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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Tuesday 23 April 2024, at 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 (Azerbaijan *v.* Armenia)**

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le mardi 23 avril 2024, à 10 heures, 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 (Azerbaïdjan c. Arménie)**

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		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
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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HE Mr Rahman Mustafayev, Ambassador of the Republic of Azerbaijan to the Kingdom of the Netherlands,

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Le PRÉSIDENT : Veuillez vous asseoir. L'audience est ouverte.

Pour des raisons dont il m'a dûment fait part, M. le juge Abraham n'est pas en mesure de participer à l'audience de ce jour. La Cour se réunit ce matin pour entendre le premier tour de plaidoiries de la République d'Azerbaïdjan sur les exceptions préliminaires soulevées par la défenderesse en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Azerbaïdjan c. Arménie)*. Je donne à présent la parole à l'agent de l'Azerbaïdjan, S. Exc. M. Elnur Mammadov. Excellence, vous avez la parole.

M. MAMMADOV : Merci bien, Monsieur le président.

INTRODUCTORY STATEMENT

1. Mr President, Madam Vice-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. Last week, Azerbaijan explained that Armenia's CERD Application falls outside your jurisdiction, either wholly because Armenia rushed to file its Application before giving negotiations a chance, or in large part because it misuses the CERD in an attempt to bring before the Court a kaleidoscope of international humanitarian law and other allegations arising out of armed conflict. As is clear on its face, and as Azerbaijan will explain this week, Azerbaijan's CERD Application is completely different.

2. Yesterday, Armenia's counsel accused Azerbaijan of having "reformulated" its CERD complaint in response to Armenia's preliminary objections. So let me set the record straight now. I will start by reiterating what exactly is Azerbaijan's CERD complaint, as advanced in its Memorial and accompanying submission, before Armenia submitted any preliminary objections.

3. Azerbaijan's CERD complaint goes to the very heart of the Convention. It centres upon a 30-year campaign of ethnic cleansing and related cultural erasure by Armenia of the Azerbaijani population and culture in the formerly occupied territories, following Armenia's illegal invasion in 1991. In open defiance of multiple United Nations Security Council resolutions, Armenia

implemented a systemic campaign to drive the Azerbaijani population from their ancestral homes, install a mono-ethnic Armenian population in its place and deny Azerbaijanis any ability to return.

4. The facts and evidence that Azerbaijan has submitted with respect to the targeted deployment of landmines, booby traps and environmental destruction form just part of that systematic, racially motivated campaign.

5. Yesterday, Armenia's Agent "vigorously denie[d]" that Armenia had ever "endorsed racist ideologies, illegally occupied Azerbaijan's territory, or controlled the authorities in Nagorno-Karabakh"[1]. This is sophistry on the part of Armenia. It ignores the overwhelming response of the international community to Armenia's invasion and occupation of Azerbaijan, which rejected Armenia's conveniently created self-determination narrative. Not a single State in the world bought into this fairy tale. The United Nations Security Council issued multiple resolutions demanding immediate, complete and unconditional withdrawal of the occupying Armenian forces from the sovereign territories of Azerbaijan. It also ignores the jurisprudence of the European Court of Human Rights confirming Armenia's effective control over those territories, and the Trilateral Statement of 10 November 2020 by which Armenia committed to withdraw its troops from, and thereby relinquish its control over, those sovereign territories of Azerbaijan. And it ignores the fact that Armenia's culpable conduct was driven by an openly racist and nationalist ideology known as Tseghakron, or "race-religion" in Armenian.

6. Last week, the Agent of Armenia dismissed Tseghakron as "an early twentieth century national ideology . . ., which has nothing to do with the mainstream political realities in Armenia today". But it was striking that Armenia did not dispute the fact that Tseghakron was and is a racist ideology, or the fact that Tseghakron had everything to do with Armenia's political realities during its campaign in the formerly occupied territories throughout the years of occupation.

7. Throughout most of its occupation, Armenia was ruled by the Republican Party of Armenia, or the RPA. The RPA was, and remains, a staunch follower of Tseghakron ideology and idolizes its founder, Garegin Nzhdeh. Even today, it proudly proclaims on its website that it is "the ideological

[1] CR 2024/21, p. 13, para. 6 (Kirakosyan).

and political successor of Nzhdeh Tseghakron Professios and National United Party" whose "ideological basis is Garegin Nzhdeh's teaching".

8. I invite the Court to reflect on some of Nzhdeh's teachings, quotations from which appear on the screen. Central to them is the notion of a superior Armenian "Aryan" race, the consequential racial inferiority of Azerbaijanis (called in his teachings "Turks") and the unification of all ethnic Armenians within a single, mono-ethnic State extending into Azerbaijan's and neighbouring States' sovereign territories. The teachings call Azerbaijanis those "who for centuries had more dog traits in themselves than human". For more detailed extracts from Nzhdeh's teachings, I refer you to tab 2 of the judges' folder.

9. Garegin Nzhdeh remains a national hero in Armenia. On the slide you see two statues of him in Armenia erected in 2016, one of which was unveiled by the then President of Armenia.

10. Nzhdeh is also venerated by fascist groups in Armenia. Here, you can see a recent parade by one such group on the main square in Yerevan, which ended in a collective Nazi salute to his statue. I pause to note that Armenia failed to take any measures to prevent this openly racist event, despite the Court's provisional measures Order dated 7 December 2021. For a State supposedly committed to the eradication of racial discrimination, I wonder why Armenia allows such parades to take place in its capital in broad daylight today?

11. Mr President, Members of the Court, last week, when addressing Azerbaijan's CERD claim, the Agent for Armenia also asserted that Azerbaijan is unable to present any hate speech or video evidence of racist atrocities[2]. That, again, is patently false.

12. My next slide shows just a few examples of the hate speech that drove Armenia's culpable conduct in the formerly occupied territories, taken from Azerbaijan's Application and Memorial. They include statements about the "ethnic incompatibility" of Armenians and Azerbaijanis, describing even the idea of coexistence as a "tragedy" and the labelling of Azerbaijanis as being at a "different level of civilization".

13. The level of Armenian hate speech against Azerbaijanis was such that, in 2021, as you can see on the screen, Twitter identified over thirty accounts, all associated with the Armenian

[2] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, CR 2024/18, p. 11, para. 4 (Kirakosyan).

Government. These accounts were either spreading hate speech against Azerbaijanis or were fake accounts pretending to broadcast Azerbaijani hate speech against Armenians. Armenia seems to have been so concerned with hate speech against Armenians that it took great efforts to create more.

14. And as far as video evidence is concerned, contrary to the assertion made by the Agent for Armenia, Azerbaijan's Application alone was accompanied by no less than 17 videos showing appalling racist atrocities committed against Azerbaijanis.

15. Azerbaijan's CERD case against Armenia manifestly falls within the substantive scope of the Convention. Having illegally invaded and occupied Azerbaijan's territory, Armenia proceeded to execute, over the following decades, the pervasive racist agenda that is the subject of Azerbaijan's complaint. Armenia's campaign was multifaceted, comprising an array of conduct — including the laying of booby traps and landmines and a devastating assault on the natural environment and resources of the formerly occupied territories — all of which targeted the local Azerbaijani population or the prevention of their return.

16. This last point is critical. Yesterday, Armenia's counsel made the extraordinary and extremely misleading submission that Azerbaijanis had no intention of returning to those territories, while Armenia was busy laying its landmines and booby traps, looting resources and reaping environmental devastation[3]. I could hardly believe my ears and I had to review the transcript to be sure.

17. No doubt Armenia's Agent knows that it was widely expected and widely demanded that Armenia must withdraw from the occupied territories and allow the many hundreds of thousands of displaced Azerbaijanis to return to their homes as part of any peaceful settlement of the conflict.

18. Azerbaijan consistently demanded the return of its displaced persons. Its demand was recognized by international bodies. The UN Security Council consistently recognized that any resolution of the conflict would entail such return. It was always a critical component of any negotiations. To be sure, it was always understood that key principles of any agreed settlement would include: (1) the return of the territories surrounding Garabagh to Azerbaijani control; and (2) the right

[3] CR 2024/21, p. 61, para. 44 (Macdonald).

of Azerbaijani displaced persons to return to their former places of residence. It is therefore puzzling that Armenia did not expect Azerbaijanis to return to the areas Armenia intentionally pillaged.

19. The map on the slide depicts the formerly occupied territories of Azerbaijan. You can see the purple lines show the former Nagorno-Karabagh Autonomous Oblast of the Azerbaijani USSR, which had been majority populated by ethnic Armenians prior to the invasion. The yellow lines depict the additional seven occupied districts whose population was 99 per cent Azerbaijani before the invasion[4]. As Professor Boisson de Chazournes will explain, and the Court can see on the map, the vast majority of the environmental destruction by Armenia was deliberately targeted at those seven districts. Again, these were districts to which everyone, including Armenia itself, was aware that a majority Azerbaijani population was expected to return if a settlement were to be reached. This explains the pattern of environmental destruction in those specific areas where Armenians did not live and Azerbaijanis were expected to return.

20. Armenia was determined to frustrate the return of Azerbaijanis to their homes, and thereby to preserve the racial purity of its occupied territories. Armenia's claim that it could not anticipate the return of displaced persons or that Azerbaijan gave it up is simply nonsensical.

21. Even today, the return of Azerbaijanis previously displaced from the formerly occupied territories remains inhibited by Armenia's misconduct, as Azerbaijan works to reinstate critical infrastructure, identify and remove landmines and booby traps and restore the natural environment. Hundreds of Azerbaijanis, mostly civilians, have lost their lives or suffered horrific life-changing injuries due to the landmines and booby traps which Armenia placed in order to prevent their return.

22. Armenians even continue to celebrate such tragedies. Some recent Armenian social media posts are on my next slide. Not only does Armenia refuse to provide Azerbaijan with detailed maps of its landmines, but it has failed to abide by its obligation to prevent and punish such blatant hate speech. Armenia's time would have been better spent combating online racism by its own nationals than browsing the web for fake Azerbaijani army badges.

23. Mr President, Members of the Court, there is one additional aspect of Armenia's invasion and 30-year occupation of Azerbaijan's territories that warrants attention. Armenia's misconduct

[4] Figure 3 to the Memorial of Azerbaijan.

included many infamous examples of grave breaches of international humanitarian law and other international human rights norms by Armenia's armed forces. Armenia has resolutely refused to investigate or prosecute them. Importantly, though — and in contrast to Armenia's approach — Azerbaijan does not claim individual breaches of CERD with respect to that misconduct. Rather, Azerbaijan treats these acts as elements composing Armenia's wholesale racist campaign. Similarly, Azerbaijan does not claim that the placement of landmines and environmental destruction constitute individual breaches of CERD, but rather as integral components of Armenia's campaign.

24. Mr President, Members of the Court, Armenia presents three jurisdictional objections to Azerbaijan's CERD complaint, each of which is designed to exclude aspects of its racist campaign from analysis by the Court at the merits stage.

25. First, it makes a *ratione temporis* objection with respect to claims concerning events prior to 15 September 1996, when Azerbaijan became a CERD party. Second, it submits a *ratione materiae* objection with respect to the targeted placement of landmines and booby traps. Third, it submits another *ratione materiae* objection with respect to Azerbaijan's claims concerning deliberate environmental harm.

26. Azerbaijan is confident that you will dismiss each of Armenia's three objections to jurisdiction at this stage, and thereby allow Azerbaijan's CERD complaint to proceed to the merits.

27. Armenia also submits a separate objection to admissibility, arising out of what it calls "Azerbaijan's three-decade delay in bringing its claims". If accepted, this would prevent the Court from assessing Azerbaijan's CERD complaint at all. Armenia tries to use its 30 years of unlawful occupation, during which it prevented access by Azerbaijan, by the UN agencies and other international organizations, as a means of precluding Azerbaijan from complaining about Armenia's racist occupation campaign following liberation of its territories. Armenia cannot benefit from its unlawful conduct.

28. In this context, it is imperative to note that Azerbaijan has brought its Application based on evidence which it has discovered, and continues to discover, following the liberation of the territories in 2020. Thus, for example, following the liberation of our territories, we have discovered ruined cities, destroyed cultural monuments and a devastated environment. And in the last few weeks,

Azerbaijan has continued to find new evidence of the deployment of booby traps to inhibit the return of ethnic Azerbaijanis to their homes.

29. In tabs 7 and 10 of your judges' folder you will find references to the multitude of evidence Azerbaijan presented to the Court, and keeps uncovering, subsequent to the liberation of its territories in late 2020.

30. Accordingly, Azerbaijan's Application arises out of a timely and orthodox invocation of the ICJ's jurisdiction under Article 22 of the Convention. If Armenia got its way, Azerbaijan would have been compelled to bring a CERD claim before the liberation of its territories and without access to much of the evidence on which it now relies. This is plainly disingenuous. Professor Talmon will address you further on Armenia's flawed admissibility complaint.

31. Ironically, if any Party delayed its CERD complaint, it was Armenia itself. Last week, Armenia's Agent described Armenia's complaint as "the culmination of decades of racial discrimination against ethnic Armenians"[5]. And yet, Armenia never communicated any CERD complaint to Azerbaijan over that "many decades" period. Instead — as Armenia itself admits in its Application — it waited until 11 November 2020 — more than 24 years after Azerbaijan's accession to the CERD but just one day after the end of the Second Garabagh War — just one day — before notifying Azerbaijan of its CERD complaint. Clearly, this timing was no coincidence. One can only wonder why Armenia had waited until it lost control of the territories of Azerbaijan as a result of the Second Garabagh War before rushing to the Court with its CERD application against Azerbaijan?

32. Mr President, Members of the Court, Azerbaijan's oral submissions this morning will proceed as follows: Mr Stephen Fietta will provide an overview of Azerbaijan's CERD complaint; Professor Vaughan Lowe will explain why Armenia's preliminary objection *ratione temporis* should be rejected; Professor Stefan Talmon will then explain why Armenia's admissibility objection fails; Mr Sam Wordsworth and Mr Sean Aughey will each rebut the legal and factual aspects of Armenia's preliminary objection with respect to landmines and booby traps; and finally, Professor Laurence Boisson de Chazournes will refute Armenia's objection with respect to the environmental damage it caused during its occupation of Azerbaijan's sovereign territories.

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[5] CR 2024/18, p. 11, para. 4 (Kirakosyan).

33. Mr President, Members of the Court, I thank you for your attention and I kindly ask that you invite Mr Stephen Fietta to the podium, who will provide an overview of Azerbaijan's CERD complaint.

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

Mr FIETTA:

OVERVIEW OF AZERBAIJAN'S CASE

1. Mr President, Members of the Court, it is a privilege to appear before you and to present this introductory overview of Azerbaijan's CERD case.

2. I have a number of overarching points to make, bearing in mind last week's hearing in this Court, before my colleagues address you on the specific issues before you this week. The two cases before you — *Armenia* v. *Azerbaijan* and *Azerbaijan* v. *Armenia* — arise, of course, out of broadly the same factual background. But Azerbaijan's case has been carefully framed and presented in a manner different from that presented by Armenia; and the difference bears directly on the question of preliminary objections.

