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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Monday 15 April 2024, at 10.10 a.m., at the Peace Palace,

President Salam presiding,

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

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le lundi 15 avril 2024, à 10 h 10, au Palais de la Paix,

sous la présidence de M. Salam, président,

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

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Judges *ad hoc*	Daudet
		Koroma
	Registrar	Gautier

Présents : M. Salam, président
M^me^ Sebutinde, vice-présidente
MM. Tomka
Abraham
Yusuf
M^me^ Xue
MM. Bhandari
Iwasawa
Nolte
M^me^ Charlesworth
MM. Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi, juges
MM. Daudet
Koroma, juges *ad hoc*

M. Gautier, greffier

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M. Shahriyar Hajiyev, deuxième secrétaire, ministère des affaires étrangères de la République d'Azerbaïdjan,

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Le PRÉSIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui et se réunira au cours des prochains jours pour entendre les plaidoiries des Parties sur les exceptions préliminaires soulevées par le défendeur en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan)*. Ce matin, elle entendra la République d'Azerbaïdjan en son premier tour de plaidoiries.

Je rappelle que, la Cour ne comptant sur le siège aucun juge de la nationalité de l'une ou l'autre des Parties, chacune d'elles s'est prévalue du droit que lui confère l'article 31 du Statut de la Cour de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire. La République d'Arménie a désigné M. Yves Daudet et la République d'Azerbaïdjan, M. Kenneth Keith, tous deux ayant été dûment installés en qualité de juges *ad hoc* le 14 octobre 2021, lors de la phase de l'instance consacrée à la demande en indication de mesures conservatoires présentée par l'Arménie. À la suite de la démission de M. Keith le 21 avril 2023, l'Azerbaïdjan a désigné M. Abdul G. Koroma, qui a été dûment installé en qualité de juge *ad hoc* le 20 juin 2023.

Je vais à présent retracer les principales étapes de la procédure en l'espèce.

Le 16 septembre 2021, l'Arménie a déposé au Greffe de la Cour une requête introductive d'instance contre l'Azerbaïdjan à raison de violations alléguées de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (que j'appellerai la « CIEDR »). Pour fonder la compétence de la Cour, l'Arménie invoque le paragraphe 1 de l'article 36 du Statut et l'article 22 de la CIEDR. La requête contenait une demande en indication de mesures conservatoires présentée en application de l'article 41 du Statut de la Cour et des articles 73, 74 et 75 de son Règlement. Par ordonnance en date du 7 décembre 2021, la Cour, ayant entendu les Parties, a indiqué certaines mesures conservatoires.

Par ordonnance en date du 21 janvier 2022, la Cour a fixé au 23 janvier 2023 et au 23 janvier 2024, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire par l'Arménie et d'un contre-mémoire par l'Azerbaïdjan. Le mémoire a été déposé dans le délai ainsi fixé.

Par lettre en date du 16 septembre 2022, l'Arménie, se référant à l'article 76 du Règlement de la Cour, a prié celle-ci de modifier la première mesure conservatoire indiquée dans l'ordonnance du 7 décembre 2021. Par ordonnance en date du 12 octobre 2022, la Cour a estimé que les circonstances,

telles qu'elles se présentaient à elle, n'étaient pas de nature à exiger l'exercice de son pouvoir de modifier les mesures indiquées dans l'ordonnance du 7 décembre 2021.

Par lettre en date du 28 décembre 2022, l'Arménie, se référant à l'article 41 du Statut de la Cour et à l'article 73 de son Règlement, a présenté une nouvelle demande en indication de mesures conservatoires et, par lettre en date du 26 janvier 2023, a communiqué à la Cour le texte d'une mesure conservatoire supplémentaire qu'elle sollicitait. Par ordonnance en date du 22 février 2023, la Cour, ayant entendu les Parties, a indiqué une mesure conservatoire.

Le 21 avril 2023, dans le délai prescrit au paragraphe 1 de l'article 79*bis* du Règlement de la Cour, l'Azerbaïdjan a soulevé des exceptions préliminaires d'incompétence de la Cour et d'irrecevabilité de certaines demandes présentées dans la requête. En conséquence, par ordonnance en date du 25 avril 2023, la Cour, notant que la procédure sur le fond était suspendue en application du paragraphe 3 de l'article 79*bis* de son Règlement, et compte tenu de l'instruction de procédure V, a fixé au 21 août 2023 la date d'expiration du délai dans lequel l'Arménie pourrait présenter un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires soulevées par l'Azerbaïdjan. L'exposé écrit a été déposé dans le délai ainsi fixé.

Par lettre en date du 12 mai 2023, l'Arménie, se référant à l'article 76 du Règlement de la Cour, a sollicité une modification de l'ordonnance rendue par la Cour le 22 février 2023. Par ordonnance en date du 6 juillet 2023, la Cour a considéré que les circonstances, telles qu'elles se présentaient alors à elle, n'étaient pas de nature à exiger l'exercice de son pouvoir de modifier l'ordonnance du 22 février 2023 indiquant une mesure conservatoire.

Le 28 septembre 2023, l'Arménie, se référant à l'article 41 du Statut de la Cour et à l'article 73 de son Règlement, a présenté une nouvelle demande en indication de mesures conservatoires. Par ordonnance en date du 17 novembre 2023, la Cour, ayant entendu les Parties, a indiqué certaines mesures conservatoires, et a notamment prescrit à la République d'Azerbaïdjan de lui présenter un rapport sur les dispositions qu'elle aurait prises pour donner effet aux mesures conservatoires indiquées, dans un délai de huit semaines à compter de la date de l'ordonnance.

L'Azerbaïdjan a ainsi présenté, le 12 janvier 2024, un rapport sur les dispositions qu'elle avait prises pour donner effet à cette ordonnance. Le 26 janvier 2024, l'Arménie a formulé des

observations sur ce rapport dans le délai qui lui avait été prescrit. Par lettre en date du 4 mars 2024, l'Azerbaïdjan a répondu à ces observations.

Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après avoir consulté les Parties, a décidé que des exemplaires des exceptions préliminaires de l'Azerbaïdjan et de l'exposé écrit de l'Arménie sur ces exceptions, ainsi que leurs annexes, expurgés dans les mesures demandées par les Parties aux fins de la protection des informations à caractère personnel, seraient rendus accessibles au public après l'ouverture de la procédure orale.

Je voudrais à présent souhaiter la bienvenue aux délégations des Parties. Je salue la présence des deux agents, ainsi que des membres des délégations respectives des deux États. Conformément aux dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tour de plaidoiries. Le premier tour s'ouvrira avec l'exposé de l'Azerbaïdjan, qui sera présenté aujourd'hui de 10 heures à 13 heures. Demain, mardi 16 avril, de 10 heures à 13 heures, nous entendrons l'Arménie en son premier tour de plaidoiries. L'Azerbaïdjan présentera son second tour de plaidoiries le mercredi 17 avril de 16 h 30 à 18 heures, et l'Arménie, le vendredi 19 avril de 10 heures à 11 h 30.

Pour cette première audience, l'Azerbaïdjan pourra, si nécessaire, poursuivre un peu au-delà de 13 heures, compte tenu du temps consacré à mes observations liminaires.

I shall now give the floor to the Agent of Azerbaijan, His Excellency Mr Elnur Mammadov. You have the floor, Excellency.

Mr MAMMADOV:

1. Merci bien, Monsieur le président. Mr President, Members of the Court, it is an honour to appear before you again and to do so on behalf of my country, the Republic of Azerbaijan. Azerbaijan considers its preliminary objections in this case imperative for the proper administration of international justice. Armenia's Application misuses the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") and tries to escape its obligation to attempt settlement of its dispute with Azerbaijan by way of negotiation, before invoking the Court's jurisdiction.

2. This is the preliminary objections hearing in the first of two CERD cases between Azerbaijan and Armenia. However, when analysed carefully, it is clear that the two cases are very different.

3. Azerbaijan's CERD complaint, which will be the focus of next week, goes to the very heart of the Convention. It is centred upon ethnic cleansing and related systematic cultural erasure by Armenia of the Azerbaijani population and culture in the formerly occupied territories of Azerbaijan. These Azerbaijani territories were illegally invaded between 1991 and 1994, and subsequently occupied by Armenia for more than thirty years, in breach of multiple resolutions of the United Nations Security Council[1]. That invasion and subsequent occupation were driven by an overtly racist and nationalist ideology known as Tseghakron. This racist ideology espouses the notion of a superior Armenian "Aryan" race[2], the racial inferiority of Azerbaijanis[3] and the unification of all ethnic Armenians within a single, mono-ethnic Armenian State extending into the internationally recognized sovereign territories not only of Azerbaijan, but also of other neighbouring States[4]. It was that overtly racist ideology which drove all of the Armenian misconduct that is the subject of Azerbaijan's CERD complaint[5].

4. Azerbaijan's CERD complaint is also procedurally orthodox. It arises out of a timely invocation of the Court's jurisdiction under Article 22 of the Convention, following a genuine attempt to negotiate until the other Party walked away.

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[1] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia),* Memorial of the Republic of Azerbaijan of 23 January 2023 (the "Memorial of Azerbaijan"), paras. 128-132; United Nations Security Council, resolution 822, doc. S/RES/822 (30 April 1993); United Nations Security Council, resolution 853, doc. S/RES/853 (29 July 1993); United Nations Security Council, resolution 874, doc. S/RES/874 (14 October 1993); United Nations Security Council, resolution 884, doc. S/RES/884 (12 November 1993); United Nations Security Council, *Decision of 6 April 1993 (3194th meeting): statement by the President*, doc. S/25539; United Nations Security Council, *Decision of 18 August 1993 (3264th meeting): statement by the President*, doc. S/26326; United Nations Security Council, *Decision of 26 April 1995 (3525th meeting): statement by the President*, doc. S/PRST/1995/21.

[2] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia),* Memorial of Azerbaijan, Annex 106, G. Nzhdeh, *Unpreachable Nation* (2021), pp. 81, 144 (certified translation); Memorial of Azerbaijan, Annex 89, G. Nzhdeh, *Selected Works of Garegin Nzhdeh* (E. Danielyan, translation and commentary) (2011), pp. 11, 35; see further, Memorial of Azerbaijan, paras. 6-8.

[3] *Ibid.*

[4] Parliamentary Assembly of the Council of Europe, *Resolution 1416, The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference* (adopted 25 January 2005), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17289&lang=en; Organisation of Islamic Cooperation, Baku Declaration (19-21 June 2006), para. 14.

[5] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia),* Memorial of Azerbaijan, Annex 91, T. de Waal, *Black Garden: Armenia and Azerbaijan Through Peace and War* (New York University Press, 2013). See further, Memorial of Azerbaijan, paras. 6-8; 55-61.

5. By contrast, much of Armenia's CERD complaint, which is the focus of this week, does not concern the Convention at all. It concerns the military conflicts connected with Armenia's illegal occupation of almost one fifth of Azerbaijan's land territory from the early 1990s and the subsequent liberation of that territory by Azerbaijani forces. Armenia's CERD complaint includes allegations of serious mistreatment of Armenians, including Armenian soldiers, prisoners of war (POWs) and civilians, in connection with those conflicts[6]. And it includes associated allegations of arbitrary detention and enforced disappearance of Armenians[7]. In short, Armenia's CERD complaint includes a kaleidoscope of grievances arising in connection with those military conflicts. Such issues do not lend themselves to the Court's jurisdiction under CERD. This is Azerbaijan's *ratione materiae* objection, on which I will elaborate shortly.

6. Additionally, *the entirety* of Armenia's CERD complaint suffers from a fatal procedural flaw. Namely, to the extent that its complaint *does* arise out of a dispute between Armenia and Azerbaijan with respect to the interpretation or application of CERD, Armenia's invocation of the Court's jurisdiction under Article 22 was premature. That is because Armenia failed to engage in negotiations with Azerbaijan in an attempt to settle that dispute and failed to pursue as far as possible the limited discussions that did take place[8]. From the outset, Armenia had its sights firmly set on commencing these proceedings before the Court and using the fact of these proceedings to wage a public media campaign against Azerbaijan. This is Azerbaijan's objection that Armenia has failed to comply with the negotiation precondition required by Article 22 of CERD, on which I will also elaborate shortly.

7. An overriding explanation for Armenia's broadly-framed CERD complaint is the limited scope of the compromissory clause at Article 22 of CERD. Armenia cannot resort to international adjudication with respect to its allegations of international humanitarian law breaches, arbitrary detention and enforced disappearance. Thus, it has been driven to shoehorn those complaints — which, properly analysed, contain no discriminatory elements — within its CERD application. This

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[6] See e.g. Memorial of the Republic of Armenia of 23 January 2023 (the "Memorial of Armenia"), Sections III.1.II, III.2.II and III.3.I.

