

7 DÉCEMBRE 2021

ORDONNANCE

**APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION
DE TOUTES LES FORMES DE DISCRIMINATION RACIALE**

(ARMÉNIE c. AZERBAÏDJAN)

**APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION**

(ARMENIA v. AZERBAIJAN)

7 DECEMBER 2021

ORDER

TABLE OF CONTENTS

	<i>Paragraphs</i>
CHRONOLOGY OF THE PROCEDURE	1-12
I. INTRODUCTION	13-14
II. PRIMA FACIE JURISDICTION	15-43
1. General observations	15-18
2. Existence of a dispute relating to the interpretation or application of CERD	19-29
3. Procedural preconditions	30-42
4. Conclusion as to prima facie jurisdiction	43
III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED	44-68
IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY	69-88
V. CONCLUSION AND MEASURES TO BE ADOPTED	89-97
OPERATIVE CLAUSE	98

INTERNATIONAL COURT OF JUSTICE

YEAR 2021

**2021
7 December
General List
No. 180**

7 December 2021

**APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION**

(ARMENIA *v.* AZERBAIJAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges ad hoc* KEITH, DAUDET; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 16 September 2021, the Republic of Armenia (hereinafter “Armenia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Azerbaijan (hereinafter “Azerbaijan”) concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter “CERD” or the “Convention”).

2. At the end of its Application, Armenia

“respectfully requests the Court to adjudge and declare:

1. That Azerbaijan is responsible for violating the CERD, including Articles 2, 3, 4, 5, 6 and 7.

2. That, as a consequence of its international responsibility for these breaches of the Convention, Azerbaijan must:

A. Cease forthwith any such ongoing internationally wrongful act and fully comply with its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD, including by:

- refraining from practices of ethnic cleansing against Armenians;
- refraining from engaging in, glorifying, rewarding or condoning acts of racism against Armenians, including Armenian prisoners of war, hostages and other detained persons;
- refraining from engaging in or tolerating hate speech against Armenians, including in educational materials;
- refraining from suppressing the Armenian language, destroying Armenian cultural heritage or otherwise eliminating the existence of the historical Armenian cultural presence or inhibiting Armenians’ access and enjoyment thereof;
- punishing all acts of racial discrimination, both public and private, against Armenians, including those taken by public officials;
- ensuring that the rights of Armenians, including Armenian prisoners of war, hostages and other detained persons are upheld on an equal basis;
- adopting the laws necessary to uphold its obligations under the CERD;
- providing Armenians with equal treatment before the tribunals and all other organs administering justice, and providing effective protection and remedies against acts of racial discrimination;

- refraining from hindering the registration and operation of NGOs and arresting, detaining and sentencing human rights activists or other individuals working towards reconciliation with Armenia and Armenians; and
 - taking effective measures with a view to combatting prejudices against Armenians, and special measures for the purpose of securing their adequate advancement.
- B. Make reparations for the injury caused by any such internationally wrongful act, including:
- by way of restitution, allowing the safe and dignified return of displaced Armenians to their homes, and restoring or returning any Armenian cultural and religious buildings and sites, artefacts or objects;
 - providing additional forms of reparation for any harm, loss or injury suffered by Armenians that is not capable of full reparation by restitution, including by providing compensation to displaced Armenians until such time as it becomes safe for them to return to their homes.
- C. Acknowledge its violations of the CERD and provide an apology to Armenia and Armenian victims of Azerbaijan’s racial discrimination.
- D. Offer assurances and guarantees of non-repetition of violations of its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD.”

3. In its Application, Armenia seeks to found the Court’s jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, Armenia asked the Court to indicate the following provisional measures:

- “Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
- Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;
- Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;

- Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalism, destruction or alteration, and allowing Armenians to visit places of worship;
- Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;
- Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;
- Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and
- Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months.”

6. The Registrar immediately communicated to the Government of Azerbaijan the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by Armenia of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 22 September 2021.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. Armenia chose Mr. Yves Daudet and Azerbaijan Mr. Kenneth Keith.

9. By letters dated 27 September 2021, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 14 and 15 October 2021 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Armenia: H.E. Mr. Yeghishe Kirakosyan,
Mr. Robert Kolb,
Mr. Constantinos Salonidis,
Mr. Sean Murphy,
Mr. Pierre d'Argent,
Mr. Lawrence H. Martin.

On behalf of Azerbaijan: H.E. Mr. Elnur Mammadov,
Mr. Vaughan Lowe,
Mr. Peter Goldsmith,
Ms Laurence Boisson de Chazournes,
Ms Catherine Amirfar,
Mr. Donald Francis Donovan.

11. At the end of its second round of oral observations, Armenia asked the Court to indicate the following provisional measures:

- “Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
- Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;
- Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;
- Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalism, destruction or alteration, and allowing Armenians to visit places of worship;
- Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;
- Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;
- Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and

- Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months.”

