

Corrigé
Corrected

CR 2021/21

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2021

Public sitting

held on Thursday 14 October 2021, at 4 p.m., at the Peace Palace,

President Donoghue presiding,

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

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le jeudi 14 octobre 2021, à 16 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

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

COMPTE RENDU

Present: President Donoghue
Vice-President Gevorgian
Judges Tomka
Abraham
Bennouna
Yusuf
Xue
Sebutinde
Bhandari
Robinson
Salam
Iwasawa
Nolte
Judges *ad hoc* Keith
Daudet

Registrar Gautier

Présents: Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
MM. Keith
Daudet, juges *ad hoc*
M. Gautier, greffier

The Government of Armenia is represented by:

H.E. Mr. Yeghishe Kirakosyan, Representative of the Republic of Armenia before the European Court of Human Rights,

as Agent;

Mr. Sean Murphy, Manatt/Ahn Professor of International Law, The George Washington University Law School, member of the International Law Commission, associate member of the Institut de droit international, member of the Bar of Maryland,

Mr. Robert Kolb, Professor of Public International Law, University of Geneva,

Mr. Pierre d'Argent, Full Professor, Université catholique de Louvain, member of the Institut de droit international, president of the European Society of International Law, Foley Hoag LLP, member of the Bar of Brussels,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia and of the Commonwealth of Massachusetts,

Mr. Constantinos Salonidis, Attorney at Law, Foley Hoag LLP, member of the Bars of the State of New York and of Greece,

as Counsel and Advocates;

Ms Diana Tsutieva, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia, the States of New Jersey and New York, and Paris,

Mr. Joseph Klingler, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia and of the State of New York,

Mr. Peter Tzeng, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia and of the State of New York,

Ms Natalia Tchoukleva, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia and of the State of New York,

Ms Yasmin Al-Ameen, Attorney at Law, Foley Hoag LLP, member of the Bar of the State of New York,

Ms Nour Nicolas, Attorney at Law, Foley Hoag LLP, member of the Bar of the State of New York,

as Counsel;

H.E. Mr. Tigran Balayan, Ambassador of the Republic of Armenia to the Kingdom of the Netherlands,

H.E. Mr. Andranik Hovhannisyan, Ambassador, Permanent Representative of the Republic of Armenia to the United Nations Office and other international organizations in Geneva,

Mr. Liparit Drmeyan, Head of the Office of the Representative of the Republic of Armenia before the European Court of Human Rights, Office of the Prime Minister of the Republic of Armenia,

Le Gouvernement de l'Arménie est représenté par :

S. Exc. M. Yeghishe Kirakosyan, représentant de la République d'Arménie auprès de la Cour européenne des droits de l'homme,

comme agent ;

M. Sean Murphy, professeur de droit international titulaire de la chaire Manatt/Ahn à la faculté de droit de l'Université George Washington, membre de la Commission du droit international, membre associé de l'Institut de droit international, avocat inscrit au barreau du Maryland,

M. Robert Kolb, professeur de droit international public à l'Université de Genève,

M. Pierre d'Argent, professeur titulaire à l'Université catholique de Louvain, membre de l'Institut de droit international, président de la Société européenne de droit international, cabinet Foley Hoag LLP, membre du barreau de Bruxelles,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et du Commonwealth du Massachusetts,

M. Constantinos Salonidis, avocat au cabinet Foley Hoag LLP, membre des barreaux de l'Etat de New York et de Grèce,

comme conseils et avocats ;

Mme Diana Tsutieva, avocate au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia, de l'Etat du New Jersey, de l'Etat de New York et de Paris,

M. Joseph Klingler, avocat au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de l'Etat de New York,

M. Peter Tzeng, avocat au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de l'Etat de New York,

Mme Natalia Tchoukleva, avocate au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de l'Etat de New York,

Mme Yasmin Al-Ameen, avocate au cabinet Foley Hoag LLP, membre du barreau de l'Etat de New York,

Mme Nour Nicolas, avocate au cabinet Foley Hoag LLP, membre du barreau de l'Etat de New York,

comme conseils ;

S. Exc. M. Tigran Balayan, ambassadeur de la République d'Arménie auprès du Royaume des Pays-Bas,

S. Exc. M. Andranik Hovhannisyan, ambassadeur, représentant permanent de la République d'Arménie auprès de l'Organisation des Nations Unies et des autres organisations internationales à Genève,

M. Liparit Drmeyan, chef du bureau du représentant de la République d'Arménie auprès de la Cour européenne des droits de l'homme, cabinet du premier ministre de la République d'Arménie,

Ms Kristine Khanazadyan, Head of the Department for Representation of the Interests of the Republic of Armenia before International Courts and Tribunals, Office of the Prime Minister of the Republic of Armenia,

Ms Marta Ayvazyan, Advisor to the Minister for Foreign Affairs of the Republic of Armenia,

Mr. Igor Mirzakhanyan, Legal Expert at the Office of the Representative of the Republic of Armenia before the European Court of Human Rights, Office of the Prime Minister of the Republic of Armenia,

Mr. Aram Aramyan, Deputy Head of Department of International Legal Cooperation, Ministry of Justice of the Republic of Armenia,

Mr. Levon Gevorgyan, Director of the “International Law and Policy Centre” Foundation, member of the Bar of Armenia,

Ms Zoya Stepanyan, First Secretary, Permanent Mission of Armenia to the United Nations Office and other international organizations in Geneva,

Ms Sheila Paylan, Senior Research Fellow at the “International Law and Policy Center” Foundation, Expert in International Criminal and Human Rights Law,

Mr. Karnig Kerkonian, Attorney at Law, Kerkonian Dajani LLP, Expert in Public International Law, member of the Bar of Illinois,

as Advisers.

The Government of Azerbaijan is represented by:

H.E. Mr. Elnur Mammadov, Deputy Minister for Foreign Affairs, Republic of Azerbaijan,

as Agent;

Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, member of the Bar of England and Wales,

Lord Peter Goldsmith, QC, Debevoise & Plimpton LLP, member of the Bar of England and Wales,

Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization at the University of Geneva, member of the Institut de droit international,

Mr. Donald Francis Donovan, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

as Counsel and Advocates;

H.E. Mr. Fikrat Akhundov, Ambassador of the Republic of Azerbaijan to the Kingdom of the Netherlands,

Mme Kristine Khanazadyan, directrice du département chargé de la représentation des intérêts de la République d'Arménie devant les juridictions internationales, cabinet du premier ministre de la République d'Arménie,

Mme Marta Ayvazyan, conseillère auprès du ministre des affaires étrangères de la République d'Arménie,

M. Igor Mirzakhanyan, expert juridique rattaché au bureau du représentant de la République d'Arménie auprès de la Cour européenne des droits de l'homme, cabinet du premier ministre de la République d'Arménie,

M. Aram Aramyan, directeur adjoint du département de la coopération juridique internationale, ministère de la justice de la République d'Arménie,

M. Levon Gevorgyan, directeur de la fondation International Law and Policy Center, avocat inscrit au barreau d'Arménie,

Mme Zoya Stepanyan, première secrétaire, mission permanente de l'Arménie auprès de l'Organisation des Nations Unies et des autres organisations internationales à Genève,

Mme Sheila Paylan, chargée de recherche principale à la fondation International Law and Policy Center, experte en droit pénal international et en droit international des droits de l'homme,

M. Karnig Kerkonian, avocat au cabinet Kerkonian Dajani LLP, expert en droit international public, membre du barreau de l'Illinois,

comme conseillers.

Le Gouvernement de l'Azerbaïdjan est représenté par :

S. Exc. M. Elnur Mammadov, ministre adjoint aux affaires étrangères de la République d'Azerbaïdjan,

comme agent ;

M. Vaughan Lowe, QC, professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford, membre de l'Institut de droit international, membre du barreau d'Angleterre et du pays de Galles,

Lord Peter Goldsmith, QC, cabinet Debevoise & Plimpton LLP, membre du barreau d'Angleterre et du pays de Galles,

Mme Catherine Amirfar, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

Mme Laurence Boisson de Chazournes, professeure au département de droit international et organisation internationale de l'Université de Genève, membre de l'Institut de droit international,

M. Donald Francis Donovan, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

comme conseils et avocats ;

S. Exc. M. Fikrat Akhundov, ambassadeur de la République d'Azerbaïdjan auprès du Royaume des Pays-Bas,

H.E. Mr. Vagif Sadigov, Ambassador of the Republic of Azerbaijan to the Kingdom of Belgium,
Permanent Representative of the Republic of Azerbaijan to the European Union,

H.E. Mr. Rovshan Sadigbayli, Ambassador of the Republic of Azerbaijan to the Republic of Austria,
Permanent Representative of the Republic of Azerbaijan to the Organization for Security and
Co-operation in Europe and other international organizations in Vienna,

H.E. Mr. Kamil Khasiyev, Ambassador of the Republic of Azerbaijan to the Republic of Serbia,

Mr. Tofiq Musayev, Deputy Permanent Representative, Permanent Mission of the Republic of
Azerbaijan to the United Nations,

Mr. Ismayil Asadov, Counselor, Embassy of Azerbaijan in the Russian Federation,

Mr. Chingiz Asgarov, Agent of the Republic of Azerbaijan before the European Court of Human
Rights,

Mr. Erkin Alikhanov, Director of the International Legal Cooperation Department, Prosecutor
General's Office of the Republic of Azerbaijan,

Ms Aygun Bashirova, Chief of the Administrative and Military Standards Acts Office of the General
Department of Legislation, Ministry of Justice of the Republic of Azerbaijan,

as Advisers;

Ms Natalie Reid, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

Mr. Conway Blake, Debevoise & Plimpton LLP, solicitor advocate of the Senior Courts of England
and Wales, and member of the Bar of the Eastern Caribbean Supreme Court,

Ms Elizabeth Nielsen, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

Ms Ashika Singh, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

Mr. Justin Rassi, Debevoise & Plimpton LLP, member of the Bar of the State of New York and
lawyer of the Supreme Court of New South Wales,

Ms Rhianna Hoover, Debevoise & Plimpton LLP, member of the Bar of the State of New York,

Mr. Aditya Laddha, PhD candidate and assistant, University of Geneva,

Mr. Luke Tattersall, Essex Court Chambers, member of the Bar of England and Wales,

as Counsel;

Ms Mary Grace McEvoy, Debevoise & Plimpton LLP,

Mr. Nakaba Egawa, Debevoise & Plimpton LLP,

Mr. Badir Bayramov, Ministry of Foreign Affairs,

as Assistants.

S. Exc. M. Vagif Sadigov, ambassadeur de la République d'Azerbaïdjan auprès du Royaume de Belgique, représentant permanent de la République d'Azerbaïdjan auprès de l'Union européenne,

S. Exc. M. Rovshan Sadigbayli, ambassadeur de la République d'Azerbaïdjan auprès de la République d'Autriche, représentant permanent de la République d'Azerbaïdjan auprès de l'Organisation pour la sécurité et la coopération en Europe et d'autres organisations internationales sises à Vienne,

S. Exc. M. Kamil Khasiyev, ambassadeur de la République d'Azerbaïdjan auprès de la République de Serbie,

M. Tofiq Musayev, représentant permanent adjoint de la République d'Azerbaïdjan auprès de l'Organisation des Nations Unies,

M. Ismayil Asadov, conseiller à l'ambassade d'Azerbaïdjan en Fédération de Russie,

M. Chingiz Asgarov, agent de la République d'Azerbaïdjan devant la Cour européenne des droits de l'homme,

M. Erkin Alikhanov, directeur du département de coopération juridique internationale du parquet général de la République d'Azerbaïdjan,

Mme Aygun Bashirova, cheffe du bureau des normes administratives et militaires du département général de la législation au ministère de la justice de la République d'Azerbaïdjan,

comme conseillers ;

Mme Natalie Reid, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

M. Conway Blake, cabinet Debevoise & Plimpton LLP, *solicitor advocate* près les juridictions supérieures d'Angleterre et du pays de Galles, membre du barreau de la Cour suprême de la Caraïbe orientale,

Mme Elizabeth Nielsen, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

Mme Ashika Singh, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

M. Justin Rassi, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York et avocat près la Cour suprême de la Nouvelle-Galles du Sud,

Mme Rhianna Hoover, cabinet Debevoise & Plimpton LLP, membre du barreau de l'Etat de New York,

M. Aditya Laddha, doctorant et assistant à l'Université de Genève,

M. Luke Tattersall, cabinet Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

comme conseils ;

Mme Mary Grace McEvoy, cabinet Debevoise & Plimpton LLP,

M. Nakaba Egawa, cabinet Debevoise & Plimpton LLP,

M. Badir Bayramov, ministère des affaires étrangères,

comme assistants.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the first round of oral observations of Azerbaijan on the Request for the indication of provisional measures submitted by the Republic of Armenia. I shall now give the floor to the Agent of Azerbaijan, His Excellency Mr. Elnur Mammadov. Your Excellency, you have the floor.

Mr. MAMMADOV:

I. INTRODUCTORY STATEMENT

1. Madam President, honourable Members of the Court, it is a great honour for me to appear today before you as the Agent of the Republic of Azerbaijan.