[7] See e.g. Memorial of Armenia, Sections VI.3.III and VI.3.IV.

[8] *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, para. 157.

preliminary objections phase provides an opportunity for the Court to define parameters for its substantive CERD jurisdiction, both in respect of the military conflicts between Armenia and Azerbaijan and with respect to other conflicts around the world. This would be especially timely given the growing tendency to misuse CERD in order to bring within the purview of this Court evermore wide-ranging disputes.

8. I will make some further remarks with respect to each of Azerbaijan's preliminary objections, before handing over to members of Azerbaijan's counsel team who will lead you through the details. As I have mentioned, and as elaborated at paragraph 71 of Azerbaijan's Preliminary Objections dated 21 April 2023, Azerbaijan raises two preliminary objections with respect to Armenia's CERD complaint.

9. The first is that Armenia's complaint should be dismissed in its entirety due to Armenia's failure to comply with the negotiation precondition at Article 22 of CERD. Azerbaijan views that precondition as a solemn obligation of all CERD parties and as a critical precursor to CERD proceedings before the Court. Consequently, Azerbaijan approached the negotiations with respect to Armenia's CERD complaints seriously, and with a view to settling their CERD disputes. It is important for the Court to appreciate the context here. Prior to Azerbaijan's attempt to negotiate the CERD disputes, Azerbaijani and Armenian representatives had not met for 30 years. As Professor Talmon will explain, the exercise of setting even the basic framework for the negotiations to come took many months. There followed just two short online meetings of any substance, lasting a few hours each, before Armenia filed its Application at the Court. To say the least, this came as a surprise to Azerbaijan. There had been no genuine negotiation process before Armenia filed its complaint.

10. The result is that the legal requirements for the invocation of the Court's jurisdiction under Article 22 were not met. Armenia filed its Application before even allowing a third meeting to discuss the Parties' positions. Having received Azerbaijan's opening positions, Armenia simply broke off the discussions on 15 September 2021 and filed its pre-prepared Application the very next day.

11. In Azerbaijan's submission, to declare the negotiations precondition in Article 22 met in such circumstances would be to render that precondition devoid of meaning. Azerbaijan requests that the Court use this opportunity to emphasize the importance of compliance with applicable negotiation requirements before invoking the Court's jurisdiction.

12. Azerbaijan's second preliminary objection is that, even if the negotiation precondition is met, several elements of Armenia's Application fall beyond the material jurisdiction of the Court under Article 22 of CERD, because they are not capable of constituting racial discrimination within the meaning of CERD. Specifically, Armenia's complaints about: the alleged murder, torture and inhumane treatment of Armenians during armed conflict[9]; the alleged arbitrary detention of Armenians[10]; and the alleged enforced disappearance of Armenians[11] all fall beyond the parameters of a CERD complaint. Rather, they engage issues of international humanitarian law, and other norms of international human rights law, that are clearly *not* subject to the Court's jurisdiction under CERD.

13. There is one exception. As indicated in my letter to the Court of 5 April 2024, in its Written Observations Armenia belatedly particularized some of its allegations of mistreatment with respect to Armenian civilians during armed conflict with reference to specific evidence purporting to indicate misconduct that is "capable" of falling within CERD. As a responsible litigant, and in the interests of the Court's efficient conduct of this proceeding, Azerbaijan has decided to withdraw its *ratione materiae* objection with respect to any of those adequately particularized allegations. Mr Wordsworth will pick up this issue further in his speech today. For now, I would simply note that, while it accepts that the Court has jurisdiction over those exceptional allegations, Azerbaijan is certain that it will defeat them at any merits stage.

14. In its formal Submissions, at page 750 of its Memorial, Armenia tries to dress up the relevant elements of its Application as CERD complaints by simply adding the adjective "discriminatory" before each of its allegations, and emphasizing that the allegations concerned "ethnic" Armenians. You can see it on your screen. But, simply adding these words to describe allegations that engage other norms of public international law, without any accompanying specific

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[9] Memorial of Armenia, p. 750, Submission (2).

[10] Memorial of Armenia, p. 750, Submission (4).

[11] Memorial of Armenia, p. 750, Submission (5).

evidence of racial discrimination, is not sufficient to make those allegations capable of falling within CERD. Armenia had to do more.

15. Two further points warrant attention before I hand over to Professor Talmon. First, Azerbaijan's *ratione materiae* objection concerns only those aspects of Armenia's CERD complaint that fall beyond the subject-matter of the Convention. It is not aimed at excluding the entirety of Armenia's CERD complaint from scrutiny by the Court at any merits stage. Thus, Azerbaijan has raised no objection at this preliminary stage with respect to a number of Armenia's CERD complaints, including those connected with hate speech and alleged failures to take effective measures to combat racial discrimination. What is at stake here is the scope of the Court's jurisdiction under Article 22 of CERD. In Azerbaijan's submission, the Court can — and, if it rejects Azerbaijan's first preliminary objection, then it *should* — building on the logic of its recent judgments, define the limits of its jurisdiction under CERD.

16. Second, while they fall beyond the Court's substantive jurisdiction under CERD, Azerbaijan does not, in any way, condone alleged violations of international humanitarian law and other international human rights norms. On the contrary, Azerbaijan takes such allegations very seriously. The record shows that, unlike Armenia, Azerbaijan has not shied from convicting its own nationals of appropriate crimes where the allegations have been proven through judicial process[12].

17. Of the dozens of Armenian POWs and other detainees taken during the Second Garabagh War and its aftermath, all the POWs and most of the detainees have been repatriated to Armenia. The rest are still incarcerated because they either have been convicted of serious crimes, including mercenaryism, torture and murder, or are currently being prosecuted for war crimes, terrorism or separatism[13]. In other words, their ongoing detention has nothing to do with racial discrimination.

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[12] See e.g. Azerbaijani Prosecutor General's Office issues statement on videos spread on social media by military servicemen, 6 Oct. 2022, available at https://en.trend.az/azerbaijan/politics/3653649.html.

[13] See e.g. Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding Armenian detainees, dated 8 Oct. 2021, No. 14/çıx65–21 (with enclosure) (certified translation) [judges' folder, tab 3]; The Azerbaijan State News Agency, *Investigation underway into information provided by Madat Babayan about Khojaly genocide*, 2 Nov. 2023, available at https://azertag.az/en/xeber/investigation_underway_into_information_provided_by_madat_babayan_about_khojaly_genocide-2811295; The Azerbaijan State News Agency, *Vagif Khachatryan sentenced to 15 years in prison*, 7 Nov. 2023, available at https://azertag.az/en/xeber/vagif_khachatryan_sentenced_to_15_years_in_prison-2817997; Turan, *David Babayan and Levon Mnatsakanyan were arrested and charged with serious crimes*, 30 Sep. 2023, available at https://turan.az/en/politics/david-babayan-and-levon-mnatsakanyan-were-arrested-and-charged-with-serious-crimes-769941.

18. Similarly, Armenia's allegations concerning enforced disappearance of Armenians have nothing to do with racial discrimination. But Azerbaijan takes them seriously and has been working in co-operation with Armenia "to ensure clarity, transparency, and mutual trust in the search for missing persons from both sides"[14].

19. Mr President, Members of the Court, that concludes my opening remarks. Azerbaijan's distinguished counsel will now address each of the preliminary objections raised by Azerbaijan.

20. First, Professor Talmon will address you on Azerbaijan's objection relating to Armenia's failure to comply with the negotiation requirement under Article 22 of CERD.

21. Second, Mr Wordsworth will address Azerbaijan's *ratione materiae* objection, with particular focus on Armenia's complaints about the alleged murder, torture and inhumane treatment of Armenians during armed conflict.

22. Third, Professor Boisson de Chazournes will address you on Azerbaijan's *ratione materiae* objection related to the alleged arbitrary detention and enforced disappearance of Armenians.

23. Thank you, Mr President, honourable Members of the Court, for the privilege of appearing before you. I now kindly ask you, Mr President, to invite Professor Talmon to address the Court.

The PRESIDENT: I thank the Agent of Azerbaijan for his statement. I now invite Professor Talmon to take the floor. You have the floor, Sir.

[14] The Azerbaijan State News Agency, *State Commission: We deem it necessary to involve individuals who served as field commanders from the Armenian side until 1994 in search process for burial sites of our missing compatriots*, 14 Feb 2024, available at https://azertag.az/en/xeber/state_commission_we_deem_it_necessary_to_involve_individuals_who_served_as_field_commanders_from_the_armenian_side_until_1994_in_search_process_for_burial_sites_of_our_missing_compatriots-2921674.

Mr TALMON:

FIRST OBJECTION: FAILURE TO MEET THE NEGOTIATION PRECONDITION IN ARTICLE 22 OF CERD

I. Introduction

1. Monsieur le President, Madam Vice-President, distinguished Members of the Court, it is an honour to appear before you.

2. My task today is to present Azerbaijan's first preliminary objection that the Application should be dismissed because Armenia failed to comply with the negotiation precondition in Article 22 of CERD.

3. Under Article 22, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention".

4. The two threshold requirements for the Court's jurisdiction — negotiations and Convention procedures — are alternative and not cumulative[15].

5. Armenia does not contend that its dispute with Azerbaijan was submitted to "procedures expressly provided for in [the] Convention".

6. The crucial question for the Court's jurisdiction therefore is whether the dispute is one that "is not settled by negotiation".

II. Question of negotiations remains open

7. Mr President, Members of the Court, the question of whether the negotiation precondition under Article 22 is fulfilled has not yet been decided. In your Order of 7 December 2021 on provisional measures, the Court observed that it "appears" that the dispute between the Parties had not been settled by negotiation[16]. No definite finding was made at the time.

8. At that stage of the proceedings, the Court needed only decide whether, "prima facie", it had jurisdiction[17]. The "prima facie" threshold is, of course, substantively lower than that which the

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[15] *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. 600, para. 113.

[16] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 375, para. 41.

[17] *Ibid.,* p. 375, para. 42.

Court must now apply in order to establish definitively whether or not it has jurisdiction over Armenia's CERD complaint. Indeed, the Court expressly reaffirmed that its decision "in no way prejudges the question of jurisdiction of the Court"[18].

9. The Court may recall that in *Georgia* v. *Russia* it also found at the provisional measures stage that the dispute had "not been resolved by negotiation" and that, prima facie, it had jurisdiction[19]. This did not prevent the Court from ruling later at the preliminary objections stage that the Parties "did not engage in negotiations" and that, consequently, it had no jurisdiction over Georgia's CERD complaint[20].

10. The same is true in the present case: Armenia has not fulfilled the negotiation requirement and there is thus no jurisdiction under Article 22 of CERD.

III. The elements of the negotiation requirement under Article 22 of CERD

11. In *Georgia* v. *Russia*, the Court set out the conditions that must be fulfilled in order to meet the negotiation requirement in Article 22.

12. *First*, there must have been negotiations between the parties, or at least a genuine attempt at negotiations by the applicant[21].

13. *Second*, if negotiations were conducted or the applicant genuinely attempted to engage in negotiations, the negotiations must have been pursued as far as possible, with a view to settling the dispute[22].

14. Neither of these conditions has been fulfilled by Armenia in the present case.

IV. No negotiations in terms of Article 22 of CERD

15. Mr President, let me start with the first condition: whether there have been negotiations between the Parties or at least a genuine attempt at negotiations by the Applicant. This depends on

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[18] *Ibid.*, p. 392, para. 97.

[19] *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. 388, paras. 115, 117

[20] *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. 140, paras. 182, 184.

[21] *Ibid.*, p. 132, para. 157.

[22] *Ibid.*, p. 132, para. 158, and p. 134, para. 162.

what constitutes negotiations in terms of Article 22. In determining what constitutes negotiations, the Court observed that:

> "[N]egotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims."[23]

16. Rather, the concept of negotiations requires that the Parties "engage in discussions . . ., with a view to resolving the dispute" or at least make a genuine attempt to do so[24].

17. Whether discussions or contacts between the Parties constitute negotiations depends upon the substance[25]. The Court held that the subject-matter of the discussions or contacts must relate to the "substantive obligations under CERD"[26]. Compliance with the substantive obligations under CERD must be at the heart of the contacts or discussions for these to qualify as negotiations. It is not sufficient for there to be exchanges between the Parties; these exchanges must concern the substantive obligations contained in CERD or, in other words, "matters concerning the interpretation or application of CERD"[27].

18. This substantive requirement excludes pre-negotiations — negotiations about negotiations — from the concept of negotiations under Article 22. Pre-negotiations are distinct and prior to actual negotiations. They determine the location, procedural modalities, scope and topics for discussion[28]. Pre-negotiations are not about the substance of the dispute and thus do not qualify as negotiations in terms of Article 22 of CERD.

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[23] *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, para. 157; *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. 602, para. 116.

[24] *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, para. 157.

[25] See *ibid.*, p. 133, para. 161.