12. At the end of its second round of oral observations, Azerbaijan requested the Court “to reject the request for the indication of provisional measures submitted by the Republic of Armenia”.

*

* *

I. INTRODUCTION

13. Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 21 September 1991 and 18 October 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity (“oblast”) that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties’ competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Armenia calls “the Second Nagorno-Karabakh War” and Azerbaijan calls “the Second Garabagh War” (hereinafter the “2020 Conflict”), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the “Trilateral Statement”. Under the terms of this statement, as of 10 November 2020, “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared”.

14. The differences between the Parties are longstanding and wide-ranging. The Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present case, the scope of which is therefore circumscribed by that Convention.

II. PRIMA FACIE JURISDICTION

1. General observations

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures, Order of 23 January 2020*, *I.C.J. Reports 2020*, p. 9, para. 16).

16. In the present case, Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD (see paragraph 3 above). The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. Article 22 of CERD reads as follows:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

18. Armenia and Azerbaijan are both parties to CERD; Armenia acceded to CERD on 23 June 1993, Azerbaijan on 16 August 1996. Neither Party made reservations to Article 22 or to any other provision of CERD.

2. Existence of a dispute relating to the interpretation or application of CERD

19. Article 22 of CERD makes the Court’s jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. According to the established case law of the Court, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11*). In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328*). The two sides must “‘hold clearly opposite views concerning the question of the performance or non-performance of certain’ international obligations” (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50, citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74*).

20. In order to determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), p. 414, para. 18*). Since Armenia has invoked as the basis of the Court’s jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (see *ibid.*).

21. Armenia contends that a dispute exists with Azerbaijan regarding the interpretation and application of CERD, as demonstrated by the correspondence between the Parties. According to Armenia, this dispute arose in the context of longstanding racial discrimination directed by Azerbaijan at individuals of Armenian national or ethnic origin. In particular, Armenia claims that a “State-sponsored policy of Armenian hatred” by the Azerbaijani authorities has led to systematic discrimination against those individuals in Azerbaijan. It submits that Azerbaijan committed grave violations of obligations arising under CERD during the 2020 Conflict, and has continued to do so following the end of hostilities, in furtherance of its policy of “ethnic cleansing” intended to rid “Azerbaijan and Nagorno-Karabakh of Armenians and Armenian influence”. According to Armenia, the violations committed by Azerbaijan are directed at individuals of Armenian national or ethnic origin, regardless of their nationality.

22. Armenia alleges that Azerbaijan has acted and continues to act in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD. Armenia asserts that Azerbaijan bears responsibility, *inter alia*, for the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin held in its custody; for engaging in practices of ethnic cleansing; for glorifying, rewarding and condoning acts of racism; for inciting racial hatred, giving as an example, mannequins depicting Armenian soldiers in a degrading way at the “Military Trophies Park” which opened in Baku in the aftermath of the 2020 Conflict; for facilitating, tolerating and failing to punish and prevent hate speech; and for systematically destroying and falsifying Armenian cultural sites and heritage.

*

23. Azerbaijan contends that there is no dispute between the Parties concerning the interpretation or application of CERD. It affirms that it is committed to respecting fully the values protected by CERD. The Respondent denies that its actions during and after the 2020 Conflict were motivated by an “ethnic animus” and argues instead that, through those actions, it responded to “a blatant and unlawful use of force against its people and its sovereign territory” on the part of Armenia, in the context of its “decades-long unlawful occupation of Azerbaijan’s territory” dating back to the hostilities that ended in 1994. In this connection, Azerbaijan states that its conduct was solely motivated by a desire to “liberate its territories from Armenia’s illegal occupation”. Azerbaijan asserts, *inter alia*, that Armenia failed to comply with four United Nations Security Council resolutions requiring the immediate, complete and unconditional withdrawal of Armenian forces from occupied areas of Azerbaijan.

24. With regard to the claims put forward by Armenia in support of its allegation that the actions of Azerbaijan constitute racial discrimination under CERD, the Respondent argues that these actions “are entirely unrelated to racial discrimination”. According to Azerbaijan, Armenia’s case before the Court is indeed not concerned with the protection of rights under CERD but instead reflects a strategy “to use the Court as a platform to broadcast [Armenia’s] grievances against Azerbaijan”. Azerbaijan moreover asserts that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group; that it reaffirms its obligations to

treat Armenian detainees in its custody in accordance with its obligations under CERD; and that it has commenced investigations and brought charges against Azerbaijani servicemen with respect to alleged crimes committed against Armenians during the 2020 Conflict.

25. In Azerbaijan's view, some of the measures requested by Armenia have in any event become moot. In particular, in addressing Armenia's request that the Court order Azerbaijan to close or suspend activities at the "Military Trophies Park", the Agent of Azerbaijan referred during the hearing to his "assurance [on the previous day] about the permanent removal of certain exhibits in the Trophies Park".

* *

26. The Court recalls that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*). The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (*ibid.*).