2. For Azerbaijan, the Convention on the Elimination of All Forms of Racial Discrimination — which I will refer to as “CERD” — is a treaty of fundamental importance. Azerbaijan is proudly multicultural and is comprised of over fifty ethnic groups and many different religious traditions¹. The President of the Republic of Azerbaijan, Ilham Aliyev, repeatedly has confirmed Azerbaijan’s commitment to CERD’s core values of equality, diversity and respect for human dignity. As he stated in April of this year, “[t]he preservation of ethnic and cultural diversity in our society, the promotion of a culture of coexistence based on mutual respect and trust, is one of the main priorities of our state policy”². We have worked hard to build a society that strives to uphold CERD’s animating principles, including by “promot[ing] understanding between races and . . . build[ing] an international community free from all forms of racial segregation and racial discrimination”³.

3. Madam President, honourable Members of the Court, I recognize that I stand before you today to respond to Armenia’s Request for provisional measures under CERD and not to present Azerbaijan’s Request for provisional measures. In Armenia’s Application and Request, however, as

¹ State Statistical Committee of the Republic of Azerbaijan, Population of Azerbaijan (2021), p. 21, available at <https://www.stat.gov.az/source/demography/ap/?lang=en>; Fazil Humbatli, “Multiculturalism in Azerbaijan: Multiculturalism in Architecture, Art and Social Life”, *Azerbaijani Multiculturalism* (2 Sept. 2016), available at https://multiculturalism.preslib.az/en_others-hpt5PRUsV3.html; Azerbaijani Multiculturalism, Azerbaijan: A Caucasian Mosaic (31 May 2013), available at https://multiculturalism.preslib.az/en_others-QfFHMZu0B.html.

² President of the Republic of Azerbaijan, To the Orthodox Christian Community of Azerbaijan (30 Apr. 2021), available at <https://en.president.az/articles/51335>. See also “President Ilham Aliyev attended the opening ceremony of the 5th World Forum on Intercultural Dialogue”, *Baku Process* (3 June 2019), available at <https://bakuprocess.az/president-ilham-aliyev-attended-the-opening-ceremony-of-the-5th-world-forum-on-intercultural-dialogue/>.

³ CERD Convention, preamble.

well as in its presentation this morning, Armenia has presented you with an inaccurate picture of the factual context of this dispute.

4. This dispute with Armenia under CERD arises in the context of two wars of Armenian aggression and Armenia's almost thirty-year occupation of territory internationally recognized as Azerbaijan's sovereign territory. Armenia is a mono-ethnic country by design, primarily as the result of a decades-long, intentional policy and practice of ethnic cleansing targeted at Azerbaijanis. Armenia's policy and practice of ethnic cleansing is rooted in a racist, ethno-nationalist ideology that openly proclaims the Armenian homeland must be preserved for Armenians alone⁴. Armenia's actions in furtherance of this goal have been so chillingly effective that Armenia has gone from being home, in the late 1980s, to a population of hundreds of thousands of ethnic Azerbaijanis — previously the largest minority ethnic group in Armenia — to announcing to the CERD Committee in 2001 its status as a “mono-ethnic State”⁵ and, by 2017, being unable to report *any* statistics on Azerbaijanis remaining in Armenia⁶.

5. Armenia's vision of the “Armenian homeland” reached beyond its own borders to the Garabagh region of Azerbaijan, prompting Armenia to expand its ethnic cleansing campaign into Azerbaijan's sovereign territory via the unlawful use of force. As the Soviet Union disintegrated in the early 1990s, Armenia unleashed a war on Azerbaijan — referred to as the First Garabagh War — and seized not just the area formerly known as Daghygh Garabagh or Nagorno-Karabakh, but also seven surrounding districts that at the time were home to a population that was 98 per cent ethnic Azerbaijanis and only 0.1 per cent ethnic Armenians⁷. In this regard, it should be noted that Azerbaijan **strongly** objects to reference by Armenia and its counsel this morning to the non-existent entity, which contravenes the basic principle of sovereignty of Azerbaijan.

⁴ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application instituting proceedings (hereinafter “Application of Azerbaijan”), paras. 5, 8, 30, 69.

⁵ Republic of Armenia, Third and Fourth Periodic Reports of Armenia, UN doc. CERD/C/372/Add.3 (13 May 2002), para. 5.

⁶ CERD Committee, Summary Record of the 2524th Meeting, document CERD/C/SR.2524 (2 May 2017), paras. 39, 43; Application of Azerbaijan, para. 6.

⁷ Application of Azerbaijan, para. 13. See also Parliamentary Assembly Council of Europe resolution 1416, The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference (2005), para. 2, available at <https://pace.coe.int/pdf/054535b64a8c8db462e36c55fd37d805120c5634eefb777b2aa00391ceb35fda/resolution%201416.pdf>.

6. The First Garabagh War took, and continues to take, a tragic human toll on Azerbaijan. Armenia ethnically cleansed more than 700,000 Azerbaijanis from the territory that it seized — comprising nearly 20 per cent of our homeland⁸. All told, including the more than 200,000 Azerbaijanis expelled from Armenia, nearly one million Azerbaijanis were forcibly displaced as a result of the war and occupation⁹. Thousands more Azerbaijanis were killed or injured, and several thousand disappeared without a trace¹⁰. Armenia's occupation also caused untold devastation to Azerbaijani lands, towns and heritage sites, which were systematically erased throughout the occupied territories¹¹. Make no mistake as to the relevance of CERD to Armenia's actions: the very objective of the First Garabagh War was to expand territory that would then be ethnically cleansed of Azerbaijanis so as to achieve a greater mono-ethnic state of Armenia. This was a war of aggression in pursuit of a policy of ethnic cleansing.

7. For years, Armenia has refused to comply with the four United Nations Security Council resolutions requiring “the immediate, complete and unconditional withdrawal” of Armenian forces from all the occupied territories of Azerbaijan¹², to engage in good faith with the Organization for Security and Co-operation in Europe (OSCE) Minsk Process for the peaceful resolution of the conflict¹³, or to cease its continued military provocations¹⁴. As a result of such provocations, the Second Garabagh War erupted over 44 days in September through November of 2020. The Trilateral Statement of 10 November 2020 — signed by Azerbaijan, Armenia and the Russian Federation — brought an end to that war, confirmed the liberation of Azerbaijan's territory and laid the foundation for a sustainable peace in the region.

⁸ See Application of Azerbaijan, paras. 9-10, 51.

⁹ See Application of Azerbaijan, para. 10. See also United Nations General Assembly resolution 48/114, Emergency international assistance to refugees and displaced persons in Azerbaijan, document A/RES/48/114 (23 March 1994), p. 2.

¹⁰ See Application of Azerbaijan, paras. 10, 28-35.

¹¹ See Application of Azerbaijan, paras. 56-64.

¹² United Nations Security Council resolution 853 (1993); United Nations Security Council resolution 822 (1993); United Nations Security Council resolution 874 (1993); United Nations Security Council resolution 884 (1993); Application of Azerbaijan, para. 40. See also Note by the President of the United Nations Security Council, UN doc. S/26326 (18 Aug. 1993); Statement by the President of the United Nations Security Council, UN doc. S/PRST/1995/21 (26 Apr. 1995).

¹³ See Application of Azerbaijan, paras. 12-13.

¹⁴ See Application of Azerbaijan, para. 70.

8. This is the critical factual context missing from Armenia's characterization of the dispute under CERD. By moving to liberate its territories from Armenia's illegal occupation, Azerbaijan was acting, or rather reacting, not out of ethnic animus but in response to a blatant and unlawful use of force against its people and its sovereign territory. The Second Garabagh War has been made the focus of Armenia's Application and the exclusive focus of its Request for provisional measures because Armenia tries to disregard its decades-long unlawful occupation of Azerbaijan's territory, along with a systematic and organized campaign of ethnic cleansing and other brutalities visited on the people of Azerbaijan that preceded that war. It is the focus of Armenia's case because Armenia now seeks to repackage certain of its complaints regarding the Second Garabagh War that are entirely unrelated to racial discrimination as requests for provisional measures under CERD.

9. This applies equally to Armenia's allegations relating to hate speech. Again, after three decades of war and occupation, it is no surprise that tensions between the two countries run high. But wartime rhetoric and political speech criticizing the racist policies promoted and executed by the Armenian Government should not be conflated with prohibited hate speech under CERD.

10. Azerbaijan is dedicated to upholding the core values protected by CERD and does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group. Azerbaijan reaffirms its obligation to treat Armenian detainees in its custody in accordance with its obligations under CERD. Azerbaijan has commenced investigations and brought charges against Azerbaijani servicemen with respect to alleged crimes committed against Armenians during the Second Garabagh War¹⁵. This is at the same time as Armenia ignores international calls to do the same for crimes committed against Azerbaijanis¹⁶.

¹⁵ See judges' folder, tab 4, Annex 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 October 2021, No. 14/çix67-21 (with enclosures) (certified translation).

¹⁶ See e.g. Nicola Murray, Deputy Head of the United Kingdom Delegation to the OSCE, "UK statement in response to OSCE Minsk Group Co-Chair statement" (17 December 2020), available at <https://www.gov.uk/government/news/uk-statement-in-response-to-osce-minsk-group-co-chair-statement>; Amnesty International, "Armenia/Azerbaijan: Decapitation and war crimes in gruesome videos must be urgently investigated" (10 December 2020), available at <https://www.amnesty.org/en/latest/press-release/2020/12/armenia-azerbaijan-decapitation-and-war-crimes-in-gruesome-videos-must-be-urgently-investigated/>; United Nations Office of the United Nations High Commissioner for Human Rights, "Nagorno-Karabakh conflict: Bachelet warns of possible war crimes as attacks continue in populated areas" (2 November 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26464>; Parliamentary Assembly of the Council of Europe, Escalation of violence in Nagorno-Karabakh and the other occupied territories of Azerbaijan, Doc No. 13930, Explanatory Memorandum by Mr. Walter, rapporteur (11 December 2015), para. 42, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22255&lang=en>.

11. In its Request, Armenia focuses its claims of incitement upon the Military Trophies Park, which opened in April 2021 to commemorate the lives lost in the long conflict between Armenia and Azerbaijan, and the liberation of Azerbaijan's territory after almost 30 years of occupation. The park was never intended to promote anti-Armenian sentiment, which is contrary to Azerbaijan's commitment to diversity as a multi-ethnic country. The few exhibits referenced in tabs 19 and 20 of your folders have been permanently removed from the park¹⁷.

12. Azerbaijani officials, including the President, have emphasized the importance of inclusion and mutual understanding in progressing towards a new era of peace and stability in the South Caucasus region. In signing the Trilateral Statement in November 2020, Azerbaijan committed to the return of displaced persons, regardless of their national or ethnic origin. President Aliyev has often repeated this commitment, as he stated with reference to the formerly occupied territories in October of last year:

“We think, and that was officially declared many times, that after the war is over, after occupational forces are withdrawn, Armenians and Azerbaijanis . . . will live side-by-side as in any other country with a multi-ethnic population and they will, I am sure, one day again will become good neighbors to each other.”¹⁸

13. Madam President, honourable Members of the Court, Azerbaijan's distinguished counsel will now explain in further detail why Armenia's request for provisional measures must be rejected in full.

14. *First*, Professor Vaughan Lowe will explain how Armenia's conduct during the negotiations undermines its case on provisional measures and outline the fundamental flaws underlying all aspects of Armenia's Request.

15. *Second*, Lord Peter Goldsmith will demonstrate that the provisional measures requested by Armenia relating to individuals presently in Azerbaijan's custody, who are all either charged with

¹⁷ Judges' folder, tab 19, Annex 24, Letter from Orujali Abbaszade, Director of the Military Trophies Park, to Elnur Mammadov, Deputy Minister of Foreign Affairs, dated 6 October 2021 (certified translation); judges' folder, tab 20, Annex 33, Letter from Orujali Abbaszade, Director of the Military Trophies Park, to Elnur Mammadov, Deputy Minister of Foreign Affairs, dated 13 October 2021 (certified translation).

¹⁸ President of Azerbaijan, “İlham Əliyevin ‘CNN International’ televiziya kanalının ‘Connect the World’ verilişinə müsahibəsi”, YouTube (9 October 2020), at 8:30–9:10, available at <https://www.youtube.com/watch?v=QTjTcTWbnmg&t=370s>; see also President of the Republic of Azerbaijan, Press Release: Nizami Ganjavi International Center's web discussion themed “The South Caucasus: Regional Development and Prospective for Cooperation” was held with the participation of President İlham Aliyev (20 May 2021), available at <https://en.president.az/articles/51583>.

or convicted of torture, mercenarism or other serious crimes, as well as the request directed at preservation of evidence, are neither justified nor warranted.

16. *Third*, Professor Laurence Boisson de Chazournes will address why Armenia's request that Azerbaijan refrain from hate speech against Armenians fails.

17. *Fourth*, Ms Catherine Amirfar will explain why the requested provisional measures relating to access to and restoration of cultural and religious heritage sites fail to meet the legal standard for the indication of provisional measures.