[26] *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. 134, para. 162; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II),* p. 419, para. 36.

[27] See *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. 134, heading III 3 *(b)*. See also *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*, joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, pp. 403-404, para. 15.

[28] Janice Stein, *The Process of International Prenegotiation: Getting to the Table* (Baltimore, Johns Hopkins University Press, 1989), pp. X-XI (available at the Peace Palace Library), judges' folder, tab 2.

19. In its provisional measures Order of 7 December 2021, the Court noted that "the Parties engaged in a significant number of written exchanges and meetings over a period of several months"[29]. The Court, however, also noted that these exchanges covered "the procedural modalities, scope and topics of their negotiations"[30]. Such procedural or technical exchanges, according to the Court's own definition, do not qualify as negotiations.

20. Armenia claims that "for over ten months, [it] exchanged more than 40 pieces of correspondence with Azerbaijan and participated in seven rounds of meetings in an effort to settle the dispute amicably"[31]. It further claims that the Parties engaged in "nearly a year of extensive negotiations"[32].

21. Mr President, these statements are misleading. They confuse the Parties' lengthy pre-negotiations with actual negotiations as required by Article 22.

22. While Armenia meticulously lists every single piece of correspondence between the Parties in its Memorial, it does not say a single word about the content of these documents. A closer look at the content of these documents and the subject-matters discussed at the online meetings between the Parties paints a very different picture.

23. Mr President, Members of the Court, let me take you through the exchanges between the Parties, one by one. The correspondence between the Parties started on 22 November 2020. In a two-page letter addressed to the Foreign Minister of Azerbaijan, the Minister for Foreign Affairs of Armenia alleged for the first time in very general terms that Azerbaijan "over the course of the past decades" had violated "its obligations under multiple provisions of the Convention". Armenia also invited Azerbaijan to enter into negotiations for the purpose of addressing and remedying its violations[33]. The letter provided a non-exhaustive list of eight abstract "actions" through which the Convention had allegedly been violated, but did not contain any information on specific violations or any request for remedies.

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[29] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 374, para. 41.

[30] *Ibid.*, p. 374, para. 39.

[31] Memorial of Armenia, para. 5.10.

[32] *Ibid.*, para. 3.490.

[33] Preliminary Objections of Azerbaijan of 21 April 2023 (the "Preliminary Objections of Azerbaijan"), Vol. II, Annex 1.

24. Azerbaijan's Foreign Minister responded on 8 December 2020, rejecting Armenia's assertions and listing on his part — by example — seven general "actions" by which Armenia had violated its obligations under CERD. In that letter, Azerbaijan also indicated that it remained "open to negotiating this matter with Armenia"[34].

25. The two letters did not address any specific violations of the Convention, let alone link any of the actions to particular obligations under the Convention. In the Court's own words, such a written "exchange of claims and directly opposed counter-claims"[35], may evidence the existence of a dispute but it does not constitute attempts at negotiations between the parties[36]. In fact, this exchange provided the prelude to the ensuing pre-negotiations.

26. Over the next seven months, from December 2020 to July 2021, the Parties engaged in pre-negotiations — negotiations about negotiations or talks about talks.

27. Seven months of pre-negotiations may seem a long time. However, it must be remembered that the Parties had not met bilaterally, without a mediator, for almost thirty years. The technical discussions thus served as confidence-building measures prior to commencement of negotiations related to Armenia's CERD complaint. Such pre-negotiations are a general feature of the relations between the Parties. For example, on 26 May 2022 the Armenian Minister for Foreign Affairs stated with regard to possible peace negotiations between the Parties: "Armenia and Azerbaijan are still holding negotiations about negotiations."[37]

28. In their pre-negotiation correspondence and meetings, the Parties focused on procedural modalities, scheduling timetables, scope and topics for the discussions to be held on the alleged violations of CERD, and the agenda for their meetings[38]. For example, on 22 December 2020 Armenia suggested to start with "the format and process of further negotiations"[39]. On 3 March 2021, Armenia expressed its hope that "the Parties will continue approaching these initial, procedural

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[34] *Ibid.*, Vol. II, Annex 2; Memorial of Armenia, para. 3.489.

[35] *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, para. 157.

[36] *Ibid.*, p. 138, para. 178.

[37] Caucasus Watch, "Mirzoyan: 'Armenia and Azerbaijan are still holding negotiations about negotiations'" (29 May 2022), https://caucasuswatch.de/en/news/mirzoyan-armenia-and-azerbaijan-are-still-holding-negotiations-about-negotiations.html.

[38] See Preliminary Objections of Azerbaijan, Vol. II, Annexes 3-42.

[39] *Ibid.*, Vol. II, Annex 3.

matters, in the same constructive fashion, with a view to promptly reaching agreement on the remaining open questions of modalities of further negotiations"[40]. Mr President, Members of the Court, as you can see on screen, it was only on 3 May 2021 that the Parties confirmed the 12-point "Agreed Procedural Modalities" for their substantive discussions[41].

29. However, this was not the end of the pre-negotiations. The Parties continued to discuss the topics for the negotiations and the scheduling of the substantive negotiations[42].

30. On 31 May 2021, the Parties presented the topics which they wanted to address during the substantive negotiations[43]. In its "Presentation . . . on the Scope of the Negotiations", Armenia identified several topics which had not been included in the first list of alleged convention violations in its letter of 11 November 2020. The newly introduced topics included allegations of "engagement in practices of ethnic cleansing", "suppression of civil society organizations working towards reconciliation with Armenia" and "failure to provide Armenians with equal treatment before tribunals and all other organs administering justice"[44]. None of these allegations could have been the subject of negotiations for the simple reason that none had been made before.

31. The two-page list of Armenia's topics to be discussed at the substantive talks was phrased in very general terms and did not include any specific examples, facts or evidence of alleged violations. Armenia also stated that it intended "to discuss the remedies" at the talks[45], but did not specify any remedies in connection with the alleged CERD violations. Without any of those specifics, a substantive discussion of alleged CERD violations was still impossible at that stage of the pre-negotiations.

32. That there were no substantive negotiations has also been confirmed by Armenia on no less than four occasions. On 30 April 2021, Armenia noted the length of time "without any substantive discussions having been held"[46]. On 22 May 2021, Armenia stated that it expects no

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[40] *Ibid.*, Vol. II, Annex 11, p. 7.

[41] See *ibid.*, Vol. II, Annexes 29, 30.

[42] See *ibid.*, Vol. II, Annexes 28, 31, 32-35.

[43] See *ibid.*, Vol. II, Annexes 33, 34, 35.

[44] *Ibid.*, Vol. II, Annex 34, pp. 2-3.

[45] *Ibid.*, Vol. II, Annex 34, p. 4.

[46] *Ibid.*, Vol. II, Annex 28.

further "delay to the commencement of substantive negotiations on its claims under the CERD"[47]; on 3 June 2021 it noted that "substantive negotiations still have yet to begin"[48]; and on 22 June 2021 it stated that it was "ready to commence meaningful substantive negotiations"[49].

33. Armenia seems to take the view that substantive negotiations finally started on 15-16 July 2021. In its letter to Azerbaijan, dated 9 July 2021, Armenia stated with regard to the proposed schedule of meetings that it trusted that this proposal would allow "substantive negotiations to commence promptly" on 15 July 2021[50].

34. According to the schedule agreed between the Parties, as you can see on the screen, at the meeting on 15-16 July 2021 Armenia presented "its claims and requested remedies"[51]. This was the first time that Armenia presented any specific allegations, set out its legal position and identified the remedies it was requesting.

35. At the meeting on 30-31 August 2021, Azerbaijan "presented its replies"[52].

36. The two meetings were thus devoted solely to the oral presentation of the claims and replies. There was no discussion of those claims and replies at these meetings or in subsequent correspondence. In fact, no discussion was foreseen at that stage. The Parties had expressly agreed to schedule the presentation of claims and replies some six weeks apart in order to allow them to prepare their replies[53].

37. By 15 September 2021, which is labelled on the screen as the "End", when Armenia informed Azerbaijan that it considered the negotiations to have failed[54], all the Parties had done was raise allegations of CERD violations[55] and present their opposing positions on the facts and the law.

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[47] *Ibid.*, Vol. II, Annex 32.

[48] *Ibid.*, Vol. II, Annex 36.

[49] *Ibid.*, Vol. II, Annex 38, pp. 2-3.

[50] *Ibid.*, Vol. II, Annex 40, p. 2.

[51] *Ibid.*, Vol. II, Annex 42, p. 1. See also *ibid.*, Annex 41, p. 2.

[52] *Ibid.*

[53] See *ibid.*, Vol. II, Annex 40, p. 2.

[54] *Ibid.*, Vol. II, Annex 44; Memorial of Armenia, para. 5.10.

[55] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 374, para. 39.

In the words of the Court, the Parties had exchanged "a series of accusations and rebuttals"[56]. What they had not done was engage in any discussion with a view to resolving the dispute.

38. Azerbaijan therefore submits that prior to 16 September 2021, when Armenia instituted the present proceedings, there had been no negotiations; in fact, negotiations in terms of Article 22 of CERD had not even started.

V. No genuine attempt at negotiations by Armenia

39. Mr President, Members of the Court, there were not only no negotiations, but Armenia never made a genuine attempt at such negotiations. It never attempted to engage in any meaningful discussions with Azerbaijan with a view to resolving the dispute.

40. It is clear from the evidence that from the outset Armenia's only aim was to bring its allegations against Azerbaijan before this Court. This is confirmed by its very first diplomatic Note of 11 November 2020, when it invited Azerbaijan to enter into negotiations for the purpose of addressing and remedying the alleged CERD violations[57].

41. This invitation was immediately followed by an ultimatum to respond and a threat of legal action. Armenia stated:

> "Should Azerbaijan reject this invitation or fail to respond to it within no more than a month from the date of receipt of this letter, *or should any purported negotiations become futile*, Armenia reserves the right to seek to settle the dispute in accordance with the procedure described under Article 22 of the Convention."[58]

42. Before negotiations could even start, Armenia already spoke of "purported negotiations" and their futility. It implicitly threatened that if it did not get its way, it would simply declare the futility of the negotiations and take the dispute to the Court. But discussions "with a view to resolving the dispute" cannot be based on threats, but require openness to the other party's position, flexibility and the ability to compromise. None of which has been shown by Armenia.

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[56] *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, para. 157; *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. 602, para. 116.

[57] Preliminary Objections of Azerbaijan, Vol. II, Annex 1, p. 2.

[58] *Ibid.*; emphasis added.

43. Proceedings before this Court were at the forefront of Armenia's mind throughout the pre-negotiations. Thus, it was of the greatest importance to Armenia to be able to use material from the negotiations to prove that the negotiations had failed[59]. For three weeks, the pre-negotiations were solely concerned with Armenia's wish to include in the Agreed Procedural Modalities a passage that would allow Armenia to prove as a matter of fact that negotiations had in fact failed[60]. Before negotiations had even started, Armenia was already more concerned with their failure than with making them a success. This is not what a genuine attempt at negotiations looks like.

44. Mr President, throughout the pre-negotiations Armenia adopted a totally unrealistic and unreasonable position with regard to the time necessary for the substantive negotiations.

45. Armenia accused Azerbaijan of multiple different violations of numerous CERD obligations, with underlying facts spanning — in Armenia's own words — "past decades"[61]. The magnitude of the dispute is demonstrated by the fact that Armenia has now submitted to this Court a 755-page Memorial, accompanied by 297 annexes totalling 1,220 pages. In these proceedings, Armenia requests the Court to rule on ten alleged breaches, involving numerous CERD provisions, and to provide at least ten different remedies[62].

46. Mr President, Members of the Court, how many days would you allocate for negotiating such a substantial dispute? Probably months, if not years. Armenia, on the other hand, initially suggested just *one* day, with a second day held in reserve for possible further discussion on Armenia's claims[63].

47. While Azerbaijan pointed out on numerous occasions that a meaningful discussion of the allegations requires more time[64], Armenia in the end only agreed to a schedule that allocated two days for the presentation of its claims and requested remedies, and gave Azerbaijan another two days to present its replies — four days in all[65]. Armenia initially suggested that each day consist of 5 hours

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[59] See *ibid.*, Vol. II, Annexes 17-26.

[60] *Ibid.*, Vol. II, Annex 24, p. 1.

[61] *Ibid.*, Vol. II, Annex 1.

[62] Memorial of Armenia, Part IX, Submissions, pp. 750-753.

[63] Preliminary Objections of Azerbaijan, Vol. II, Annex 5.

[64] See *ibid.*, Vol. II, Annexes 37, 39.

[65] *Ibid.*, Vol. II, Annex 42. See also Annex 38, p. 3; Annex 36.

and 30 minutes of actual presentation time, which would have meant a total of 22 hours for both Parties' presentations[66]. In the end, I was told, the actual time used for these two presentations was less than seven hours.