3. As the Court will recall, there are three main phases in the history relevant to this case. The first phase, Armenia's territorial claims over Azerbaijan, led to armed hostilities in 1991. By the time a ceasefire was established in 1994, Armenia was, illegally, in occupation of the Garabagh region and seven surrounding districts of Azerbaijan — for brevity, I shall refer to the occupied area as the "Garabagh region". The UN Security Council called for the complete, immediate and unconditional withdrawal of the Armenian occupying forces[6]. The 1994 ceasefire ended the First Garabagh War, and thus the first phase. However, Azerbaijan was unable to liberate its occupied territories within which the so-called "illegally installed régime" — controlled by Armenia — was established.

4. Phase two comprises the illegal Armenian occupation of Garabagh, which continued for almost thirty years. The occupying Armenian forces did not withdraw until the 44-day Second Garabagh War, which lasted from 27 September to 10 November 2020. Following mediation, a

[6] UN Security Council resolutions 822 (30 April 1993), 853 (29 July 1993), 874 (14 October 1993), 884 (12 November 1993).

ceasefire agreement — known as the Trilateral Statement — was signed by Armenia, Azerbaijan and Russia. But even then, Armenia continued to deploy military units in part of the Garabagh region, posing a serious threat to regional peace and stability. It was only through the counter-terror operation on 19 and 20 September 2023 — which began phase three — that Azerbaijan was able fully to restore its sovereignty and control over the formerly occupied areas.

5. You heard much last week about atrocities allegedly carried out by Azerbaijanis. Many people watching these proceedings in Azerbaijan and elsewhere will feel anger at this one-sided account. They will recall not only the violent expulsion by Armenia of over one million Azerbaijanis from their homes[7] and episodes such as the Khojaly genocide, which is recognized by 17 States as such[8], and the razing to the ground of the city of Aghdam, later described as the "Hiroshima of the Caucasus"[9]. Their recollection will extend also to the whole range of Armenia's campaign of ethnic cleansing, from individual acts of egregious cruelty to the clinical, systematic use of landmines in particular locations to prevent the return of displaced Azerbaijanis to their homes[10]. Many people watching these proceedings will be frustrated that Azerbaijan's counsel are not setting the record straight on all of this. But now is not the time for that work.

6. The discussion about individual atrocities last week arose because Azerbaijan was illustrating its basic point that not every alleged action by an Azerbaijani against an Armenian could be assumed to be motivated by racial animosity. The mere fact of deploying a landmine or a cluster bomb does not always, and in all circumstances, violate the CERD: something more is required, such as evidence that particular racial or ethnic groups have been targeted. In much of its case, Armenia has not shown that "something more". It simply presumes that everything done to Armenians was motivated by racial hatred. Hence Azerbaijan's preliminary objection last week. This *ratione materiae* question does not arise this week because Armenia has made no equivalent objection to Azerbaijan's case — and rightly so, because Azerbaijan's case was carefully framed to avoid that fault.

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[7] Memorial of Azerbaijan, para. 51, referencing Annex 51 and 91.

[8] Armenia-Azerbaijan conflict, Large-scale Massacres, Acts of Genocide, https://president.az/en/pages/view/azerbaijan/karabakh.

[9] "'They destroyed everything': Inside the war-torn lands of Azerbaijan's 'Hiroshima'" (8 April 2023), *The Express*, https://www.express.co.uk/news/world/1756223/azerbaijan-armenia-conflict-nagorno-karabakh-aghdam.

[10] Memorial of Azerbaijan, paras. 116, 223, 273, 275-277.

7. Azerbaijan wishes to make clear to the Court during this week the crucial differences between the CERD cases brought by Armenia and Azerbaijan respectively, especially for purposes of jurisdiction.

8. The myriad claims that comprise *Armenia's case*, as you heard last week and can see from Armenia's Memorial[11], are rooted in the conduct of armed hostilities and their immediate aftermath. They are bound up with questions about the applicability of international humanitarian law between belligerent States, which Armenia tries to shoehorn into its CERD complaint.

9. Turning to *Azerbaijan's CERD case*, the legal position of an occupying Power is fundamentally different. Armenia was the occupying Power in Garabagh for three decades[12]. As such it had international responsibility for public order and safety throughout the territory[13]. That included responsibility for compliance with the CERD. Yet far from securing that compliance, Armenia used its occupation to mount a wide-ranging, sustained and systematic campaign of ethnic cleansing and cultural erasure against Azerbaijanis. As Azerbaijan reported to the CERD Committee in 2005: "as a result of Armenian aggression and ethnic cleansing . . . there are now some 1 million refugees and displaced persons in Azerbaijan"[14].

10. The extent and nature of Armenia's efforts to impose and maintain ethnic purity throughout the parts of Azerbaijan that it illegally occupied started to become clear only in 2020, when many of the obstacles placed by Armenia to the gathering of evidence were overcome by Azerbaijan's liberation of large parts of the formerly occupied territory. Hence the timing of Azerbaijan's Application to the Court the next year, in 2021.

11. Mr President, Members of the Court, this is a paradigmatic case of racial discrimination perpetrated on a mass scale, of precisely the kind that the CERD was put in place to prevent. As the

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[11] Paragraph 6 of its Application asserts, referring to the Second Garabagh War, that "during that armed conflict, Azerbaijan committed grave violations of the CERD", and paragraph 7 asserts that "even after the end of hostilities, Azerbaijan has continued to engage in the murder, torture and other abuse of Armenian prisoners of war, hostages and other detained persons".

[12] A. Clapham, P. Gaeta, M. Sassòli, *The 1949 Geneva Conventions. A Commentary* (2015), p. 1458 (M. Bothe).

[13] *Ibid.*; Article 43 Hague Regulations concerning the Laws and Customs of War on Land, Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, 1907.

[14] The Committee on the Elimination of Racial Discrimination Considers Report of Azerbaijan (7 March 2005) https://www.ohchr.org/en/press-releases/2009/10/committee-elimination-racial-discrimination-considers-report-azerbaijan-0; United Nations General Assembly, Report of the United Nations High Commissioner for Refugees, doc. A/49/380 (13 September 1994), 8-9; Memorial of Azerbaijan, paras. 52-53.

preamble to the Convention provides, the States parties are resolved to "prevent and combat racist doctrines and practices". Such doctrines and practices lie at the heart of Azerbaijan's complaint. Armenia's case, by contrast, contains, in large part, a plethora of individual actions allegedly committed during armed hostilities.

12. Mr President, Members of the Court, I thank you for your attention and ask that you now call on Professor Vaughan Lowe, King's Counsel, who will address you on jurisdiction *ratione temporis*.

The PRESIDENT: I thank Mr Fietta for his statement. I now invite Professor Vaughan Lowe to take the floor. You have the floor, Sir.

Mr LOWE:

TEMPORAL JURISDICTION

ARMENIA'S PRELIMINARY OBJECTION — *RATIONE TEMPORIS*

1. Thank you, Mr President, Members of the Court, it is a privilege to appear before you and an honour to have been entrusted with this part of Azerbaijan's submission.

2. I shall address Armenia's first objection, that Azerbaijan's claims relating to the First Garabagh War, which ended in 1994, are outside the jurisdiction of the Court *ratione temporis*[15].

3. The Court will recall that Armenia acceded to CERD on 23 June 1993 and Azerbaijan acceded on 16 August 1996; and in accordance with Article 19, the Convention entered into force for each of them 30 days after its accession. CERD thus entered into force for Armenia on 23 July 1993 and for Azerbaijan on 15 September 1996.

4. It is common ground that the Court has no jurisdiction over matters prior to July 1993[16], and Azerbaijan makes no such claims. It is also agreed that the Court does have jurisdiction in respect of Azerbaijan's claims relating to the period after September 1996[17].

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[15] Preliminary Objections of Armenia, para. 5.

[16] CR 2024/21, p. 19, para. 6 (Martin).

[17] CR 2024/21, p. 19, para. 7 (Martin).

5. Thus, when Armenia says that "the Court's jurisdiction ratione temporis under Article 22 of the CERD does not and cannot extend to the period prior to its entry into force between the Parties on 15 September 1996"[18], the jurisdictional dispute is in fact confined to a 38-month period between July 1993 and September 1996, and it covers only a part of Azerbaijan's claims.

6. Azerbaijan's position on this comes down to three propositions.

(a) First, there is a distinction between (i) the question of the date on which the Court has jurisdiction and is seised of a dispute, and (ii) the question of the dates of the facts that the Court can adjudicate upon in the exercise of that jurisdiction. One might call it the distinction between the temporal scope of procedural rights and duties, related to dispute settlement procedures, and the temporal scope of substantive rights and duties under the CERD. Here the dispute concerns only the latter. The Court certainly had jurisdiction over at least some of Azerbaijan's claims and was seised of the dispute when Azerbaijan filed its Application in 2021.

(b) Second, Azerbaijan says that the Court can exercise its jurisdiction *ratione temporis* over claims that Armenia breached its substantive obligations under the CERD in respect of any conduct occurring on or after 23 July 1993 — the date on which those substantive CERD provisions entered into force for Armenia[19].

(c) Third, even if 15 September 1996 were the critical date as Armenia argues (*quod non*), all of Azerbaijan's claims would still be within the Court's jurisdiction *ratione temporis*. Jurisdiction over Armenia's breaches of CERD obligations originating in conduct after 15 September 1996 — the cultural and environmental destruction are examples — is not contested; and while some of the breaches may have begun between 23 July 1993 and 15 September 1996, they are what the ILC has characterized as continuing or composite breaches of international law, which extend in time and remain breaches after 15 September 1996[20].

7. All of these propositions are straightforward; and all will be well known and understood by the Court, because they concern questions that have arisen and been decided by the Court before.

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[18] Preliminary Objections of Armenia, para. 18.

[19] Observations of Azerbaijan, para. 3.

[20] Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ARSIWA"), Articles 14, 15.

8. Armenia provides five grounds or arguments for its jurisdictional objections concerning the period from July 1993 to September 1996[21]: but each is without foundation and should be rejected.

Armenia's first ground: a "dispute" relates to acts when both States are party to the Convention

9. Armenia's first ground is that CERD Article 22, by referring to "disputes 'between two or more States Parties with respect to the interpretation or application' of the CERD, makes clear that it does not apply to acts or facts that preceded the CERD's entry into force *as between the States parties concerned*"[22]. But CERD Article 22 does not say any such thing, either clearly or obscurely. Armenia is imposing its own interpretation upon Article 22.

10. Armenia suggests that its interpretation of Article 22 is supported by the principle of the non-retroactivity of treaties, reflected in Article 28 of the Vienna Convention on the Law of Treaties. But that is incorrect. Article 28 reads as follows:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty *with respect to that party*".

11. As you can see, Article 28 does not refer to the date of entry into force *as between the States parties concerned*: it refers to the date of entry into force of the treaty *with respect to that party* — in this case, Armenia. And the passages quoted by Armenia[23] from the work of the ILC on what became Article 28 are directed at a different point: that the *substantive* provisions of a treaty cannot bind a State before it has acceded to the treaty, and the non-retroactivity principle therefore precludes the use of a dispute settlement clause in the treaty in respect of claims relating to acts and omissions prior to the alleged wrongdoing State's accession. We invite you to read all five paragraphs of the ILC Commentary on what was then numbered draft article 24[24].

12. The key point is that retroactivity is relevant in *two* distinct contexts: procedurally, where the question is, did the States consent to the Court's jurisdiction at the material time; and

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[21] Preliminary Objections of Armenia, para. 23.

[22] *Ibid.*, paras. 24-29 (emphasis added).

[23] *Ibid.*, para. 25.

[24] Draft Articles on the Law of Treaties with commentaries, Reports of the Commission to the General Assembly (1966), pp. 211-213.

substantively, where the question is, was the State bound by a substantive provision of the CERD at the material time. And the material times are different.

The "procedural" question

13. The answer to the procedural question is clear. It is an elementary principle of international law that the jurisdiction of international tribunals derives from the consent of States parties to submit a particular dispute to the tribunal, as of the date on which the dispute settlement mechanism is invoked[25].

14. Azerbaijan could invoke the dispute resolution clause in the CERD and file an application in respect of a dispute with another State party to the CERD, at any time following the date on which the Convention came into effect for Azerbaijan and that other State party. The Court's jurisdiction depends on the consent of the parties on the date that the dispute is put before it. In this case, both Parties had consented to the Court's jurisdiction by 15 September 1996. And the Court's jurisdiction was actually invoked by Azerbaijan's Application 25 years later, on 23 September 2021. There is no element of retroactivity here.

15. The dates of the alleged violations of substantive provisions of international law is an entirely separate point. This was established in the *Bosnian Genocide* case. There, Yugoslavia — like Armenia here — argued that the Court, once seised, could only deal with events subsequent to the date on which the Genocide Convention became applicable as between the parties. The Court held, however, that the Genocide Convention — and in particular its compromissory clause in Article IX — does not contain any provision which limits the Court's jurisdiction *ratione temporis* in that way. Nor did the Parties make any reservation to that effect. Therefore, the Court had jurisdiction to adjudicate on the application of the Genocide Convention to facts which occurred prior to the Convention entering into force *between* the Parties[26].

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[25] Observations of Azerbaijan, paras. 19, 24.

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, para. 34. Cf., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35: "The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment".

16. The same is true in respect of Article 22 of the CERD. It contains no limitation *ratione temporis* confining the Court's jurisdiction to facts or situations arising after a certain date; nor has either Party purported to make any reservation having a similar effect. Complaints of breaches that have arisen out of facts occurring during or in relation to the First Garabagh War are within the jurisdiction of the Court, once it became validly seised.

17. That is, of course, not to say that the Court can treat the *substantive* provisions of the CERD as if it had always been in force for both Armenia and Azerbaijan. Obviously, no State party can be bound by a treaty provision that has not entered into force for it. I turn to that question next.

The "substantive" question

18. The substantive question is whether Armenia was at the material time — the time when the conduct complained of occurred — obliged to act in a certain way.

19. Armenia accepted yesterday that it was bound to comply with the provisions of the CERD from 23 July 1993, when the CERD entered into force for Armenia[27].

20. Azerbaijan was well aware of the importance of questions of temporal jurisdiction and has deliberately not presented any claims based on atrocities committed by Armenia prior to 23 July 1993. *All* of Azerbaijan's claims arise after 23 July 1993, when Armenia became bound by the CERD[28]. Indeed, in its Memorial Azerbaijan separated out the facts occurring before and after 23 July 1993 so that it is clear what facts can give rise to operative breaches by Armenia of the CERD[29].

21. Where Azerbaijan's Memorial refers to events before 1993, it does so only as background, in order to cast light on the context and as evidence of Armenia's purpose in carrying out its post-1993 breaches of the CERD. This is consistent with this Court's guidance in *Croatia* v. *Serbia*, where it said that "what happened prior to 8 October 1991", the critical date in that case, is "pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention"[30].

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[27] CR 2024/21, p. 26, para. 42 (Martin).

[28] Observations of Azerbaijan, paras. 32-33.