27. The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Azerbaijan gave rise to violations of its obligations under CERD. The Court notes that, according to Armenia, Azerbaijan has violated its obligations under the Convention in various ways (see paragraphs 21 to 22 above). Azerbaijan has denied that it has committed any of the alleged violations set out above and that the acts complained of fall within the scope of CERD (see paragraphs 23 to 24 above). The divergence of views between Armenia and Azerbaijan regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 11 November 2020 and 8 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. It is further demonstrated by subsequent exchanges between the Parties.

28. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Azerbaijan's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Armenia are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Armenia to have been committed by Azerbaijan are capable of falling within the provisions of the Convention.

29. The Court finds therefore that there is a sufficient basis at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation or application of CERD.

3. Procedural preconditions

30. Under Article 22 of CERD, a dispute may be referred to the Court only if it is “not settled by negotiation or by the procedures expressly provided for in this Convention”. The Court has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141).

31. The Court has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 600, para. 113). Since Armenia does not contend that its dispute with Azerbaijan was submitted to “procedures expressly provided for in [the] Convention”, which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is “not settled by negotiation”, within the meaning of Article 22.

32. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

33. At this stage of the proceedings, the Court will examine whether it appears, *prima facie*, that Armenia genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter’s compliance with its substantive obligations under CERD, and whether Armenia pursued these negotiations as far as possible (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 420, para. 36).

* * *

34. Regarding the procedural preconditions set out in Article 22 of CERD, Armenia states that, since the end of hostilities in autumn 2020, it has exchanged over 40 pieces of correspondence and held several rounds of meetings with Azerbaijan. Specifically, Armenia asserts that the Minister for Foreign Affairs of Armenia, in a letter dated 11 November 2020 addressed to his counterpart in Azerbaijan, expressly referred to violations of multiple provisions of CERD by Azerbaijan, and invited Azerbaijan to enter into negotiations with Armenia to remedy those violations. Armenia notes that in his letter of reply, dated 8 December 2020, the Minister for Foreign Affairs of Azerbaijan rejected Armenia’s allegations. Armenia indicates that, from November 2020 to September 2021, the Parties engaged in further rounds of written exchanges and participated in at least seven rounds of meetings between March and September 2021, “in an effort to settle this dispute amicably”.

35. Armenia claims that during these rounds of negotiations, the Parties' positions on the crucial points that divided them — namely whether Azerbaijan had violated its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD and whether it consequently owed reparation — did not change. Armenia further contends that, by 16 September 2021, the date on which it filed its Application, there was “no reasonable prospect” that the respective positions of the Parties would evolve, and that it thus considered that the negotiations had failed. In light of the impasse it describes, Armenia contends that the precondition of negotiations contained in Article 22 of CERD has thus been met.

*

36. Azerbaijan, for its part, claims that Armenia did not genuinely attempt to engage in meaningful negotiations prior to the institution of proceedings before the Court against Azerbaijan. In its view, the time frame of the supposed negotiations shows that Armenia was never serious about finding a solution to the matters that divided the Parties. Specifically, Azerbaijan notes that the period from November 2020 to July 2021 was spent “talking about the procedural modalities” and that the first substantive meeting between the Parties was held in mid-July 2021. Moreover, Azerbaijan argues that, even thereafter, Armenia never attempted to engage constructively with any of the proposals put forward by the Respondent. In particular, Azerbaijan maintains that, during the bilateral meeting held on 30-31 August 2021, it presented counter-proposals that were never genuinely considered nor discussed by Armenia, which simply rejected those proposals altogether at the following meeting of 14-15 September 2021 before filing its Application and Request for the indication of provisional measures the following day.

37. Azerbaijan argues that a State is not entitled to bring a premature end to negotiations relating to alleged violations of obligations arising under CERD simply because it would rather raise these issues by means of proceedings before the Court. With regard to Armenia's position that the negotiations had reached an impasse, Azerbaijan states that it was not open to Armenia to make such a determination unilaterally, as the continuation of negotiations cannot be subject to “a right to exercise an unreasoned veto”. In addition, according to Azerbaijan, Armenia's claim that the negotiations failed was based on Azerbaijan's refusal to accept that it had violated CERD, a claim which Azerbaijan considers both unreasonable and inappropriate, since “[a]cceptance of guilt as a threshold condition has no place in genuine negotiations”. In sum, according to Azerbaijan, the record shows that it tried to engage in constructive negotiations whereas Armenia made no genuine attempt to do so. Azerbaijan concludes that the Court manifestly lacks jurisdiction either to determine the merits of the case or to order provisional measures because Armenia has failed to fulfil the precondition of negotiation contained in Article 22 of CERD.

* *

38. Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, “the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question” (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36, citing *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).