48. The allocation of seven hours for the presentation of claims and replies cannot be considered a genuine attempt at negotiations with regard to settling a dispute of this magnitude.

49. The present case may be contrasted with the CERD case between Ukraine and Russia, which was of similar magnitude. In that case, Ukraine sent 19 diplomatic Notes to Russia[67], expressly referring to the rights and obligations under CERD and the alleged violations of the Convention[68], and providing Russia with extensive and detailed records of alleged acts of racial discrimination. During three rounds of face-to-face meetings, Ukraine engaged with Russia on the facts and circumstances of specific discriminatory acts and sought Russia's responses and explanations. Ukraine also provided responses to Russia's questions concerning specific incidents, both during the meetings and in follow-up diplomatic correspondence[69]. It is against this background that the Court observed that:

> "negotiations between the Parties lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, *indicates that a genuine attempt* at negotiation was made by Ukraine"[70].

There is no similar evidence of a genuine attempt at negotiation in the present case by Armenia.

50. Mr President, during the pre-negotiations Armenia also paved the way for unilaterally declaring the negotiations to have become futile. While initially Armenia suggested that the Parties

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[66] *Ibid.*, Vol. II, Annex 38, p. 3, fn. 8.

[67] *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)*, Memorial of Ukraine, 12 June 2018, para. 645.

[68] See *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. 603, para. 118; Written statement of observations and submissions on the preliminary objections of the Russian Federation submitted by Ukraine, 14 January 2019, para. 354.

[69] *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)*, Written statement of observations and submissions on the preliminary objections of the Russian Federation submitted by Ukraine, 14 January 2019, para. 354.

[70] *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. 603, para. 120; emphasis added.

"*jointly* assess whether further negotiations are constructive in resolving the dispute"[71], it later reserved for itself the right to assess "if further negotiations might be constructive"[72]. In the end, it dropped any reference to such assessment[73]. In particular, it did not agree to Azerbaijan's suggestion that "after the September session, the Parties shall mutually assess their progress and whether there exists a clear path forward to amicable settlement of all or part of their claims"[74]. Such an approach cannot be considered a genuine attempt at good-faith negotiations.

51. On 15 September 2021, at the meeting that was actually reserved for the presentation of Armenia's replies to Azerbaijan's own CERD claims, Armenia rejected Azerbaijan's proposals for remedies outright without engaging with them. It simply unilaterally declared that the negotiations had failed and walked away. Again, not a genuine attempt at negotiations.

52. Less than 24 hours after declaring that the negotiations had failed, Armenia submitted an 82-page Application instituting proceedings against Azerbaijan for alleged violations of CERD, accompanied by a Request for the indication of provisional measures. The detailed Application was accompanied by 62 annexes. Ten of these annexes were accompanied by certified translations which had all been prepared between 2 and 13 September 2021[75].

53. Now, everyone familiar with cases before this Court will understand that such an elaborate application requires several months of preparation. Work on these documents must have started well before Armenia even presented its claims to Azerbaijan on 15 July 2021.

54. Armenia's conduct clearly shows that it never made a good-faith attempt at settling the dispute by negotiations — it never gave negotiations a chance. It treated its exchanges with Azerbaijan as no more than a formality to go through in order to do what it had planned from the start: initiate proceedings before this Court.

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[71] Preliminary Objections of Azerbaijan, Vol. II, Annex 2.

[72] *Ibid.*, Vol. II, Annex 38, p. 3.

[73] *Ibid.*, Vol. II, Annex 42.

[74] *Ibid.*, Vol. II, Annex 39, p. 4; Annex 41, p. 2.

[75] See Application and Request for provisional measures submitted by Armenia, 16 September 2021, Annexes 3, 4, 5, 7, 8, 9, 12, 17, 56, 62.

VI. No exhaustion of negotiations

55. Mr President, Members of the Court, with no negotiations and no genuine attempt at negotiations, that basically is the end of Armenia's Application.

56. If the Court should find, however, that a mere presentation of Armenia's claims on 15-16 July 2021 and the presentation of Azerbaijan's replies on 30-31 August 2021 were sufficient to constitute substantive negotiations, or that Armenia — despite what has been said — made a genuine attempt at such negotiations, the Court must decide whether Armenia pursued the negotiations as far as possible, with a view to settling the dispute[76]. As the Court held in *Georgia* v. *Russia*, to make this determination it must ascertain whether the negotiations failed, became futile, or reached a deadlock before the application was submitted to the Court[77].

57. The Court's inquiry into the sufficiency of negotiations is a question of fact to be considered in each case[78]. It is not for Armenia simply to declare unilaterally that negotiations failed. Indeed, Armenia has not provided any evidence that it pursued the negotiations as far as possible with a view to settling the dispute.

58. In past cases, the Court has found that negotiations have failed or reached the point of futility or deadlock "when the parties' 'basic positions ha[d] not subsequently evolved' after several exchanges of diplomatic correspondence and/or meetings"[79].

59. In order to qualify as negotiations in terms of Article 22, these exchanges of diplomatic correspondence and meetings must, of course, refer to the "substantive obligations under CERD"[80].

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[76] *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, para. 158, and p. 134, para. 162; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 420, para. 36. See also *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931*, *P.C.I.J., Series A/B, No. 42*, p. 116.

[77] See *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. 134, para. 162. See also *ibid.*, p. 133, para. 159.

[78] *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. 133, para. 160.

[79] *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, para. 93. See also *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023*, para. 41.

[80] *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. 134, para. 162; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36.

Armenia and Azerbaijan set out their positions on 15-16 July and 30-31 August 2021, respectively. There were thus not "several exchanges of diplomatic correspondence" or "several meetings", but just two meetings in which each side set out its position for the first time. Meetings with such a narrowly defined purpose cannot form the basis for a finding that positions have not evolved or that no progress has been made in terms of substantive matters.

60. It is difficult to see how Azerbaijan's position could have "evolved", and how "progress in reaching common ground on substantive issues" could have been made[81] when the discussions were terminated by Armenia shortly after Azerbaijan had set out its position for the first time. A position can only evolve when it is given a chance to evolve.

61. At the provisional measures stage, the Court found that, based on information available then, it "seems" that the position of the Parties remained unchanged and that their negotiations had reached an impasse[82]. As I have already shown, the Court is not bound by this finding.

62. The finding is also incorrect: progress on substantive matters was indeed made. In its reply to Armenia's claims and requested remedies, Azerbaijan did not rebuff the idea of remedies but, in the interest of resolving the dispute, submitted a proposal for joint actions[83]. Several of the 13 actions proposed by Azerbaijan directly corresponded to the remedies requested by Armenia, which is demonstrated by the fact that they also correspond to the remedies Armenia now requests before this Court.

63. Mr President, Members of the Court, let me give you just three examples of progress, albeit tentative, that has been made in just two exchanges.

64. First, Armenia asks the Court to order Azerbaijan to "[a]llow the safe and dignified return of displaced ethnic Armenians to their homes and places of origin"[84]. In its proposals, Azerbaijan had offered to "facilitat[e] the return of all refugees and IDPs [internally displaced persons] displaced by the conflict who desire to return to their homes"[85].

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[81] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 374, para. 40.

[82] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 374, para. 41.

[83] See Preliminary Objections of Azerbaijan, Vol. II, Annex 45.

[84] Memorial of Armenia, Part IX, Submissions, para. 14 *(a)*.

[85] Preliminary Objections of Azerbaijan, Vol. II, Annex 45, bullet point 5.

65. Second, Armenia asks the Court to order Azerbaijan to "[g]uarantee the right of ethnic Armenians within its jurisdiction to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms"[86]. In its proposals, Azerbaijan had offered to "take steps to provide for . . . [t]he rights of everyone, regardless of ethnic origin, to equality before the law and the equal enjoyment of fundamental human rights"[87].

66. Third, Armenia asks the Court to order Azerbaijan to "[a]dopt immediate and effective measures in the fields of . . . education . . . with a view to combating prejudices which lead to racial discrimination against ethnic Armenians"[88]. In its proposals, Azerbaijan had offered to "assess educational materials and remove any . . . anti-Armenian statements from textbooks and other materials used in schools"[89].

67. In addition, in response to Armenia's claims with regard to the Military Trophies Park[90], Azerbaijan offered in its Reply to "acknowledge that the use of mannequins to depict Armenian soldiers in the Military Trophies Park . . . [has] inflamed tensions between the two States" and to "consider removing some mannequins depicting Armenian soldiers and ensure that the Park tour guides do not use inflammatory language inciting discrimination against Armenians"[91].

68. All these proposals by Azerbaijan show that the negotiations were not at an impasse or futile; they had just started. Azerbaijan expressly confirmed its willingness to discuss its proposals to resolve Armenia's claims, and "to consider any other reasonable proposals put forward by Armenia"[92]. However, rather than putting forward any proposals, Armenia just walked away.

69. That concrete results could be achieved when the Parties constructively engaged was shown by the exchange of Armenian personnel for information on a portion of landmines planted by

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[86] Memorial of Armenia, Part IX, Submissions, para. 14 *(d)*.

[87] Preliminary Objections of Azerbaijan, Vol. II, Annex 45, bullet point 1.

[88] Memorial of Armenia, Part IX, Submissions, para. 14.

[89] Preliminary Objections of Azerbaijan, Vol. II, Annex 45, bullet point 8.

[90] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 369, para. 22.

[91] Preliminary Objections of Azerbaijan, Vol. II, Annex 45, bullet point 13.

[92] *Ibid.*, Vol. II, Annex 43.

Armenia in Azerbaijan's liberated territories[93]. The same could have been the case with regard to CERD complaints.

70. Armenia did not engage with Azerbaijan's proposals for remedies but summarily rejected them, apparently because Azerbaijan did not concede Armenia's claims outright. Negotiations, however, do not mean that one party simply submits to the demands of the other.

71. Armenia also took exception to Azerbaijan's proposals being made on a "no-prejudice basis"[94]. But diplomatic negotiations are often conducted on a no-prejudice basis in order to facilitate the free exchange of proposals. During the pre-negotiations, Azerbaijan had expressly suggested including a no-prejudice clause in the Agreed Procedural Modalities[95]. Armenia's reason for unilaterally terminating the negotiations thus cannot be considered valid.

72. There is no question of the negotiations failing due to a lack of progress on substantive matters. The only reason why negotiations were not pursued as far as possible is Armenia's unwillingness to do so. As negotiations have not been exhausted, the precondition of negotiation is thus not met.

VII. Submissions

73. Let me conclude: according to the Court's own definition of negotiations in terms of Article 22, the Parties never conducted negotiations and Armenia also never made a genuine attempt at such negotiations.

74. Even if it did, by unilaterally breaking off the negotiations when they had only just begun, Armenia did not pursue these negotiations as far as possible.

75. If Armenia's conduct in this case indeed sufficed to meet the requirement of negotiations, this procedural precondition would not just be downgraded to a mere formality, it would become a farce, with far-reaching consequences for future CERD cases more generally.

76. For these reasons, the Court should uphold Azerbaijan's first preliminary objection and dismiss Armenia's Application for lack of jurisdiction under Article 22 of CERD.

77. That brings me to the end of my presentation. I thank the Court for its kind attention.

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[93] *Ibid.*, Vol. II, Annex 39, p. 3.

[94] *Ibid.*, Vol. II, Annex 44.

[95] See *ibid.*, Vol. II, Annex 12, p. 2.

78. Mr President, it may now be a convenient time for a short break. Otherwise, may I ask you to call on Mr Wordsworth to present Azerbaijan's second preliminary objection. Thank you.

The PRESIDENT: I thank Professor Talmon for his statement. Before I invite the next speaker to take the floor, the Court will observe a 10-minute break. The sitting is suspended.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite Mr Wordsworth to address the Court. You have the floor, Sir.

Mr WORDSWORTH:

ARMENIA'S CLAIM THAT AZERBAIJAN HAS VIOLATED ITS OBLIGATIONS UNDER ARTICLES 2 (1), 4 *(A)* AND 5 *(B)* OF CERD BY ENGAGING IN THE DISCRIMINATORY MURDER, TORTURE AND INHUMANE TREATMENT OF ETHNIC ARMENIANS

A. Introduction

1. Mr President, Members of the Court, it is a privilege to appear before you and to have been asked by Azerbaijan to introduce its objections to jurisdiction *ratione materiae*, and then to develop the objection so far as concerns alleged breaches of CERD concerning alleged murder, torture and inhumane treatment of ethnic Armenians[96]. Our basic point is that what should really be claims for breach of international humanitarian law in the context of active hostilities are impermissibly being presented by Armenia as CERD claims.