18. *Finally*, Mr. Donald Francis Donovan will offer concluding observations as to why Armenia's Request for provisional measures as a whole is defective and must be rejected.

19. Madam President, honourable Members of the Court, I thank the Court for its kind attention and request that the Court invite Professor Vaughan Lowe to the podium.

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

Mr. LOWE:

II. ARMENIA'S REQUESTED MEASURES DO NOT MEET THE STANDARD FOR THE INDICATION OF PROVISIONAL MEASURES

1. Thank you, Madam President. Madam President, Members of the Court: it is a privilege to appear before you, and an honour to have been entrusted with the presentation of this part of the submissions of the Republic of Azerbaijan.

A. Introduction

2. Provisional measures are all about urgency; and the two cases which you now have before you, show two very different understandings of what amounts to urgency. One is based on the kind of urgency that is felt when you are about to put your foot on the ground and you have a sudden fear that the ground looks disturbed and might conceal unmarked landmines laid during a recently-ended 30-year military occupation of your country, and that your next step might be your last. The other is

based on what Armenia calls the “extreme urgency”¹⁹ that lies behind its request that detainees taken into custody in Azerbaijan during and after last year’s armed conflict which ended that military occupation should, if they are Armenian, be released immediately from the detention facilities where they are being held.

3. The defects in Armenia’s requests are clear and decisive, and it is tempting to go straight to them. But to do so would overlook a more elementary objection to Armenia’s Request, which bears on all of its specific requests for provisional measures.

4. Armenia’s Request is based on the premise that its dispute with Azerbaijan is not settled by negotiation, and the Court therefore has under CERD Article 22 the prima facie jurisdiction that the Court’s jurisprudence establishes is necessary as a basis for ordering provisional measures²⁰.

B. Prima facie jurisdiction

5. The Court held in *Georgia v. Russia*, that prior resort to negotiations is a precondition of jurisdiction under CERD Article 22²¹, and that “the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”²².

6. Armenia says that the negotiations have failed and are futile. Why? Professor Kolb was candid. It is because Azerbaijan would not accept Armenia’s demand that Azerbaijan admit at the outset that it is guilty of breaches of the CERD. First admit you are guilty, then we will talk.

7. That is no way to negotiate. And it is obviously not a provisional measures point: it is a merits point. Azerbaijan put forward proposals for immediate steps to address the very matters that are the subject of Armenia’s present Request.

¹⁹ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application instituting proceedings and Request for provisional measures of the Republic of Armenia (hereinafter “Application and Request for provisional measures of Armenia”), para. 131.

²⁰ See e.g. *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)*, pp. 630-631, para. 25; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016 (II)*, p. 1155, paras. 31-33.

²¹ *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.

²² *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. 159.

8. That is evident from three documents in your folder. The first is Azerbaijan's Note Verbale to Armenia dated 2 September 2021²³. It was submitted by Armenia as its Annex 60; but Armenia asked that it not be publicly quoted or displayed in these proceedings. It is at tab 1 in your folders.

9. The second document is Armenia's response dated 10 September 2021²⁴ — Armenia's Annex 61, also confidential but in your folders as tab 2.

10. The third document, at tab 3 of your folders, is a document relating to the negotiations that Armenia has not put before you²⁵. It is a summary of the fresh proposals made by Azerbaijan to Armenia six weeks ago, on 30-31 August 2021.

11. As the Court knows, there is an agreement between the two Parties on procedural modalities for the negotiations, filed by Armenia as its Annexes 40 and 41. Azerbaijan considers it clear that under Agreed Modalities 7 and 12, each Party is free to use its own declarations, admissions or proposals from the negotiations in these proceedings before the Court. We will, however, respect the Court's advice in its letters of 7 October 2021 that these documents should not be displayed or quoted in the course of this hearing, and will treat the text of Azerbaijan's August proposals in the same way.

12. Rather than read them out, I invite the Members of the Court to read those documents, bearing in mind three questions:

(a) The *first* arises from Armenia's argument that the precondition of negotiations is met when the parties' basic positions have not evolved after several exchanges of diplomatic correspondence and meetings²⁶, and that "the parties' basic positions today remain exactly the same as they were in the Foreign Ministers' letters of 11 November and 8 December 2020"²⁷. So the *first question* is, has the position of Azerbaijan in the negotiations remained rigid and inflexible between, for

²³ Judges' folder tab 1, Annex 60 to the Application and Request for provisional measures of Armenia, Note Verbale from the Permanent Mission of the Republic of Armenia to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Republic of Azerbaijan to the United Nations Office and other International Organizations in Geneva dated 10 September 2021, Ref. 2203/1415/2021.

²⁴ Judges' folder tab 2, Annex 61 to the Application and Request for provisional measures of Armenia, Note Verbale from the Permanent Mission of the Republic of Armenia to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Republic of Azerbaijan to the United Nations Office and other International Organizations in Geneva dated 10 September 2021, Ref. 2203/1415/2021.

²⁵ Judges' folder tab 3, Annex 32, Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elnur Mammadov, Deputy Minister of Affairs, dated 9 October 2021, No. 0612/04/21/01.

²⁶ Application and Request for provisional measures of Armenia, para. 18.

²⁷ Application and Request for provisional measures of Armenia, para. 19.

example, 2020, or the statement of 3 March 2021 — Armenia’s Annex 23 — and Azerbaijan’s proposals of 30-31 August 2021; or did Azerbaijan display a willingness to find a negotiated solution to the disputes with Armenia?

(b) *Second*, did Azerbaijan’s detailed proposals address matters that Armenia is now arguing before this Court are matters that require Court intervention as a matter of extreme urgency?

(c) *Third*, given that Azerbaijan’s proposals were presented two weeks in advance of the meeting of 14-15 September, and that Armenia’s Application and Request for provisional measures was filed under 24 hours after that meeting, on 16 September, what conclusion is to be drawn about the “failure” or “futility” of these negotiations? Did negotiations on these proposals fail? Or did Armenia never give them a chance?

13. The CERD does not entitle a State to opt out of attempts to find a negotiated solution, whether by refusing to turn up for negotiations, or by being physically present in order to satisfy Article 22 but refusing to give proper consideration to proposals put forward by the other side. States cannot simply choose to prefer the Court to a negotiation. And if a State attempts to seize the Court of a dispute without meeting the preconditions in the CERD, the Court — according to its own jurisprudence — manifestly lacks the jurisdiction either to determine the merits of the case or to order provisional measures.

C. Urgency

14. Let me turn to the question of urgency. Urgency has two aspects:

(a) The *first* is *timing*. Armenia must satisfy the Court *that* it needs a Court Order now, and that it cannot wait until the full evidence is heard and the case is addressed on its merits.

(b) The *second* aspect is that there must be a *need* for the Court to order the provisional measures requested.

15. On timing: urgency must be shown if provisional measures are to be ordered²⁸. If Armenia really considered these matters “extremely urgent”, why did it not take up Azerbaijan’s invitation to discuss its proposals? They were fresh proposals, not previously discussed; and they were not put forward on a “take it or leave it” basis.

²⁸ *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 243, para. 50.

16. If this Request for provisional measures is really about measures that are urgently necessary to “preserve the respective rights of either party” — about “a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision”²⁹, why did Armenia abruptly move this dispute out of negotiations and into the Court? Why is Armenia pursuing an obviously hopeless attempt to invoke the CERD in order to have the Court order that the gates of Azerbaijan’s prisons be flung open and all Armenians charged or convicted of crimes in relation to the armed conflict be invited to leave?

17. Indeed, where is the evidence of *any* imminent risk? The “factual basis” for Armenia’s requests lies in historic episodes whose examination would be a matter for any merits phase, should this case proceed that far. But there is *no* evidence of any imminent risk of breach; and Azerbaijan’s commitments make it very clear that there is no such risk.

18. The second aspect of urgency is the practical need for the measures. There can be no urgent need if the measures themselves are not necessary and will contribute little or nothing to the preservation of rights facing an imminent risk of serious and irreparable harm.

19. But in this case there is no need for a Court Order. As the Agent has indicated and my colleagues will shortly explain, the majority of Armenia’s requests for provisional measures relate to matters on which Azerbaijan has already committed itself. The request that the Court order Azerbaijan to do what Azerbaijan has already declared that it is legally committed to do is unnecessary and has no apparent purpose except to use this Court to score a point against Azerbaijan.

20. The Court has been clear that a declaration or undertaking made by the agent of a party before the Court or in a public statement has binding legal effect³⁰. Where this is the case and the

²⁹ *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. 428, para. 61.

³⁰ See e.g. *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 13, para. 27.

party is under a legal obligation to act accordingly, it removes the element of necessity required for the Court to order provisional measures³¹. The Court's practice is to "take note" of the undertaking³².

D. The specific Armenian requests

21. Let me then take the specific Orders that Armenia asks the Court to make, in paragraph 131 of its Application. And I put aside for the moment Armenia's request that the Court order the immediate release of Armenian detainees, and start with the *second* request, regarding the treatment of Armenian detainees:

(a) Azerbaijan has reaffirmed its obligation to treat all Armenian detainees in its custody in accordance with its obligations under the CERD³³. That is the necessary consequence for all States Parties of acceding to the CERD.

(b) Similarly, with the *third* request, Azerbaijan undertakes that it will not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group³⁴. Azerbaijan has removed the mannequins and helmets that are the focus of Armenia's complaints regarding the Military Trophies Park. Yes, Azerbaijan (like Armenia³⁵), filed an unsworn statement to that effect;³⁶ and it is accurate, as anyone in Baku can see, and Azerbaijan stands by it³⁷. Perversely, Armenia presents this move by Azerbaijan as increasing the plausibility of Armenia's Request³⁸.

³¹ See e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para. 71; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I), p. 11, paras. 31-33; *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. 248, para. 61; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 24, para. 73-74; *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 244, para. 54.

³² See e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para. 71; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 24, paras. 73-74.

³³ CR 2021/21, p. 13, para. **Error! Reference source not found.** (Mammadov).

³⁴ *Ibid.*

³⁵ Application and Request for provisional measures of Armenia, Ann. 68, pp. 72-73, judges' folder, tab 3.

³⁶ CR 2021/20 (Martin).

³⁷ Ann. 24, Letter from Orujali Abbaszade, Director of the Military Trophies Park, to Elnur Mammadov, Deputy Minister for Foreign Affairs, 6 Oct. 2021 (certified translation); Ann. 33, Letter from Orujali Abbaszade, Director of the Military Trophies Park, to Elnur Mammadov, Deputy Minister for Foreign Affairs, 13 Oct. 2021 (certified translation).

³⁸ CR 2021/20 (Salonidis).

- (c) The *fourth* request is for an order that Azerbaijan protect the right for Armenians to access and enjoy Armenian historical, cultural and religious heritage sites, including by prohibiting vandalism, destruction and alteration of those sites. Azerbaijan accepts that all persons who are lawfully present in Azerbaijan, including Armenians, will be able to visit historical, cultural, and religious sites in the territory of Azerbaijan that are safely open to the public, on an equal basis. Azerbaijani law forbids vandalism and destruction of sites of Armenian heritage as it does in relation to sites of Azerbaijani heritage³⁹.
- (d) Further, in relation to the *fifth* Request, Azerbaijan is facilitating efforts to protect and preserve such sites and artefacts relevant to the rights enjoyed by Armenia under the CERD, and 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”⁴⁰.
- (e) On the *sixth* request, Azerbaijan has undertaken to investigate and prosecute credible allegations of crimes committed against Armenians during the Second Garabagh War, including many of those invoked in Armenia’s pleadings and annexes⁴¹. As you will hear shortly, extensive criminal proceedings have already been pursued.
- (f) And as for the *seventh* request, Azerbaijan accepts that as a State party to this dispute, it, like Armenia, is under a legal duty not to take any action that would aggravate or extend the existing dispute or render it more difficult to solve.

22. What does that leave? Where is the necessity for an order from this Court? There are three orders that the Court might be requested to make: first, an order for the release of Armenian detainees; second, an order to provide Armenian detainees with “independent” medical and psychological evaluations; and third, an order prohibiting “any impediment on efforts to protect and preserve Armenian historic, cultural and religious heritage”. I shall take them in reverse order.

³⁹ Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, 8 Oct. 2021 (certified translation).

⁴⁰ *Ibid.*

⁴¹ CR 2021/21, p. 13, para. **Error! Reference source not found.**, p. 14, para. **Error! Reference source not found.** (Mammadov); Annex 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding criminal cases initiated and investigations conducted by the Prosecutor General’s Office, dated 6 October 2021, No. 14/ çix67–21 (with enclosures) (certified translation).

23. As for prohibiting “any impediment” to work on sites and artefacts of the Armenian heritage — request 5 — in so far as that request goes beyond the obligations under the CERD which Azerbaijan accepts, the request is badly-framed and counter-productive. Some “impediments” to protection and preservation of the historic, cultural and religious heritage are plainly necessary. Building controls are necessary to ensure that buildings are safe; restrictions on the renovation and restoration of historic buildings are necessary in order to ensure that the work is appropriate in design and quality. It is difficult to believe that Armenia really wishes the Court to order Azerbaijan to stand back from all such supervision and control of restoration and renovation work. Azerbaijan considers that its commitment to protect and preserve such sites and artefacts is sufficient and renders this request unnecessary.