39. The Court notes that, as evidenced by the material before it, Armenia raised allegations of violations by Azerbaijan of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

40. The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Armenia and Azerbaijan, by letters dated 11 November 2020 and 8 December 2020 respectively, and the last bilateral meeting held on 14-15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Armenia’s allegations of Azerbaijan’s non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15-16 July 2021, 30-31 August 2021 and 14-15 September 2021 shows a lack of progress in reaching common ground on substantive issues. In particular, in the Note Verbale dated 10 September 2021 from the Permanent Mission of Armenia to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of Azerbaijan to the United Nations Office and other International Organizations in Geneva, Armenia stated that it considered Azerbaijan’s “responses” (to the allegations of violations of obligations arising under CERD made against it) presented during the 15-16 July 2021 session to be “in fact categorical rejections of Armenia’s claims and requested remedies”. For its part, during the oral proceedings, Azerbaijan argued — with reference to the bilateral sessions held in July, August and September 2021 — that every time it put forward counter-proposals in response to Armenia’s claims for remedies, Armenia failed to “put forward any proposals”.

41. Despite the fact that Armenia alleged in bilateral exchanges that Azerbaijan had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on the alleged non-compliance by Azerbaijan with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

42. Recalling that, at this stage of the proceedings, the Court need only decide whether, prima facie, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

4. Conclusion as to prima facie jurisdiction

43. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the “interpretation or application” of the Convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

44. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures, Order of 23 January 2020*, *I.C.J. Reports 2020*, p. 18, para. 43).

45. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* * *

46. In the present proceedings, Armenia asserts rights under Articles 2, 3, 4, 5, 6 and 7 of CERD. In particular, Armenia asserts the right of prisoners of war and civilian detainees of Armenian national or ethnic origin to be repatriated and their right to be protected from inhuman treatment, the right of persons of Armenian national or ethnic origin not to be subject to hate speech by Azerbaijan and the right of persons of Armenian national or ethnic origin to access and enjoy their cultural heritage, as well as Azerbaijan’s corresponding obligation not to destroy, erase or falsify such heritage. Armenia argues that these rights are plausible in so far as they are “grounded in a possible interpretation” of the Convention and that Azerbaijan’s actions plausibly constitute acts of racial discrimination in violation of its obligations under CERD.

47. Armenia contends that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin following the ceasefire reached on 10 November 2020 constitutes a violation by Azerbaijan of its obligations under Articles 2 and 5 of CERD. More specifically, Armenia submits that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin is a denial of their right to equality before the law, namely “before or under international humanitarian law”, and amounts to “racial discrimination” within the meaning of CERD. According to Armenia, these detainees have been subjected to “sham criminal proceedings”, and it is “readily apparent” from the willingness of Azerbaijan to repatriate some prisoners of war on certain occasions, while refusing to repatriate others captured under similar circumstances, that their continued detention “has nothing to do with actual criminality”. The Applicant is thus of the view that the Azerbaijani authorities are not “applying criminal law fairly and judiciously”, but rather are “using criminal law arbitrarily as a subterfuge for prohibited, discriminatory conduct”.

48. The Applicant further maintains that the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin by Azerbaijan violates Article 5 (b) of CERD, which protects the “right to security of person and protection by the State against violence or bodily harm”. It asserts that evidence in the case file establishes that “atrocious acts”, including torture, targeting these persons, were committed with “clear hatred being shown to persons of Armenian origin”. In Armenia’s view, the treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin before Azerbaijani courts “clearly implicates” Article 5 (a) of CERD which recognizes “[t]he right to equal treatment before the tribunals and all other organs administering justice”.

49. Armenia states that the rights of persons of Armenian national or ethnic origin not to be subject to racial hatred and racial hate speech are explicitly stated in Articles 2, 4 and 7 of CERD. It asserts that Azerbaijan, instead of respecting these rights, is violating them “on a daily basis through a constant rhetoric of hate”. According to Armenia, this rhetoric “escalated” before and during the 2020 Conflict, and was employed by politicians and high-ranking officials, including the President of Azerbaijan. Armenia further refers to “the racist depictions of Armenian soldiers in denigrating and dehumanizing scenes” in Azerbaijan’s “Military Trophies Park”. Armenia thus contends that its “rights under Article 2, 4 and 7 of the Convention meet any threshold of plausibility for purposes of this phase of the proceedings”.

50. Armenia also refers to the rights of persons of Armenian national or ethnic origin under Articles 2 and 5 of CERD to access and enjoy, without discrimination, their historic, cultural and religious heritage. More specifically, Armenia invokes Article 5 (d) (vii) which prohibits racial discrimination in relation to the right to freedom of religion and Article 5 (e) (vi) which guarantees the right to equal participation in cultural activities, which, according to Armenia, entails a right to the protection and preservation of Armenian historic, cultural and religious heritage. Armenia alleges that acts of destruction and vandalism have been perpetrated by “Azerbaijani soldiers and mercenaries” against Armenian religious and cultural heritage sites, and that acts of desecration of Armenian cemeteries and religious artefacts, such as the “khachkars” (or “cross-stones”) have also occurred. Armenia further alleges that Azerbaijan, by carrying out what it calls restoration works on

the cathedral of Shushi, has altered features characteristic of Armenian cultural heritage. Considering the alleged general context of anti-Armenian hatred, Armenia contends that the repeated destruction, alteration and desecration of Armenian cultural heritage and religious sites in territories controlled by Azerbaijan constitutes “racial discrimination” in breach of Articles 2 and 5 of CERD and therefore that its rights under these provisions are plausible.

