DISSENTING OPINION OF JUDGE YUSUF

1. The Court has thrown wide open the gates of the Convention on the Elimination of Racial Discrimination (hereinafter "CERD" or the "Convention") to all kinds of claims that have nothing to do with its provisions or with its object and purpose. Through this Order, claims under humanitarian law have been given a home in CERD, whereas the law on the safeguarding of cultural heritage has been brought within the scope of CERD. This unprecedented approach risks transforming the Convention into a "fourre-tout"; a receptacle in which all sorts of asserted rights may be stuffed. It may also turn the Convention into an all-encompassing instrument for those trying to establish the jurisdiction of the Court whenever other legal grounds cannot be found for that purpose. This is the reason for my dissent, which is further elaborated below.

2. According to Article 41 of the Statute, provisional measures are to be indicated by the Court, if it considers that circumstances so require, "to preserve the respective rights of either party". To this end, the Court does not need to establish definitively the existence of the rights claimed. The Court must, however, satisfy itself that the rights sought to be protected may plausibly be grounded in the applicable legal instrument or in the legal rules under which the claim is made. In other words, and with regard to the present case, the acts complained of must plausibly constitute acts of racial discrimination within the meaning of Article 1, paragraph 1, of the Convention, and must be capable of falling within the scope of CERD.

3. This is not the case, in my view, with respect to two distinct rights claimed by Armenia and dealt with in the first and third subparagraphs of the *dispositif*: the right of "all persons captured in relation to the 2020 Conflict who remain in detention" to be protected from violence and bodily harm; and the right to have "Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts" protected from acts of vandalism and desecration.

4. These rights are certainly worthy of protection. I am personally very sensitive to the humane treatment of prisoners of war and other persons arrested by State authorities, whether it is in relation to an armed conflict or not, as well as the safeguarding and preservation of cultural heritage sites. However, these matters fall under the scope of other instruments of international law, not CERD. As such, they raise questions of law over which the Court has no jurisdiction under Article 22 of CERD.

5. Armenia requested the Court to indicate provisional measures for the release and repatriation as well as for the protection from alleged inhuman treatment or bodily harm of the persons it identified as Armenian prisoners of war and civilian detainees taken by the Azerbaijani forces during the armed conflict of 2020. To this end, Armenia has provided the Court with a list of 45 persons detained by Azerbaijan, whom it characterizes as "All Armenian *nationals*", "prisoners of war and civilians of Armenian ethnicity and *nationality*"[1] or "Armenian servicemen and civilians"[2] (emphases added).

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[1] See Annex 68 of Additional Annexes filed by Armenia, "Letter from Yeghishe Kirakosyan, Representative of the Republic of Armenia before the European Court of Human Rights to the Registrar of the International Court of Justice (6 October 2021), attaching Table of 45 POWs and civilians acknowledged by Azerbaijan as of 6 October 2021". By a letter dated 22 October 2021, the Agent of Armenia informed the Court that "on 19 October 2021, five out of the 45 prisoners of war and civilians whose captivity has been acknowledged by the authorities of Azerbaijan were repatriated to the Republic of Armenia".

[2] Application of Armenia, paras. 105-106 and 111. See also CR 2021/20, p. 58, para. 12 (Martin); CR 2021/22, pp. 19-20, paras. 3-8 (Murphy) (referring to "Armenian soldiers").

6. Both Armenia and Azerbaijan are parties to the Third Geneva Convention relative to the Treatment of Prisoners of War (hereinafter the "Third Geneva Convention") and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter the "Fourth Geneva Convention"). The Third Geneva Convention regulates in detail the release, repatriation and treatment of prisoners of war, while the Fourth Geneva Convention deals with the internment or detention of "protected persons". The provisions of both Conventions prohibit adverse distinctions between these individuals based, in particular, on "race" or "nationality"[3]. International humanitarian law also provides specific mechanisms for monitoring compliance with these obligations[4]. Indeed, both Parties have indicated that the International Committee of the Red Cross has been monitoring the treatment of the Armenian detainees[5].

7. The Order correctly concludes in paragraph 60 that the release and repatriation of the Armenian detainees is not a right that is plausibly protected under CERD, but is governed by the relevant rules of international humanitarian law. It also recalls that "measures based on current nationality do not fall within the scope of CERD", and states that "Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin".

8. The same considerations, as well as the same conclusion, should logically apply to the alleged mistreatment of the same detainees, since, as rightly stated in the Order, Armenia has not provided the Court with evidence that these persons "continue to be detained by reason of their national or ethnic origin". This is all the more true in view of the non-applicability of the CERD to the treatment of such detainees who are being held, according to the Order itself, on the basis of their current nationality[6].