[29] Memorial of Azerbaijan, pp. 21-81, paras. 42-119, and pp. 81-199, paras. 82-245.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 58, para. 119. See also the separate opinion of President Tomka at p. 165, para. 26, where he stated that "the Court could have looked at the events occurring prior to that date in order to determine whether the later acts fell within a particular pattern from which the intent could be inferred".

22. Azerbaijan's case involves no retroactive application of the CERD. In *Belgium* v. *Senegal*, the Court held that the principle of non-retroactivity is satisfied whenever a convention is applied to "facts having occurred after its entry into force *for the State concerned*", as opposed to "acts . . . that took place prior to [the Convention's] entry into force *for that State*"[31].

23. The *erga omnes partes* and *jus cogens* character of the obligations under the CERD and similar treaties supports the principle that those obligations are engaged for every party from the date that the treaty comes into force for that party[32]. The Court's reasoning in *Belgium* v. *Senegal* is again on point[33]. Obligations in conventions such as the Convention against Torture, in that case, or the CERD in the present case, are owed to all States parties. It is not a matter of reciprocity or of the standing of particular States parties. As the Court has said, "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention"[34]. Ratifications of conventions of this kind are binding commitments to observe the Convention rules; and any State party can call out those who break the commitment. Armenia has known for over thirty years that another State party could bring a claim against it; and it knew that when it chose to ratify the CERD.

24. Indeed, the point goes further. In its 2012 Judgment in the *Nicaragua* v. *Colombia* case, the Court held that in light of the object and purpose of the UN Convention on the Law of the Sea, which was to establish a legal order for the oceans, Colombia was entitled to invoke Nicaragua's obligations as a State party to the UNCLOS, even though Colombia itself *never* became a party to the UNCLOS[35].

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[31] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, *Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100 (emphasis added).

[32] Observations of Azerbaijan, para. 21.

[33] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, *Judgment, I.C.J. Reports 2012 (II)*, pp. 449-450, paras. 68-70.

[34] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, *Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68; cf., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 611, para. 22, citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[35] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 668-669, para. 126.

25. There is no question of retroactivity in the present case because the relevant conduct underpinning Azerbaijan's claims of breach occurred after CERD's entry into force for Armenia in 1993[36].

26. I turn to the third point: the relevance of continuing and composite breaches of international law.

Continuing and composite breaches

27. Mr Martin referred yesterday to "discrete acts or omissions constituting immediate breaches" or "simple breaches" of international law[37]. The ILC called them "*completed acts*"[38]. A violation of a State's airspace and a violation of the immunity of a diplomat are examples. Mr Martin, seeking to make a point about exactly when a breach occurs, contrasted them with composite acts, where cumulative or aggregated conduct constitutes the essence of the wrongful act[39]. "[A]partheid is different in kind from individual acts of racial discrimination", he said, rightly[40]. But the relevant contrast here is not between completed acts and composite acts, but between completed acts and *continuing acts*, such as unlawful occupations of territory or continuing failures to fulfil a duty to bring an end to racial discrimination[41].

28. As the ILC said,

> "conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present"[42].

That is the situation here. Armenia's continuing failure to take steps to eradicate racial discrimination and organizations based on ideas of racial superiority[43], for example, may have begun years before it ratified CERD; but, as the ILC put it, "[t]he breach of an international obligation by an act of a

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[36] Observations of Azerbaijan, para. 20.

[37] CR 2024/21, p. 29, para. 52 (Martin).

[38] ARSIWA, Article 14 (2).

[39] CR 2024/21, p. 29, para. 52 (Martin).

[40] *Ibid.*

[41] ARSIWA, Article 14, Commentary, *passim*, *YILC*, 2001, Vol. II, Part 2.

[42] *Ibid.*, para. 12.

[43] CERD, Article 4.

State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation"[44].

29. Composite acts are just one kind of continuing act. A single, isolated refusal on grounds of race to allow a person access to a public park is a completed act in breach of the CERD: but a sustained practice of refusing access on racial grounds is a composite act — it is apartheid. It arises from "a series of actions or omissions defined in aggregate as wrongful"[45]; and as the ILC explained, a composite act "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation"[46].

30. Mr Martin obscures that point by referring repeatedly to the date of "crystallization" of composite acts[47]. That is looking at the wrong end. That is when the composite breach starts: but the important point here is that the breach continues and "lasts for as long as these actions or omissions are repeated"[48].

31. Azerbaijan's claims point to two aspects of Armenia's conduct. First, all of the Armenian acts and omissions of which Azerbaijan complains either originated after 23 July 1993, or they continued after 23 July 1993 — the date on which the CERD entered into force for Armenia. None of Azerbaijan's claims alleges a breach of international law that was completed before July 1993.

32. Second, Azerbaijan says that Armenia's cumulative or aggregated acts and omissions amount to a practice of ethnic cleansing which, like apartheid, is itself a distinct breach of the CERD. If Armenia wants a definition of the elements of the delict[49], one might start with that framed by the UN Commission of Experts: "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas"[50].

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[44] ARSIWA, Article 14 (2).

[45] *Ibid.*, Article 15 (1).

[46] *Ibid.*, Article 15 (2).

[47] CR 2024/21, p. 28, para. 48, p. 29, para. 54, p. 30, para. 55 (Martin).

[48] ARSIWA, Article 15 (2).

[49] CR 2024/21, p. 29, para. 54 (Martin).

[50] UN doc. S/1994/674, 27 May 1994, para. 130.

33. Azerbaijan says that Armenia expelled Azerbaijanis from their homes, incited hatred towards them, destroyed their cultural heritage and public buildings in order to deprive them of a homeland and a base for their culture, and then mined and booby-trapped their homes in order to prevent them returning. That is what Azerbaijan understands by ethnic cleansing: a wholesale repudiation of all of the principles that the CERD was established to secure. It is more than the sum of its parts: and as a continuous, and continuing, policy and pattern of behaviour, it is a violation of the CERD.

34. As I noted earlier, the dispute over the Court's jurisdiction *ratione temporis* is limited to a contested period of 38 months. In fact, even that overstates the case. Even if the Court were to accept Armenia's argument that the critical date in this case is the date of the CERD's entry into force for Azerbaijan, 15 September 1996 (rather than July 1993), Azerbaijan's claims still remain within the Court's jurisdiction.

35. Acts and omissions fall outside the temporal scope of the Court's jurisdiction only if they were completed before the date of the entry into force of the treaty for the acting State. The ongoing and systematic nature of Armenia's claim of ethnic cleansing, spanning three decades, can in no sense be considered to have been "completed" before September 1996, let alone before July 1993. Mines and booby traps were still being laid within the past four years.

36. All of Azerbaijan's claims are based on acts or omissions that either occurred or continued after 15 September 1996, and Azerbaijan's submissions in paragraph 97 of its Application and paragraph 591 of its Memorial are to be understood in that light[51]. These are continuing breaches. Azerbaijan's claims, and the "dispute" under Article 22, relate to conduct that occurred when both States were party to the Convention.

37. Again, in its Memorial and Observations on Armenia's Preliminary Objections, Azerbaijan has identified the breaches of the CERD which occurred or extend after the 15 September 1996 date for which Armenia contends[52].

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[51] Observations of Azerbaijan, para. 35; *Austria* v. *Italy*, ECtHR Application No. 788/60, Decision of 11 January 1961 (1962), pp. 20-21.

[52] See Observations of Azerbaijan, paras. 37-42, which reference the relevant sections of Azerbaijan's Memorial and the facts to which they relate concerning continuing and composite acts.

38. I can deal with Armenia's other arguments more swiftly, because they all derive from the mistaken analysis of the temporal limitations that I have tried to unpack this morning.

Armenia's second ground: non-retroactivity of CERD

39. Armenia's second objection[53] is that the CERD parties never intended its provisions to be applied retroactively. But they are not being applied retroactively.

40. The substantive obligations run from the date the treaty is binding on the offending State; and the procedural rights and obligations under Article 22 run from the date that the treaty is in force between both States parties.

41. And that perhaps explains why no States have considered it necessary to make reservations concerning the retroactive application of the CERD[54]. It obviously cannot be applied retroactively to events occurring prior to their becoming bound by the CERD.

Armenia's third ground: Article 22 only applies to acts subsequent to when the State joined the Convention

42. Armenia's third objection[55], that CERD Article 22 cannot be understood to confer rights on States corresponding to a time during which they were not parties to the CERD is no more than another rewording of the same point, and it has the same answer.

43. The CERD does not confer rights on States before they became parties to it. Azerbaijan gained the procedural right to invoke the CERD through the dispute settlement mechanism in Article 22 only when Azerbaijan became a party to the CERD and the CERD entered into force for it.

44. The substantive provisions are not conditional on the compromissory clause, but are rather dependent on the date on which the offending State entered into the CERD, and the CERD became effective for that State[56]. Armenia was obliged to comply with the CERD from 23 July 1993 when the CERD entered into force for it.

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[53] Preliminary Objections of Armenia, para. 30.

[54] CR 2024/21, p. 22, paras. 24-25 (Martin).

[55] Preliminary Objections of Armenia, paras. 31-34.

[56] Observations of Azerbaijan, para. 22.

Armenia's fourth ground: opening the floodgates to historic claims

45. The suggestion that Azerbaijan's interpretation "would open up a vast universe of potential historic claims" and "even create reluctance to include provisions giving jurisdiction to the Court in future treaties" is Armenia's fourth objection[57].

46. The answer to this is that no claims can ever arise in respect of any conduct occurring before the CERD entered into force for its first 27 parties, on 4 January 1969, or the later dates on which it took effect for each of the other 155 parties.

47. For example, Angola and Dominica acceded to the CERD in 2019: no case could be brought against them under the CERD for any alleged breach of the CERD occurring before 2019.

48. The CERD has been in force for more than half a century, and the Court has so far had cases emanating from only four situations — *Ukraine* v. *Russia*, *Georgia* v. *Russia*, *Qatar* v. *United Arab Emirates* and *Azerbaijan* v. *Armenia* . This is hardly a vast universe of historic claims.

Armenia's fifth ground: reciprocity as a condition to Article 22

49. Armenia's fifth and final objection[58] is that extending the application of Article 22 to events prior to the entry into force of the CERD as between itself and Azerbaijan would ignore the element of reciprocity inherent in compromissory clauses.

50. Again, there is a simple answer. There is no reference at all to reciprocity in CERD Article 22, of the kind that is present in Article 36 (3) of the Court's Statute.

51. Armenia says: "Whenever a compromissory clause is contained in an international agreement . . . in accordance with Article 36, para. 1, it applies obviously to all the parties concerned in a like manner"[59]. That is plainly correct, but it does not advance Armenia's case. It is necessary to separate the substantive and procedural questions. Reciprocity only goes to the question of whether or not there is mutual consent between the parties to the International Court of Justice's jurisdiction under Article 22.

52. Azerbaijan accepts, of course, that Article 22 applies to all CERD parties in a like manner. But it is sufficient for reciprocity purposes that both States parties could file claims under Article 22

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[57] Preliminary Objections of Armenia, paras. 35-36.

[58] *Ibid.*, paras. 37-39.

[59] *Ibid.*, para. 38, fn. 56.

after 15 September 1996, as indeed both Parties have done. And as for Armenia's curious observation that "if Azerbaijan were right, that would mean that Armenia would be entitled to present counter-claims in this case"[60], let it do so. Why has it not done so already?

53. There does not need to be identity in terms of the critical date for the application of substantive obligations under a treaty in order for there to be reciprocity over the ability to bring claims under the compromissory clause[61]. All multilateral treaties that remain open for accession by other States necessarily contemplate that some States will become bound by substantive obligations earlier than others. That is how multilateral conventions work. As the Court itself has said, "in a Convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties"[62].

Armenia's *ratione temporis* ground is not suitable for preliminary determination

54. For all these reasons, Azerbaijan's position is that the Court can dismiss Armenia's *ratione temporis* objection now. If, however, the Court wishes to hear Azerbaijan's case pleaded out before it decides the question definitively, then the matter will require detailed consideration of the facts and evidence in the case, only some of which Armenia has addressed[63]. In such circumstances, the question would not have an "exclusively preliminary character" and could not be resolved at this preliminary objections stage of the proceedings[64], not least because Azerbaijan's claim is not that each of a host of individual acts and omissions constituted a breach of the CERD but rather that Armenia was engaged in a systematic pattern and practice of discrimination contrary to the CERD, evidenced by the aggregate of its conduct over an extended period of occupation.

55. Armenia accepts that the Court has jurisdiction over post-1996 conduct. There is no suggestion that the whole of Azerbaijan's claims fall outside the Court's temporal jurisdiction, and

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[60] CR 2024/21, p. 30, para. 58 (Martin).

[61] Observations of Azerbaijan, para. 27.

[62] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 611, para. 22, citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[63] Preliminary Objections of Armenia, paras. 41-57.

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 55, para. 110.

only when the evidence is considered can it be finally decided if any individual facts must be disregarded and, if so, what the effect on Azerbaijan's case might be. That is a matter for the hearing on the merits[65].

56. Azerbaijan's respectful submission is therefore that for the reasons that I have set out, Armenia's preliminary objections to the Court's jurisdiction *ratione temporis* fall to be dismissed.

57. Mr President, Members of the Court, this concludes my submissions. I thank you for your attention, and ask that you now call on Professor Stefan Talmon, who will address you on the issue of admissibility.

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

Mr TALMON:

ADMISSIBILITY OF AZERBAIJAN'S CLAIMS RELATING TO EVENTS PRIOR TO 15 SEPTEMBER 1996

I. Introduction

1. Monsieur le président, Madam Vice-President, distinguished Members of the Court, my task today is to respond to Armenia's admissibility objection.

2. Armenia here simply recycles and repackages its objection to the Court's jurisdiction *ratione temporis* under a different heading[66].

3. Let me note at the outset that Armenia's admissibility objection is of limited scope. Armenia does not object to the admissibility of Azerbaijan's Application as a whole, but only to what it calls "Azerbaijan's historical claims"[67]; that is claims based on events before 15 September 1996[68]. Even

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[65] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 58, para. 119; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 465, para. 145; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 43.

[66] See Preliminary Objections of Armenia, paras. 20, 38.

[67] *Ibid.*, heading before para. 58, para. 60.

[68] See *ibid.*, paras. 63, 64.

if this objection were upheld, it would bring the proceedings to an end only with respect to these specific claims[69].

4. However, as Professor Lowe has shown, Azerbaijan's claims cannot be neatly separated into claims pertaining to events before and after 15 September 1996. Many of the claims concern continuing or composite violations of the CERD which began before 15 September 1996 and continued thereafter. Whether there are any self-contained claims prior to 15 September 1996 will invoke an examination of the substance of the claims and thus be a question for the merits.

5. No such examination will be necessary, however, as Armenia's admissibility objection already fails on legal grounds.

6. Armenia puts forward two arguments: *first*, it alleges that Azerbaijan's purported delay in asserting its historical claims was detrimental to Armenia; and, *second*, that these claims supposedly created procedural inequalities between the Parties.

II. Alleged delay in bringing claims being detrimental to Armenia

7. Mr President, let me begin with the allegation that Azerbaijan's purported delay in bringing its claims was detrimental to Armenia.