24. On access to “independent” medical and psychological evaluations — request 2 — again the order sought seems off-target. Of course, Azerbaijan accepts the need to treat all detainees properly — whether or not they are Armenian — including by providing necessary medical and psychological evaluations. But there is no evidence of Azerbaijan presently failing to do this; and no reason to suppose that Armenians need “independent” examinations, separate from those provided for Azerbaijani or any other detainees. Moreover, Azerbaijan has been and is co-operating with the ICRC in relation to detainees⁴², so that there is in fact an independent body monitoring the position. It is hard to see what more Armenia wants, other than direct access for Armenian nominees to Armenian detainees — and there are no legal grounds to make such a request.

25. The principal element of contention which remains is Armenia’s first request: that the Court order Azerbaijan to “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”.

26. Azerbaijan wishes to draw a line under hostilities with Armenia. As part of this process it has already released the vast majority of Armenians detained during and after the most recent

⁴² 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, No. 17/4/16399 (certified translation); Annex 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister of Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation); see also “Nagorno-Karabakh conflict: Offering a lifeline to families of detained people”, International Committee of the Red Cross, available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-connecting-families-detainees>.

hostilities. As Lord Goldsmith will explain, those who remain have either been lawfully tried and convicted of crimes before Azerbaijan's domestic courts and are now serving their sentences, or — in the case of two of them — have been charged with serious offences and are awaiting trial. Azerbaijan most certainly does not accept that it has a legal duty “to release immediately all Armenian prisoners of war . . . and other detainees in its custody” — there are no hostages; and I put that jibe aside.

27. Azerbaijan does not accept that it has a duty to release convicted persons before they have served their sentences in accordance with the normal legal rules, or to release people charged before they have faced trial⁴³. Indeed, when their crimes constitute breaches of the CERD or of other international or domestic obligations, Azerbaijan is legally obliged to pursue the matter, and not simply to release each and every Armenian detainee forthwith without regard to anything other than his or her ethnicity.

E. Plausible rights

28. That observation highlights a further point. Nowhere in the CERD is there any basis for a plausible claim that the CERD gives Armenia a right to demand the immediate release of all Armenian detainees. That is scarcely surprising: no international instrument would impose such an indiscriminate obligation, fundamentally at odds with the core principles of the criminal justice system⁴⁴.

29. Similarly, there is no plausible claim to CERD rights in respect of the other disputed requests: those for orders regarding independent medical and psychological evaluations, and the removal of any impediment on works on the Armenian heritage.

⁴³ See e.g. Ministry of Foreign Affairs of the Republic of Azerbaijan, No:191/21, Information of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan on the next provocation of the armed forces of Armenia along the border in the direction of the Kalbajar region (2021), available at <https://mfa.gov.az/en/news/no19121-information-of-the-press-service-department-of-the-ministry-of-foreign-affairs-of-the-republic-of-azerbaijan-on-the-next-provocation-of-the-armed-forces-of-armenia-along-the-border-in-the-direction-of-the-kalbajar-region-enru>; Ministry of Defense of the Republic of Azerbaijan, “Armenia committed a provocation in the direction of the Kalbajar region of the state border” (27 May 2021), available at <https://mod.gov.az/en/news/armenia-committed-a-provocation-in-the-direction-of-the-kalbajar-region-of-the-state-border-36046.html>.

⁴⁴ See e.g. *Jadhav (India v. Pakistan)*, *Provisional Measures, Order of 18 May 2017*, *I.C.J. Reports 2017*, pp. 244-245, para. 56.

F. Non-aggravation

30. And finally, I note in relation to Armenia's seventh request, for an order that "Azerbaijan shall not take any action . . . which may aggravate or extend the existing dispute", that the Court has held that such an order is appropriate only in cases where other provisional measures have been ordered⁴⁵.

G. Conclusion

31. Madam President, Members of the Court, my task has been to outline the fundamental flaws that undermine all elements of Armenia's requests for provisional measures — the absence of prima facie jurisdiction, of any semblance of genuine urgency or proof of an imminent threat, and the absence of a need for the Court to order conduct to which Azerbaijan is already expressly committed. My colleagues will now explain those points in greater detail, subject by subject, and tie the requests to the factual realities of this case.

32. Madam President, honourable Members of the Court, thank you for your attention; that brings my submissions to a close and unless I can assist you further I would ask that you now invite Lord Goldsmith to the lectern. Thank you.

The PRESIDENT: I thank Professor Lowe and I now invite Mr. Peter Goldsmith to address the Court. You have the floor, Sir.

Mr. GOLDSMITH:

III. PROVISIONAL MEASURES RELATING TO ARMENIANS UNDER PROSECUTION AND TO THE PRESERVATION OF EVIDENCE SHOULD BE REJECTED

1. Madam President, honourable Members of the Court, it is actually a great honour to appear again before this Court, and today to do so on behalf of the Republic of Azerbaijan.

2. I will be addressing the provisional measures that relate to the Armenian detainees presently in the custody of Azerbaijan, including the request that Azerbaijan "shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody" who were captured during

⁴⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I), p. 16, paras. 49-51.*

or after the Second Garabagh War⁴⁶. I shall also address the requests regarding detainee treatment and the preservation of evidence⁴⁷.

3. The Republic of Azerbaijan wishes to make clear, at the outset, that it has not taken or kept any hostages. Azerbaijan has repatriated prisoners of war captured during the Second Garabagh War in accordance with its obligations under the Trilateral Statement and international humanitarian law.

4. The limited number of Armenian detainees who presently remain in Azerbaijan's custody have been charged or convicted of serious crimes, including torture, mercenarism and espionage — crimes that Azerbaijan has duties and rights, under international and domestic law, to investigate and prosecute.

5. By petitioning the Court to order their immediate release, Armenia makes an application way beyond the scope and purpose of provisional measures. Armenia has neither requested measures linked to plausible rights under the CERD nor demonstrated an imminent risk of irreparable harm to any such rights. Instead, Armenia is turning the protections of the CERD on their head, seeking a blanket amnesty for charged or convicted criminals simply because they are Armenian. It is, moreover, an irreversible measure that does not provisionally “preserve” rights. It is a misuse of the provisional measures process that must be rejected.

A. Armenia's request to “release immediately” all Armenian detainees is unlawful and must be dismissed

1. Armenia's request does not engage plausible rights

6. Armenia's request that Azerbaijan “release immediately” all Armenian detainees in its custody does not engage, as I say, plausible rights under the CERD, and that is for two reasons. *First*, these individuals are not being detained “based on” their national or ethnic origin. *Second*, their detention is lawful under both international and domestic law and thus has neither the purpose nor the effect of impairing the detainees' equal enjoyment of fundamental human rights. As a result, their detention does not “constitute acts of racial discrimination as defined in Article 1 of the Convention” and cannot plausibly engage rights under the CERD⁴⁸. I will elaborate on each of these points.

⁴⁶ Application and Request for provisional measures of Armenia, para. 131.

⁴⁷ *Ibid.*

⁴⁸ *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. 406, para. 52.

7. *First*, the detainees in custody have not been detained “based on” their ethnic or national origin. This morning, Professor Murphy provided no evidence of this, and is asking the Court to *assume* discrimination. Of course, 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 is not evidence of racial discrimination.

8. The one point *that* Professor Murphy did make was to say that Azerbaijan released some Armenian detainees but not others. In fact, Azerbaijan released or repatriated *the vast majority* of Armenians in relation to the hostilities last autumn, in a variety of circumstances⁴⁹. For instance, in the last few months, eight Armenian detainees were released following investigation, on the basis that they had committed no crimes⁵⁰. This was not pursuant to a bargain with Armenia. This shows that Azerbaijan investigated in each case whether there is a basis for continued detention. That is the exact opposite of arbitrary conduct, as it was described by Armenia this morning. Other detainees were released as part of exchanges, including for landmine maps which Azerbaijan acutely needed to protect its people from serious harm and which Armenia continuously refused to provide. For example, in the last *release exchange*, it was Armenia who used detainees as bargaining chips, refusing to hand over landmine maps unless some detainees *were are* released. It is outrageous, we suggest, for Armenia to suggest that Azerbaijan should not have released detainees and instead allow its citizens to continue to be blown up by unexploded landmines laid by Armenia during its 30-year occupation of Azerbaijan’s sovereign territory.

9. Madam President, honourable Members of the Court, at tab 5 of your folders, you will find a complete list of the 45 detainees remaining in Azerbaijan’s custody, along with their charges and convictions⁵¹. Professor Murphy has alluded to others, but let me be clear: there are no others, and Armenia has not provided any evidence to the contrary, including that any of the missing persons

⁴⁹ Judges’ folder, tab 5, Ann. 21, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding Armenian detainees, dated 8 Oct. 2021, No. 14/çix65–21 (with enclosure) (certified translation).

⁵⁰ “Azerbaijan detains and later releases another Armenian soldier for crossing the border”, *JAM News* (8 June 2021), available at <https://jam-news.net/azerbaijan-detains-another-armenian-soldier-for-crossing-the-border/>; “Azerbaijan returns missing Armenian serviceman back to home country”, *News.AZ* (6 Oct. 2020), available at <https://www.news.az/news/azerbaijan-returns-missing-armenian-serviceman-back-to-home-country>.

⁵¹ Judges’ folder, tab 5, Ann. 21, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding Armenian detainees, dated 8 Oct. 2021, No. 14/çix65–21 (with enclosure) (certified translation).

have not been killed in battle. As the Court can see from the table, Azerbaijan has detained individuals who have been charged or convicted of torture, murder, mercenarism and other serious crimes. Azerbaijan has rights and obligations to investigate and prosecute these offences under the Geneva Conventions and generally under international and domestic law.

10. The individuals currently detained by Azerbaijan on this basis include, for example, and I refer to numbers 42 and 43:

- (a) Two Armenian nationals, who are serving 20-year sentences for, among other crimes, torturing, killing and holding hostage various Azerbaijani civilians and soldiers between 1991 and 2020⁵². Numerous victims described routine and brutal beatings at the hands of these two Armenian servicemen⁵³. For example, Azerbaijani soldiers and civilians testified to being beaten with the butt and barrel of machine guns and pieces of wood, or being nearly drowned, doused with gasoline or deprived of food and water⁵⁴.
- (b) Number 1 on the list, a Lebanese national, who participated in attacks against Azerbaijani civilians and soldiers during the conflict between Armenia and Azerbaijan in exchange for material compensation⁵⁵. That individual was sentenced to 20 years in prison for mercenarism and terrorism, among other crimes⁵⁶.

11. The detention of these individuals is, we submit, no basis for provisional measures, because there is no evidence that their continued detention is “based on” their ethnic origin.

12. Secondly, these detentions have proper legal basis, and do not therefore impair the detainees’ human rights under the CERD. This morning Professor Murphy spent a lot of time arguing that the detainees are POWs, and that Azerbaijan is under an obligation to repatriate them. Even if the detainees were prisoners of war — and that actually does not matter at this stage — Article 119 (5) of the Third Geneva Convention is clear: “Prisoners of war against whom criminal

⁵² See Ann. 11, Judgment on Behalf of the Republic of Azerbaijan, Baku Military Court, Case No. 1–1(093)–104/2021 (2 Aug. 2021) (certified translation).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Ann. 5, Judgment on Behalf of the Republic of Azerbaijan, Baku Military Court, Case No. 1–1(093)–94/2021 (14 June 2021) (certified translation).

⁵⁶ *Ibid.*

proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment”.

13. Armenia’s contention that the detainees are being prosecuted on “fabricated charges” is unsubstantiated and false. Professor Murphy stated this morning that, to quote him, “it makes no sense”, he said, to prosecute individuals for illegal crossing of the border. But there is no dispute that these individuals entered the territory of Azerbaijan weeks after the cessation of hostilities, and Azerbaijan detained them because they were suspected of being involved in attacks on Azerbaijani civilians and servicemen, resulting in four deaths⁵⁷. It is entirely within Azerbaijan’s sovereign prerogative to prosecute those crimes under its laws.

14. In addition, as the evidence adduced by Azerbaijan demonstrates, each convicted individual was tried and sentenced by regularly constituted courts, in accordance with due process requirements in accordance with Azerbaijan’s international obligations.

15. Azerbaijani law requires that all accused — regardless of their national or ethnic origin — be treated equally before the courts, and in accordance with international standards. The rights involved include the right:

- (a) to be informed of the nature of the charges against him, without delay and in a language that he understands⁵⁸;
- (b) to have the assistance of counsel⁵⁹;
- (c) to be presumed innocent until proven guilty⁶⁰;
- (d) to be tried by an independent and impartial court or tribunal⁶¹;

⁵⁷ See judges’ folder, tab 11, Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation); judges’ folder, tab 12, Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); judges’ folder, tab 13, Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation). See also Republic of Azerbaijan Ministry of Foreign Affairs, No.:172/21, Head of the Press Service Department of the MFA of Azerbaijan Leyla Abdullayeva answers the question of the media, available at <https://mfa.gov.az/en/news/no17221-head-of-the-press-service-department-of-the-mfa-of-azerbaijan-leyla-abdullayeva-answers-the-question-of-the-media>.