9. However, the Order contradicts itself, and simply asserts at the end of the same paragraph that "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". No reasons are given and no explanation whatsoever is provided on how the Court has arrived at such an internally inconsistent and incoherent conclusion with regard to the same persons and on the basis of the same factual record. If the Court is not satisfied that these persons are being detained by reason of their national or ethnic origin, it is difficult to understand by what means it has come to be persuaded, even prima facie, that the same persons are allegedly being mistreated because of their national or ethnic origin.

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[3] Article 16 of the Third Geneva Convention ("any adverse distinction based on race, nationality . . . or any other distinction founded on similar criteria"); Article 13 ("any adverse distinction based, in particular, on race [or] nationality") and Article 27, paragraph 3, of the Fourth Geneva Convention ("without any adverse distinction based, in particular, on race").

[4] CR 2021/21, p. 31, para. 24 (Lord Goldsmith), citing Azerbaijan's Annex 17, *Armenia* v. *Azerbaijan*, ECHR Application No. 42521/20, Letter ECHR–LE2.1aG from Johan Callewaert, Deputy Grand Chamber Registrar, to Mr. Çingiz Əsgərov, Agent of the Government of the Republic of Azerbaijan, dated 9 June 2021 ("as was already noted in the Court's letter of 3 November 2020, there exist other international mechanisms which are better placed for continuous monitoring of the conditions of detention of people captured during armed conflicts, and both Armenia and Azerbaijan are therefore strongly advised to resort to these mechanisms").

[5] CR 2021/21, p. 22, para. 24 (Lowe), citing Azerbaijan's Annex 19, Letter from Ogtay Mammadov, Acting Head of Penitentiary Service, Major-General of Justice, to Sabina Aliyeva, Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan, regarding dates of ICRC visits to detainees, dated 17 September 2021. See also CR 2021/20, p. 40, para. 29 (Murphy). See further CR 2021/21, p. 35, para. 38, and fn. 91 (Lord Goldsmith), with further references.

[6] *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*, paras. 88 and 105.

10. The Court goes even further and decides in subparagraph 1 *(a)* of the *dispositif* that Azerbaijan shall "[p]rotect 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" (emphasis added). The reference in the *dispositif* and in paragraph 92 of the Order to "all persons" captured in relation to the 2020 Conflict by Azerbaijan is surprising, since it differs from the description of the persons whose rights are found plausible by the Court in paragraph 60 of the Order.

11. The reference to "all persons" substantially broadens the category of those persons who were considered under paragraph 60 to consist only of "persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath", i.e. those included in the list of 45 detainees provided by Armenia. Consequently, it appears that, through paragraph 92 of the Order and subparagraph 1 *(a)* of the *dispositif*, the rights to be protected by Azerbaijan are now extended to "all persons" captured in relation to the conflict, without any indication in the Order of who these persons are and whether the Court has received information from any source on the identity of those who may be included in such a sweeping reference to "all persons".

12. It is my view that neither the simple assertion of the existence of a plausible right, without indicating a reason why it is so, and without demonstrating that it may possibly fall within the scope of CERD, nor the extension of such right to "all persons", with regard to whom a claim was not made by the requesting party, can provide justifiable grounds for the Court to exercise the powers granted it by Article 41 of the Statute in the present case. Regardless of the alleged unlawfulness of Azerbaijan's conduct with respect to Armenian detainees under the applicable rules of international humanitarian law, the obligation imposed upon it through an order on provisional measures on the basis of CERD must be grounded on the provisions of this specific legal instrument and the rights protected by it.

13. The above statement applies equally to the conclusions of the Court with regard to the protection of cultural and religious sites. In my view, there is no plausible right under CERD over the preservation of cultural heritage. Considerations of race and racial discrimination cannot and do not apply to monuments, groups of buildings, sites and artifacts. The provisions of CERD, which is an instrument on human rights, are intended to safeguard the basic rights and fundamental freedoms of human beings. Conversely, the protection of cultural monuments, religious sites and other buildings falls within the ambit of other instruments aimed at protecting these buildings and artifacts as the "cultural heritage of mankind" or on the basis of their historical, cultural and religious significance to States and to the national identity of their peoples.

14. This includes, in particular, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two additional protocols of 1954 and 1999, to which both Armenia and Azerbaijan are parties. That instrument provides the appropriate legal framework for the protection of cultural heritage in the context of armed conflicts, as recognized by the United Nations Security Council[7]. This is confirmed by the fact that UNESCO and the intergovernmental Committee of the 1954 Hague Convention have already been seised of the preservation of cultural sites in and around "Nagorno-Karabakh" pursuant to the 1954 Hague

[7] United Nations Security Council, resolution 2347 (2017), 24 March 2017, paras. 5-7.