8. Before addressing this argument, let me note at the outset that Armenia itself brings numerous claims with regard to events between "the late 1990s and 2005"[70]. Armenia first raised these claims in November 2020, but it seems to have no problem with a delay of more than 23 years here, but, as we heard yesterday: "what is sauce for the goose is sauce for the gander"[71].

9. Azerbaijan did not object to the admissibility of these claims because delay is not an issue in the present case.

10. It is correct that the Court recognized in the *Nauru* case that "delay on the part of a claimant State may render an application inadmissible"[72]. But the Court immediately went on to note:

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[69] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120.

[70] Memorial of Armenia, para. 3.124, and paras. 3.122, 3.127. See also *ibid.*, paras. 3.2, 3.6, 3.11, 3.19 n. 237, 3.69, 3.128, 3.149, 3.147, 3.154, 6.83 and Annexes 1, 20.

[71] CR 2024/21, p. 27, para. 45 (Martin).

[72] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 253-254, para. 32. See also *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 37, para. 44.

> "[I]nternational law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[73]

11. Inadmissibility must thus be determined in light of the circumstances. The circumstance seized upon by Armenia is whether the respondent State has been seriously disadvantaged by a delay[74]. As the ILC noted in its commentary to the Articles on State Responsibility:

> "The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued."[75]

12. There is no basis on which Armenia could have developed a reasonable expectation that Azerbaijan would no longer pursue its claims.

13. The mere passing of time does not give rise to such an expectation.

14. Azerbaijan regularly made Armenia aware of its grievances with regard to the subject-matter of CERD. For example, in August 1993, shortly after Armenia acceded to CERD, Azerbaijan accused it of "ethnic cleansing"[76]. Azerbaijan also stated that "full responsibility for the consequences of the said actions is borne by official circles in the Republic of Armenia"[77]. As there were no diplomatic relations between the Parties, these grievances were conveyed in letters to the United Nations. Azerbaijan regularly asked for these letters to be circulated as UN documents. These letters did not go unnoticed, as Armenia responded to some of the accusations in letters of its own[78]. Like in the *Nauru* case, Armenia was thus aware of Azerbaijan's grievances throughout all these years.

15. That Azerbaijan did not expressly refer to the CERD in these letters could not give rise to a reasonable expectation that no claims for the grievances would be pursued. As the Court noted in *Georgia* v. *Russia*, an "express reference to the treaty" is not required to bring the matter under

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[73] *Ibid.*

[74] ARSIWA, Commentary to Article 45, *YILC*, 2001, Vol. II, Part 2, p. 123, para. 11.

[75] *Ibid.*

[76] Letter dated 5 August 1993 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, UN doc. S/26271, 7 August 1993. See also UN docs. S/26583, 14 October 1993; S/1994/155, 11 February 1994; UN doc. S/1994/147, 14 February 1994, S/1994/688, 9 June 1994; S/1994/1339, 25 November 1994; S/1995/413, 24 May 1995; A/C.3/51/9, 30 October 1996; S/1997/662, 25 August 1997.

[77] Letter dated 25 November 1994 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, UN doc. S/1994/1339, 25 November 1994, Annex.

[78] Letter dated 30 August 1993 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, UN doc. S/26386, 31 August 1993.

CERD[79]. What is important is that the grievances raised "relate to the subject-matter of the treaty"[80]. There is no subject-matter more clearly within the CERD than ethnic cleansing.

16. Armenia also claims that a reasonable expectation was created because Azerbaijan allegedly had all the material to bring a claim upon its accession to the Convention in 1996, but did not do so. However, this is incorrect.

17. Azerbaijan only learnt of the full extent of the CERD violations and was only able to gather the necessary evidence for bringing the present claims in November 2020 upon liberating its territory that had been under Armenian occupation since 1994. It must be remembered that neither Azerbaijan nor the United Nations had access to the occupied territory before[81].

18. Armenia is deliberately trying to reduce Azerbaijan's claims to forcible expulsion by claiming that testimonies of the displaced persons could have been secured since the 1990s. Azerbaijan's claims, however, also encompass the deployment of landmines and booby traps in civilian areas, environmental degradation and cultural erasure — to prove these violations, physical access to the formerly occupied territory was essential.

19. It is also wrong to state — as Armenia did — that Azerbaijan's Memorial draws only on documents available for years. As a quick perusal of the Memorial will show, there are numerous references to material that has become available only after the liberation of the territory[82].

20. Mr President, Armenia tries to introduce disadvantage as another, separate circumstance to be considered when determining whether the passage of time renders an application inadmissible. The ILC, however, assumed that the respondent State was disadvantaged only if it could reasonably have expected that the claim would no longer be pursued[83].

21. In any case, there is no disadvantage on the part of Armenia.

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[79] *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. 161.

[80] *Ibid.*

[81] UNESCO, Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two 1954 and 1999 Protocols, Report on the Activities from 1995 to 2004 (2005), p. 7.

[82] See, e.g., Memorial of Azerbaijan, paras. 136, 137, 138, 143, 146, 147, 155, 156, 158-163, 168-169, 173, 204, 220, 223, 275, 276-280, 330, 538, 539.

[83] ARSIWA, Commentary to Article 45, *YILC*, 2001, Vol. II, Part 2, p. 123, para. 11.

22. Armenia's access to witnesses and documentary evidence is a non-issue here. According to the jurisprudence of the Court, it is "the party which alleges a fact in support of its claims to prove the existence of that fact"[84] — in the present case it thus falls to Azerbaijan to "submit the relevant evidence to substantiate its claims"[85].

23. In any case, Armenia, being aware of Azerbaijan's grievances, would have had 26 years of occupation to collect all the relevant evidence for its defence. In addition, it must be recalled that Azerbaijan fully liberated the occupied territory only in September 2023. Armenia thus had two years since the filing of the present claims to gather evidence in the territory still under its control.

III. Alleged procedural inequality between the Parties

24. Mr President, Members of the Court, I can be brief with regard to Armenia's second argument that the historical claims are inadmissible because they would create a procedural inequality between the Parties. It is argued that while Azerbaijan could submit claims under CERD pertaining to facts prior to 15 September 1996, Armenia could not submit counter-claims with regard to these facts.

25. However, this is not a question of admissibility but a consequence of the Court's rules on counter-claims requiring that the counter-claim comes within the jurisdiction of the Court[86]. This is not the first case where the Court finds that its jurisdiction is not limited to "facts subsequent to the date when the Convention became applicable between the parties"[87], thus allowing one of the Parties to bring a claim with regard to these facts.

26. This is also not a question of procedural inequality but a consequence of the operation of the substantive law. A State is bound by a treaty only from the date it has become a party to the treaty. The fact that Armenia had been bound by CERD for some three years longer than Azerbaijan

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[84] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 33.

[85] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 163.

[86] Rules of Court, Article 80 (1).

[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 458, para. 123. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 194, para. 370. See further *ibid.*, Memorial of the Government of the Republic of Bosnia and Herzegovina, 15 April 1994, paras. 2.1.0.1, 2.1.0.5.

has nothing to do with procedural equality or the good administration of justice, but is a consequence of States being free to decide when to become a party to a multilateral treaty.

27. The procedural equality of the Parties under CERD is guaranteed by Armenia and Azerbaijan being able to institute proceedings against each other under Article 22 only from the moment that they are both parties to the Convention.

IV. Submissions

28. Let me conclude: there is no legal basis for finding that Azerbaijan's claims would be inadmissible.

29. *First*, Armenia has not suffered any prejudice in the sense that it could have reasonably expected that the claims would no longer be pursued.

30. *Second*, Armenia is in no way disadvantaged.

31. *Third*, there is no question of procedural inequality between the Parties.

32. For those reasons, Armenia's admissibility objection should thus be dismissed.

33. I thank the Court for its kind attention and, Mr President, it may now be a convenient time for a short break. Otherwise, I may ask you to call on Mr Wordsworth to respond to Armenia's second preliminary objection.

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 11.25 a.m. to 11.40 a.m.

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

Mr WORDSWORTH: Thank you, Sir.

AZERBAIJAN'S RESPONSE TO ARMENIA'S PRELIMINARY OBJECTION CONCERNING "AZERBAIJAN'S CLAIMS AND CONTENTIONS CONCERNING LANDMINES AND BOOBY TRAPS" (LEGAL ISSUES)

1. Mr President, Members of the Court, I will be dealing with Armenia's misconceived objection *ratione materiae* concerning what it calls "Azerbaijan's claims and contentions concerning

landmines and booby traps"[88], and I start by making two responsive points on the applicable legal test.

A. The applicable test with respect to objections *ratione materiae*

2. First, Armenia seeks, inappropriately, to turn Article 1 (1) into a rigid two-step test, pursuant to which the Court should, it is said, ask:

(a) whether there is a distinction, exclusion or preference which is "based on race, colour, descent or national or ethnic origin" and, only "if so", ask

(b) whether that distinction, exclusion or preference has had the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms[89].

3. This interpretation then feeds into a broad-brush and notably simplistic argument, which you heard repeated yesterday, that Azerbaijan's case on landmines and booby traps inevitably fails because these "are indiscriminate weapons that are incapable of making a distinction based on national or ethnic origin"[90]. That makes no sense at all because, of course, all depends on how and for what reason any given weapon is being used and, consistent with this basic observation, it should be obvious that the question of "purpose or effect" may shed light on the question of whether the impugned measure is "based on . . . national or ethnic origin" — or *vice versa*.

4. Unsurprisingly, and notwithstanding Armenia's current contentions, the *Qatar* v. *United Arab Emirates* case does not suggest the contrary[91], while, in its recent Judgment in *Ukraine* v. *Russia*, the Court demonstrated how the stated purpose *or* the effects of a measure may show that it is "based on" a prohibited ground, explaining, as you can see in the last sentence on your screens:

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[88] Preliminary Objections of Armenia, p. 41, heading, and para. 80.

[89] *Ibid.*, para. 72.

[90] *Ibid.*, paras. 84-86; CR 2024/21, pp. 43-44, para. 5 (Salonidis).

[91] Cf. Preliminary Objections of Armenia, paras. 74-76, quoting *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. 107-109, paras. 109, 112.

"racial discrimination may result from a measure which is neutral on its face, but whose effects show that it is 'based on' a prohibited ground"[92].

5. Thus the Court provides an example of how the two elements of Article 1 (1) do interrelate, and there is no assistance to be gained from Armenia's inaccurate suggestion of a rigid two-step approach.

6. Second, it still has to be emphasized that there is no test of plausibility to be applied at the jurisdictional phase. The Court could scarcely have made this more clear in the *Ukraine* v. *Russia* case concerning the International Convention for the Suppression of the Financing of Terrorism (hereinafter the "ICSFT"). At the provisional measures phase, the Court rejected Ukraine's request on the basis that it had not put forward a plausible case on the requisite mental element, that is, knowledge or intent[93]. By contrast, in its subsequent Judgment on preliminary objections, the Court explained that: "At the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted"[94].

7. Russia's objections *ratione materiae* were then rejected without any consideration of plausibility at all, with the Court's basic position being that questions largely of a factual matter were properly for the merits[95].

8. It was therefore a little surprising to see again yesterday, just as in Armenia's written objections, a repeated reliance on the findings on plausibility in the Orders of December 2021 and February 2023 — with just an assertion as to these being "highly relevant", and without any close focus into what the Court was actually saying[96].

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[92] *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.

[93] *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, para. 75.

[94] *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. 584, para. 58.

[95] *Ibid.*, p. 586, para. 63.

[96] Preliminary Objections of Armenia, paras. 82, 87, 97-99; CR 2024/21, p. 44, paras. 6-7 (Salonidis).

9. Looking, then, at paragraph 53 of the December 2021 Order, on which Armenia has placed such great weight, the Court explains[97] — and I will take this in stages:

> "With regard to rights under CERD asserted by Azerbaijan with respect to Armenia's alleged conduct in relation to landmines, the Court recalls that *Azerbaijan claims that this conduct is part of a longstanding campaign of ethnic cleansing*. The Court recognizes that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD and that such a policy can be effected through a variety of military means."[98]

10. And pausing there, that is a correct reflection of how Azerbaijan puts its case, and it is a statement useful to the Court at this jurisdictional phase as to how such a case can implicate rights under CERD. In other words, the case relevant to landmines — as correctly identified by the Court — concerns a long-standing campaign of ethnic cleansing effected through a variety of military means, that is indeed capable of having an adverse effect on the enjoyment of certain rights protected under the CERD. It was puzzling that, yesterday, Mr Salonidis should spend so much time seeking to persuade you that Azerbaijan, by contrast, has a wholly free-standing claim of breach of CERD in relation to landmines and booby traps, without taking you to either how the claim is put in Azerbaijan's Memorial or how the Court itself has understood the claim. I will return to that point in a moment.

11. The Court's Order then continues: "However, the Court does not consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines."

12. This is concerned with the plausibility of obligations of Armenia with respect to the specific interim remedies that were being sought by Azerbaijan at paragraphs *(a)* and *(b)* of its Request for provisional measures[99]. The current issue, by contrast, is whether an act or subset of acts — here, planting landmines and booby traps — is capable of forming part of a broader systematic practice — ethnic cleansing — in *breach* of a given treaty. The Court is no longer concerned with remedies, the availability of which is not decisive of whether CERD may be engaged.

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[97] Preliminary Objections of Armenia, para. 97; CR 2024/21, p. 44, para. 6 (Salonidis).

[98] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 425, para. 53 (emphasis added).

[99] *Ibid.*, p. 408, para. 5.

13. Turning to the final sentence in this passage:

> "Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin."

14. This is concerned with plausibility by reference to the evidence then before the Court. But now the Court is assessing jurisdiction, not considering plausibility and specific interim remedies, and by reference to the facts as they have developed. On its past jurisprudence, it would plainly be inappropriate to determine in the course of preliminary objections that a State cannot assert rights that are capable of falling within a given treaty. And this is all the more so when the Court has already indicated that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD, and that such a policy can be effected through a variety of military means, which must in principle include the laying of landmines and booby traps[100].

B. The nature of Azerbaijan's case

15. This takes me to the question of what Azerbaijan is in fact claiming — a claim that has been correctly understood by the Court as concerning a long-standing campaign of ethnic cleansing, with the conduct of laying mines and booby traps being the means of achieving ethnic cleansing, rather than breaches of the CERD per se[101].

16. As the Court will recall, the relevant claim of Azerbaijan is as stated at paragraph 591 (1) *(a)* of its Memorial, in its submissions:

> "Armenia, through its State organs, State agents and [so on], is responsible for *violations of Articles 2, 3, 4, 5, 6, and 7 of CERD by the following actions*:
>
> *(a)* The ethnic cleansing and cultural erasure of Azerbaijanis from the then-occupied territories, and establishment of an ethnically pure Armenian settlement in those territories, including by [and then you see the relevant sub-provision dealing with the conduct]:
>
> . . . . . .

[100] See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 22 February 2023*, paras. 22-23.

[101] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 425, para. 53.

(iv) barring of Azerbaijanis from access to the then-occupied territories and from Armenia, including frustration of the right of internally displaced Azerbaijanis and Azerbaijani refugees to return home".