⁵⁸ See Ann. 2, Criminal Procedure Code of the Republic of Azerbaijan, Art. 14 (4) (certified translation) (hereinafter “CPC”). See also *ibid.*, Arts. 90 (7) (1)–(3), 91 (5) (1), 147 (5) (5), 232 (4).

⁵⁹ See Ann. 2, CPC, Art. 19 (certified translation). See also *ibid.*, Arts. 90 (7) (7)–(9), 91 (5).

⁶⁰ See Ann. 3, Constitution of the Republic of Azerbaijan, Art. 63 (certified translation). See also Ann. 2, CPC, Art. 21 (1) (certified translation)

⁶¹ See Ann. 2, CPC, Art. 25 (certified translation). See also *ibid.*, Art. 28.

- (e) to be tried in public⁶² and without undue delay⁶³;
- (f) to examine witnesses⁶⁴ and be present at the trial⁶⁵;
- (g) not to be compelled to testify against himself or to confess guilt⁶⁶; and
- (h) to have the right to appeal any decision against him⁶⁷.

16. Those rights are referred to in annexes in the folders before the Court. As is clear from the court judgments adduced by Azerbaijan, the detainees currently serving a custodial sentence were convicted based on an independent evaluation of the evidence. That is shown by the fact, in many cases, the initial charges were reduced or dropped where the judges determined the evidence was insufficient to support them⁶⁸. For example, on 2 July 2021 the Baku Court on Grave Crimes refused to uphold charges against 14 detainees for terrorism or illegal possession of firearms due to lack of evidence, and found that only charges concerning illegal crossing of the border were established⁶⁹.

17. These trials were held in open court. The hearings were *indeed* broadcasted via video stream which was accessible to the public; and representatives of the International Committee of the Red Cross (“ICRC”), the diplomatic corps, the Azerbaijani Ombudsman and the international media were present.

⁶² See Ann. 2, CPC, Art. 27 (certified translation). See also *ibid.*, Art. 91(5) (24).

⁶³ See Ann. 2, CPC, Arts. 22, 48 (certified translation).

⁶⁴ See *ibid.*, Art. 19 (4) (5).

⁶⁵ See *ibid.*, Art. 27 (2).

⁶⁶ See Ann. 3, Constitution of the Republic of Azerbaijan, Art. 66 (certified translation). See also Ann. 2, CPC, Art. 20 (certified translation).

⁶⁷ See Ann. 2, CPC, Art. 91 (5) (31) (certified translation).

⁶⁸ See judges’ folder tab 11, Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation); judges’ folder tab 12, Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); judges’ folder tab 13, Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation); Ann. 11, Judgment on Behalf of the Republic of Azerbaijan, Baku Military Court, Case No. 1–1(093)–104/2021 (2 August 2021) (certified translation). See also judges’ folder tab 5, Ann. 21, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding Armenian detainees, dated 8 October 2021, No. 14/çix65–21 (with enclosure) (certified translation).

⁶⁹ Judges’ folder tab 11, Ann. 6, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1204/2021 (2 July 2021) (certified translation). See also judges’ folder tab 12, Ann. 7, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1242/2021 (22 July 2021) (certified translation); Ann. 8, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1256/2021 (23 July 2021) (certified translation); judges’ folder tab 13, Ann. 10, Judgment on Behalf of the Republic of Azerbaijan, Baku Court on Grave Crimes, Case No. 1(101)–1258/2021 (29 July 2021) (certified translation).

18. In summary, Azerbaijan is not wantonly detaining or prosecuting Armenians based on racial animus. It does so based on the merit of each individual criminal allegation⁷⁰. Armenia can establish no impairment of human rights or unlawful discrimination.

2. There is no link between the measure requested and any rights at risk of prejudice

19. Madam President, honourable Members of the Court, I turn now to the question of the link between the measures requested and any rights at risk of irreparable prejudice. We say there is none.

20. As a preliminary matter, there is no rule of international law which allows Armenia to demand release of individuals who are being lawfully detained and tried for grave criminal offences. As Professor Vaughan Lowe has just recently made clear, Armenia's request seeks to establish a de facto régime of immunity — immunity — for its nationals, which finds no support in the CERD or general international law.

21. Further, by requesting that Azerbaijan “release immediately all Armenian . . . detainees in its custody”⁷¹, the requested measure overreaches. It takes no account of whether Azerbaijan has a lawful basis for their detention. It is an abuse, moreover, of the provisional measures régime, because it calls for an irreversible measure that would irreparably prejudice Azerbaijan's rights to see its laws observed and obeyed, and crimes against it and its people punished.

22. Similar requests for the release of criminal detainees have been rejected by international courts and tribunals.

23. In the case of *The “Enrica Lexie” Incident (Italy v. India)*, the UNCLOS Tribunal refused a request by Italy that it order India to release detainees who were subject to criminal proceedings in India⁷². As Judge Paik explained in his separate declaration:

“[The] [e]xercise of criminal jurisdiction is a duty of the [Court]. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State. In exercising criminal jurisdiction, obtaining the custody of the accused is crucial. . . . [R]equiring India virtually to ‘hand over’ the accused to Italy goes beyond the function of

⁷⁰ See e.g. “Azerbaijan detains and later releases another Armenian soldier for crossing the border”, JAM News (8 June 2021), available at <https://jam-news.net/azerbaijan-detains-another-armenian-soldier-for-crossing-the-border/>; “Azerbaijan returns missing Armenian serviceman back to home country”, News.AZ (6 October 2020), available at <https://www.news.az/news/azerbaijan-returns-missing-armenian-serviceman-back-to-home-country>.

⁷¹ Application and Request for provisional measures of Armenia, para. 131 (emphasis added).

⁷² *The “Enrica Lexie” Incident (Italy v. India)*, *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, paras. 29, 141.

provisional measures as interim relief and comes close to prejudging the merits of the dispute.”⁷³

24. Similarly, the European Court of Human Rights rejected as inappropriate Armenia’s previous request to them for interim measures seeking the release of the detainees held by Azerbaijan, noting that: “there exist other international mechanisms which are better placed for continuous monitoring of the conditions of detention of people captured during armed conflicts”⁷⁴. The European Court of Human Rights found that non-judicial monitoring — by institutions like the ICRC — was the appropriate mechanism; not the release of the detainees. Professor Murphy seemed to imply this morning that this was an idiosyncratic “custom” of the European Court of Human Rights. It is not: as pointed out in *Italy v. India*, an order for release “goes beyond the function of provisional measures [on] interim relief”⁷⁵. Armenia has also suggested that this Court’s Order in the *Hostages* case provides support for its request. But that is not right. That case did not involve the release of detainees held in the custody of a State properly exercising its criminal jurisdiction, in accordance with due process of law. It involved a mob holding US citizens hostage, without any proper legal basis. That could not be further from the facts of this case.

3. Armenia’s request lacks urgency or imminent risk of irreparable prejudice

25. Given that Armenia has not identified any CERD rights that have been implicated by the mere fact of Azerbaijan’s lawful detentions, then we say there is no risk of irreparable prejudice to any CERD rights.

26. Conversely, the measures requested by Armenia would risk prejudice to Azerbaijanis’ rights. Azerbaijan is obliged under the CERD to provide effective protection and remedies against acts of racial discrimination, and that includes an obligation to investigate and prosecute acts of racial discrimination⁷⁶. Certain of the detainees — for example, detainee numbers 42 and 43 — committed

⁷³ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, declaration of Judge Paik, para. 6.

⁷⁴ Ann. 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 (emphasis added).

⁷⁵ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, declaration of Judge Paik, para. 6.

⁷⁶ See *Salifou Belemvire v. Moldova*, Communication No. 57/2015, Opinion, doc. CERD/C/94/D/57/2015 (24 November 2017).

ethnically motivated crimes against Azerbaijanis⁷⁷, which Azerbaijan is required to investigate and prosecute under international law. The rights of Azerbaijani victims to a remedy would be nullified if their torturers were simply allowed to walk free.

27. In sum, Armenia has not fulfilled the legal requirements for the indication of provisional measures, and the Court should therefore dismiss its request for the release of detainees.

B. Armenia's request that Azerbaijan treat all Armenian detainees in its custody in accordance with its obligations under CERD and permit independent medical evaluations is similarly not warranted

28. I turn to the question of treatment of detainees. Because Armenia's request for an order mandating that Azerbaijan treat detainees in its custody in accordance with CERD must similarly be rejected. It is, of course, not disputed that all detainees should be treated in accordance with CERD and should not be subject to mistreatment on the basis of their national or ethnic origin — that is a commitment that Azerbaijan made when it joined CERD, and it stands by it.

29. This morning, Professor Murphy mentioned only one allegation concerning a detainee presently in Azerbaijan's custody. This was a long description of a video allegedly showing Azerbaijani servicemen mistreating a Mr. Ludvik Mkrtychyan. Nowhere in its presentation, though, did Armenia mention that Azerbaijan is actually investigating that very case⁷⁸. If I ~~can~~ *could* refer the Court to tab 4 of your folders, the video that Professor Murphy described as "Video 7" is referenced in the letter confirming the ongoing investigations by Azerbaijan's General Prosecutor⁷⁹. That letter also confirms the witness interrogations and other concrete steps being taken in this case.

30. Fundamentally, Azerbaijan has demonstrated through its actions that it does not condone torture or mistreatment of any kind, regardless of a detainee's origin. In the circumstances, Armenia does not have a plausible breach of CERD to allege.

⁷⁷ See Ann. 11, Judgment on Behalf of the Republic of Azerbaijan, Baku Military Court, Case No. 1-1(093)–104/2021 (2 August 2021) (certified translation).

⁷⁸ Judges' folder tab 4, Ann. 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 October 2021, No. 14/çix67–21(with enclosures) (certified translation).

⁷⁹ Judges' folder tab 4, Ann. 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs regarding criminal cases initiated and investigations conducted by the Prosecutor General's Office, dated 6 October 2021, No. 14/çix67–21(with enclosures) (certified translation).

31. This is in stark contrast, we say, to Armenia's position. Azerbaijan and the international community have repeatedly called on Armenia to abide by its CERD obligations to investigate and prosecute the numerous credible reports of torture or mistreatment perpetrated by Armenian forces against Azerbaijanis both during the First and the Second Garabagh War⁸⁰. Armenia has remained silent on this issue, and has not publicly confirmed that it has taken any action to address these grave allegations. More may be said on this in the proceedings next week.

32. But here, Armenia's application should be dismissed on the basis of the urgency requirement alone. There can be no urgency where Azerbaijan has affirmed that it is complying with the obligations in question, and it is demonstrably doing so⁸¹.

33. There is no evidence of imminent risk of irreparable prejudice to the rights of detainees presently in custody. There are several protections in place to ensure that remains the case. The ICRC has access to all of the detainees, and it has confirmed that it "visits individuals detained in relation to the Nagorno-Karabakh conflict on a regular basis . . . [and] assess[es] their treatment and conditions of detention and facilitate their contact with the families"⁸². That is, Members of the Court, in your folder tab 9. You will see there photographs published by the ICRC showing detainees actually sending video messages to family members.

⁸⁰ See e.g. Amnesty International, "Armenia/Azerbaijan: Decapitation and war crimes in gruesome videos must be urgently investigated" (10 December 2020); United Nations Office of the United Nations High Commissioner for Human Rights, "Nagorno-Karabakh conflict: Bachelet warns of possible war crimes as attacks continue in populated areas" (2 November 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26464>; Nicola Murray, Deputy Head of the United Kingdom Delegation to the OSCE, "UK statement in response to OSCE Minsk Group Co-Chair statement" (17 December 2020), available at <https://www.gov.uk/government/news/uk-statement-in-response-to-osce-minsk-group-co-chair-statement>; Human Rights Watch/Helsinki, "Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh" (December 1994), pp. 56-60, 91, 97; Human Rights Watch/Helsinki, "Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno Karabakh" (September 1992), pp. 23-28. See also Application of Azerbaijan, paras. 42, 80-81.

⁸¹ See *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), pp. 623, 645-646; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 139 and 155.

⁸² Judges' folder, tab 9, International Committee of the Red Cross, "Nagorno-Karabakh conflict: Offering a lifeline to families of detained people" (24 Aug. 2021), available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-connecting-families-detainees>; emphasis added.

34. In addition, the Azerbaijani ombudsperson pays regular *ad hoc* visits to detainees⁸³ — see tab 7, Annex 19 — without prior notification⁸⁴. The ombudsperson has reported that she visited the Armenian detainees on 16 May 2021 and explained her mandate to them, speaking through an Armenian interpreter⁸⁵. She handed out the text of the European Convention on Human Rights in the detainees' native language, explained the detainees' rights to them and gave the detainees the telephone number of the call centre of the Ombudsman Institution which functions 24 hours a day⁸⁶.

35. During her visit, the ombudsperson examined the general treatment of the detainees, who 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 relatives⁸⁷. They also reported that ICRC representatives had visited them⁸⁸.