*

51. Azerbaijan acknowledges that, as of 8 October 2021, 45 named individuals captured in relation to the 2020 Conflict remained in its custody. It asserts that these persons are not detained “on the basis of their national or ethnic origin” and maintains instead that they have been charged or convicted of serious offences including torture, murder or mercenarism. According to Azerbaijan, their detention is lawful under domestic and international law and does not have the “purpose or effect” of impairing their equal enjoyment of fundamental rights. It notes that “if Azerbaijan is engaged in a conflict with a wholly ethnically Armenian force, the detainees it holds are likely to be ethnically Armenian”, but that this is not evidence of racial discrimination. Azerbaijan also underscores that it has “released or repatriated *the vast majority* of Armenians” (emphasis in the original) detained in relation to the 2020 hostilities, and stresses that the release of eight Armenian detainees in recent months was “not pursuant to a bargain with Armenia”, confirming therefore that “Azerbaijan investigated in each case whether there is a basis for continued detention”. Accordingly, Azerbaijan claims that the detention of individuals of Armenian ethnic or national origin cannot be regarded as “racial discrimination” within the meaning of Article 1 of CERD and thus cannot plausibly engage rights under the Convention.

52. Azerbaijan adds that it has initiated investigations in cases where there have been credible allegations of mistreatment of Armenian detainees, which it says demonstrates that it does not condone torture or mistreatment of any kind, regardless of a detainee’s origin. It considers that Armenia therefore has no plausible rights under CERD based on allegations of the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin.

53. Azerbaijan denies that it has incited hatred of people of Armenian national or ethnic origin and argues that Armenia’s allegations in this regard are not supported by specific declarations or conduct on the part of Azerbaijan. Therefore, according to the Respondent, Armenia has not established any plausible rights under CERD based on its allegations that Azerbaijan violated its obligations by inciting racial hatred against persons of Armenian national or ethnic origin. As to Armenia’s references to the “Military Trophies Park”, Azerbaijan considers that, in light of the fact that the mannequins and helmets of Armenian soldiers have been “permanently removed” from display, “there is nothing remaining at the Park that could possibly implicate rights under CERD”.

54. Regarding Armenian religious and cultural heritage, Azerbaijan accepts that all persons who are lawfully present in Azerbaijan, including persons of Armenian national or ethnic origin, must be able to visit on an equal basis historic, cultural and religious sites that are safely open to the public in its territory. Azerbaijan claims that certain heritage sites, however, are currently not accessible due to the placement of landmines by Armenia. According to the Respondent, restriction of access to those sites is aimed at ensuring the safety and security of persons, regardless of their national or ethnic origin, and cannot, therefore, constitute an act of racial discrimination under CERD or a basis to claim “a plausible CERD right”. Azerbaijan adds that its law forbids vandalism and destruction of cultural and religious heritage and asserts that it is “facilitating efforts to protect and preserve” Armenian sites and artefacts relevant to the rights under CERD. Moreover, Azerbaijan contends that it has undertaken to investigate all credible allegations of vandalism, destruction, and unauthorized alteration of historic and cultural monuments and cemeteries used by ethnic Armenians.

55. Azerbaijan concludes that in the present case the Applicant has failed to show that it seeks to protect plausible rights on the merits in so far as it has not established that the acts complained of constitute acts of “racial discrimination” within the meaning of CERD.

* *

56. The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. Article 1, paragraph 1, of CERD defines racial discrimination in the following terms:

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

Articles 2, 3, 4, 5, 6 and 7 of the Convention, invoked by Armenia in its Application and for the purposes of its Request for the indication of provisional measures, read as follows:

“Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
 - (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

- (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.”

57. The Court notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. It recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 426, para. 51).

58. A State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention (see *ibid.*, para. 52). In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

59. The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention.

60. In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, Armenia asserts two distinct rights: the right to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD (*Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021*, para. 105). The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan.

61. The Court also considers plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage.

* *

62. The Court now turns to the condition of the link between the rights claimed by Armenia and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Armenia have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Armenia.