17. There are then four other instances in which Azerbaijan alleges that there has been a separate breach of Articles 2-7 CERD, as listed out at subparagraphs 591 (1) *(b)-(e)*, concerning the promotion of hatred and the like, none of which are subject to *ratione materiae* objections by Armenia.

18. There are three points to draw out.

19. First, the relevant claim at paragraph 591 (1) *(a)* is one of breach through ethnic cleansing and cultural erasure. There is no separate plea for breach with respect to the laying of landmines and booby traps. This is merely part of the conduct on which Azerbaijan relies to demonstrate ethnic cleansing and cultural erasure, and it is not even conduct that is expressly mentioned within the submissions. It merely falls within the broader conduct of barring access to the formerly occupied territories at subparagraph (iv).

20. Armenia spent a good deal of time yesterday trying to persuade you of the contrary, suggesting for example that because Azerbaijan had used the term "landmine" 73 times in its Memorial that there must be a discrete claim in relation to landmines, and taking you to isolated passages from pleadings and oral submissions to the same end[102]. We refer to how the claim is in fact put in the formal submissions, and ask you, in so far as considered necessary or helpful, to refer to passages from past oral submissions that you were *not* taken to yesterday[103], but which *are* reflected in how the Court itself understood Azerbaijan's case in its prior Orders. And, another useful reference to that effect is paragraph 21 of the December 2021 Order, where the Court summarized as follows:

> "Azerbaijan specifically alleges that, following the end of the 2020 Conflict, Armenia 'actively continues to prevent' the return of displaced ethnic Azerbaijanis to the areas formerly under Armenian control by refusing to share information about the minefields in the area where their former homes were located so as to allow for mine clearance operations, and by 'continu[ing] to plant *new* mines on Azerbaijan's territory' (emphasis in the original). Azerbaijan considers that the Applicant's conduct in this regard is 'a continuation of Armenia's decades-long ethnic cleansing campaign' against persons of Azerbaijani national or ethnic origin."[104]

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[102] CR 2024/21, p. 45, paras. 10-11 (Salonidis).

[103] See Armenia's judges' folder, tab CS4 (Salonidis), referring to CR 2021/24, p. 30, paras. 2, 4 (Amirfar), but not paras. 16 and 22; also judges' folder, tab CS7 (Salonidis), referring to CR 2023/3 p. 27, para. 2 (Amirfar), but e.g. not paras. 9-14, or to Lowe at paras. 12-13, or to Reid at e.g. paras. 2 and 10, 19, 27-28.

[104] See also para. 44.

21. So whereas Armenia may wish to identify and seek to object to what it calls the "claims and contentions concerning landmines and booby traps", this cannot be a valid jurisdictional objection. There is no jurisdictional objection *ratione materiae* to Azerbaijan's actual claim of ethnic cleansing. If the Court has — as is accepted — jurisdiction over that claim, it has jurisdiction *ratione materiae*, full stop.

22. Second, if Azerbaijan were considered as having individual claims for breach with respect to each of the individual lines of conduct listed at paragraph 591 (1) *(a)* (i)-(v) of its Memorial, it would make no difference. There is no jurisdictional objection with respect to the relevant conduct, that is subparagraph (iv) on the "barring of Azerbaijanis from access to the then-occupied territories . . . including frustration of the right . . . to return". The differing means by which the barring is said to have been achieved can only be a matter for assessment at the merits[105]. However, it appears obvious that the barring of access, that is, steps taken to ensure that territory ethnically cleansed of Azerbaijanis remains ethnically cleansed, can be achieved through the laying of mines and booby traps.

23. Third, it is not open to a respondent to accept the Court's jurisdiction over a claim but then to assert the existence of certain subdivisions of the claim with a view to seeking to persuade the Court that individual aspects of conduct relied upon could not amount to a breach of CERD.

(a) It is for the claimant State to formulate its claim as it chooses. If jurisdiction is not challenged in relation to the claim, but part of the conduct relied on is not considered by the respondent to be in breach or even capable of amounting to a breach, that is a matter for the merits. There is no provision in the Court's Statute or Rules that allows for what is, in effect, the attempted striking out at the jurisdictional phase of one of many lines of allegation and evidence that a claimant submits in order to demonstrate the existence of a given breach. Indeed it would be extraordinary if it were otherwise, as the Court cannot be in a position to evaluate one element of conduct relied upon without seeing the entirety of the evidence relied upon with respect to the specific allegation of breach[106].

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[105] Memorial of Azerbaijan, Chapter III, section C *(c)*.

[106] Cf. CR 2024/21, pp. 47-48, paras. 20-21 (Salonidis).

(b) Reliance was placed yesterday on the Court's undoubted authority to determine the nature of the dispute before it in order to assess whether there is indeed a dispute as to interpretation or application of a given treaty[107]. But that is of no relevance in the current context. A dispute as to whether there has been ethnic cleansing, or even as to whether there has been a barring of access and frustration of the ability to return, is plainly within CERD, and this is not even contested. There is nothing in the Court's jurisprudence to say that it must, or even could, go further and see whether, objectively, the actual claim could be dissected and substituted by a series of narrower claims, one of which could be said to be outside jurisdiction. The reference yesterday to *Equatorial Guinea* v. *France* was notably unhelpful as, there, the Court was merely identifying that it did not have jurisdiction over one aspect of the dispute, that is the claim in so far as it concerned rules of customary international law: such rules were not incorporated by the specific treaty provision relied on by the claimant, namely Article 4 of the Palermo Convention. That is simply a matter of treaty interpretation, not the slicing up of a claim, as it was put by the claimant, into a series of subclaims made up of discrete allegations of fact.

C. Armenia's objection

24. I turn now to say a few words on the more fact-based contentions made by Armenia.

25. Armenia contends that, even accepting Azerbaijan's factual allegations as true, Armenia's alleged use of landmines and booby traps would not constitute a distinction within Article 1 (1) that is based on national or ethnic origin[108]. It makes just two points:

(a) First, Armenia says that landmines and booby traps are "indiscriminate by nature" and are "incapable of making a distinction based on national or ethnic origin"[109]. This appears facile and is, moreover, inconsistent with what Armenia is saying in its Observations on Azerbaijan's objections[110]. Like any weapon, landmines and booby traps are generally used in a targeted way and can thus be used to target specific groups of civilians based on national or ethnic origin[111].

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[107] *Ibid.*, pp. 46-47, paras. 16-18 (Salonidis).

[108] Preliminary Objections of Armenia, para. 83.

[109] *Ibid.*, paras. 84-86; CR 2024/21, pp. 43-44, para. 5 (Salonidis).

[110] See Written Observations of Armenia, para. 56.

[111] Memorial of Azerbaijan, para. 451.

As such, it should be indisputable that landmines and booby traps can be deployed to pursue a programme of ethnic cleansing.

(b) Second, and related to this, Armenia asserts that "any placing of landmines was done exclusively for defensive military purposes and only along the line of contact between military forces"[112]. Well, that is Armenia's case. Azerbaijan challenges this and for good reason, as we will come back to. For now, however, the point is that, unsurprisingly, it is *not* the practice of the Court to approach jurisdictional objections on the basis that the assertions of fact by the *respondent* State are true.

26. Mr Aughey will shortly take you to what the documents show so far as concerns landmines, that is, they provide a more than sufficient evidentiary basis for Azerbaijan's contention that: "[t]he landmines Armenia planted were a critical element . . . of its campaign to create and maintain an ethnically pure Armenian settlement on Azerbaijan's territory by barring the return of displaced Azerbaijanis"[113].

27. Once such factual allegations by the claimant are assumed as true on the face of the relevant documents, and it is to be recalled that Armenia last week advocated for a measurably weaker test than that[114], the allegations with respect to landmines — forming, as they do, part of a much wider case of ethnic cleansing — must inevitably be capable of falling within CERD.

28. The same applies to the allegations with respect to booby traps, which Azerbaijan explains, by reference to specific evidence, were placed, *inter alia*, by Armenian forces in houses and villages to which Azerbaijanis would be returning[115]. Armenia's contrary case that booby traps were planted only by civilians can only be resolved at the merits phase.

29. In addition, just as in the ICSFT case between Ukraine and Russia, the question of whether alleged acts fall within the scope of the treaty is closely tied-up with the mental element of the perpetrator, in this case the basis and purpose of the alleged acts. As the Court explained in *Ukraine* v. *Russia*, such fact- and evidence-heavy matters are not suitable for consideration at a jurisdictional

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[112] Preliminary Objections of Armenia, paras. 85 and 87; CR 2024/21, p. 44, para. 5 (Salonidis).

[113] Memorial of Azerbaijan, para. 273.

[114] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, CR 2024/18, p. 36, para. 10, and p. 43, para. 30 (Murphy); CR 2024/16, p. 48, para. 21 (Macdonald). See also CR 2024/19, p. 20, para. 14 and p. 24, para. 25 (Wordsworth).

[115] Memorial of Azerbaijan, para. 281.

phase[116], and all the more so given that it is Armenia that knows precisely when and where and why it planted landmines, or whether Azerbaijan is right to say that Armenian forces planted booby traps. These are all matters for the merits.

30. I conclude by dealing with three further points made by Armenia.

31. First, it contends that, even accepting Azerbaijan's factual allegations as true, Armenia's alleged use of landmines and booby traps did not have the requisite discriminatory purpose or effect[117]. This makes no sense. Azerbaijan's case, to recall, is that: "The landmines Armenia planted were a critical element . . . of its campaign to create and maintain an ethnically pure Armenian settlement on Azerbaijan's territory by barring the return of displaced Azerbaijanis"[118.] That is a factual allegation supported by evidence. If the allegation is accepted as true, then the existence of the requisite discriminatory purpose or effect is manifest so far as concerns jurisdiction, and all the more so in circumstances where there is no challenge to jurisdiction over the relevant CERD claim, which is of the attempted creation and maintenance of an ethnically pure Armenian settlement on Azerbaijani territory.

32. Second, Armenia says that: "To the extent that the placement of landmines and booby traps could be said to specifically affect a particular group, that group could only be Azerbaijani nationals who are members of the Armed Forces"[119]. Yet that is mere assertion, and a self-serving one, as all depends on the disputed issues of where and why landmines and booby traps were planted. And the assertion is inconsistent with the evidence, such as the location of booby traps in civilian houses[120].

33. Third, it was also said by Armenia yesterday that there could be no jurisdiction with respect to landmines or booby traps so far as concerns the Court's 7 December 2021 Order on provisional measures, which requires the Parties to "refrain from any action which might aggravate or extend the dispute"[121]. Armenia accepts the binding nature of the Order and the corresponding jurisdiction of

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[116] *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. 584, paras. 57-58.

[117] Preliminary Objections of Armenia, para. 93.

[118] Memorial of Azerbaijan, para. 273.

[119] Preliminary Objections of Armenia, para. 96.

[120] Memorial of Azerbaijan, para. 281.

[121] CR 2024/21, p. 48, para. 22 (Salonidis), referring to Written Observations of Azerbaijan, para. 92.

the Court. However, it says that Azerbaijan cannot assert a claim for non-aggravation by virtue of conduct that did not justify the indication of the substantive provisional measures requested, and it also says that there is anyway no evidence at all to support a case on breach[122].

34. Neither point can be made good. Suppose that Azerbaijan is able to show on the merits that, despite the Court's Order of December 2021, certain booby traps were later set by Armenian military personnel in civilian areas, or that Armenia's continuing refusal to provide reliable maps of its minefields and booby traps has led to further deaths or injury to civilians? Aggravation and extension of the dispute would appear clear. As to the facts, including as to the purpose and effect of Armenia's landmines and booby traps, and developments since the Orders on provisional measures, with your leave, I will now hand over to Mr Aughey.

35. Mr President, Members of the Court, that concludes my remarks, and I thank you for your attention.

The PRESIDENT: I thank Mr Wordsworth for his statement. I now invite Mr Sean Aughey to take the floor. You have the floor, Sir.

Mr AUGHEY:

AZERBAIJAN'S RESPONSE TO ARMENIA'S PRELIMINARY OBJECTION CONCERNING "AZERBAIJAN'S CLAIMS AND CONTENTIONS CONCERNING LANDMINES AND BOOBY TRAPS" (FACTUAL POINTS)

1. Mr President, Members of the Court, I will address Azerbaijan's evidence concerning landmines and booby traps. Yesterday, Mr Salonidis said nothing about this evidence, instead merely repeating Armenia's assertion that the "placement of such weapons, to the extent that it was done by Armenia, was done exclusively for defensive purposes"[123].

2. According to Azerbaijan's evidence, as the Armenian forces withdrew from the territories liberated in November 2020, landmines were placed in locations such as agricultural fields, graveyards and gardens in order to inflict as much human loss as possible on the returning

[122] CR 2024/21, pp. 48-49, paras. 23-26 (Salonidis).

[123] CR 2024/21, p. 44, para. 5 (Salonidis).

Azerbaijani population[124]. It is also Azerbaijan's case that Armenia deliberately planted landmines and booby traps in Azerbaijani civilian areas, including after it had agreed to return those areas to Azerbaijan under the 2020 Trilateral Statement[125].

3. In December 2020, the United Nations undertook an inter-agency mine action assessment and concluded that there were "indications that some houses might have been booby trapped (IED) as the Armenians withdrew"[126]. We have a copy of that report, which is not in the public domain, and we hope that Armenia will agree that it may be put before the Court.

4. In June 2021, the head of Azerbaijan's Mine Action Agency (known as "ANAMA"), a very well-respected Azerbaijani agency that has been operating for almost thirty years with the support of the United Nations Development Programme, reported — and you can see this on the screen: "Most of the mines found outside of the former line of contact have been buried in fields utilised in the past 3-5 years for agricultural purposes"[127]. And ANAMA concluded that Armenia's forces "deliberately mined" these areas "during the forced withdrawal"[128].

5. More recently, after almost three years of further de-mining activities, on 12 February 2024, ANAMA stated:

> "When we look at the statistics of mine actuation incidents, we can see that areas are *heavily contaminated* with mines, *not only along the former line of contact, but also in residential areas, crop fields*, river banks, forests and *cemeteries. 247 of 345 victims*

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[124] Memorial of Azerbaijan, para. 223, referring to Independent Permanent Human Rights Commission (IPHRC) of the Organisation of Islamic Cooperation (OIC), Report of the OIC-IPHRC Fact Finding Visit to the Territories Previously Occupied by Armenia to Assess Human Rights & Humanitarian Situation, 22-26 September 2021 (14 November 2021) https://oic-iphrc.org/home/post/35, paras. 24-25.

[125] Memorial of Azerbaijan, paras. 273, 277-278; Mine Action Agency of the Republic of Azerbaijan, "Assistance Required for the Republic of Azerbaijan in the Humanitarian Mine Action for Safe Reconstruction and Return of IDPs to the Conflict Affected Territories of Azerbaijan" (2021), p. 2 (Annex 32 to Azerbaijan's Request for provisional measures, 23 September 2021); Letter from Vugar Suleymanov, Chairman of the Board of the Mine Action Agency of the Republic of Azerbaijan, to Fuad Alasgarov, Head of the Department of Work with Law Enforcement Bodies of the Presidential Administration of the Republic of Azerbaijan, 11 June 2021, No. 414/M, p. 5 (certified translation) (Annex 36 to Azerbaijan's Request for provisional measures, 23 September 2021).