2. The key question for present purposes is whether, as required by Article 22 of CERD, Armenia's claims give rise to a dispute "with respect to the interpretation or application of this Convention". The Court is very familiar with this wording and this is now the fourth case in which the Court has had to consider the extent of its jurisdiction *ratione materiae* under Article 22, with the issue also falling for consideration next week so far as concerns Armenia's jurisdictional objections to Azerbaijan's CERD claims. But the current cases do have two unusual features, which it is useful to focus on up front.

[96] Memorial of Armenia, Section VI.3.I.

3. First, both Parties implicitly accept, in their respective preliminary objections, that certain of the claims *are* capable of engaging CERD. This stands in marked contrast to the *Georgia* v. *Russia*, *Ukraine* v. *Russia* and *Qatar* v. *United Arab Emirates* cases. In the current cases, there is no objection *ratione materiae* in respect of certain of the claims, and most obviously the two Parties' respective allegations of ethnic cleansing. So far as concerns the objections before you today, these have been carefully restricted, and concern only discrete claims of misconduct that in essence concern periods of active hostilities, that is:

(a) The objection *ratione materiae* to Armenia's freestanding claim that Azerbaijan has breached Articles 2 (1), 4 *(a)* and 5 *(b)* of CERD "by engaging in the discriminatory murder, torture and inhumane treatment of ethnic Armenians", in so far as that claim concerns (i) alleged acts against Armenian military personnel in the course of active hostilities and (ii) alleged acts against Armenian civilians in active hostilities in so far as these have not been particularized with reference to specific evidence of racial discrimination[97]. I will be making the submissions on the issues arising here.

(b) There is then the objection *ratione materiae* to Armenia's freestanding claims that Azerbaijan has breached Articles 2 and 5 *(a)* CERD "by engaging in practices of discriminatory arbitrary detention of ethnic Armenians" and "by engaging in practices of discriminatory enforced disappearances of ethnic Armenians"[98]. Professor Boisson de Chazournes will shortly be addressing these claims.

4. These confined objections are brought because these Armenian claims conflate alleged breaches of international humanitarian law with CERD, and although Armenia has put considerably more effort in its Written Observations to seeking to tie its allegations to racial discrimination, an impermissible conflation remains. The Court is being asked to allow through to the merits a seemingly unrestricted series of allegations of executions, targeted shootings, indiscriminate attacks, mistreatment, unlawful detention and enforced disappearance, in the context of active hostilities in an armed conflict. All of this conduct would, if proven, constitute very serious breaches of international humanitarian law, and it is the attempted pulling across of a broad and open-ended

[97] Memorial of Armenia, p. 750, Submission (2). See also Section VI.3.I.

[98] Memorial of Armenia, p. 750, Submissions (4) and (5). See also Sections VI.3.III and VI.3.IV.

series of potential violations of international humanitarian law into CERD that motivates the current objections *ratione materiae*.

5. The second unusual feature of the current case is that there is much common ground as to the correct legal test and approach to be followed, and no doubt the Parties' respective claims and respective jurisdictional objections have had a usefully corrective impact against the adoption of any extreme positions on the law. Thus:

(a) It is common ground between the Parties that the test at this jurisdictional stage is whether the conduct complained of is "capable of falling within the scope of the Convention"[99]. This will naturally also be the test under consideration next week in the context of the objections to Azerbaijan's claims for breach of CERD.

(b) Both Parties also recognize that the Court has upheld preliminary objections *ratione materiae* under CERD where it concluded that the alleged discrimination was based on a ground which is not specifically protected within the Article 1 (1) definition of racial discrimination, and the allegations did not support an inference of discrimination based on one of the protected grounds. Thus in *Qatar* v. *United Arab Emirates*, the Court held that, while measures based on current nationality "may have collateral or secondary effects on persons" of a particular national or ethnic origin, "this does not constitute racial discrimination within the meaning of the Convention"[100]. In the recent Judgment in *Ukraine* v. *Russia*, the Court reiterated that: "Mere collateral or secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention"[101]. This would be applicable, for example, where an Armenian citizen was detained after crossing into Azerbaijan unlawfully, bypassing the applicable border controls. In general terms, unless the allegations and evidence relied on show something other than mere collateral or secondary effects

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[99] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 108, para. 111; *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. 595, para. 96.

[100] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112.

[101] *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), Judgment of 31 January 2024*, para. 196.

on ethnic Armenians, the Court should conclude that it lacks jurisdiction *ratione materiae* over the claims because they are not capable of constituting racial discrimination within the meaning of Article 1 (1).

(c) It is also common ground between the Parties that CERD can apply in an armed conflict as well as in peacetime, and that conduct which violates international humanitarian law can also implicate CERD. But this is only so if the conduct involves racial discrimination as defined in Article 1 (1) CERD, now on your screens, which concerns, so far as is relevant for today, "any distinction . . . based on . . . 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"[102].

(d) At the same time, however, as the Court has previously recognized, international humanitarian law is "the law applicable in armed conflict which is designed to regulate the conduct of hostilities"[103]. This does not suggest the exclusion of international human rights law, CERD included, but it is common ground between the Parties that "the mere fact that the peoples of two States at war are primarily of different ethnic origin", as they are in this case, "does not, without more, transform every act of war into a distinction 'based on' ethnic origin" so as to be capable of engaging CERD[104].

6. It follows that a key question — both this week and next — is whether there has been some cognizable case of that something "more", alongside the need for the no less essential case on the discriminatory "purpose or effect".

7. This leads to two further points.

8. First, that requisite showing of something "more" is of very great importance. Although, in their respective preliminary objections, both Parties accept that certain of the claims made are capable of falling within CERD, it could not be appropriate to take a blanket approach and accept, without

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[102] Preliminary Objections of Azerbaijan, para. 49; Written Statement of observations and submissions on the preliminary objections of the Republic of Azerbaijan of 21 August 2023 ("Armenia's Observations"), para. 40. See also Article 1 (1) of CERD defining as: "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".

[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 178, para. 105.

[104] Preliminary Objections of Azerbaijan, para. 8; Armenia's Observations", para. 6.

any closer inspection, that all apparent international humanitarian law violations that are claimed to have been based on racial discrimination are indeed capable of falling with the provisions of CERD.

9. It appears critical for the Court to distinguish between conduct that is capable of giving rise to a claim for violation of international humanitarian law and conduct that is additionally capable of falling within the scope of CERD. As the Court has observed, "the scope of CERD . . . exclusively concerns the prohibition of racial discrimination on the basis of race, colour, descent, or national or ethnic origin"[105]. There is no wider gateway. And unless the Court controls that gateway at this jurisdiction stage, it risks sending the signal that many potential violations of international humanitarian law could be presented as CERD claims by reference to context alone, and hence will be determined by the Court at the merits stage provided only that the applicant frames its claim with sufficient care. And pausing here, it is to be emphasized that:

(a) Armed conflicts frequently arise between States whose populations are predominantly of different national or ethnic origins; and, in the course of such armed conflicts there will, unfortunately, almost always be instances or at least allegations of, for example, mistreatment or wrongful detention, both as concerns members of the hostile State's armed forces and its civilians.

(b) But, given the absence of an obvious avenue for bringing claims for breach of international humanitarian law before an international court or tribunal, that is, given the absence of a compromissory clause within the 1949 Geneva Conventions, there is a movement towards unduly creative methods to bring cases concerning armed conflict before international courts and tribunals, with the obvious risk of international humanitarian law complaints being inappropriately framed as CERD claims. The views expressed by Judge Yusuf in his declaration of 22 February 2023 offer an expression of this concern[106], and there is plainly a need for at least some caution.

10. Second, the need for something "more" cannot be satisfied by the existence of a general backdrop of extreme hostility between the combatants to an armed conflict and their respective

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[105] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 105, para. 104.

[106] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 22 February 2023*, declaration of Judge Yusuf, paras. 3-4.

populations. Nonetheless, according to Armenia in its Observations, "Azerbaijan's suggestion that the Armenophobia permeating Azerbaijani society is irrelevant is simply misplaced, not least because it reveals that the conduct at issue in this case is neither exclusively directed at Armenian nationals nor exclusively related to wartime hostilities"[107]. This is problematic.

11. Leaving to one side the self-serving use of terms like "Armenophobia", Azerbaijan has not said that the general background of anti-Armenian sentiment is "irrelevant", and it is notable that Armenia does not footnote to any specific passage in Azerbaijan's Preliminary Objections[108].

12. Rather, the existence of anti-Armenian sentiment may have some relevance as background context, but that is all. By contrast, Armenia is suggesting that the so-called Armenophobia means that the conduct at issue in this case is "not exclusively related to wartime hostilities", that is, it is being presented as distinguishing the current case from wartime hostilities in which international humanitarian law and other norms alone would apply. Indeed, almost ten pages of Armenia's Written Observations are devoted to presenting "general Armenophobia" as a relevant factor[109].

(a) But anti-Armenian sentiment, just like the anti-Azerbaijani sentiment that exists on the other side, must be placed in its proper context. Animosity to a hostile State and its armed forces has always been present in armed conflicts, and often extends to the hostile State's population. Such animosity during time of war has always included the use of insults and derogatory terms that focus on the nationality of the enemy armed forces and which could be portrayed as racist.

(b) Examples would include the terms used by the Americans, British and Russians to describe the Germans during the Second World War and vice versa or, more recently, no doubt, the use of language by both sides in the ongoing armed conflict between Ukraine and Russia, which has not however been co-opted into the construction of a CERD claim brought by reference to conduct since February 2022. And another example is the present case, which involves a long-running armed conflict and almost thirty years of military occupation by Armenia of part of Azerbaijan's internationally recognized sovereign territory, from which the Azerbaijani

[107] Armenia's Observations, para. 89.

[108] Armenia's Observations, para. 89.

[109] Armenia's Observations, pp. 52-61.

population was ethnically cleansed. And it is to be recalled that the conflict resulted in more than one million internally displaced Azerbaijanis[110].

(c) The mere existence of the resulting anti-Armenian sentiment, just as the parallel existence of anti-Azerbaijani sentiment, does not demonstrate racial discrimination for the purposes of Article 1 CERD[111]. As a general matter, as the Court has previously recognized in *Qatar* v. *United Arab Emirates*, "declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD"[112]. Of course, the context of that case — with no armed hostilities and no military occupation — was very different, as were the declarations at issue, but the basic point that insults or criticism or bitter hostility are not to be conflated with racial discrimination within CERD applies in the current case, with all the more need for attention to the distinction given the risk for conflation when one is concerned with the hostile rhetoric common in times of war.

(d) And as to this, it is to be recalled that Azerbaijan's objection concerns alleged conduct during active hostilities, that is, alleged breaches by Azerbaijan during the period of active hostilities in April 2016, during the Second Garabagh War in 2020, and at certain later dates, including in September 2022 when there were certain clashes along the undelimited border between the two States[113].

13. And as a final point on the relevant tests, even if the Court were satisfied at this stage that the criticism or hostility could be characterized as entailing an element of racial prejudice, that would still not be enough on its own. Such statements could only be regarded as relevant evidence of racial discrimination if the other factors within Article 1 (1) are present, including the requirement of purpose or effect with respect to the specific alleged violations.

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[110] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia),* Memorial of Azerbaijan, para. 3.

[111] Preliminary Objections of Azerbaijan, paras. 35-37.

[112] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 109, para. 112.

[113] Memorial of Armenia, para. 6.87, and see paras. 6.82-6.89; Preliminary Objections of Azerbaijan, para. 7.

B. Azerbaijan's objection concerning alleged discriminatory murder, torture and inhumane treatment of Armenian service personnel

14. With these factors in mind, I turn to Azerbaijan's objection to Armenia's claim concerning "engaging in the discriminatory murder, torture and inhumane treatment of ethnic Armenians"[114]. As explained in its letter of 5 April 2024, with the relatively low threshold that applies at this jurisdictional phase in mind, and likewise the further particularization in Armenia's Written Observations of its factual allegations and the evidence relied on[115], Azerbaijan has further confined its objection. This is now focused on allegations in the periods of active hostilities and (i) inadequately particularized allegations of racial discrimination concerning Armenian civilians and (ii) the alleged acts against Armenia's armed forces personnel. It is with respect to these two elements of the claim that it is most evident that Armenia has failed to put before the Court the something "more" that is required to distinguish its claim from allegations that otherwise would solely be a matter for international humanitarian law and other non-CERD norms applicable in the context of active hostilities within an ongoing armed conflict[116].

15. It is also to be emphasized that, unlike for example in the *Ukraine* v. *Russia* case[117], and unlike most of Armenia's other claims in this case, Armenia's claim with respect to alleged discriminatory murder, torture and inhumane treatment is not framed by reference to an alleged systematic campaign or practice of racial discrimination. Instead, it appears to concern a number of alleged individual acts and specific episodes said to constitute racial discrimination.