* *

63. Armenia considers that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. According to Armenia, the measures relating to prisoners of war and other detainees of Armenian national or ethnic origin will ensure that they can enjoy their right under Article 2 of CERD to be free from racial discrimination in all of its forms and their right, under Article 5 of CERD, to be secure and protected by the State from violence or bodily harm. For Armenia, the only genuine way to protect these rights is to order that the detainees be immediately released and that they be treated humanely pending their release. Armenia further asserts that the

measure requesting that Azerbaijan refrain from espousing hatred of people of Armenian national or ethnic origin and that the “Military Trophies Park” be closed, is directly linked to rights under Articles 2, 4 and 7 of CERD, which set out specific ways in which a State party must act to meet its obligations to combat racial discrimination. With regard to the measures relating to the protection and preservation of Armenian historic, cultural and religious heritage and the need to ensure a right of access, Armenia maintains that these measures are necessary in order to protect the right of persons of Armenian national or ethnic origin under Article 5 to equal participation in cultural activities, including the right of access to and enjoyment of their cultural heritage.

*

64. Azerbaijan considers that there is no link between the measures requested by Armenia and the rights under CERD that it claims on the merits. In particular, with regard to the measures aimed at obtaining the release of all Armenian detainees in its custody and at ensuring their proper treatment pending that outcome, Azerbaijan argues, first, that there is no provision in CERD on the basis of which Armenia could demand the release of lawfully detained individuals. Secondly, it contends that the individuals who remain in Azerbaijan have either been lawfully tried, convicted and are serving their sentences or are awaiting trial. Azerbaijan therefore does not accept that it is under any duty to release those persons before they have been tried or, if found guilty, before they have served their sentence. Azerbaijan argues, thirdly, that all Armenian detainees in Azerbaijan’s custody are treated in accordance with Azerbaijan’s obligations under CERD.

65. With regard to the measure requesting Azerbaijan to refrain from espousing hatred of people of Armenian national or ethnic origin, the Respondent asserts that it has pledged its adherence to the obligations under CERD not to condone statements or actions that promote hatred or incite violence targeting a specific group on the basis of its national or ethnic origin. Azerbaijan also notes that mannequins depicting Armenian soldiers and displays of helmets of Armenian soldiers were permanently removed from the “Military Trophies Park”, as confirmed by a statement from its Agent (see paragraph 25 above).

66. With regard to the measures aimed at protecting Armenian historic, cultural and religious heritage sites, as well as at ensuring the rights of Armenians to access and enjoy them, Azerbaijan states that all persons who are lawfully present in Azerbaijan, including Armenians, are able to access such sites on an equal basis; Azerbaijan also refers to an Azerbaijani law forbidding the vandalism and destruction of sites of Armenian historic, cultural and religious heritage. The Respondent further notes that it is facilitating efforts to protect and preserve sites and artefacts that are relevant under CERD.

* *

67. The Court has already found that at least some of the rights claimed by Armenia under CERD are plausible (see paragraphs 59 to 61 above). It considers that a link exists between certain measures requested by Armenia (see paragraphs 5 and 11 above) and the plausible rights it seeks to protect. This is the case for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm; to refrain from espousing hatred against persons of Armenian national or ethnic origin; and to prevent, prohibit and punish vandalism, destruction or alteration of Armenian historic, cultural and religious heritage and to protect the right to access and enjoy that heritage. These measures, in the Court's view, are directed at safeguarding plausible rights invoked by Armenia under CERD.

68. The Court concludes, therefore, that a link exists between some of the rights claimed by Armenia and some of the requested provisional measures.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

69. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures, Order of 23 January 2020*, *I.C.J. Reports 2020*, p. 24, para. 64, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Provisional Measures, Order of 3 October 2018*, *I.C.J. Reports 2018 (II)*, p. 645, para. 77).

70. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*ibid.*, p. 24, para. 65). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

71. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

72. Armenia submits that there is an urgent need to protect prisoners of war and civilian detainees of Armenian national or ethnic origin from further mistreatment, to protect persons of Armenian national or ethnic origin from continued hate speech, and to protect Armenian historic, cultural and religious heritage from erasure.

73. Armenia alleges that the evidence shows a clear record and practice of Azerbaijani authorities abusing prisoners of war and civilian detainees of Armenian national or ethnic origin. Armenia adds that these individuals continue to be at grave risk of execution, torture or other forms of mistreatment. It contends that prisoners of war and civilian detainees of Armenian national or ethnic origin have been, and continue to be, exposed to stabbings, beatings, burnings and electric shocks, and that such treatment is often accompanied by ethnic slurs and other hate speech. Armenia states that a number of military and civilian detainees of Armenian national or ethnic origin have even been executed. Armenia maintains that the fact that the detainees are subject to the arbitrariness of criminal proceedings in Azerbaijan, in which they “are charged long after they should have been repatriated, and then tried and convicted in a matter of days, often in a language they do not understand”, and that they are at risk of being given lengthy prison sentences makes them extremely vulnerable to continued abuse. For all these reasons, Armenia is of the view that there is a clear and imminent threat of psychological trauma, bodily harm and even death for detainees of Armenian national or ethnic origin.