36. ~~What is~~ *Once* more, detainees were also visited by the National Preventive Group's doctor, who accompanied the ombudsperson, and provided medical examinations at the request of the detainees⁸⁹. All detainees have access to routine and urgent medical care as needed⁹⁰.

⁸³ See judges' folder tab 7, Ann. 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, No. 17/4 16399 (certified translation); judges' folder tab 8, Ann. 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation); judges' folder tab 10, Ann. 23, Letter from Sabina Aliyeva, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 6 October 2021, No. 1/23943–21 (with enclosure) (certified translation); Ann. 27, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Report of the Azerbaijani Ombudsperson on the Ad-hoc visit to examine the treatment towards the members of armed group of Armenia detained in Azerbaijan; Annex 28, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, the Ad-hoc Report on the examination by the Azerbaijani Ombudsperson of the treatment towards the members of the armed group of Armenia detained in Azerbaijan (19 May 2021); Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Ombudsman Sabina Aliyeva visited prisoners of war (18 Oct. 2020), available at <https://www.ombudsman.az/en/view/news/2135/ombudsman-sabina-aliyeva-visited-prisoners-of-war>; Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, The Ombudsman Sabina Aliyeva conducted another visit under the NPM Mandate (9 January 2021), available at <https://ombudsman.az/en/view/news/2337/ombudsman-sabina-aliyeva-continues-her-visits-in-the-frames-of-the-npm-mandate>; Commissioner for Human Rights of the Republic of Azerbaijan, Ombudsman Sabina Aliyeva continues her visits in the frames of the NPM mandate, (15 Jan. 2021), available at <https://ombudsman.az/en/view/news/2337/ombudsman-sabina-aliyeva-continues-her-visits-in-the-frames-of-the-npm-mandate>.

⁸⁴ Ann. 28, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, the Ad-hoc Report on the examination by the Azerbaijani Ombudsperson of the treatment towards the members of the armed group of Armenia detained in Azerbaijan (19 May 2021), p. 2.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p. 4.

⁸⁷ *Ibid.*, p. 3.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, p. 4.

⁹⁰ Judges' folder tab 8, Ann. 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation).

37. As the European Court of Human Rights has rightly indicated, these are the forms of protections that are appropriate in the circumstances of the case, pending the determination of the merits of the dispute — and not provisional measures such as those sought here.

38. Armenia also seeks an order that Azerbaijan permit “independent medical and psychological evaluations” of the detainees. *Well*, actually, there is no evidence warranting such interference in the internal workings of Azerbaijan’s criminal justice system. Moreover, the measure is not necessary given that the evidence indicates that the detainees have received adequate medical treatment and monitoring by the ombudsperson and ICRC⁹¹.

39. *So*, Armenia has not demonstrated urgency, or plausibility under CERD and no link between the requested measures and the rights engaged. In the absence of legal or evidentiary support, the application should therefore be dismissed.

C. Armenia’s request that Azerbaijan take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD is also not warranted

40. Finally, Armenia requests that Azerbaijan take *steps or* measures to prevent the destruction and ensure preservation of evidence related to allegations falling within the scope of CERD.

41. But Armenia does not provide any factual basis for its request. It does not mention a single instance of Azerbaijan destroying evidence and it does not mention any facts which would indicate that there is even a risk that Azerbaijan would destroy evidence. To the contrary: Azerbaijan is committed to preserving the integrity of these proceedings, has not tampered with evidence, and does not intend to do so.

⁹¹ See e.g. judges’ folder, tab 9, International Committee of the Red Cross, Nagorno-Karabakh conflict: Offering a lifeline to families of detained people (24 August 2021), available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-connecting-families-detainees>; judges’ folder tab 8, Ann. 22, Letter from Jeyhun Shadlinski, Deputy Head of the State Security Service of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding ICRC visits to detainees, dated 8 October 2021 (with enclosure) (certified translation); judges’ folder tab 7, Ann. 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, No. 17/4 16399 (certified translation); judges’ folder tab 10, Ann. 23, Letter from Sabina Aliyeva, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Minister for Foreign Affairs, dated 6 October 2021, No. 1/23943–21 (with enclosure) (certified translation); Annex 27, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Report of the Azerbaijani Ombudsperson on the Ad-hoc visit to examine the treatment towards the members of armed group of Armenia detained in Azerbaijan; Annex 28, Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, the Ad-hoc Report on the examination by the Azerbaijani Ombudsperson of the treatment towards the members of the armed group of Armenia detained in Azerbaijan (19 May 2021).

42. This Court previously ordered Myanmar, for instance, in *The Gambia v. Myanmar*, to “take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations” under the Genocide Convention⁹². In that case, there were credible allegations that Myanmar was destroying evidence of genocidal acts⁹³. There are no such allegations here, and the request must fail for that reason alone.

43. **And** there are also additional guarantees that evidence will be preserved in this case. For instance, with regard to the detainees, independent bodies including the ICRC have regular access to the detainees and are able to monitor their condition⁹⁴. Similarly, Azerbaijan has opened investigations in cases where there have been credible individual allegations of mistreatment, which continue today⁹⁵. **I** **H**ave mentioned this already. In that context, Azerbaijan is in fact actively preserving evidence.

44. Armenia has not asserted any plausible rights under CERD in making this request. As there are no allegations against Azerbaijan regarding destruction of evidence, there cannot be urgency or risk of irreparable prejudice. This request appears to be merely an “add-on” to Armenia’s other requests. It has no independent basis to sustain it, and therefore must fail.

45. Madam President, honourable Members of the Court, that concludes my observations before you for today. I do thank the Court for its kind attention and request that the Court call Professor Boisson de Chazournes to the podium.

The PRESIDENT: I thank Lord Goldsmith and I now invite Professor Laurence Boisson de Chazournes to address the Court. You have the floor.

⁹² *Application of 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*, para. 86(3).

⁹³ *The Gambia v. Myanmar*, CR 2019/18, p. 27, para. 24 (Akhavan), citing United Nations, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, 12 Sept. 2018, UN doc. A/HRC.39/64, para. 50. See also CR 2019/18, p. 68, para. 14 (Sands) and CR 2019/20, p. 38, para. 20 (Sands, citing same report); *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, para. 81.

⁹⁴ See p. 31, para. 24; p. 33, para. 33; p. 34, para. 35-36; p. 35, para. 38; p. 36, para. 43 above.

⁹⁵ Judges’ folder tab 4, Annex 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding criminal cases initiated and investigations conducted by the Prosecutor General’s Office, dated 6 October 2021, No. 14/çix67–21 (with enclosures) (certified translation).

Mme BOISSON DE CHAZOURNES :

**IV. LA MESURE DEMANDANT LA FERMETURE DU PARC AUX TROPHÉES MILITAIRES
DOIT ÊTRE REJETÉE**

1. Madame la présidente, Mesdames et Messieurs les juges, c'est pour moi un grand honneur de me présenter devant votre Cour au nom de la République d'Azerbaïdjan.

2. Dans sa requête en indication de mesures conservatoires, l'Arménie a demandé à la Cour d'indiquer une mesure générale enjoignant à l'Azerbaïdjan de s'abstenir de «spousing hatred of people of Armenian ethnic or national origin»⁹⁶. A cette mesure générale, elle a joint une mesure spéciale, qui est celle de «closing or suspending the activities of the Military Trophies Park»⁹⁷. Ce parc étant le seul objet concret de la requête de l'Arménie, j'expliquerai, dans un premier temps, pourquoi cette mesure n'est pas justifiée. J'expliquerai ensuite pourquoi rappeler à un Etat ses obligations en vertu de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (que nous dénommerons la «CERD») n'est également pas justifié. L'Arménie a traité de questions de fond ce matin, en méconnaissance des conditions de la procédure de demande en mesures conservatoires.

3. Le parc des trophées militaires a été construit pour commémorer les vies perdues dans le long conflit entre l'Arménie et l'Azerbaïdjan ainsi que la libération du territoire de l'Azerbaïdjan après presque trente ans d'occupation⁹⁸. Il y figurait des mannequins de soldats arméniens. Cependant, comme vous le verrez à l'onglet n° 19 des dossiers de plaidoiries, ceux-ci ont depuis été retirés⁹⁹.

4. Madame la présidente, l'Arménie n'explique pas comment, compte tenu de ces faits, sa demande en indication de mesures conservatoires portant sur le parc comporte encore un objet. En fait, l'Arménie ne le peut tout simplement pas, et ce, pour quatre raisons.

⁹⁶ Requête introductive d'instance et demande en indication de mesures conservatoires de la République d'Arménie (ci-après «Requête arménienne»), p. 57, par. 131.

⁹⁷ Requête arménienne, p. 57, par. 131.

⁹⁸ CR 2021/21, p. 13, par. 10 (Mammadov).

⁹⁹ Onglet n° 19 du dossier de plaidoiries, annexe 24, Lettre du directeur du parc des trophées militaires, M. Orujali Abbaszada, au ministre délégué aux affaires étrangères, M. Elnur Mammadov, 6 octobre 2021 (traduction certifiée).

5. Premièrement, il est incontestable que la Cour n'exerce son pouvoir d'indiquer des mesures conservatoires que s'il y a «urgence, c'est-à-dire s'il existe un risque réel et imminent qu'un préjudice irréparable soit causé aux droits en litige avant que la Cour ne rende sa décision définitive»¹⁰⁰. Dans la présente affaire, l'Arménie prétend que la situation est urgente parce que les violations alléguées de la CERD ont lieu «in an environment of anti-Armenian hatred» et que ces expressions de haine «increase the risk of further atrocities [and] aggravate and extend the Parties' dispute»¹⁰¹. Dans la mesure où cela se rapporte au parc, ce raisonnement ne tient pas. L'Arménie invoque l'urgence sur la base d'un risque dont elle n'a pas démontré l'existence. Et même s'il existait un tel risque, le retrait des mannequins du parc des trophées militaires y remédie pleinement. Le retrait des mannequins démontre également la volonté réelle de l'Azerbaïdjan de prendre des mesures proactives en réponse aux plaintes pour incitation, comme l'exige la CERD. Même si, ainsi que l'a prétendu l'Arménie ce matin, le retrait des mannequins de soldats était une réponse à sa requête et donc permettrait d'asseoir la plausibilité des droits en cause, affirmation, Mesdames et Messieurs les juges, qui est erronée ainsi que vous le verrez à l'onglet n° 19 du dossier des juges, le retrait des mannequins et casques, seuls éléments de contestation de la part de l'Arménie, élimine toute urgence d'agir.

6. Mesdames et Messieurs les juges, la deuxième raison justifiant un rejet de cette mesure conservatoire tient à ce que celle-ci va trop loin. L'Arménie demande à la Cour de fermer ou de suspendre l'ensemble du parc des trophées militaires. Ce parc est un mémorial de guerre, destiné à commémorer la fin de l'occupation arménienne qui a duré des décennies ainsi que les sacrifices de près de 3000 militaires azerbaïdjanais tombés au combat¹⁰². A cette fin, le parc expose du matériel militaire de la seconde guerre du Karabagh, notamment des véhicules blindés, des armes d'artillerie et des munitions. Au total, le parc s'étend sur une superficie de plus de 5 hectares et contient

¹⁰⁰ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II), p. 26, par. 61.*

¹⁰¹ Requête arménienne, p. 55-56, par. 128-129.

¹⁰² Voir Nations Unies, lettre datée du 30 avril 2021 adressée au Secrétaire général par le représentant permanent de l'Azerbaïdjan auprès des Nations Unies (3 mai 2021), doc. A/75/869-S/2021/421 ; ministère des affaires étrangères de la République d'Azerbaïdjan, No:147/21, *Commentary of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan to the letter of the Council of Europe Commissioner for human rights, Dunja Mijatovic addressed to the President of the Republic of Azerbaijan* (2021) ; ministère des affaires étrangères de la République d'Azerbaïdjan, No:131/21, *Commentary of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan on the statement of the Armenian Foreign Ministry on the opening of the Military Trophy Park in Baku* (2021).

138 trophées de guerre exposés, dont les mannequins ne représentaient qu'une petite partie¹⁰³. Les casques également retirés¹⁰⁴ ne proviennent pas de militaires arméniens tombés au combat ainsi que l'Arménie l'a prétendu¹⁰⁵. Ils ont été collectés dans des entrepôts et des positions abandonnées¹⁰⁶.

7. L'on ne comprend donc pas la demande arménienne visant à fermer ou suspendre l'ensemble du parc des trophées militaires. L'Arménie n'explique pas comment le parc dans son ensemble et son état actuel, peut plausiblement engager des droits au titre de la CERD. Et si elle ne l'explique pas, c'est qu'elle ne le peut pas.

8. Le parc expose des équipements militaires des forces adverses et célèbre la victoire de l'Azerbaïdjan dans la seconde guerre du Karabagh de la même manière que d'autres musées dans le monde le font¹⁰⁷. Les équipements sont exposés avec une brève description comprenant leurs spécifications techniques¹⁰⁸. De telles présentations ne peuvent pas être considérées comme des actes de discrimination raciale au sens de la CERD. Elles ne visent pas ni n'incitent à la haine contre les forces opposées en raison de leur origine nationale ou ethnique. Elles ne font que rassembler et

¹⁰³ "War Trophies Park, About Us", War Trophies Park, disponible à l'adresse suivante : <https://herbiqenimetlerparki.az/en/page/herbi-qenimetler-parki/haqqimizda> ; onglet n° 19 du dossier de plaidoiries, annexe 24, Lettre du directeur du parc des trophées militaires, M. Orujali Abbaszada, au ministre délégué aux affaires étrangères, M. Elnur Mammadov, 6 octobre 2021 (traduction certifiée).