16. Now, a claim based on an alleged systematic campaign or practice is more difficult to make good at the merits because, obviously, the existence of that campaign or practice must be established. But, as a corollary, at the jurisdictional phase, it may be less difficult to establish that the claim is capable of falling within CERD because the very existence of the claim is predicated on there being a systematic campaign or practice of specifically racial discrimination. Alleged instances of racial discrimination in that context are put forward as examples of an overarching practice, and

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[114] Memorial of Armenia, p. 750, Submission (2). See also section VI.3.I.

[115] Armenia's Observations, paras. 48-61.

[116] Memorial of Armenia, para. 6.87; and see paras. 6.82-6.89.

[117] *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. 576, para. 26.

it is some evidence of the practice that must be put before the Court, without the same need to tie each individual instance relied on to specific instances of alleged racial discrimination.

17. By contrast where, as here, there is a freestanding claim on discriminatory murder, torture and inhumane treatment, Armenia must satisfy the Court that the instances of allegedly unlawful conduct are themselves, in each case, capable of falling within CERD. In other words, within this discrete claim and as to each of the instances relied on, there must be the requisite element of racial discrimination adequately pleaded.

18. To take an example for what might otherwise seem a rather abstract point, at paragraphs 3.242 and 3.243 of its Memorial, Armenia alleges, referring to the Second Garabagh War:

> "Throughout the war, Azerbaijan deliberately used weapons causing extensive and indiscriminate harm to civilians. For example, in residential areas outside of its direct control, Azerbaijan repeatedly used cluster munitions, which pose an immediate threat to civilians, even in the densely civilian-populated city of Stepanakert. Azerbaijan also resorted to the use of incendiary weapons, including white phosphorus munitions, may cause deep burns 'all the way down to and even through the bone' and can reignite even after initial treatment.
>
> In total, during the 44 days of war, Azerbaijan destroyed an estimated 14,000 civilian structures, including 'homes, markets and infrastructure vital to the survival of the local population, such as bridges, electricity, telecoms, [and] gas and water supply systems'."[118]

19. Azerbaijan's concern is that, through the allegation of use of a certain type of weapon or of indiscriminate harm more generally — that is, matters plainly governed by international humanitarian law — Armenia is seeking to bring within CERD the entirety of a period of active hostilities, thus establishing a wholly open-ended jurisdiction with respect to, for example, alleged violence caused to civilians of Armenian ethnicity. If this were just being presented as background to specific allegations that were then tied back to specific acts of racial discrimination, then that would be less problematic, but it does not appear to Azerbaijan that this is so. Indeed, these paragraphs form part of the Memorial that Armenia presents as being "direct evidence of Azerbaijan's racially motivated violence"[119].

20. By way of another example, Armenia relies on the following allegations as part of such "direct evidence":

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[118] Memorial of Armenia, paras. 3.242 and 3.243, footnotes omitted.

[119] Armenia's Observations, para. 47, referring to Memorial III.2.II (*inter alia*).

> "As noted above, in September 2022, Azerbaijan launched a full-scale armed attack against the sovereign territory of Armenia, using heavy artillery and drones to target not only military units and installations, but also towns and villages on the Armenian side of the international border between Armenia and Azerbaijan. Azerbaijan's aggression was swiftly met with international condemnation and calls to withdraw its troops.
>
> The attack resulted in the deaths of at least 207 Armenian servicemen and four civilians — a number which is likely to rise given the number of those still missing as of the date of this Memorial — injuries to other servicemen and civilians, and significant damage to civilian infrastructure"[120].

21. Armenia's claim of breach of CERD would appear to include these four civilians who, according to Armenia, were very unfortunately killed during a military operation which Armenia wishes to characterize as unlawful. Yet there is nothing remotely specific to suggest that this loss of military and civilian life was based on racial discrimination. There are various other examples[121].

22. Azerbaijan accepts that Armenia has made certain adequately particularized allegations of mistreatment of ethnic Arminian civilians in the armed conflict accompanied by alleged racial discrimination[122], and it is accepted that such complaints are, on their face, capable of falling within CERD, although Azerbaijan anticipates defeating Armenia's claims at the merits phase. But otherwise the mere listing of alleged civilian deaths or allegations as to the use of indiscriminate weaponry should not be enough, in effect, to bring into play at the merits phase the whole conduct of the Second Garabagh War and, likewise, other phases of active hostilities so far as concerns civilian deaths and injury.

23. I turn to the allegations of murder, torture or inhumane treatment of Armenian military personnel during active hostilities, and here — in this context of a bitter armed conflict and prolonged military occupation of Azerbaijan's territory — there is an even greater and pressing need for the something "more" to demonstrate that what appear to be very serious allegations of breach of international humanitarian law amount to conduct capable of engaging CERD.

24. In its Written Observations, at paragraph 48, Armenia has sought to meet Azerbaijan's objection by placing particular weight on a number of incidents recorded on video that appear to

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[120] Memorial of Armenia, paras. 4.130-4.131; see also Armenia's Observations, para. 47, referring to Memorial IV.2.IV.B (*inter alia*).

[121] See e.g. Memorial of Armenia, paras. 4.103-4.108.

[122] See e.g. Memorial of Armenia, paras. 3.248, 6.37, and Annex 117, referred to in Armenia's Observations, para. 48.

show certain shocking mistreatment accompanied by the use of specific language that is said to show that the mistreatment was based on racial discrimination[123].

25. But care is needed here as CERD will not be engaged in cases where the military personnel of the opposing forces have been captured or killed in an armed conflict and alleged mistreatment merely involves some form of derogatory and insulting behaviour. In circumstances where it is common ground that "the mere fact that the peoples of two States at war are primarily of different ethnic origin does not, without more, transform every act of war into a distinction 'based on' ethnic origin"[124], it will be necessary to make some showing that alleged mistreatment is not due to an individual's status as an enemy combatant but is indeed due specifically to ethnic origin.

(a) In Armenia's first example, it refers to a video purporting to show Azerbaijani soldiers mutilating the corpse of a dead Armenian serviceman and claiming that we "will eliminate their race"[125]. However, the word that is being translated as "race" by Armenia is a Russian word "сорт", the word for "sort" or "kind" — and the actual words being directed towards the Armenian soldier are that we "will destroy their sort" — and this is language used in the context of immediately preceding statements concerning taking revenge for having "killed our strong guys", which appears to be a reference to Azerbaijani military personnel. By reference to this correct translation, the mistreatment — although shocking and very regrettable — appears to have been based on an individual's status as an enemy combatant, not due specifically to ethnic origin.

(b) The other examples of alleged mistreatment of Armenian servicemen in or immediately subsequent to hostilities show the use of language such as "the disgraceful people" or "they are not human beings" or insulting references to "dogs"[126], which would not be enough to turn what would be an apparent breach of international humanitarian law, however serious, into a claim capable of falling within CERD. Otherwise, almost every significant or long-running conflict involving different ethnic groups would be capable of generating CERD claims.

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[123] Armenia's Observations, para. 48.

[124] Preliminary Objections of Azerbaijan, para. 8; Armenia's Observations, para. 6.

[125] Armenia's Observations, para. 48 referring to Armenia's Annex 134.

[126] See e.g. Armenia's Observations, para. 48 referring to Armenia's Annexes 128, 169, 131, 168, 167, 132, 137. Regarding Armenia's Annex 167, see also Azerbaijan's Annex 295.

26. Armenia also says that its videos represent the tip of the iceberg. But this is not a claim based on a practice or a campaign, it is a claim based on alleged acts, and Armenia can either tie back certain alleged acts to racial discrimination or it cannot. It also relies on multiple witness statements in its Annex 291, but these likewise do not indicate alleged mistreatment based on racial discrimination as opposed to the existence of derogatory insults. Armenia has put forward what it presumably considers to be its best examples from its Annex 291 at paragraph 53 of its Written Observations. In each case, a prisoner of war has allegedly been mistreated, accompanied by language such as "Armenians have been nomads and did not have a state, and that they seized [the Azerbaijanis'] historic lands" or "Armenians should not exist".

27. Armenia would presumably again say that this is the tip of an iceberg, but the iceberg appears to be one of alleged mistreatment and insult of prisoners of war based on their status as combatants in the active hostilities phase of an armed conflict, and not matters for CERD.

28. Azerbaijan in no way seeks to question the potential importance or role for CERD in an armed conflict. However, it does consider that, even at the jurisdictional phase, close attention is required to where, by reference to the allegations presented in a given case, the Court should draw the boundary between colourable breaches of CERD and matters which would be for international humanitarian law, and other non-CERD norms, alone. The Convention was not intended for all apparent breaches of international humanitarian law in an ethnic conflict, and that much is common ground between the Parties. Armenia accepts it must demonstrate something more, even at the current phase, and, for example, even taking into account the backdrop of the so-called "Armenophobia", the existence of civilian casualties, or the use of cluster bombs, or some showing of the use of derogatory and insulting language towards members of the opposing armed forces, cannot be enough.

29. Mr President, Members of the Court, I thank you for your attention, and ask you, Mr President, to call upon Professor Boisson de Chazournes.

The PRESIDENT: I thank Mr Wordsworth for his statement. Je donne maintenant la parole à M[me] la professeure Laurence Boisson de Chazournes. Madame.

M^me^ BOISSON DE CHAZOURNES :

I. INTRODUCTION

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs de la Cour, c'est un privilège de me présenter aujourd'hui devant vous au nom de l'Azerbaïdjan.

2. Il me revient de développer les *deuxième* et *troisième* objections de l'Azerbaïdjan concernant la compétence *ratione materiae* de votre juridiction en vertu de la CIEDR.

3. La deuxième objection de l'Azerbaïdjan concerne les allégations de l'Arménie, telles qu'elles sont présentées dans la partie VI, chapitre 3, section III de son mémoire, selon lesquelles l'Azerbaïdjan a détenu arbitrairement des personnes d'origine arménienne.

4. La troisième objection de l'Azerbaïdjan concerne les allégations de l'Arménie, ainsi qu'il est indiqué dans la partie VI, chapitre 3, section IV de son mémoire, selon lesquelles l'Azerbaïdjan aurait soumis des personnes d'origine arménienne à des disparitions forcées.

5. Selon la jurisprudence bien établie de la Cour, le critère de compétence consiste à déterminer si le comportement dénoncé est « susceptible d'entrer dans » les dispositions de la CIEDR[127]. Toutefois, en l'espèce, la Cour est confrontée à une question différente.

6. Ainsi que l'a indiqué M. Wordsworth, cette question a trait à la distinction entre les comportements qui donnent lieu à une violation relevant du droit international humanitaire et les comportements qui sont susceptibles de relever de la CIEDR. Si une telle distinction n'est pas établie, les limites appropriées de la compétence *ratione materiae* de la haute juridiction en vertu de la CIEDR risqueraient de ne pas être respectées. Or les allégations et les preuves de l'Arménie qui font l'objet des exceptions préliminaires de l'Azerbaïdjan — si elles étaient considérées comme fondées — impliquent le droit international humanitaire et ne fournissent aucune base permettant de conclure qu'elles relèvent des dispositions de la CIEDR. L'absence de base juridictionnelle en vertu du droit international humanitaire ne peut servir d'excuse à l'Arménie pour tenter de faire passer ses revendications sous le régime de la CIEDR.

7. À la lumière de ces réflexions, permettez-moi maintenant d'en venir à la deuxième objection de l'Azerbaïdjan.

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[127] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats arabes unis), exceptions préliminaires, arrêt, C.I.J. Recueil 2021*, p. 108, par. 111.

II. LES ALLÉGATIONS DE L'ARMÉNIE CONCERNANT LA DÉTENTION ILLÉGALE NE RELÈVENT PAS DE LA CIEDR

8. L'Arménie se plaint que l'Azerbaïdjan viole les articles 2 et 5 *a)* de la CIEDR en s'engageant dans des « practices of discriminatory arbitrary detention of ethnic Armenians »[128].

9. Les allégations de l'Arménie concernant la détention illégale, qui font l'objet de la deuxième objection de l'Azerbaïdjan à la compétence *ratione materiae* de votre juridiction, se divisent en deux catégories :

a) Tout d'abord, elles portent sur les ressortissants arméniens qui ont franchi illégalement la frontière avec l'Azerbaïdjan ;

b) et deuxièmement, sur les prisonniers de guerre capturés pendant la deuxième guerre du Garabagh.

10. Je reviendrai sur ces deux catégories dans un instant. L'Azerbaïdjan tient à préciser d'emblée qu'il a rapatrié la majorité des prisonniers de guerre capturés pendant le conflit armé, conformément à ses obligations en vertu du droit international humanitaire et de la déclaration trilatérale[129]. Les Arméniens actuellement détenus par l'Azerbaïdjan, dont le nombre est limité, ont été accusés ou condamnés pour des crimes graves, incluant torture, mercenariat et espionnage, des crimes pour lesquels l'Azerbaïdjan a le devoir et le droit, en vertu du droit international et de son droit national, d'enquêter et de poursuivre.