74. Armenia further speaks of obsessive and continuing expressions of hatred for persons of Armenian national or ethnic origin emanating from Azerbaijani politicians and high-ranking government officials, including the President. It alleges that this environment of hate may entail irreparable consequences, in particular by making the physical and mental abuse of all Armenians more likely, “including those living in Nagorno-Karabakh and those still held in captivity” in Azerbaijan. For example, the racist depictions at the “Military Trophies Park” of Armenian soldiers in denigrating and dehumanizing scenes “exacerbate[] the already real and present threat to the detainees”.

75. Armenia also contends that Azerbaijan has damaged, altered and destroyed Armenian churches (such as the Holy Saviour/Ghazanchetsots Cathedral in Shushi, the Armenian church of Saint John the Baptist in Shushi and the Saint Yeghishe Church in Mataghis), gravestones (in Hadrut, in north of Shushi, in Mets Tagher, in Taghavard and in Sghnakh), and other cultural and religious sites and artefacts (such as “khachkars” (or “cross-stones”)). Armenia claims that Azerbaijan continues to engage in these acts of destruction and vandalism or allows these acts to occur. It adds that even before the most recent armed conflict, Azerbaijan was prolific in its efforts to erase any vestige of the Armenian presence from its territory and that the continued racist hate speech by the President of Azerbaijan and senior government officials “only exacerbates this real and present risk”. Indeed, according to Armenia, by refusing even to acknowledge the existence of Armenian cultural heritage, the President of Azerbaijan “is directly promoting a climate that is even more conducive to the hate-filled destruction of that heritage”.

76. Azerbaijan denies that there exists an imminent risk of irreparable prejudice to the rights of the Applicant under CERD because it has already reaffirmed on several occasions its obligations under the Convention and has taken concrete action to comply with those obligations.

77. In particular, Azerbaijan asserts that it has given its commitment that no detainees should be subject to mistreatment on the basis of their national or ethnic origin. It notes that the International Committee of the Red Cross visits individuals detained in relation to the 2020 Conflict on a regular basis, assesses their treatment and conditions of detention and facilitates contact with their families. In addition, Azerbaijan states that, during visits by the Azerbaijani ombudsperson, Armenian detainees confirmed that they were provided with adequate food, both in quantity and nutritional value, had access to clean drinking water and were able to speak with their relatives. Detainees were also visited by the Azerbaijani National Preventive Group's doctor and were provided medical examinations at their request. Consequently, Azerbaijan is of the view that Armenia has not demonstrated an imminent risk of irreparable prejudice to the rights of detainees presently in custody.

78. Azerbaijan further points out that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group. It claims that Armenia misinterprets the statements made by the President and senior government officials of Azerbaijan, which were directed against enemy forces in the context of an armed conflict, and not against Armenians as an ethnic group. Moreover, when certain statements were thought to have been directed against the Armenian people, as opposed to the policies and practices of Armenia, Azerbaijani officials took "immediate and positive measures designed to" combat hate speech. Azerbaijan further observes that it has taken concrete steps to address Armenia's concerns by removing mannequins and helmets from the "Military Trophies Park" and that this removal of the only specific objects complained of by Armenia eliminates any urgency to act.

79. Azerbaijan further claims to have acknowledged publicly "its international obligation to protect and uphold historical, cultural and religious heritage in the liberated territories". It observes that the protection of historic and cultural monuments is also enshrined in Azerbaijan's Constitution and in its statutory law, which criminalizes the deliberate destruction or damaging of over 6,300 sites that are listed on its State Registry, which includes sites identified by Armenia. Azerbaijan adds that it has undertaken to "provide support for investigations of all credible allegations of vandalism, destruction, and unauthorized alteration of historical and cultural monuments and cemeteries used by ethnic Armenian individuals". It further notes that it is already working to restore sites on its National Registry damaged during the conflict. Azerbaijan argues that Armenia does not identify with any specificity any sites that it asserts to be in imminent danger of destruction unless the Court issues provisional measures. According to Azerbaijan, instead of pointing to specific, ongoing conduct that could demonstrate the risk of a real and imminent irreparable prejudice as required, Armenia contents itself with alleging only past conduct, primarily during or in the aftermath of active hostilities. For example, it refers to allegations of conflict-related damage to the Gazanchi Church, damage to war memorials, a cross-stone and a monument in Shusha by Azerbaijani soldiers, and soldiers vandalizing the Yegish Arakel Temple. The Respondent further submits that Armenia's

requested provisional measure preventing or prohibiting “alterations” to cultural heritage is tantamount to a prohibition on Azerbaijan from pursuing reconstruction and restoration of such heritage in its own sovereign territory without consulting Armenia and that this request “assumes a right to ‘enjoy’ monuments reconstructed to its specification” which does not plausibly exist under CERD.

* *

80. Having previously determined that some of the rights asserted by the Applicant are plausible and that there is a link between those rights and the provisional measures requested, the Court now considers whether irreparable prejudice could be caused to those rights and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

81. The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 (a), (b), (c), (d) and (e) are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142; *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*, p. 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 430-431, para. 67). The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD.