¹⁰⁴ Onglet n° 20 du dossier des plaidoiries, annexe 33, lettre du directeur du parc des trophées militaires, M. Orujali Abbaszada, au ministre délégué aux affaires étrangères, M. Elnur Mammadov, 13 octobre 2021 (traduction certifiée).

¹⁰⁵ Requête arménienne, p. 33-34, par. 86.

¹⁰⁶ Onglet n° 21 du dossier de plaidoiries, annexe 31, lettre de Hasan Mansurov, chef du département des enquêtes du service de sécurité de l'Etat de la République d'Azerbaïdjan, à Elnur Mammadov, ministre délégué aux affaires étrangères, concernant les casques exposés dans le parc des trophées militaires, daté du 30 septembre 2021, n° 7/3355 (traduction certifiée).

¹⁰⁷ Voir, par exemple, "The US Army Ordnance Museum", Ordnance Museum, l'adresse suivante : <http://www.ordmusfound.org/the-us-army-ordnance-museum/> ; "The Zero: Two men and a plane", Auckland Museum, disponible à l'adresse suivante : <https://www.aucklandmuseum.com/discover/collections/topics/zero> ; "China People's Revolution Military Museum", China.org, disponible à l'adresse suivante : <http://www.china.org.cn/english/kuaixun/73574.htm> ; "Memories of 1971 Bangladesh War come alive in Army museum", Business Standard (13 December 2016), disponible à l'adresse suivante : https://www.business-standard.com/article/current-affairs/memories-of-1971-bangladesh-war-come-alive-in-army-museum-113121601009_1.html ; "At Karachi's air force museum, memorabilia include war trophies from India and Israel", Arab News (6 septembre 2019), disponible à l'adresse suivante : <https://www.arabnews.pk/node/1550466/Pakistan> ; "Eyewitness museum", Holland.com, disponible à l'adresse suivante : <https://www.holland.com/global/tourism/holland-stories/liberation-route/eyewitness-museum-1.htm> ; "War Trophies", Musée canadien de la guerre, disponible à l'adresse suivante : <https://www.warmuseum.ca/firstworldwar/history/after-the-war/history/war-trophies> ; "Musée Somme 1916 – Albert", Musée Somme 1916, disponible à l'adresse suivante : <http://www.musee-somme-1916.eu/> ; "Musée du cratère Hooge", Hooge Crater Museum, disponible à l'adresse suivante : <https://www.hoogecrater.com/fr/> ; Tour virtuel du Musée National d'Histoire Militaire, disponible à l'adresse suivante : <http://www.mnhm.net/ng/index.php/virtual-visit> ; "Battle of the Bulge", Musée National d'Histoire Militaire, disponible à l'adresse suivante : <http://www.mnhm.net/ng/index.php/explore/battle-of-the-bulge> ; "Jeep captured from Pak in 1971 stands as 'war trophy' in Army camp near Leh", Hindustan Times (9 septembre 2019), disponible à l'adresse suivante : <https://www.hindustantimes.com/india-news/jeep-captured-from-pak-in-1971-stands-as-war-trophy-in-army-camp-near-leh/story-qowmWN9tm7Ay1Gd1WvLRpL.html>.

¹⁰⁸ Voir onglet n° 22 du dossier des juges.

exposer des objets de guerre, sur la seule base de leur lien avec le conflit. En définitive, et contrairement à ce qu'avance l'Arménie, le parc ne peut pas être considéré comme impliquant de manière plausible des droits au titre des articles 2 ou 4 de la CERD.

9. Madame la présidente, j'en viens maintenant à la troisième raison qui justifie un rejet de la demande arménienne, à savoir qu'il n'y a aucun lien entre la mesure demandée par l'Arménie et les droits qu'elle prétend protéger. Ni dans ses écritures, ni lors des audiences de ce matin, l'Arménie n'a expliqué comment la mesure demandée répondait, à ce stade, à sa préoccupation de prévenir toute discrimination anti-arménienne. Si l'on suit la logique de l'Arménie, le meilleur moyen de prévenir tout risque d'incitation à la discrimination anti-arménienne serait de retirer les mannequins du parc. Et c'est exactement ce qu'a fait l'Azerbaïdjan et le nouveau complexe commémoratif ne reprendra pas les objets critiqués¹⁰⁹. La demande de mesure conservatoire de l'Arménie concernant le parc n'a donc plus de raison d'être. Et cette situation s'apparente à celle rencontrée dans l'affaire des *Essais nucléaires*¹¹⁰.

10. La quatrième et dernière raison justifiant le rejet de la demande arménienne est que, si l'on sépare le parc du reste de la mesure demandée par l'Arménie, il ne reste que la formulation vague et générale selon laquelle «Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin»¹¹¹. Une telle formulation ne fait que réaffirmer les obligations générales des parties en vertu de l'article 4 de la CERD et ne peut donc constituer une mesure conservatoire appropriée. Cette demande n'est pas non plus étayée par des déclarations ou des comportements spécifiques impliquant de manière plausible des droits au titre de la CERD.

11. Réalisant probablement cela, le conseil pour l'Arménie préféra sortir de leur contexte des mots ou des bouts de phrases prononcés par le président Aliyev. Etant au stade des mesures conservatoires, je ne rentrerai pas dans le détail de chaque exemple mentionné par M. Salonidis ce matin, car cela reviendrait à aborder le fond de l'affaire. Je me contenterai de quelques exemples qui sont suffisants pour que votre juridiction comprenne que l'argument arménien de la rhétorique

¹⁰⁹ Onglet n° 19 du dossier de plaidoiries, annexe 24, Lettre du directeur du parc des trophées militaires, M. Orujali Abbaszada, au ministre délégué aux affaires étrangères, M. Elnur Mammadov, 6 octobre 2021 (traduction certifiée).

¹¹⁰ *Essais nucléaires (Australie c. France)*, arrêt, C.I.J. Recueil 1974, p. 271, par. 56.

¹¹¹ Requête introductive d'instance et demande en indication de mesures conservatoires de l'Arménie, p. 57, par. 131.

haineuse est une déformation de la réalité et une mauvaise interprétation des propos du président et des responsables du Gouvernement azerbaïdjanais.

12. Les quelques exemples de discours d'officiels azerbaïdjanais que l'Arménie cite dans sa requête qualifiant l'Arménie de «main enemy», «despised enemy», «vandals», or «occupiers» visent le Gouvernement arménien, les forces armées arméniennes ou des personnes spécifiques ayant eu un comportement criminel. Vous trouverez une liste de tous les discours invoqués par l'Arménie dans sa requête à l'onglet n° 23 de vos dossiers. Il en ressort clairement que ces déclarations étaient dirigées contre les forces ennemies dans le contexte d'un conflit armé et d'une occupation illégale bien établie, et non contre les Arméniens en tant que groupe ethnique. Elles n'étaient donc pas «fondées sur» des idées de supériorité raciale ou sur «la race, la couleur, l'ascendance ou l'origine nationale ou ethnique» en violation de la CERD¹¹².

13. De surcroît, lorsque certaines déclarations ont été considérées comme dirigées contre le peuple arménien plutôt que contre les politiques et pratiques de l'Arménie, les responsables azerbaïdjanais ont «immédiatement» pris, selon les termes de l'article 4 de la convention, «des mesures positives destinées à» lutter contre les discours de haine. Tel a été le cas, par exemple, de l'usage du mot «dogs» par le président Aliyev, que M. Salonidis a mentionné ce matin. Invoquant l'usage de ce mot par le président de l'Azerbaïdjan, celui-ci omit toutefois trois faits importants. Tout d'abord, cette déclaration a été faite le 4 octobre 2020, alors qu'un conflit armé opposait les forces armées des deux pays. Ensuite, dès le 6 novembre 2020, le président Aliyev rejeta toute interprétation de ce discours comme se référant au peuple arménien. Dans une interview à la BBC, il déclara :

«What I said, I meant those who continue to occupy our territories. I meant Armenian military-political leadership. I meant so-called 'authorities of Nagorno-Karabakh' ... So I meant them, I didn't mean Armenian people.»¹¹³

14. Enfin, après la signature de la déclaration trilatérale qui mit fin aux hostilités actives, le ministre azerbaïdjanais des affaires étrangères expliqua une nouvelle fois publiquement que cette déclaration ne «visait pas le peuple arménien», mais concernait plutôt «la direction politico-militaire

¹¹² Voir, par exemple, *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), exceptions préliminaires, arrêt du 4 février 2021*, p. 35, par. 110.

¹¹³ YouTube, "President Ilham Aliyev was interviewed by BBC News" (9 November 2020), disponible à l'adresse suivante : <https://youtu.be/eP98bXyWBdc?t=235>.

arménienne», y compris «ceux qui ont commis des crimes de guerre contre les civils»¹¹⁴. C'est ce que la CERD exige des Etats parties, ainsi que l'a confirmé le Comité pour l'élimination de la discrimination raciale¹¹⁵.

15. Prenons un autre exemple invoqué par M. Salonidis. En avril, le président Aliyev déclara que «all our cities and mosques have been destroyed. Cows and pigs were kept in mosques; they insulted the entire Muslim world, destroyed and plowed up graves, unearthed the graves and looted gold teeth of the dead.»¹¹⁶ C'est dans ce contexte qu'il a dit, en parlant de ceux qui avaient commis de telles destructions, «[s]avage is perhaps too soft a word to describe them»¹¹⁷.

16. Enfin, je voudrais revenir sur le discours du mois de mai rapporté par M. Salonidis et dans lequel le président Aliyev aurait qualifié les Arméniens de «barbarians» et de «wild tribe»¹¹⁸. En fait, la déclaration complète est la suivante : «The one who committed this destruction is a barbarian. ... I saw that everything on the left and right was destroyed and plundered. It looked as if a wild tribe had swept through these lands.»¹¹⁹

17. Pour toutes ces raisons, la mesure demandée par l'Arménie est clairement injustifiée et doit être rejetée. Madame la présidente, Mesdames et Messieurs les juges, ceci conclut ma plaidoirie. Il me reste à remercier la Cour de son attention. Je vous saurais gré, Madame la présidente, de bien vouloir donner la parole à Mme Amirfar.

The PRESIDENT: I thank Professor Boisson de Chazournes and I now invite Ms Catherine Amirfar to address the Court. You have the floor.

¹¹⁴ «Chef du ministère des Affaires étrangères de l'Azerbaïdjan : «Notre conflit avec l'Arménie n'est pas religieux»», *Caucase de France* (25 novembre 2020), disponible à l'adresse suivante : <https://caucasefrance.com/2020/11/chef-du-ministere-des-affaires-etrangees-de-lazerbaïdjan-notre-conflit-avec-larmenie-nest-pas-religieux/>.

¹¹⁵ Comité pour l'élimination de la discrimination raciale, Recommandation générale n° 35 concernant la lutte contre les discours de haine raciale, CERD/C/GC/35, par. 37.

¹¹⁶ Voir CR 2021/20, p. 27, par. 13 (Salonidis), faisant référence à la participation du président de la République d'Azerbaïdjan, Ilham Aliyev, à l'ouverture du musée des trophées militaires (12 avril 2021), disponible à l'adresse suivante : <https://en.president.az/articles/51067>.

¹¹⁷ *Ibid.*

¹¹⁸ Voir CR 2021/20, p. 27-28, par. 14 (Salonidis), faisant référence au Comité d'Etat pour les affaires des réfugiés et des personnes déplacées au sein de la République d'Azerbaïdjan, le président Ilham Aliyev a assisté à la cérémonie pour la restauration de la ville d'Aghdam et a rencontré des membres du public (28 mai 2021), disponible à l'adresse suivante : <http://idp.gov.az/en/news/1205>.

¹¹⁹ *Ibid.*

Ms AMIRFAR:

**V. THE FOURTH AND FIFTH MEASURES ON HERITAGE SITES
SHOULD BE REJECTED**

1. Madam President, honourable Members of the Court, it is a privilege to appear before you on behalf of the Republic of Azerbaijan.

2. I will explain why Armenia is not entitled to its fourth and fifth requests for provisional measures, which ask the Court to order Azerbaijan: *first*, to allow Armenians to “access and enjoy” alleged heritage sites; and *second*, to facilitate, and refrain from placing any impediment on efforts to protect and preserve such sites¹²⁰.

3. Before parsing Armenia’s requests, I want to state squarely that what Armenia puts in issue here is Azerbaijan’s reconstruction and restoration efforts in the formerly Occupied Territories — that is, Azerbaijan’s own territory. To explain why that work has been entirely non-discriminatory, some context would be useful.