[126] See Letter dated 8 February 2023 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, p. 3, https://un.mfa.gov.az/files/shares/Letters/77session/Letter%20to%20UNSG%20in%20reply%20to%20Armenia's%20letter%20on%20mines%20A-77-726%20Eng.pdf.

[127] Letter from Vugar Suleymanov, Chairman of the Board of the Mine Action Agency of the Republic of Azerbaijan, to Fuad Alasgarov, Head of the Department for Work with Law Enforcement Bodies of the Presidential Administration of the Republic of Azerbaijan, dated 11 June 2021, No. 414/M (Certified Translation) (with enclosure), p. 4 (Annex 36 to Azerbaijan's Request for Provisional Measures dated 23 September 2021).

[128] *Ibid.*

of mine incidents after the Second Garabagh War were killed or received various bodily injuries in the *areas away from the former line of contact*."[129]

6. There are various photos in your judges' folders at tab 7 to illustrate how, by way of example, landmines have been placed in a desecrated cemetery so as to explode when attempts are made to restore toppled gravestones. Is it really being said that this can only have been done for defensive purposes?

7. Even by reference to the still incomplete picture that the Court now has, there is important evidence of the planting of landmines "to create and maintain an ethnically pure Armenian settlement on Azerbaijan's territory by barring the return of [ethnic] Azerbaijanis"[130]. In this respect, on the screen you can see from an updated map of minefields found by ANAMA and locations where mines have exploded that these are not confined to the line of contact, which is marked by the brown diagonal lines running along the top and then down the east side, as is alleged by Armenia in its Memorial.

8. A little more orientation is needed on this map:

(a) The location of minefields found by ANAMA based on records provided by Armenia are indicated by solid red circles.

(b) Additional minefields found by ANAMA are marked in purple and by the symbol "MF".

(c) Starting at the bottom of the map, the districts of Gubaldy, Zangilan and Jabrayil were liberated during the Second Garabagh War. ANAMA has found numerous minefields in these areas — all far from the former line of contact and in civilian areas where internally displaced Azerbaijanis once lived and were expected to return — and Azerbaijan contends that those mines were laid by Armenia's forces as they withdrew from those territories.

(d) Pursuant to the Trilateral Statement, Armenia's forces also withdrew from the districts of Kalbajar, Lachin and Aghdam in late 2020. Again, Azerbaijan contends that Armenia's forces laid landmines in civilian areas as they withdrew. You can see that ANAMA has found minefields in the west of Kalbajar and Lachin districts, away from the line of contact.

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[129] ANAMA, Facebook post, 12 February 2024, https://www.facebook.com/anama.gov.az/posts/pfbid031dtV5xrEALDiJZzexSnWM39jJz73Saim3LU3fgHLNYzk2337okMK3MGvLPw7QsN5l, certified translation (emphasis added) (judges' folders, tab 10).

[130] Memorial of Azerbaijan, para. 273.

(e) Armenia had access to the city of Lachin and the villages of Sus and Zabukh until August 2022 when, pursuant to the Trilateral Statement, those settlements were returned to Azerbaijan. Azerbaijan's Memorial contends that Armenian forces laid landmines and booby traps as they withdrew, that is, after the Court's Order of December 2021[131]. Notably, Mr Salonidis ignored this when he baldly asserted "Azerbaijan literally provided no evidence — not a single citation or source" to support an allegation that landmines and booby traps were placed since 7 December 2021[132].

9. In this respect, you can see on your screens now two booby traps that were found in October 2022 in houses and other civilian buildings in the villages of Sus and Zabukh, one set to blow up when a threshold is crossed, the other when a door is opened. Internally displaced Azerbaijani families once lived and worked in these buildings, and they were expected to return. As regards the second image, please note that nails have been packed around the explosive so as to inflict as much physical injury as possible[133]. The Court has seen these images before but it is also important to understand the context in which these explosives were set. As recorded in a formal inspection in November 2022: "23 out of 33 private residential houses, 122 ancillary buildings, libraries, elementary schools and store buildings in Sus village are fully and deliberately destroyed, plundered"[134].

10. In a further recent example — published on 19 April, as one of ANAMA's regular updates on its de-mining activities — it stated that "a significant amount of explosive material has been discovered in [a] farm-type building associated with [a] residential building". ANAMA explained:

> "improvised explosive devices, explosive materials, both electric and non-electric detonators, numerous explosive charges prepared for powerful explosions, as well as improved explosive devices installed using D1 hand grenades manufactured in Armenia, were discovered on the site"[135].

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[131] *Ibid.*, paras. 278, 280-281.

[132] CR 2024/21, p. 49, para. 26 (Salonidis).

[133] Memorial of Azerbaijan, para. 281, fn. 662.

[134] Letter from Elchin Mammadov, First Deputy Prosecutor General of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, 19 Jan. 2023, No. 03/222006229, with enclosures (certified translation), p. 188 (Annex 24 to Azerbaijan's Request for provisional measures, 4 January 2023). See also p. 142 regarding Zabukh village.

[135] Mine Action Agency of the Republic of Azerbaijan, "Explosive materials have been discovered in Khojavand region", 19 April 2024, https://anama.gov.az/news/217.

And you can see that equipment on the screen.

11. It is important also for the Court to have firmly in mind Armenia's refusal to hand over maps of where mines and booby traps have been set, even following the cessation of hostilities. If the explosives really were just for defensive purposes, as Armenia contends[136], what possible justification could there be for Armenia not to hand over comprehensive and accurate information as to their placement after November 2020?

12. To give something of an insight to this, on 6 April 2021, the Armenian Ministry of Foreign Affairs called Azerbaijan's request for landmine maps a "fake agenda"[137]. That was plainly wrong, and the international community — including the Parliamentary Assembly of the Council of Europe[138], the European Parliament[139] and the OSCE Minsk Group Co-Chairs[140] — continues to call on Armenia to release all maps.

13. Armenia eventually shared a limited number of maps of around 97,000 landmines planted along certain sections of the former line of contact in the Aghdam region[141]. It did this only in June 2021 and only in exchange for the return of 15 detainees. At the time Azerbaijan said, and this may be thought to have been stating the obvious[142], "[o]btaining mine maps will save the lives and

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[136] Memorial of Azerbaijan, para. 275. Cf. Preliminary Objections of Armenia, paras. 85-86, 89, 91, 94-95; CR 2024/21, p. 44, para. 5 (Salonidis).

[137] Ministry of Foreign Affairs of the Republic of Armenia, "The answer of the MFA Spokesperson Anna Naghdalyan to the questions of the journalists regarding the Azerbaijani allegations on minefield maps", 6 April 2021, https://www.mfa.am/en/interviews-articles-and-comments/2021/04/06/spox_journalists_answer/10885.

[138] Parliamentary Assembly of the Council of Europe, Humanitarian consequences of the conflict between Armenia and Azerbaijan / Nagorno-Karabakh conflict, resolution 2391 (2021), https://pace.coe.int/en/files/29483/html.

[139] European Parliament, Prisoners of war in the aftermath of the most recent conflict between Armenia and Azerbaijan, doc. P9_TA(2021)0251 (20 May 2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0251_EN.html; European Parliament, Joint statement by the Chair of the Delegation for relations with the South Caucasus, MEP Marina Kaljurand, the European Parliament's Standing Rapporteur on Armenia, MEP Andrey Kovatchev, and the European Parliament's Standing Rapporteur on Azerbaijan, MEP Zeljana Zovko, Delegation for relations with the South Caucasus, doc. 2019-2024 (8 June 2021), https://www.europarl.europa.eu/cmsdata/235661/20210608_Joint%20Statement_Kaljurand-Kovatchev-Zovko_AM-AZ_landmines.pdf.

[140] OSCE Minsk Group, "Statement by the Co-Chairs of the OSCE Minsk Group", 13 April 2021, https://www.osce.org/minsk-group/483416; OSCE Minsk Group, "Statement by the Co-Chairs of the OSCE Minsk Group", 5 May 2021, https://www.osce.org/minsk-group/485558. See also "Armenia obliged to hand over minefield maps to Azerbaijan under int'l humanitarian law: Matthew Bryza", News.az (4 June 2021), https://www.news.az/news/armenia-obliged-to-handover-minefield-maps-to-azerbaijan-under-intlhumanitarian-law-matthew-bryza.

[141] Ministry of Foreign Affairs of the Republic of Azerbaijan, press release No. 217/21, Information of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan (12 June 2021), https://mfa.gov.az/en/news/no21721-information-of-the-press-service-department-of-the-ministry-of-foreign-affairs-of-the-republic-of-azerbaijan.

[142] *Ibid.*

health of tens of thousands of our citizens, including mining workers, and accelerate reconstruction projects . . . and the return of [internally displaced persons]".

14. Nonetheless, Armenia's Prime Minister's position was as follows[143]: "maps of mined areas have been provided to Azerbaijan. However, they want to give the impression that we have given everything we have. However, this is not the case; instead, a tiny part is provided."

15. As the casualties continued to mount, including among Azerbaijani civilians who have returned, Azerbaijan called on Armenia, repeatedly, to provide all maps in its possession of where it set explosives. An updated list of such statements is included in your judges' folders at tab 8.

16. Between July and December 2021, Armenia provided minefield records for a total of over 1,000 minefields containing around 390,000 mines its forces had placed along certain additional sections of the former line of contact, as well as records for just eight minefields laid in Zangilan, Gubaldy and Jabrayil districts, all far from the contact line.

17. Also in November 2021, following a fact-finding visit to the liberated territories, the Independent Permanent Human Rights Commission of the Organisation of Islamic Cooperation reported that there is "sufficient evidence to conclude that purposeful measures were undertaken by the Armenian side" to impede the return of "hundreds of thousands of [internally displaced persons] desperately waiting to return to their homes in safety and dignity", including "massive contamination of the liberated territories with mines" and "massive militarization of the occupied territories by laying multilayer military obstacles"[144].

18. As to the utility of the limited maps that were provided by Armenia in 2021, Azerbaijan subsequently explained in a letter to the United Nations Secretary-General dated 24 August 2022[145]:

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[143] Extract from Speech by Nikol Pashinyan, posted on YouTube channel of NEWS AM (13 June 2021), https://www.youtube.com/watch?v=7lbPymz14zQ (certified translation) (Annex 33 to Azerbaijan's Application and Request for provisional measures, 21 September 2021). See also Tass, "Yerevan transfers only a fraction of minefield maps to Baku, says Pashinyan", 13 June 2021, https://tass.com/world/1302267.

[144] Memorial of Azerbaijan, para. 220, referring to Independent Permanent Human Rights Commission (IPHRC) of the Organisation of Islamic Cooperation (OIC), Report of the OIC-IPHRC Fact-Finding Visit to the Territories Previously Occupied by Armenia to Assess Human Rights & Humanitarian Situation, 22-26 September 2021 (14 November 2021) https://oic-iphrc.org/home/post/35, paras. 41-43.

[145] Letter dated 24 August 2022 from the Chargé d'affaires a.i. of the Permanent Mission of Azerbaijan to the United Nations addressed to the Secretary-General, https://journal.un.org/en/new-york/documents/2022-09-13. See also ANAMA press release No. 493/22, Press release on ongoing threats as a result of planting of landmines in the territories of Azerbaijan by Armenia, 25 October 2022, https://mfa.gov.az/en/news/no49322; ANAMA press release No. 031/24, Commentary on the statement of the Armenian side on the intention to hand over set of landmine maps to Azerbaijan, 25 January 2024, https://mfa.gov.az/en/news/no03124.

> "[O]nce examined by field specialists, it turned out that the mine formularies were incomplete, covering only part of the liberated territories, and a significant part of them were unreliable, while others contained no information pertinent to demining. The practical utility of the records of the minefield maps handed over by Armenia is around 25 per cent".

19. In October 2022, ANAMA reiterated that "about 55% of recent landmine explosions occurred in the territories outside the areas where maps were provided by Armenia"[146]. This can also be seen from the map on the screen.

20. In October 2021, Armenia's Agent told this Court: "we stand ready to provide any more maps in our possession regarding minefields located behind the lines currently held by Azerbaijani armed forces, which now present solely humanitarian concerns"[147].

21. And, despite its statements[148] — including its statement to this Court on 31 January 2023[149] — that all maps in its possession have been handed over, maps for 13 minefields in Shusha and Lachin districts were subsequently provided in October 2023. Further, on 25 January 2024, Armenia announced that it was providing to Azerbaijan an additional eight sets of records on the location of landmines. This statement is in your judges' folder at tab 9 and also on the screen[150]:

> "*Recently, after* several publications by the Azerbaijani media about injuries received by citizens of the Azerbaijan Republic from a mine explosion, and in continuation of *the agreement reached as a result of negotiations* . . ., the [Republic of Armenia] National Security Service *resumed survey work among former NK military personnel, as a result of which 8 new records appeared*."

22. This of course begs the question why there had ever been any halt in gathering information from "former NK military personnel", especially since Armenia has had to recognize that this is purely a "humanitarian" issue[151]. And please do recall that landmines within the formerly occupied territories have caused 65 deaths and 287 injuries since November 2020, of which 50 deaths and

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[146] ANAMA press release No. 493/22, Press release on ongoing threats as a result of planting of landmines in the territories of Azerbaijan by Armenia, 25 October 2022, https://mfa.gov.az/en/news/no49322.

[147] CR 2021/25, p. 13, para. 9 (Kirakosyan).

[148] See e.g. Prime Minister of the Republic of Armenia, "If anyone thinks that the peace agenda is the 'peaceful annihilation' of the Republic of Armenia or Armenians of Nagorno-Karabakh, they are seriously mistaken", Prime Minister's speech at the Cabinet meeting, 10 November 2022, https://www.primeminister.am/en/statements-and-messages/item/2022/11/10/Cabinet-meeting-Speech/.

[149] CR 2023/4, p. 31, para. 66 (Murphy).

[150] National Security Service, Republic of Armenia, 25 January 2024, https://www.sns.am/en/news/view/920 (emphasis added).

[151] See e.g. CR 2021/25, p. 13, para. 9 (Kirakosyan).

123 casualties were civilians. And this includes the deaths of 14 civilians and the maiming of 33 more since the Court's Order of 22 February 2023.

23. Further, as ANAMA explained in a statement of 12 February 2024, which is in the judges' folder at tab 10, these eight reports "mainly consist of notes on the mine-planted areas covering the [former contact line in] Kalbajar region" and, as regards this limited area:

> "as it was before, the information in the recently submitted contours has been reflected *inaccurately, unreliabl[y] and incompletely*. The analysis and processing of the contours defined that the information contained in the documents is *not consistent with the real minefields*, the reference *coordinates are incorrect and useless*."

24. ANAMA also stated:

> "In general, the contours submitted by the Armenian side cover part of the area along the former line of contact. Information about the part of the former line of contact passing through the territories of Khojavend, Tartar and Goranboy districts, as well as the areas mined by the Armenian military units during the time they retreated in November 2020, has not yet been provided."