11. D'entrée, il convient de noter que les Parties s'accordent à dire que, à ce stade, la Cour n'a point besoin d'apprécier les éléments de preuve ou d'examiner le fond pour rejeter une demande. Comme la Cour l'a noté dans son arrêt *Ukraine c. Russie* sur les exceptions préliminaires, la tâche de la Cour, telle qu'elle ressort de l'article 79 de son Règlement, se limite à examiner « les points de droit et de fait ayant trait à l'exception d'incompétence soulevée »[130].

12. Les allégations de l'Arménie — même si elles étaient considérées comme fondées — ne relèvent pas de la CIEDR, car l'Arménie n'a pas fourni de preuves suffisantes permettant de conclure que les « practices of discriminatory arbitrary detention » supposément pratiquées par l'Azerbaïdjan

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[128] Mémoire de l'Arménie (MA), p. 750, Submission 4).

[129] Onglet nº 3 du dossier des juges, Annex 21, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding Armenian detainees, dated 8 October 2021, No. 14/çıx65–21 (with enclosure) (Certified Translation) (Hearing on the Republic of Armenia's Request for Provisional Measures, 14-15 October 2021, Azerbaijan's Annexes, 12 October 2021).

[130] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, p. 584, par. 58.

étaient « fondées » sur l'origine ethnique. Au contraire, les preuves produites par l'Arménie montrent clairement que tous les détenus ont été capturés au cours d'hostilités actives ou ont été détenus en raison de leurs activités illégales présumées. De ce fait, l'Azerbaïdjan, prenant appui sur les mots du juge Yusuf, considère que les preuves produites par l'Arménie à l'appui de ses allégations « n'[ont] rien à voir avec la CIEDR, mais tout à voir avec le droit humanitaire (*jus in bello*) applicable entre deux États engagés dans un conflit armé »[131].

a) Les ressortissants arméniens qui ont franchi illégalement la frontière avec l'Azerbaïdjan

13. Passons à la première catégorie de détenus visés par la plainte, à savoir les ressortissants arméniens qui ont franchi illégalement la frontière avec l'Azerbaïdjan. Comme il ressort des allégations de l'Arménie, ces personnes ont été placées en détention par l'Azerbaïdjan parce qu'elles avaient illégalement pénétré sur le territoire azerbaïdjanais et non pas parce qu'elles étaient ethniquement arméniennes[132]. Il est à peine besoin de rappeler que la réglementation et le contrôle des frontières relèvent de la souveraineté de l'Azerbaïdjan qui l'exerce tant à l'égard de ressortissants de l'Arménie que de ressortissants de tout autre État qui franchiraient la frontière illégalement.

14. Nonobstant ce qui vient d'être dit, l'Arménie se réfère à quelques cas de ressortissants arméniens pour tenter d'établir l'existence d'un dit « pattern » de détention de la part de l'Azerbaïdjan[133]. En outre, l'Arménie prend appui sur certaines décisions de la Cour européenne des droits de l'homme afin de transformer ses allégations en allégations de discrimination raciale au titre de la CIEDR. Mais comme la Cour l'a noté dans l'affaire *Qatar c. Émirats arabes unis*,

> « [i]l revient à la Cour ... de déterminer le champ d'application de la CIEDR, qui vise exclusivement l'interdiction de la discrimination fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique. La Cour relève que les conventions régionales relatives aux droits de l'homme, sur lesquelles se fonde la jurisprudence des cours régionales, concernent le respect de droits de l'homme sans distinction aucune entre leurs bénéficiaires. »[134]

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[131] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan), mesures conservatoires, ordonnance du 22 février 2023*, déclaration du juge Yusuf, par. 5.

[132] Voir MA, VI.3.III.

[133] *Ibid.*, p. 603, par. 6.120.

[134] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats arabes unis), exceptions préliminaires, arrêt, C.I.J. Recueil 2021*, p. 105, par. 104.

Les arrêts de la Cour européenne des droits de l'homme n'apportent pas d'aide pour savoir si les détentions alléguées sont « susceptibles » d'être « fondées » sur l'origine ethnique. La Cour européenne des droits de l'homme n'a pas apprécié et évalué les circonstances entourant chacune des détentions et les différences entre celles-ci. Elle n'a pas non plus pris en compte que ces détenus étaient des prisonniers de guerre. En outre, elle n'a pas cherché à savoir si les détentions étaient fondées sur l'origine ethnique des personnes concernées.

15. Monsieur le président, Mesdames et Messieurs de la Cour, l'Azerbaïdjan soutient que ces personnes ont été détenues en raison de leur implication en tant que membres des forces armées arméniennes, saboteurs ou espions. Leur détention n'avait rien à voir avec leur appartenance ethnique. L'Azerbaïdjan a détenu ces personnes en tant que prisonniers de guerre conformément à la convention de Genève de 1949 relative au traitement des prisonniers de guerre (aussi dénommée « troisième convention de Genève »). Les questions concernant les détenus, leurs conditions et l'échange de prisonniers de guerre entre l'Azerbaïdjan et l'Arménie étaient traitées par le Comité international de la Croix-Rouge (CICR). En effet, pendant la durée de leur détention, l'Azerbaïdjan a régulièrement communiqué avec le CICR, car les questions concernant les prisonniers de guerre étaient traitées par le CICR. Comme la Cour le sait, les quatre conventions de Genève et le protocole additionnel I confèrent au CICR un mandat spécifique pour agir en cas de conflit armé international. Et en particulier, le CICR a le droit de visiter les prisonniers de guerre et les internés civils. Comme l'Azerbaïdjan l'a expliqué à la Cour lors de précédentes audiences, l'Azerbaïdjan a détenu des individus qui sont entrés sur le territoire de l'Azerbaïdjan parce qu'ils étaient soupçonnés d'être impliqués dans des attaques contre des civils et des militaires azerbaïdjanais[135].

16. Tout ceci établit clairement que les détentions faisant l'objet de la plainte ne sont pas « susceptibles » d'être « fondées » sur les origines ethniques. Pour établir la compétence en vertu de la CIEDR, l'Arménie doit démontrer davantage que le simple fait que les individus étaient arméniens.

b) Les prisonniers détenus pendant la seconde guerre du Garabagh

17. J'en viens maintenant à la deuxième catégorie de détenus visés par la plainte, à savoir les prisonniers détenus pendant la seconde guerre du Garabagh.

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[135] CR 2021/21, p. 28, par. 13 et note de bas de page 57 (Goldsmith).

18. L'Arménie admet que ces personnes ont été détenues « during and in the wake of the Second [Garabagh] War »[136]. Un examen rapide de l'annexe 297 du mémoire arménien, qui se trouve à l'onglet nº 4 du dossier des juges, le confirme, l'Arménie ayant elle-même indiqué que presque tous les individus capturés ou détenus pendant ou après la deuxième guerre du Garabagh étaient des prisonniers de guerre. Les colonnes intitulées « Status » et « Date of capture » de l'annexe 297 montrent clairement que les personnes ont été détenues pendant la deuxième guerre du Garabagh[137]. De même, lors des audiences sur la demande de mesures conservatoires en 2021, l'Arménie a présenté un tableau de 45 personnes détenues par l'Azerbaïdjan, en les identifiant comme « [a]ll Armenian nationals » et « prisoners of war and civilians of Armenian ethnicity and nationality »[138]. Or, il est bien établi que la discrimination fondée sur la nationalité n'est pas couverte par la CIEDR[139].

19. Le recours de l'Arménie aux observations finales du comité CIEDR du 22 septembre 2022 n'est pas pertinent et n'est certainement pas déterminant pour savoir si les détentions alléguées sont « susceptibles » d'être « fondées » sur des origines ethniques. Le comité CIEDR a simplement noté qu'il était « profondément préoccupé par [l]es allégations » de « détentions arbitraires » de « prisonniers de guerre et []autres personnes protégées d'origine nationale ou ethnique arménienne »[140]. Il est important dans ce contexte de garder à l'esprit l'observation récente faite par la Cour dans l'affaire *Ukraine c. Russie*, à savoir que « le comité de la CIEDR ne se prononce pas sur la question de savoir si les allégations en question sont véridiques, et qu'il ne s'appuie pas sur des preuves de première main »[141]. Tel est le cas en l'espèce. Les observations du comité CIEDR

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[136] MA, p. 606, par. 6.126.

[137] Onglet nº 4 du dossier des juges, Annex 297, List of Armenians Detained During and After the Second Nagorno-Karabakh War (as of January 2023) (confidential) (MA, vol. III).

[138] Onglet nº 5 du dossier des juges, Annex 68, Letter from Yeghishe Kirakosyan, Representative of the Republic of Armenia before the European Court of Human Rights, to Philippe Gautier, Registrar, International Court of Justice (6 October 2021), attaching Table of 45 POWs and Civilians Acknowledged by Azerbaijan as of 6 October 2021 (Hearing on the Republic of Armenia's Request for Provisional Measures, Armenia's Additional Annexes, 8 October 2021) ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan), mesures conservatoires, ordonnance du 7 décembre 2021*, *C.I.J. Recueil 2021*, opinion dissidente du juge Yusuf, p. 396, par. 5.

[139] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats arabes unis), exceptions préliminaires, arrêt, C.I.J. Recueil 2021*, p. 106, par. 105.

[140] Committee on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of Azerbaijan, Nations Unies, doc. CERD/C/AZE/CO/10-12 (22 septembre 2022), accessible à l'adresse suivante : https://documents.un.org/api/symbol/access?j=G2249930&t=pdf, par. C.4 *a)* (MA, annexe 5).

[141] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), arrêt du 31 janvier 2024*, par. 334.

n'aident pas l'Arménie car elles ne prennent pas position sur la question de savoir si les détentions alléguées étaient « fondées » sur des origines ethniques, ce qui permettrait à l'Arménie de revendiquer que ses allégations relèvent de la CIEDR. L'Arménie fait également référence à la « résolution du Parlement européen du 20 mai 2021 sur les prisonniers de guerre à la suite du dernier conflit entre l'Arménie et l'Azerbaïdjan »[142], et à la résolution 2391 (2021) de l'Assemblée parlementaire du Conseil de l'Europe sur les « conséquences humanitaires du conflit entre l'Arménie et l'Azerbaïdjan/le conflit du [Garabagh] »[143]. Monsieur le président, les titres de ces deux documents sont évocateurs et instructifs. Ces deux documents portent sur des questions d'hostilités armées entre l'Arménie et l'Azerbaïdjan et sur leurs conséquences. Ces deux résolutions ne traitent pas de l'appartenance ethnique des détenus et ne sont d'aucune assistance pour conclure que les détentions alléguées sont « susceptibles » d'être « fondées » sur les origines ethniques.

20. Permettez-moi également d'aborder brièvement l'allégation de l'Arménie selon laquelle les détentions mentionnées étaient prétendument « arbitraires », allégation fondée sur des affirmations non étayées selon lesquelles les accusations criminelles n'ont pas été poursuivies de manière équitable[144]. L'Azerbaïdjan n'a pas détenu ces personnes au mépris des garanties d'une procédure régulière et d'autres exigences juridiques. L'Azerbaïdjan a précédemment expliqué à la Cour[145] que chaque individu ayant fait l'objet d'un procès a été jugé et condamné par des tribunaux régulièrement constitués, conformément aux exigences d'une procédure régulière en accord avec les obligations internationales de l'Azerbaïdjan. Mesdames et Messieurs les juges, par souci de précision, les droits individuels protégés par le droit de l'Azerbaïdjan sont présentés aux onglets n^{os} 6, 7 et 8 du dossier des juges[146].

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[142] European Parliament, Resolution of 20 May 2021 on prisoners of war in the aftermath of the most recent conflict between Armenia and Azerbaijan (2021/2693(RSP)) (20 mai 2021), accessible à l'adresse suivante : https://www.europarl.europa.eu/doceo/document/TA-9-2021-0251_EN.pdf (MA, annexe 35).

[143] Council of Europe, Parliamentary Assembly, Resolution 2391(2021): Humanitarian consequences of the conflict between Armenia and Azerbaijan/Nagorno-Karabakh conflict (27 septembre 2021) (MA, annexe 37).

[144] Voir MA, III.3.I.B.

[145] CR 2021/21, p. 28-29, par. 14-15 et 17 (Goldsmith).

[146] Onglet n° 6 du dossier des juges, Annex 1, Criminal Code of the Republic of Azerbaijan (Certified Translation) (Hearing on the Republic of Armenia's Request for Provisional Measures, 14-15 October 2021, Azerbaijan's Annexes, 12 October 2021) ; onglet n° 7 du dossier des juges, Annex 2, Criminal Procedure Code of the Republic of Azerbaijan (Certified Translation) (Hearing on the Republic of Armenia's Request for Provisional Measures, 14-15 October 2021, Azerbaijan's Annexes, 12 October 2021) ; onglet n° 8 du dossier des juges, Annex 3, Constitution of the Republic of Azerbaijan (Certified Translation) (Hearing on the Republic of Armenia's Request for Provisional Measures, 14-15 October 2021, Azerbaijan's Annexes, 12 October 2021).

