and imminent risk* that irreparable prejudice will occur if the measure were not indicated. As we said yesterday, were the Court to act in the absence of that kind of showing, it would prejudice the issues in question. The Court has repeatedly stated that it cannot do that in a provisional measures application.

14. To finish the point, we can briefly recall some of the occasions in which the Court has indicated provisional measures. In the *Treaty of Amity* case, the Court indicated provisional measures when specific United States sanctions against Iran threatened to deprive that country of medicines, foodstuffs and equipment necessary for civil aviation<sup>86</sup>. And in other cases, the Court has indicated provisional measures when individuals were about to be executed<sup>87</sup>, when armed conflict was occurring on the ground<sup>88</sup> and when nuclear tests were scheduled to occur<sup>89</sup>.

15. In addition, as we explained yesterday, Armenia's Request would prejudice *Azerbaijan's* rights. Armenia had no answer on why the Court is bound under Article 41 to consider the irreparable prejudice that Armenia's measures will cause to Azerbaijan's rights. All we heard on that point from Armenia this morning was Dr. Salonidis's observation that it posed an "interesting question"<sup>90</sup>. But Armenia elected not to take on that interesting question or to rebut Azerbaijan's showing that the measures sought by Armenia would prejudice Azerbaijan's rights.

16. There is yet another fundamental point that Azerbaijan made yesterday on which we heard nothing this morning from Armenia, and that point goes to the very character of the imminent injury that might justify an indication of provisional measures — whether the harm to be avoided would be truly irreparable so as to prevent the Court from providing effective relief if it decides the case adversely to the party to be restrained. As we said, the Court's Judgment in *Pulp Mills* makes that

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<sup>86</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 623.

<sup>87</sup> See e.g. *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 258; para. 41 (I); *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91-92, para. 59 (I) (a).

<sup>88</sup> See e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 129, para. 47.

<sup>89</sup> *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 105-106, para. 35.

<sup>90</sup> CR 2021/22, p. 15, para. 4 (Salonidis).

point<sup>91</sup>, and in the context of the disputes over cultural heritage, Azerbaijan recognizes that the Court would have the authority, in the event of a decision adverse to its position, to order the modification or dismantlement of restoration and reconstruction works. Reparation could take the form of restitution. That should be a complete answer to the concerns Armenia has expressed here.

17. Madam President, Members of the Court, nothing we heard from Armenia yesterday or this morning should cause the Court to examine Armenia's request for provisional measures with any less discipline than it customarily exercises.

18. I thank the Court for its kind attention. And I ask you now to invite the Agent for the Republic of Azerbaijan, Mr. Mammadov, to the podium.

The PRESIDENT: I thank Mr. Donovan for his statement. I now invite the Agent of Azerbaijan, His Excellency Mr. Elnur Mammadov to take the floor.

Mr. MAMMADOV:

#### V. CLOSING STATEMENT

1. Madam President, honourable Members of the Court, it is my privilege to address you once again and to close the submissions by the Republic of Azerbaijan.

2. The relief Armenia seeks from the Court would, in large part, require Azerbaijan to take steps that it already has committed to take. This includes my assurance yesterday about the permanent removal of certain exhibits in the Trophies Park as referenced by the related letters at tabs 19 and 20 of your folders<sup>92</sup>.

3. Armenia's other requests seek relief that is not available to Armenia on a request for provisional measures under CERD. Indeed, contrary to the assertion by Armenia's Agent today that its requests are tailored "to stay within the four corners of the CERD"<sup>93</sup>, its presentations yesterday

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<sup>91</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 13 July 2006*, *I.C.J. Reports 2006*, p. 133, para. 78.

<sup>92</sup> CR 2021/21, p. 14, para. 11 (Mammadov); Ann. 24, Letter from Orujali Abbaszade, Director of the Military Trophies Park, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 6 October 2021 (certified translation); Ann. 33, Letter from Hasan Mansurov, Head of Investigation Department of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs, regarding helmets displayed in Military Trophies Park, dated 30 September 2021, No. 7/3355 (certified translation).

<sup>93</sup> CR 2021/22, p. 33, para. 2 (Kirakosyan).

and this morning suggest that Armenia's true motivation in requesting provisional measures is not to protect rights under CERD from irreparable harm, but to use the Court as a platform to broadcast its grievances against Azerbaijan. Provisional measures are wholly unnecessary — and indeed inappropriate — in such circumstances.

4. Madam President, honourable Members of the Court, my country emphasizes its great respect for the Court and its continued commitment to fulfil its obligations under CERD. I want to take this opportunity to thank the Office of the Registrar and the interpreters for their tremendous work during these proceedings.

5. I shall now read out the Republic of Azerbaijan's final submissions.

In accordance with Article 60 (2) of the Rules of Court, for the reasons explained during these hearings, the Republic of Azerbaijan respectfully asks the Court to reject the request for the indication of provisional measures submitted by the Republic of Armenia.

6. Madam President, honourable Members of the Court, I thank you for your kind attention.

The PRESIDENT: I thank the Agent of Azerbaijan, whose statement brings to an end the second round of oral argument of Azerbaijan. I would now like to thank the Agents, counsel and advocates of the two Parties for their statements. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Order in a public sitting. Since the Court has no other business before it today, the sitting is declared closed.

*The Court rose at 6 p.m.*

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