25. I conclude. Azerbaijan has put forward more than sufficient evidence which, on its face, shows that Armenia's forces placed landmines and booby traps in civilian areas, far from the former line of contact, setting these lethal devices in places from which Azerbaijanis had been displaced and to which they were expected to return. This can have had no defensive purpose. And likewise, Armenia's continued refusal to share complete and accurate information on the location of the minefields and booby traps, long after the cession of hostilities, can have had no defensive purpose. This is why, as Mr Wordsworth has explained, Armenia's conduct is put forward as an element of Azerbaijan's claim for ethnic cleansing.

26. Mr President, Members of the Court, I thank you for your attention and may I ask that you call on Professor Boisson de Chazournes.

The PRESIDENT : I thank Mr Aughey for his statement. Je donne maintenant la parole à M^me^ la professeure Laurence Boisson de Chazournes. Madame, vous avez la parole.

M^me^ BOISSON DE CHAZOURNES :

LA COUR A COMPÉTENCE *RATIONE MATERIAE* SUR LES DEMANDES DE L'AZERBAÏDJAN CONCERNANT LA DESTRUCTION ET LA DÉGRADATION DIFFÉRENTIELLES DE L'ENVIRONNEMENT NATUREL DANS LES ZONES OÙ LES AZERBAÏDJANAIS RÉSIDAIENT AVANT LE NETTOYAGE ETHNIQUE ET L'OCCUPATION PAR L'ARMÉNIE

I. Introduction

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi de me présenter à nouveau devant vous au nom de la République d'Azerbaïdjan.

2. Je traiterai de la deuxième objection préliminaire de l'Arménie à la compétence *ratione materiae* de la Cour sur les demandes de l'Azerbaïdjan concernant les actes et les omissions discriminatoires de l'Arménie ayant causé la destruction et la dégradation de l'environnement à l'encontre des Azerbaïdjanais.

3. À ce stade, la Cour n'est pas tenue de déterminer si les actes illicites de l'Arménie violent les dispositions de fond de la CIEDR[152]. Votre juridiction doit seulement vérifier « si les actions ou les omissions dont le demandeur fait grief au défendeur entrent dans le champ d'application d[e la CIEDR] »[153].

4. Votre juridiction a également récemment précisé dans son arrêt *Ukraine c. Russie* que

> « [l]a "discrimination raciale" au sens du paragraphe 1 de l'article premier de la CIEDR comporte donc deux éléments. En premier lieu, une "distinction, exclusion, restriction ou préférence" doit être "fondée sur" l'un des motifs prohibés, à savoir "la race, la couleur, l'ascendance ou l'origine nationale ou ethnique". En second lieu, une telle différence de traitement doit avoir "pour but ou pour effet de détruire ou de compromettre la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme". »[154]

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[152] *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. 595, par. 94.

[153] *Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie ; 32 États intervenants), exceptions préliminaires, arrêt du 2 février 2024*, par. 136.

[154] *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. 195.

5. C'est à la lumière de ce test juridique que tant l'établissement de la compétence de la Cour que la définition de la discrimination raciale à l'article premier, paragraphe 1, de la CIEDR doivent être compris, et non autrement ainsi qu'a voulu le prétendre l'Arménie[155].

6. En guise d'introduction, permettez-moi également de préciser que les revendications de l'Azerbaïdjan portent sur des actes de destruction et de dégradation de l'environnement constitutifs de racisme environnemental[156].

7. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, prenant en compte ce qui vient d'être dit, je vais présenter les raisons pour lesquelles la Cour est compétente *ratione materiae* au titre de la CIEDR à l'égard du comportement illicite de l'Arménie en matière de destruction de l'environnement. Mon propos s'articulera autour de deux points :

a) Tout d'abord, la destruction discriminatoire de l'environnement par l'Arménie a été fondée sur l'origine ethnique ou nationale ; et

b) deuxièmement, la destruction discriminatoire de l'environnement par l'Arménie a porté atteinte à l'égalité d'exercice et de jouissance des droits de l'homme et des libertés fondamentales des Azerbaïdjanais.

8. J'en viens au premier point.

II. La destruction discriminatoire de l'environnement par l'Arménie a été fondée sur l'origine ethnique ou nationale

9. L'Arménie soutient dans ses *exceptions préliminaires* que les actes de destruction de l'environnement dont se plaint l'Azerbaïdjan ne constituent pas une discrimination fondée sur l'origine nationale ou ethnique. Permettez-moi — cela étant nécessaire à ce stade — de rappeler à votre attention les éléments de preuve présentés par l'Azerbaïdjan dans son mémoire, lesquels démontrent que la destruction de l'environnement dans ce différend est bien « fondée sur » l'origine ethnique ou nationale des Azerbaïdjanais.

10. L'ensemble de ces preuves montrent clairement que l'objectif de discrimination raciale de l'Arménie est manifestement évident dans son traitement différencié des districts azerbaïdjanais qui

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[155] Voir CR 2024/21, p. 52-58, par. 9-34 (Macdonald).

[156] Voir MA, p. 237-275, par. 291-344.

entourent la région du Garabagh. Ce traitement est en fort contraste avec celui que l'Arménie a réservé aux zones habitées par des personnes d'origine arménienne.

11. Pendant l'occupation illégale des districts azerbaïdjanais et de la région du Garabagh par l'Arménie, les Azerbaïdjanais ont été systématiquement privés de l'accès à des ressources naturelles telles que les ressources en eau, en raison de leur origine ethnique ou nationale, alors que les Arméniens étaient favorisés.

12. Cette discrimination ciblée n'est pas une simple allégation ; l'Azerbaïdjan l'a étayée par des preuves concrètes qui nourrissent des plaintes pour discrimination directe et discrimination indirecte.

13. Le rapport et les conclusions des experts indépendants de la société *Industrial Economics* (IEcexperts) sur l'évaluation des dommages causés à l'environnement dans les territoires libérés, de même que le rapport du Programme des Nations Unies pour l'environnement (PNUE), sont examinés en détail dans le mémoire de l'Azerbaïdjan[157].

14. Le mémoire de l'Azerbaïdjan énumère les actes de destruction de l'environnement qui ont eu lieu dans les districts d'Aghdam, de Fuzuli, de Gubadly, de Jabrayil, de Kalbajar, de Latchine et de Zangilan. Ces sept districts entourent la région du Garabagh. La région du Garabagh avait une population en majorité arménienne. Les sept districts, eux, étaient majoritairement peuplés d'Azerbaïdjanais[158]. Ainsi que vous pouvez le voir à l'écran, si on prend en compte la répartition ethnique de ces districts, moins de 1 % de la population totale est composée d'Arméniens. Ces districts ne peuvent donc pas être considérés comme arméniens[159].

15. Ces districts, historiquement dominés par les Azerbaïdjanais, sont restés en grande partie non habités pendant les trois décennies d'occupation arménienne, à l'exception de quelques personnes d'origine arménienne originaires de pays tiers.

16. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, comme le montre la carte affichée à l'écran, la différence de traitement exercée par l'Arménie entre les Azerbaïdjanais et les Arméniens est claire. Les atteintes portées à l'environnement, comme la construction de

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[157] MA, p. 237-275, par. 291-344.

[158] MA, p. 24-26, par. 46-49.

[159] MA, p. 27, fig. 3.

centrales hydroélectriques, la déforestation et l'abandon des terres agricoles, ont été réalisées de manière disproportionnée dans des zones majoritairement peuplées d'Azerbaïdjanais pendant l'occupation. Ces zones sont indiquées en jaune sur la carte.

17. Les zones délimitées en violet, en revanche, étaient les zones habitées par les personnes d'origine arménienne. Il n'est donc pas surprenant qu'il n'y ait pas eu d'actes de destruction de l'environnement dans ces zones.

18. Ainsi, les deux districts comptant une population arménienne importante avant l'occupation, à savoir Khojaly et Khojavand, comptaient des dizaines de milliers d'hectares de forêts et d'arbres en 1994[160]. Chacun de ces districts a subi une perte de forêt inférieure à 1 % pendant l'occupation, alors que les districts azerbaïdjanais de Fuzuli, Aghdam et Jabrayil ont perdu à jamais entre 31 et 50 % de leurs forêts[161].

19. La tentative de l'Arménie d'affirmer que les actes de destruction de l'environnement ont été uniformément répartis dans les territoires occupés ne repose sur aucune base probante et contredit les preuves accablantes présentées par l'Azerbaïdjan. Je vous réfère au rapport du PNUE, que vous trouverez en annexe du mémoire de l'Azerbaïdjan. Il a documenté le traitement différencié des populations azerbaïdjanaise et arménienne pendant l'occupation illégale par l'Arménie, ainsi que la privation délibérée de ressources essentielles subie par les Azerbaïdjanais au profit des Arméniens[162].

20. Monsieur le président, à ce stade, tous ces éléments sont plus que suffisants pour prouver que les actes de destruction de l'environnement commis par l'Arménie sont susceptibles de relever de la CIEDR.

21. Ce constat me conduit à évoquer les prétendues « features » du présent différend que l'Arménie a dépeintes. L'Arménie a fait valoir que les Azerbaïdjanais d'origine ethnique n'étaient pas présents dans les territoires azerbaïdjanais où des actes de discrimination raciale ont été commis. Cet argument, si je puis dire, évite la question ou, pour utiliser une autre langue de la Cour, « misses the point ».

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[160] Voir MA, p. 257, par. 316.

[161] Voir MA, p. 356-357, par. 466.

[162] Voir MA, p. 244-275, par. 300-344.

22. Comme l'Azerbaïdjan l'a fait valoir dans son mémoire, les actes de destruction et de dégradation de l'environnement commis par l'Arménie font partie de sa revendication plus large selon laquelle l'Arménie a mené une campagne de nettoyage ethnique contre les Azerbaïdjanais d'origine ethnique. Et l'un des traits importants de cette campagne a été de changer complètement les attributs des territoires azerbaïdjanais que l'Arménie a illégalement occupés. Les territoires azerbaïdjanais en question sont les sept districts entourant la région du Garabagh que je viens d'évoquer. Ces sept districts étaient historiquement peuplés d'Azerbaïdjanais d'origine ethnique, et non d'Arméniens. Cela signifie qu'après l'expulsion brutale des Azerbaïdjanais de leurs foyers, l'Arménie a poursuivi sa campagne de nettoyage ethnique, notamment en dégradant l'environnement naturel des territoires azerbaïdjanais à un point tel que cet environnement est devenu non soutenable et malsain, rendant impossible la vie des Azerbaïdjanais d'origine ethnique lors de leur retour.

23. Il importe peu, par conséquent, de savoir si les Azerbaïdjanais d'origine ethnique étaient présents dans les territoires lorsque l'Arménie a détruit et dégradé l'environnement des territoires azerbaïdjanais, puisque la campagne brutale de nettoyage ethnique de l'Arménie visait à garantir que les Azerbaïdjanais d'origine ethnique seraient privés, lors de leur retour, de leur droit de jouir de leur patrie, y compris de l'environnement et des ressources naturelles qui en font partie. C'est dans ce contexte de déplacement des Azerbaïdjanais d'origine ethnique et de création d'obstacles à leur retour que l'Arménie a commis des préjudices environnementaux discriminatoires sur le plan racial.

24. De même, une autre prétendue « feature » décrite par l'Arménie est que les Azerbaïdjanais d'origine ethnique ont été exclus par l'Arménie de ces territoires par la force militaire. Une fois de plus, l'Arménie ne traite pas du problème.

25. L'expulsion des Azerbaïdjanais d'origine ethnique de leurs maisons et de leurs territoires par la force militaire n'a constitué que la première étape de la campagne de nettoyage ethnique menée par l'Arménie. Cette campagne s'est poursuivie tout au long de son occupation des territoires azerbaïdjanais. Comme l'agent l'a expliqué, la restitution des sept districts azerbaïdjanais autour de la région du Garabagh faisait partie des négociations entre l'Arménie et l'Azerbaïdjan. Et qu'a fait l'Arménie ? L'Arménie a fait en sorte que les négociations échouent, l'Arménie a maintenu son contrôle illégal sur les territoires azerbaïdjanais et l'Arménie a continué de commettre des actes de

destruction et de dégradation de l'environnement, cela aboutissant au fait que, le jour venant pour les Azerbaïdjanais d'origine ethnique de retourner chez eux, ils n'avaient pas de foyer où aller.

26. L'Arménie a toujours eu connaissance du fait que ces districts abritaient des Azerbaïdjanais qui ont le droit de retourner dans leurs foyers et de jouir de leurs droits fondamentaux en vertu de la CIEDR et du droit international. L'Arménie a utilisé ces districts azerbaïdjanais et leurs ressources comme des biens sujets à pillage, à la destruction et à la pollution. Ceci inclut les forêts, les « Natural Monuments Trees », les infrastructures hydrauliques, les terres cultivées et les vignobles essentiels à la vie et aux moyens de subsistance des Azerbaïdjanais.

27. La différence de traitement est donc évidente si l'on compare l'environnement naturel des sept districts azerbaïdjanais entourant la région du Garabagh avec l'environnement naturel de la région du Garabagh.

28. Hier, l'Arménie a également fait valoir que « Azerbaijan does not suggest that the harms it complains of were "based on" any of the protected grounds, in the sense that that was their stated purpose »[163]. Deux points doivent être formulés en réponse.

29. Tout d'abord, pour déterminer si le comportement environnemental illégal de l'Arménie peut constituer une discrimination raciale, il importe peu que l'objectif des actes illégaux soit déclaré ou non. Le but peut être établi par déduction, ainsi que l'a précisé la Cour. Ainsi dans son récent arrêt *Ukraine c. Russie*, la Cour a examiné l'allégation de l'Ukraine selon laquelle « des Tatars de Crimée et [les Ukrainiens de souche] ont été [soumis à des actes] de violences physiques en raison de leur origine ethnique », elle l'a examinée sur la base de « présomptions de fait, [d']indices ou [de] preuves circonstancielles »[164]. Deuxièmement, sur un point connexe, la Cour a également déclaré dans ce même arrêt « qu'un État qui n'est pas en mesure d'apporter la preuve directe de certains faits doit pouvoir "recourir plus largement aux présomptions de fait, aux indices ou preuves circonstancielles (*circumstantial evidence*)" »[165]. Ceci s'applique à l'Azerbaïdjan. Au moment du dépôt de son

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[163] Voir CR 2024/21, p. 53, par. 14 (Macdonald).

[164] *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. 217.

[165] *Ibid.*, par. 169.

mémoire, l'Azerbaïdjan n'avait pas un accès complet aux territoires occupés. Il a donc dû s'appuyer sur des déductions pour établir le but couvert par la CIEDR.

30. Il en découle que l'Azerbaïdjan a raison de soutenir que les actes discriminatoires de destruction et de dégradation de l'environnement commis par l'Arménie ont été « fondés sur » l'origine ethnique ou nationale, car les actes illicites de l'Arménie ont été délibérément concentrés dans des zones qui étaient majoritairement peuplées et habitées par des Azerbaïdjanais d'origine ethnique avant leur occupation par l'Arménie.