82. As the Court has noted previously, individuals subject to inhuman and degrading treatment or torture could be exposed to a serious risk of irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142). The Court has also recognized that psychological distress, like bodily harm, can lead to irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 431, para. 69).

83. In the view of the Court, acts prohibited under Article 4 of CERD — such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin — can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the State. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress.

84. The Court has also indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage “has been the scene of armed clashes between the Parties” and when “such clashes may reoccur” (see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 552, para. 61).

85. In the present proceedings, the information placed before the Court by the Parties includes the Resolution of the Parliamentary Assembly of the Council of Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021. It observes that the Assembly indicates, *inter alia*, that

“[a]mong allegations made by both sides, backed up by reputable international NGOs and a wealth of information available from different sources, there [is] worrying . . . evidence of . . . [a] substantial number of . . . allegations of [systematic] inhuman and degrading treatment and torture of Armenian prisoners of war by Azerbaijanis”.

The Court moreover observes that the Assembly “regrets that there remain statements at the highest level which continue to portray Armenians in an intolerant fashion”.

86. The Court in addition notes that the Assembly

“condemns the damage deliberately caused [by Azerbaijan] to [Armenian] cultural heritage during the 6-week war, and what appears to be the deliberate shelling of the Gazanchi Church/Holy Saviour, Ghazanchetsots Cathedral in Shusha/Shushi as well as the destruction or damage of other churches and cemeteries during and after the conflict; remains concerned, in the light of past destruction, about the future of the many Armenian churches, monasteries, including the monastery in Khutavank/Dadivank, cross-stones and other forms of cultural heritage which have returned under Azerbaijan control; [and] expresses concern about a developing narrative in Azerbaijan promoting a ‘Caucasian Albanian’ heritage to replace what is seen as an ‘Armenian’ cultural heritage” (*Resolution 2391 (2021), text adopted by the Assembly on 27 September 2021, 24th sitting*).

87. The Court also takes note of the joint statement issued by several United Nations human rights experts who, on 1 February 2021, addressed the situation of Armenians being held captive in Azerbaijan and expressed grave concern “at allegations that prisoners of war and other protected persons have been subjected to extrajudicial killing, enforced disappearance, torture and other ill-treatment” (United Nations Office of the High Commissioner for Human Rights, “Nagorno-Karabakh: Captives Must be Released — UN Experts” (1 February 2021)).

88. In light of the considerations set out above, the Court concludes that the alleged disregard of the rights deemed plausible by the Court (see paragraphs 59 to 61 above) may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. CONCLUSION AND MEASURES TO BE ADOPTED

89. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above (see paragraphs 59 to 61).

90. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures, Order of 23 January 2020*, *I.C.J. Reports 2020*, p. 28, para. 77).

91. In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

92. The Court considers that, with regard to the situation described above, pending the final decision in the case, Azerbaijan must, in accordance with its obligations under CERD, protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law; take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.

93. The Court takes full cognizance of the representation made by the Agent of Azerbaijan during the oral proceedings regarding certain exhibits in the “Military Trophies Park”, namely that mannequins depicting Armenian soldiers and displays of helmets allegedly worn by Armenian soldiers during the 2020 Conflict have been permanently removed from the park and will not be shown in the future (see paragraphs 25 and 65 above). In this regard, the Agent of Azerbaijan also referred to two letters of 6 and 13 October 2021, whereby the Director of the “Military Trophies Park” indicated that “all mannequins displayed at the Military Trophies Park . . . were removed on October 1, 2021” and that, “on October 08, 2021 all helmets were removed from the Military Trophies Park”. The Director of the “Military Trophies Park” further indicated that “[t]he mannequins and helmets will not be displayed at the Military Trophy Park or the Memorial Complex/Museum in the future”.

94. The Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, *Application of the International Convention on the Elimination of*

All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

95. The Court further recalls that Armenia requested it to indicate provisional measures directing Azerbaijan “to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD” and to provide regular reports on the implementation of provisional measures. The Court, however, considers that, in the particular circumstances of the case, these measures are not warranted.

*

* *

96. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109*) and thus create international legal obligations for any party to whom the provisional measures are addressed.

*

* *

97. The Court further reaffirms that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Armenia and Azerbaijan to submit arguments in respect of those questions.

*

* *

98. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) By fourteen votes to one,

Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judges ad hoc* Keith, Daudet;

AGAINST: *Judge* Yusuf;

(b) Unanimously,

Take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin;

(c) By thirteen votes to two,

Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge ad hoc* Daudet;

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

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Armenia and the Government of the Republic of Azerbaijan, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge YUSUF appends a dissenting opinion to the Order of the Court; Judge IWASAWA appends a declaration to the Order of the Court; Judge *ad hoc* KEITH appends a declaration to the Order of the Court.

(Initialed) J.E.D.

(Initialed) Ph.G.