21. L'Azerbaïdjan a précédemment partagé avec la Cour les décisions judiciaires des instances nationales azerbaïdjanaises dans lesquelles les charges initiales ont été réduites ou abandonnées après que les juges ont déterminé que les preuves étaient insuffisantes pour les étayer[147]. Ainsi, par exemple, le 2 juillet 2021, la Cour de Bakou sur les crimes graves a refusé de maintenir des charges contre 14 détenus pour terrorisme ou possession illégale d'armes à feu en raison du manque de preuves, et elle a estimé que seules les charges concernant le franchissement illégal de la frontière étaient établies[148].

22. Les détenus qui restent sous la garde des autorités de l'Azerbaïdjan ont été reconnus coupables de crimes graves, y compris de torture et de meurtre. Par exemple, deux ressortissants arméniens purgent des peines de 20 ans pour, entre autres crimes, avoir torturé, tué et retenu en otage divers civils et soldats azerbaïdjanais pendant le conflit entre les deux États. De nombreuses victimes ont décrit des passages à tabac routiniers et brutaux aux mains de ces deux soldats arméniens[149]. Le droit de l'Azerbaïdjan de détenir de telles personnes est prévu par l'article 119, paragraphe 5, de la troisième convention de Genève, lequel précise :

> « Les prisonniers de guerre qui seraient sous le coup d'une poursuite pénale pour un crime ou un délit de droit pénal pourront être retenus jusqu'à la fin de la procédure et, le cas échéant, jusqu'à l'expiration de la peine. Il en sera de même de ceux qui sont condamnés pour un crime ou délit de droit pénal. »

Et bien que l'Arménie ne partage pas ces informations avec la Cour, plusieurs Arméniens ont été rapatriés en Arménie suite aux décisions de la Cour suprême d'Azerbaïdjan du 8 septembre 2022[150]. Ces décisions démontrent que les détenus arméniens continuent de bénéficier d'une procédure régulière et d'un traitement égal devant les tribunaux, conformément aux normes internationales[151].

23. Mesdames et Messieurs les juges, les preuves montrent clairement que les détentions n'ont aucun lien discernable avec l'origine ethnique et sont entièrement liées au fait que les détenus combattaient, ou étaient perçus comme combattants, ou qu'ils étaient engagés dans de graves

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[147] CR 2021/21, p. 29, par. 16 (Goldsmith).

[148] *Ibid.*

[149] CR 2021/21, p. 27, par. 10 (Goldsmith).

[150] Voir Reply by the Republic of Azerbaijan to the joint communication by the Special Procedures Mandate Holders of 28 November 2022 (Ref: AL AZE 1/2022) (21 February 2023), accessible à l'adresse suivante : https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37389.

[151] *Ibid.*

violations du droit. L'observation de la Cour dans son ordonnance du 7 décembre 2021 selon laquelle « [l]'Arménie n'a pas présenté à la Cour de preuve que ces personnes demeurent en détention en raison de leur origine nationale ou ethnique »[152] doit être gardée à l'esprit. Ces personnes ont été détenues en raison de leur statut de membres de l'armée arménienne ou de citoyens arméniens soupçonnés d'avoir pénétré illégalement sur le territoire azerbaïdjanais. De plus, ces détentions ont eu lieu pendant les hostilités actives entre l'Arménie et l'Azerbaïdjan.

24. Le simple fait que ces détenus en temps de guerre soient principalement des personnes d'origine arménienne ne transforme pas automatiquement les demandes relatives à leur détention en demandes au titre de la CIEDR. Il s'agit simplement d'une réalité malheureuse mais prévisible dans le cadre d'un conflit armé avec un État dont la population est presque entièrement composée d'Arméniens. En d'autres termes, le fait que les détenus soient majoritairement issus d'un groupe ethnique est le reflet de la démographie de l'État arménien impliqué dans le conflit et non la preuve d'une intention discriminatoire fondée sur l'appartenance ethnique.

25. La Cour doit donc établir une distinction entre les demandes qui doivent être examinées au fond, à savoir les demandes concernant la discrimination raciale qui sont formulées par l'Arménie et par l'Azerbaïdjan, l'un contre l'autre, et les demandes qui concernent le droit international humanitaire et qui n'ont rien à voir avec la CIEDR.

26. Pour clarifier, l'Azerbaïdjan ne soutient pas que la CIEDR est remplacée par le droit international humanitaire dans le contexte d'un conflit armé[153]. Mais l'allégation de l'Arménie selon laquelle les détentions incriminées étaient prétendument arbitraires et discriminatoires ne peut être évaluée au regard de la CIEDR. Le droit international humanitaire est conçu pour réglementer les conflits armés et la conduite des hostilités. C'est dans ce contexte que les allégations de l'Arménie concernant une prétendue détention illégale ont été formulées.

27. L'Azerbaïdjan soutient que la question de savoir si une détention est illégale ne peut être tranchée que par référence au droit applicable en temps de conflits armés.

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[152] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan), mesures conservatoires, ordonnance du 7 décembre 2021*, *C.I.J. Recueil 2021*, p. 383, par. 60.

[153] Cf. *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif*, *C.I.J. Recueil 2004 (I)*, p. 178, par. 106.

28. La troisième convention de Genève réglemente en détail la libération, le rapatriement et le traitement des prisonniers de guerre, tandis que la quatrième convention de Genève relative à la protection des personnes civiles en temps de guerre (dite « quatrième convention de Genève ») traite de l'internement ou de la détention des « personnes protégées ». Les dispositions de ces deux conventions visent l'ensemble des populations des pays en conflit, « sans aucune distinction de caractère défavorable, de race, de nationalité, de religion, d'opinions politiques ou autre, fondée sur des critères analogues »[154]. En outre, le droit international humanitaire coutumier prévoit que « [l]es États doivent enquêter sur les crimes de guerre ... sur leur territoire, et, le cas échéant, poursuivre les suspects »[155].

29. Il en résulte que la Cour devrait rejeter les demandes de l'Arménie concernant la prétendue détention illégale de soldats, de personnel militaire et d'autres détenus arméniens car elles ne relèvent pas de la compétence *ratione materiae* de la Cour.

III. LES ALLÉGATIONS DE DISPARITIONS FORCÉES FORMULÉES PAR L'ARMÉNIE NE RELÈVENT PAS DU CHAMP D'APPLICATION DE LA CIEDR

30. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, j'en viens maintenant à la troisième et dernière exception d'incompétence *ratione materiae* de votre juridiction. L'Arménie demande à la Cour de déclarer que « Azerbaijan has violated its obligations under Articles 2 and 5 *(a)* of the CERD by engaging in practices of discriminatory enforced disappearance of ethnic Armenians »[156].

31. L'Azerbaïdjan affirme qu'il existe des preuves qui démontrent que les allégations de l'Arménie concernant les disparitions forcées sont infondées. Comme le note la commission d'État sur les prisonniers de guerre, les otages et les personnes disparues de l'Azerbaïdjan, après la

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[154] Art. 16, convention (III) de Genève relative au traitement des prisonniers de guerre, 12 août 1949 ; voir aussi art. 13 et art. 27, par. 3, convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre, 12 août 1949.

[155] CICR, Base de données, DIH [droit international humanitaire] coutumier, Les poursuites pour crime de guerre, accessible à l'adresse suivante : https://ihl-databases.icrc.org/fr/customary-ihl/v1/rule158 ; voir aussi art. 1, 49 et 50, convention (I) de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949 ; Art. 1, 129 et 130, convention (III) de Genève relative au traitement des prisonniers de guerre, 12 août 1949 ; Art. 1, 146 et 147, convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre, 12 août 1949 ; Art. 85, 86, 87 et 88 du protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (protocole I), 8 juin 1977 ; voir aussi art. 6, protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (protocole II), 8 juin 1977.

[156] MA, p. 750, Submission 5).

deuxième guerre du Garabagh, 1 713 corps ont été découverts et remis à l'Arménie. À la suite du conflit militaire sur la frontière non délimitée entre l'Arménie et l'Azerbaïdjan du 12 au 14 septembre 2022, 157 corps ont été retrouvés et remis à l'Arménie. Après les mesures antiterroristes locales prises par les forces armées azerbaïdjanaises au Garabagh du 19 au 20 septembre 2023, 173 corps de militaires ont été retrouvés et remis à l'Arménie[157]. Mesdames et Messieurs les juges, l'Arménie vous demande de considérer qu'il y a, ce qu'elle dénomme, une pratique de disparitions forcées. Toutefois, les faits que je viens d'évoquer montrent bien qu'il n'y a pas de pratique de discrimination fondée sur l'origine ethnique en matière de disparitions.

32. De plus, l'Azerbaïdjan est prêt à coopérer avec les représentants de l'Arménie pour assurer la recherche des personnes disparues, et cela des deux côtés[158]. Cela montre clairement que l'Azerbaïdjan ne refuse ni ne dissimule aucune information sur les personnes disparues à la suite d'un conflit armé. Et cela ne signifie pas que les disparitions dans le cadre d'un conflit armé sont « fondées sur » des origines ethniques[159].

33. Je peux être brève sur la troisième objection. En effet, l'Arménie ne s'appuie sur aucune base pour fonder son allégation selon laquelle un Arménien aurait été tué, détenu ou soumis à une disparition forcée en raison de son origine ethnique. La CIEDR ne réglemente pas les « disparitions forcées ». Celles-ci se sont produites dans le contexte d'hostilités armées. Et pour définir les « disparitions forcées », l'Arménie prend d'ailleurs appui sur la convention internationale pour la protection de toutes les personnes contre les disparitions forcées[160]. La raison pour laquelle l'Arménie tente de faire passer les allégations de disparitions forcées sous la CIEDR est claire. L'Arménie est partie à la convention internationale pour la protection de toutes les personnes contre les disparitions forcées, ce qui n'est pas le cas de l'Azerbaïdjan. Le seul moyen dont dispose l'Arménie pour porter ses allégations devant la Cour est de tenter d'étendre la compétence *ratione materiae* en vertu de la CIEDR au-delà des limites acceptables. L'Arménie est d'ailleurs bien

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[157] "State Commission: We deem it necessary to involve individuals who served as field commanders from the Armenian side until 1994 in search process for burial sites of our missing compatriots", *AZERTAG* (14 février 2024), accessible à l'adresse suivante : https://azertag.az/en/xeber/state_commission_we_deem_it_necessary_to_involve_individuals_who_served_as_field_commanders_from_the_armenian_side_until_1994_in_search_process_for_burial_sites_of_our_missing_compatriots-2921674.

[158] *Ibid.*

[159] *Ibid.*

[160] MA, p. 612, par. 6.140.

consciente que ses demandes ne relèvent pas de la CIEDR. En effet, l'Arménie note elle-même dans son mémoire que les disparitions forcées sont interdites par le droit international humanitaire coutumier[161]. Au risque de redire ce qui a été déjà dit, je rappellerai que votre haute juridiction a précisé en l'affaire *Ukraine c. Russie* qu'elle « n'a pas compétence pour se prononcer sur des manquements allégués à d'autres obligations imposées par le droit international, notamment celles qui découlent d'autres instruments internationaux relatifs aux droits de l'homme »[162].

34. En l'absence de preuves spécifiques mettant en évidence une différence de traitement fondée sur l'origine ethnique, les allégations de l'Arménie ne mettent pas en cause la CIEDR. La tentative de l'Arménie d'argumenter que les allégations de disparitions doivent être « [v]iewed in the context of Azerbaijan's incessant hateful rhetoric against ethnic Armenians »[163] a pour objet de tenter de les placer dans le champ de la CIEDR. Mais comme l'a précisé M. Wordsworth, ceci n'est pas suffisant pour transformer des allégations liées à la conduite d'activités armées en allégations qui relèveraient de la CIEDR.

35. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, ceci conclut ma présentation ainsi que le premier tour de plaidoiries de l'Azerbaïdjan. Je tiens à vous remercier très sincèrement de votre attention, en mon nom personnel et au nom de l'ensemble des membres de la délégation de l'Azerbaïdjan. Je vous remercie, Monsieur le président.

Le PRÉSIDENT : Je remercie Madame Boisson de Chazournes, dont l'exposé clôt l'audience de ce jour. La Cour se réunira de nouveau demain, mardi 16 avril 2024, à 10 heures, pour entendre l'Arménie en son premier tour de plaidoiries.

L'audience est levée.

L'audience est levée à 12 h 55.

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[161] *Ibid.*, par. 6.141.

[162] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), arrêt du 31 janvier 2024*, par. 201.

[163] MA, p. 620, par. 6.156.