Convention, and the Parties have engaged in consultations with these organs in relation to these matters[8].

15. Article 5, paragraph *(e)* (vi), of CERD protects the enjoyment of "[t]he right to equal participation in cultural activities". This right is to be read together with the *chapeau* of Article 5 which provides that "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". It is not therefore a self-standing provision which is disconnected from racial discrimination. It has to be analysed and understood through the prism of acts or actions which make distinctions on the basis of race, colour, or national or ethnic origin. Such acts or actions are not identified anywhere in the Order.

16. It should also be recalled that the United Nations Committee on Economic, Social and Cultural Rights, in its Comment No. 21 on Article 15, paragraph 1 *(a)*, of the International Covenant on Economic, Social and Cultural Rights does not establish a direct link or consequential relationship between the broader and unqualified "right of everyone to take part in cultural life" and the protection of cultural and religious sites by State authorities. The European Court of Human Rights also could not find such a link between the provisions of the European Convention on Human Rights and claims relating to cultural heritage sites or artefacts[9]. It follows that an obligation for States to prevent and punish acts of vandalism and desecration of cultural heritage and religious sites does not arise from the requirement, in Article 5, paragraph *(e)* (vi), of CERD, of equality before the law in the enjoyment of the "right to equal participation in cultural activities".

17. Moreover, it is not tenable, in my view, to assert that "religious heritage", in the sense of churches, cathedrals or other places of worship are plausibly protected under CERD (cf. paragraphs 63, 66-67, 72, 75, 79, and 92 of the Order). It is well known that the drafters of CERD decided not to address religious discrimination or religious intolerance in this Convention, and Article 1, paragraph 1, of CERD does not list religion or creed amongst the prohibited grounds for the purposes of "racial discrimination". It is therefore erroneous, in my view, to refer to a plausible right under the Convention for the protection of religious sites or places of worship.

18. Paragraph 84 of the Order appears to seek support for the possible existence of a risk of irreparable damage to cultural sites in the Court's jurisprudence by reference to the case concerning the *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)*, where the Court indicated provisional measures for free access to the Temple, which had been inscribed in the UNESCO World Heritage List[10]. This case, however, is distinguishable from the present circumstances, in so far as the Court's prima facie jurisdiction there was premised on a much wider jurisdictional basis.

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[8] UNESCO, "UNESCO is awaiting Azerbaijan's Response regarding Nagorno-Karabakh mission", 21 December 2020, available at https://en.unesco.org/news/unesco-awaiting-azerbaijans-response-regarding-nagorno-karabakh-mission, accessed 28 Nov. 2021.

[9] See, for example, ECtHR, *Ahunbay et autres c. Turquie*, Requête no. 6080/06, décision, 21 février 2019, paras. 23-25; ECtHR, *Syllogos ton Athinaion v. the United Kingdom*, Application no. 48259/15, Decision, 31 May 2016.

[10] *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)*, pp. 548 and 555, paras. 48 and 69 (B) (1)-(3).

19. In the *Temple of Preah Vihear* case, Thailand and Cambodia had originally made declarations recognizing the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. In 2011, the Court considered that, by virtue of Article 60 of the Statute, it could entertain a request for the interpretation of the Judgment that it had previously rendered. Thus, the Court had a much wider scope of authority to preserve the respective rights of the parties under the entirety of the relevant rules of international law applicable between them, which of course included the different instruments on the protection of cultural heritage[11]. In the present case, however, the Court's power to indicate provisional measures under Article 41 of the Statute is limited to the "respective rights of either party" that may be subsequently adjudged to belong to them under CERD. The CERD does not, however, incorporate any rights relating to the protection of cultural or religious sites.

20. In light of the above considerations, it is my considered opinion that CERD does not provide legal grounds for the indication of provisional measures in the present case with regard to the alleged mistreatment by Azerbaijan of the persons identified by Armenia as prisoners of war or civilian detainees or, for that matter, the other persons who are apparently included in the reference to "all persons" in the *dispositif* of the Order. Nor is such legal basis afforded by CERD with respect to the protection of cultural and religious sites. The Court's indication of provisional measures in relation to these two claims by Armenia is not, in my view, legally justified.

(Signed) Abdulqawi A. YUSUF.

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[11] *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), Judgment, I.C.J. Reports 2013*, pp. 317-318, para. 106.