

DECLARATION OF JUDGE *AD HOC* KEITH

No request for repatriation of detainees in Armenia's Application — Plausibility of right to cultural property under CERD — Risk of irreparable prejudice.

1. In this declaration, I address two matters.

2. The first concerns the request made by Armenia for the release of Armenians who were detained by Azerbaijan during the 2020 Conflict or the aftermath. I agree with the reason given by the Court in paragraph 60 of the Order: the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”) does not plausibly require Azerbaijan to repatriate those persons.

3. In addition to that reason, I call attention to the essential object of provisional measures. Their inherent character, as reflected in Article 41 of the Statute of the Court, is to preserve the rights claimed by either party, here the Applicant, as the Court makes clear in paragraph 44 of the Order. Nowhere in the list of requests set out in paragraph 97 of Part IV, titled “Relief Sought”, of the Application, filed by Armenia with the Registry on 16 September 2021, is relief sought in respect of the release or repatriation of those Armenians detained by Azerbaijan. The second and sixth of the points listed in paragraph 97 (2) (A) of the Application are limited to the rights of those Armenians in detention, but nowhere in the relief sought on the merits is there any reference to a right to be repatriated or released. The section on the facts supporting the request for provisional measures similarly does not go beyond the treatment of Armenians who remain under detention (paras. 104-112). Those matters are properly the subject of the first provisional measure indicated by the Court in paragraph 98 (1) (a) of the Order.

4. Second, I explain my negative vote on the measure relating to cultural property, set out in paragraph 98 (1) (c) of the Order. The relevant rights protected by CERD are limited ones. They are the rights of persons to freedom of thought, conscience and religion (Art. 5, para. (d) (vii) of CERD) and the right to equal participation in cultural activities (*ibid.*, Art. 5, para. (e) (vi)). The first of those rights, in many cases, can be enjoyed without access to physical places, and I do not see real evidence in the record of the denial of the second. CERD does not accord protection to cultural property itself. That protection is provided by other international instruments in carefully limited ways. Both Armenia and Azerbaijan are parties to several of them. I do not see the *Temple* case as being relevant in this case¹. The Court's jurisdiction at the merits stage of that case arose under unilateral acceptances of the jurisdiction of the Court by the two parties, without relevant reservations, rather than under the limited jurisdiction conferred by Article 22 of CERD.

5. Next, to the extent that CERD does provide for access to sites that include Armenian cultural property, that access is, on my understanding of the evidence, made difficult by the existence of landmines and the lack of knowledge of their spread, rather than because of the national or ethnic origin of those seeking access. Further, actions by the Azerbaijani authorities to restore war-damaged property and to undertake public works are not to be seen as plausible breaches of the particular rights in the Convention.

¹ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 537.*

6. Finally, on my reading of the record, I am unable to find evidence of a real and imminent risk that irreparable prejudice will be caused to the right in respect of cultural property. The material before the Court at present is too scant to meet that exacting standard.

(Signed) Kenneth KEITH.