31. L'argument de l'Arménie selon lequel l'Azerbaïdjan ne fournit aucune preuve pour justifier le but des actes illicites de cette dernière ignore tout simplement les faits et les preuves fournis par l'Azerbaïdjan dans son mémoire. La campagne illégale de nettoyage ethnique et de ségrégation raciale menée par l'Arménie depuis des décennies est bien documentée. La destruction des infrastructures hydrauliques, la pollution des sols et de l'eau et la restriction de l'accès aux terres agricoles fertiles, pour ne citer que quelques-unes des pratiques, ont affecté de manière disproportionnée le droit des Azerbaïdjanais à la santé, y compris l'accès à leurs terres d'origine.

32. Comme l'Azerbaïdjan l'a expliqué dans son mémoire, l'environnement naturel des territoires libérés était indissociable des aspects culturels, sociaux et économiques de la vie des Azerbaïdjanais. Par exemple, des hectares de mûriers ont été détruits par l'Arménie. Ces arbres sont historiquement importants pour les Azerbaïdjanais car ils sont utilisés pour l'élevage des vers à soie, un moyen de subsistance traditionnel pour eux[166].

33. De même, les « National Monument Trees », qui revêtent une importance culturelle pour les Azerbaïdjanais[167], ont été détruits pendant l'occupation arménienne. Tous les arbres détruits se trouvaient dans des districts dont la population était majoritairement azerbaïdjanaise avant l'occupation[168].

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[166] MA, p. 264, par. 326.

[167] MA, annexe 65, Industrial Economics, Inc. and RESPEC, Inc., Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan, for Use in Proceedings Before the International Court of Justice in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)* (hereinafter "IEc Environmental Expert Report"), p. 23.

[168] *Ibid.*, Annex D.

34. Avant l'occupation arménienne, l'Azerbaïdjan avait créé deux réserves naturelles et quatre sanctuaires naturels dans la région du Garabagh, dans le but de protéger et de conserver des zones environnementales historiquement importantes. Cependant, l'Arménie n'a pas protégé ces zones sensibles sur le plan environnemental et culturel.

35. Par exemple, en raison des actes discriminatoires de destruction de l'environnement commis par l'Arménie, les districts de Jabrayil et de Gubadly ont subi de « sévères » dommages forestiers[169]. Les experts soulignent que « [m]ore than two-thirds of the quantified harm, 745 hectares, occurred within Gubadly State Nature Sanctuary, a place of special importance for protection of natural resources »[170].

36. Autre exemple : les arbres dénommés « [rare] Eastern Plane » ont été coupés dans la réserve naturelle nationale de Basitchay, à Zangilan[171].

37. En outre, l'Arménie a délibérément détourné et géré de manière négligente les eaux du réservoir de Sarsang afin de priver les Azerbaïdjanais qui vivaient dans les zones adjacentes aux territoires occupés de l'accès à l'eau nécessaire à la consommation humaine, à l'assainissement et à l'irrigation des cultures[172]. En réaction à ce comportement, l'Assemblée parlementaire du Conseil de l'Europe a adopté en 2016 la résolution 2085, demandant « aux autorités arméniennes de ne plus utiliser les ressources en eau comme outils d'influence politique ou instruments de pression bénéficiant à une seule des parties au conflit »[173]. La résolution note entre autres que

> « la création délibérée d'une crise environnementale artificielle doit être considérée comme "une agression environnementale" et doit être jugée comme un acte hostile d'un État envers un autre, visant à créer des zones de catastrophe écologique et à rendre impossible la vie normale de la population concernée … *dont sont victimes les citoyens azerbaïdjanais habitant la vallée du Bas-Karabakh* »[174].

38. Les termes de la résolution ne laissent place à aucune équivoque. Le comportement de l'Arménie dénoncé par le Conseil de l'Europe visait les Azerbaïdjanais en les privant de l'égalité de

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[169] *Ibid.*, Annex C.

[170] *Ibid.*, Annex C.

[171] MA, p. 250, par. 309.

[172] MA, p. 269-273, par. 333-342.

[173] Assemblée parlementaire du Conseil de l'Europe, résolution 2085 (2016), Les habitants de régions frontalières de l'Azerbaïdjan sont délibérément privés d'eau, accessible à l'adresse suivante : https://pace.coe.int/fr/files/22429/html, par. 7.2.

[174] *Ibid.*, par. 3 et 4 (les italiques sont de nous).

jouissance et d'exercice de leurs droits fondamentaux. Ajoutons que le propos de l'Arménie selon lequel le réservoir a été endommagé et n'a jamais été réparé ne l'aide d'aucune manière. Ce propos montre plutôt que, bien que contrôlant le réservoir, l'Arménie n'a jamais pris de mesures nécessaires pour le réparer et a donc privé les Azerbaïdjanais de l'accès à l'eau jusqu'en 2022[175].

39. Monsieur le président, j'en viens maintenant au *deuxième* point. Les revendications avancées par l'Azerbaïdjan soulignent une dure réalité : celle d'une différence de traitement qui a eu non seulement pour but mais aussi pour effet de porter atteinte aux droits fondamentaux des Azerbaïdjanais, en particulier à leurs droits à la santé et à la propriété.

III. La destruction de l'environnement par l'Arménie a porté atteinte à l'égalité d'exercice et de jouissance des droits de l'homme et des libertés fondamentales des Azerbaïdjanais

40. L'Arménie tente de discréditer ces allégations en faisant valoir que les droits à la santé et à la propriété ne relèvent pas de la CIEDR[176]. Pourtant, ces droits comme d'autres droits fondamentaux relèvent bien de la CIEDR. En outre, les allégations de l'Azerbaïdjan selon lesquelles l'Arménie a traité différemment les Azerbaïdjanais en fonction de leur origine ethnique ou nationale, ce qui a eu pour but et pour effet de compromettre la reconnaissance, la jouissance ou l'exercice de leurs droits fondamentaux, ne se limitent pas au droit à la santé et à la propriété ; elles impliquent aussi d'autres droits qui leur sont liés, tels le droit à l'eau et le droit au retour[177]. Il est à peine besoin de rappeler que la destruction de l'environnement, qu'elle soit intentionnelle ou non, a des répercussions considérables sur la santé et le bien-être des individus et leurs droits fondamentaux[178].

a) Droit à la santé

41. Selon les termes on ne peut plus clairs de la CIEDR, la Cour est compétente pour juger du comportement discriminatoire de l'Arménie en matière de destruction de l'environnement, lequel affecte le *droit à la santé des* Azerbaïdjanais. Le texte de l'article 5 de la CIEDR fait explicitement

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[175] Voir « Azerbaijani experts inspect Sarsang reservoir in Karabakh economic region », *AZERNEWS* (23 August 2022), accessible à l'adresse suivante : https://www.azernews.az/nation/198404.html.

[176] Voir EPA, p. 65-66, par. 131.

[177] MA, p. 353-355, par. 460-463.

[178] Voir Nations Unies, note du Secrétaire général sur les obligations relatives aux droits de l'homme se rapportant aux moyens de bénéficier d'un environnement sûr, propre, sain et durable, doc. A/73/188 (19 juillet 2018).

référence aux droits économiques et sociaux, incluant le « [d]roit à la santé » reconnu à l'article 5 *e)* iv) comme droit fondamental devant être protégé sans distinction de race, de couleur ou d'origine nationale ou ethnique. Ce droit doit être interprété comme signifiant

> « "the highest attainable standard of physical and mental health" … embrac[ing] a wide range of socio-economic factors that promote conditions in which people can lead a healthy life [including] food[,] nutrition [and] sanitation, [housing and] work[] conditions, and a *healthy environment* »[179].

42. L'Arménie se méprend lorsqu'elle affirme qu'il n'est porté atteinte à ce droit que lorsque le groupe protégé subit des effets néfastes sur son état de santé ou lorsqu'il est confronté à des risques potentiels pour la santé dans la région où il est physiquement résident[180]. L'Arménie affirme également à tort que des actes de destruction de l'environnement se sont aussi produits dans des zones où les Azerbaïdjanais ne vivaient pas[181].

43. Monsieur le président, l'Arménie veut imposer sa propre interprétation restrictive de l'article 5 de la CIEDR. Or rien dans la CIEDR ne justifie cette restriction, surtout si l'on garde à l'esprit que l'Arménie a mené de manière délibérée des actions dans les zones azerbaïdjanaises afin de créer un environnement malsain qui empêche le retour des Azerbaïdjanais dans leurs foyers[182].

44. L'Arménie a affirmé à tort que la décision du Comité CIEDR invoquée par l'Azerbaïdjan ne concernait que les populations autochtones, lesquelles continuaient à utiliser et à occuper leurs terres. Il s'agit là d'une lecture tronquée de la décision, le Comité ayant noté que les activités menées par les États-Unis entravaient « l'accès et l'utilisation » à ces zones[183].

45. Un autre aspect doit être pris en considération. Le déni du droit d'un individu à retourner dans son foyer, tel qu'il est consacré à l'article 5 de la CIEDR et d'autres instruments de droits de

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[179] P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 374 ; voir aussi, Nations Unies, Comité des droits économiques, sociaux et culturels, Question de fond concernant la mise en œuvre du pacte international relatif aux droits économiques, sociaux et culturels — Observation générale nº 14 (2000) — Le droit au meilleur état de santé susceptible d'être atteint (art. 12 du Pacte international relatif aux droits économiques, sociaux et culturels), doc. E/C.12/2000/4 (11 août 2000), par. 4 (les italiques sont de nous).

[180] EPA, p. 67-68, par. 136-139.

[181] EPA, p. 68, par. 139 ; voir MA, p. 269-275, par. 333-344.

[182] MA, p. 256, par. 313 ; p. 260-261, par. 319 ; p. 263-264, par. 325 ; p. 266, par. 328 ; p. 361, par. 473.

[183] Nations Unies, Comité pour l'élimination de la discrimination raciale, Mesures d'alerte rapide et procédure d'action urgente — Décision 1 (68) — États-Unis d'Amérique, CERD/C/USA/DEC/1 (11 avril 2006), par. 7-8.

l'homme[184], constitue une violation fondamentale des droits de l'homme. Et ce déni devient encore plus flagrant lorsque l'État ou la situation de l'État occupé rend l'habitat non soutenable et malsain.

46. En outre, les liens entre les conditions environnementales et la santé publique sont largement reconnus par le droit international. Ainsi, j'évoquerai le Comité des droits économiques, sociaux et culturels, qui a réaffirmé dans son observation générale n° 14 que le droit à la santé inclut l'accès à un environnement sain en tant que facteur déterminant de la santé[185]. Lorsque les actions d'un État occupant entraînent des dommages environnementaux qui rendent le domicile impropre à l'habitation, il s'agit d'une violation non seulement du droit au retour, mais aussi du droit à la santé. Cette violation aux multiples facettes souligne l'interconnexion des droits de l'homme et la nécessité d'un cadre juridique intégré pour relever les défis complexes auxquels sont confrontées les personnes touchées par les conflits armés et les régimes d'occupation.

b) **Droit à la propriété**

47. L'Arménie interprète également de manière erronée le droit à la propriété qui relève lui aussi de la CIEDR. Elle affirme que les actes discriminatoires de destruction de l'environnement ne peuvent mettre en cause le droit à la propriété que dans les cas impliquant des « indigenous peoples resident on their traditional lands »[186].

48. Dans le cadre de la CIEDR, le droit à la propriété est protégé par l'article 5 *d)* v). Son exercice est prétérité par des comportements qui dégradent ou menacent l'intégrité de l'environnement naturel sur la base d'une discrimination raciale. La CIEDR n'impose pas la limitation revendiquée par l'Arménie. Elle ne crée pas de catégorie spéciale pour les populations autochtones en tant que groupe protégé. Le champ de l'article premier, paragraphe 1, de la CIEDR est large et inclut toute discrimination fondée sur « la race, la couleur, l'ascendance ou l'origine nationale ou ethnique ».

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[184] Voir Pacte international relatif aux droits civils et politiques (23 mars 1976), art. 12.

[185] Voir Nations, Unies, Comité des droits économiques, sociaux et culturels, Question de fond concernant la mise en œuvre du pacte international relatif aux droits économiques, sociaux et culturels — Observation générale n° 14 (2000) — Le droit au meilleur état de santé susceptible d'être atteint (art. 12 du Pacte international relatif aux droits économiques, sociaux et culturels), doc. E/C.12/2000/4 (11 août 2000).

[186] Voir EPA, p. 69, par. 141.

49. En outre, le Comité CIEDR a spécifiquement reconnu « [l]e droit à la propriété et à l'utilisation, la conservation et la protection des terres qu'elles occupent traditionnellement, ainsi qu'aux ressources naturelles lorsque leur mode de vie et leur culture sont liés à l'utilisation des terres et ressources »[187]. Comme l'Azerbaïdjan l'a souligné dans son mémoire, les territoires azerbaïdjanais en question revêtaient une signification particulière pour les Azerbaïdjanais d'origine ethnique, en termes d'importance culturelle et vitale.

50. Le comportement discriminatoire de l'Arménie a empêché les Azerbaïdjanais d'exercer leurs droits d'accès, d'utilisation et de jouissance de leurs biens, de leurs terres et de leurs ressources. Les allégations de l'Azerbaïdjan selon lesquelles l'Arménie a détruit et dégradé l'environnement naturel sont susceptibles de relever de la compétence de la Cour au titre de la CIEDR.

51. Mesdames et Messieurs de la Cour, les faits et arguments juridiques présentés par l'Azerbaïdjan ont bien démontré que la destruction de l'environnement a été fondée sur l'origine ethnique ou nationale et a porté atteinte à l'égalité d'exercice et de jouissance des droits fondamentaux des Azerbaïdjanais.

52. Cette objection préliminaire doit être rejetée.

53. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je vous remercie de votre attention. Ma présentation clôt le premier tour de plaidoiries de l'Azerbaïdjan. Je vous remercie.

Le PRÉSIDENT : Je remercie M[me] la professeure Boisson de Chazournes, dont l'exposé conclut donc cette audience. La Cour se réunira de nouveau demain, mercredi 24 avril, à 16 h 30, pour entendre l'Arménie en son second tour de plaidoiries, au terme duquel celle-ci donnera lecture de ses conclusions finales. L'Azerbaïdjan présentera son second tour de plaidoiries lors d'une audience qui se tiendra le vendredi 26 avril, à 10 heures, à l'issue de laquelle il donnera également lecture de ses conclusions finales. Chacune des Parties disposera, lors de ce second tour, d'un maximum d'une heure et demie pour présenter ses arguments.

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[187] Nations Unies, Comité pour l'élimination de la discrimination raciale, Recommandation n° 34 adoptée par le Comité – Discrimination raciale à l'égard des personnes d'ascendance africaine, CERD/C/GC/34 (3 octobre 2011), par. 4 *a)*.

Je rappellerai que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les exposés oraux du second tour devront être aussi succincts que possible. Le second tour des plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre Partie. Il ne doit par conséquent pas constituer une répétition des présentations déjà faites par les Parties, lesquelles ne sont, au demeurant, pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué. L'audience est levée.

L'audience est levée à 13 heures.

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