4. It is well documented — indeed, beyond dispute — that entire Azerbaijani towns and villages in the formerly Occupied Territories were destroyed during the First Garabagh War and ensuing thirty years of occupation¹²¹. On the slide are photographs depicting, for example, the destruction of the city of Aghdam, once home to a population of 70,000 Azerbaijanis that were displaced by Armenia’s campaign of ethnic cleansing¹²². After visiting this area in June 2021, the United Nations High Representative for the Alliance of Civilizations observed with respect to Aghdam that “[n]othing is left. Everything is completely ruined.”¹²³ Likewise, this photograph depicts the complete devastation of Fuzuli, once a town in the formerly Occupied Territory that was

¹²⁰ See Application and Request for provisional measures of Armenia, para. 131.

¹²¹ See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application of Azerbaijan, paras. 39, 56, 58.

¹²² OSCE Minsk Group, 7-12 October 2010, Report of the OSCE Minsk Group Co-Chairs’ Field Assessment Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (2011), p. 6.

¹²³ Office of the President of the Republic of Azerbaijan, “Ilham Aliyev received UN High Representative for Alliance of Civilizations” (23 June 2021), available at <https://en.president.az/articles/52233>. See also “No-Man’s-Land: Inside Azerbaijan’s Ghost City Of Aghdam Before Its Recapture”, Radio Free Europe/Radio Liberty (25 November 2020), available at <https://www.rferl.org/a/inside-agdam-the-ghostcity-of-the-caucasus-after-1990s-conflict/30966555.html> (photographs by Stepan Lohr).

home to some 17,000 Azerbaijanis prior to the ethnic cleansing¹²⁴. Just three weeks ago, the Council of Europe's Parliamentary Assembly condemned "the damage and destruction for which Armenia is responsible in the former conflict areas returned to Azerbaijan, and in particular the almost total destruction and looting of Aghdam, Fuzuli and other areas over the last 30 years, as well as the transfer of cultural heritage"¹²⁵. All told, Armenia's systematic campaign of anti-Azerbaijani cultural erasure included the destruction, damage or desecration of at least 64 of 67 mosques and Islamic religious shrines¹²⁶, nearly 400 cultural monuments, and more than 800 cultural institutions, such as libraries, music schools and museums¹²⁷.

5. Azerbaijan has had to undertake its restoration and reconstruction work in the midst of this unthinkable destruction. In carrying out that work, Azerbaijan has made repeated commitments to protect and restore safe access to heritage sites in the formerly Occupied Territories, regardless of national or ethnic origin, which we have collected at tab 17 of your folder¹²⁸. For example, on 14 November 2020, Azerbaijan's President affirmed that "[a]ncient Muslim and Christian temples located in the territory of Azerbaijan are protected by the state"¹²⁹, and confirmed that all "Christians living in Azerbaijan will be able to make use of these temples"¹³⁰. The Ministry of Culture likewise affirmed that "along with mosques and other Islamic monuments in the liberated territories, the

¹²⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application of Azerbaijan, para. 58; OSCE Minsk Group, 31 January-5 February 2005, Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK) (Apr. 2005), pp. 7-8.

¹²⁵ Parliamentary Assembly of the Council of Europe, Resolution 2391 (27 September 2021), para. 18.1.

¹²⁶ Letter dated 18 December 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. A/75/660 (22 Dec. 2020), p. 6.

¹²⁷ Annex 29, Minister of Culture of the Republic of Azerbaijan, Statement by H.E. Anar Karimov at the 48th session of the Human Rights Council (22 Sept. 2021), transcript available at https://hrcmeetings.ohchr.org/HRCSessions/HRCDocuments/46/OTH/OTH_1951_76_d95b204d_d6b6_4946_a458_e2c459717303.docx, video available at <https://media.un.org/en/asset/k16/k16xeug5mv>.

¹²⁸ Judges' folder, tab 17, Compendium of Public Statements by the Republic of Azerbaijan, Regarding Commitment to Protect all Heritage Sites on an Equal Basis.

¹²⁹ Office of the President of the Republic of Azerbaijan, "President of the Russian Federation Vladimir Putin Made a Phone Call to Ilham Aliyev" (14 Nov. 2020), available at <https://en.president.az/articles/46658>. See also Ministry of Culture of the Republic of Azerbaijan, "Russian Cultural Figures who Appealed to UNESCO Receive a Letter" (12 Feb. 2021), available at <http://mct.gov.az/en/common-news/13359>; Twitter post, Regarding the Republic of Azerbaijan's Protection of All Cultural and Religious Sites, @azembassyus (28 December 2020 at 12:32pm); "Azerbaijan vows to protect Christian churches as many flee", *abcNews* (15 Nov. 2020), available at <https://abcnews.go.com/International/wireStory/azerbaijani-leader-christian-churches-protected-74217002>.

¹³⁰ Office of the President of the Republic of Azerbaijan, "President of the Russian Federation Vladimir Putin Made a Phone Call to Ilham Aliyev" (14 Nov. 2020), available at <https://en.president.az/articles/46658>.

Christian heritage, irrespective of its origin will also be preserved, restored and put into operation”¹³¹. In recent years, Azerbaijan has restored a Russian Orthodox Church in Baku¹³², constructed a Catholic cathedral on land donated by the Government¹³³; and restored an Armenian Church in Baku, damaged in 1990, which houses a library of some 5,000 precious Armenian manuscripts¹³⁴.

6. With this background, I turn to the four categories of conduct allegedly justifying Armenia’s requests: *first*, the alleged failure to allow Armenians to visit places of worship; *second*, the alleged failure to prevent, prohibit or punish vandalism or destruction of Armenian heritage sites; *third*, their alleged “alteration”; and *finally*, alleged impediments placed on efforts to protect and preserve them. Armenia’s requests misstate the facts, fail to identify plausible rights under CERD, cannot establish urgency, and improperly ask the Court to prejudge the merits.

A. Alleged failure to allow access to places of worship

7. *First*, Armenia requests provisional measures to ensure rights to “access and enjoy” alleged sites by, *inter alia*, ordering Azerbaijan, in its Request, to “allow[] Armenians to visit places of worship”¹³⁵. Neither Professor d’Argent nor Mr. Martin invoked or even referred to this aspect of Armenia’s Request this morning, for good reason: Armenia has neither identified a plausible right nor demonstrated urgency, and indeed this aspect of the request reveals conduct that Armenia is not interested in airing. It is *Armenia’s* deliberate placement of landmines throughout the formerly Occupied Territories and its *ongoing refusal* to provide Azerbaijan with full and accurate information

¹³¹ Ministry of Culture of the Republic of Azerbaijan, “We Will Always Show Due Diligence and Care Towards the Protection of the Christian Religious Heritage in the Territory of the Republic of Azerbaijan” (12 Nov. 2020) available at <http://mct.gov.az/en/common-news/13315>; Letter dated 17 November 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Office of the Director-General of UNESCO, p. 3.

¹³² “His Holiness Patriarch Kirill visits Cathedral of the Nativity of the Most Holy Mother of God in Baku”, Russian Orthodox Church (14 Nov. 2019), available at <http://www.patriarchia.ru/en/db/text/5532265.html>.

¹³³ The Holy See, Address of the Holy Father (2 Oct. 2016), available at https://www.vatican.va/content/francesco/en/speeches/2016/october/documents/papa-francesco_20161002_azerbaijan-autorita-baku.html.

¹³⁴ Hikmet Hajiyev, “Azerbaijan has restored Christian buildings everywhere ‘Why would we do otherwise in liberated Karabakh?’”, *Washington Times* (7 Dec. 2020), available at <https://www.washingtontimes.com/news/2020/dec/7/azerbaijan-has-restored-christian-buildings-everyw/>.

¹³⁵ See Application and Request for provisional measures of Armenia, para. 131.

about their location¹³⁶ that has forced Azerbaijan to restrict access to areas for non-discriminatory safety reasons.

8. On this point I can be brief. Armenia's deliberate and indiscriminate placement of hundreds of thousands of landmines in the formerly Occupied Territories¹³⁷ has made access to those territories extremely dangerous. In your folder at tab 15 and on the screen is a map showing the low, medium and high landmine contamination zones in the formerly Occupied Territory depicted in orange, yellow and red, respectively¹³⁸. The heritage sites that Armenia alleges in its Request are marked by the black pushpins and are in areas riddled with mines and unexploded ordnance, especially in civilian areas that were principally inhabited by Azerbaijanis prior to Armenia's ethnic cleansing¹³⁹ and far removed from active hostilities.

9. In short, Azerbaijan's conduct with respect to allowing visitation to places of worship in the formerly Occupied Territories cannot constitute an act of racial discrimination under CERD or link to the protection of a plausible CERD right. By its Request, Armenia places the CERD on its head: by acting to ensure the safety and security of persons regardless of ethnic or national origin, Azerbaijan acts to fulfil its obligations under CERD, not violate them.

B. Alleged risk of destruction of cultural heritage sites

10. *Second*, Armenia insists that, absent the orders it seeks, there exists imminent risk that Azerbaijan will fail to terminate, prevent, prohibit, or punish the vandalism or destruction of heritage sites on the basis of national or ethnic origin¹⁴⁰. But Armenia cannot demonstrate *any* such imminent risk. Nor can it claim that the measures requested are linked to a plausible CERD violation. To the

¹³⁶ See e.g. Letter dated 18 December 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. A/75/660 (22 Dec. 2020), p. 6; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Request for provisional measures of the Republic of Azerbaijan (hereinafter "Request for provisional measures of Azerbaijan"), paras. 8-13; Annex 18, Letter from Vugar Suleymanov, Chairman of the Board of the Mine Action Agency of the Republic of Azerbaijan, to Fuad Alasgarov, Head of the Department for Work with Law Enforcement Bodies of the Presidential Administration of the Republic of Azerbaijan, 11 June 2021, No. 414/M (certified translation) (with enclosure).

¹³⁷ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application of Azerbaijan, paras. 49, 84; Request for provisional measures of Azerbaijan, paras. 8-16.

¹³⁸ See Ann. 26, Letter from Michael C. Donlan, Principal and President, Industrial Economics, Incorporated, to Elnur Mammadov, Deputy Minister of Foreign Affairs, dated 10 October 2021 (with enclosure).

¹³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application of Azerbaijan, para. 13.

¹⁴⁰ See Application and Request for provisional measures of Armenia, paras. 7, 39, 118, 131.

contrary, Azerbaijan's undertakings and actions make clear that there is no such risk, and no such link.

11. Azerbaijan has acknowledged publicly "its international obligation to protect and uphold historical cultural and religious heritage in the liberated territories"¹⁴¹. The protection of historical and cultural monuments also is enshrined in Azerbaijan's Constitution¹⁴², and statutory law¹⁴³, which criminalizes the deliberate destruction or damage of over 6,300 sites that are listed on its State Registry¹⁴⁴. This Registry represents a diversity of cultural and ethnic origin and includes sites that Armenia identifies in its Request¹⁴⁵ and referred to this morning: the Gazanchi Church (referred to by Armenia as "Ghazanchetsots Cathedral"), the Ghiz Monastery (referred to by Armenia as "St. John the Baptist Church"), and the Yegish Arakel Temple (referred to by Armenia as "St. Yeghishe Apostle Monastic Complex")¹⁴⁶. There are also robust criminal, administrative, and civil consequences for violations, including the payment of reparation¹⁴⁷. Azerbaijani law also penalizes the desecration of graves in any cemetery with a prison term of up to five years, as well as fines¹⁴⁸.

12. Azerbaijan's commitment to these obligations can be determined not only by its words, but by its deeds. Azerbaijan is already working to restore sites on its National Registry damaged during the conflict, including the Gazanchi Church, the Ghiz Monastery and the Yegish Arakel

¹⁴¹ Ministry of Foreign Affairs of the Republic of Azerbaijan, No:104/21, Commentary of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan about unfounded claims by Armenia on committing "cultural crimes" in the liberated territories of Azerbaijan, available at <https://mfa.gov.az/en/news/no10421-commentary-of-the-press-service-department-of-the-ministry-of-foreign-affairs-of-the-republic-of-azerbaijan-about-unfounded-claims-by-armenia-on-committing-cultural-crimes-in-the-liberated-territories-of-azerbaijan>. See also Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister of Foreign Affairs regarding restoration and reconstruction works, dated 8 October 2021.

¹⁴² See Ann. 3, Constitution of the Republic of Azerbaijan, Art. 77.

¹⁴³ See Ann. 4, Law of the Republic of Azerbaijan On the Protection of Historical and Cultural Monuments, Arts. 13, 14, 29; Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 October 2021.

¹⁴⁴ See Ann. 1, Criminal Code of the Republic of Azerbaijan, Art. 246. See also *id.* Art. 116; Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 October 2021.

¹⁴⁵ See Application and Request for provisional measures of Armenia, paras. 115-116.

¹⁴⁶ See Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 October 2021.

¹⁴⁷ See Ann. 4, Law of the Republic of Azerbaijan On Protection of Historical and Cultural Monuments, Arts. 28-29.

¹⁴⁸ See Ann. 1, Criminal Code of the Republic of Azerbaijan, Art. 245; Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister for Foreign Affairs regarding restoration and reconstruction works, dated 8 October 2021.

Temple¹⁴⁹. Azerbaijan is also enforcing the protections in a non-discriminatory manner. In December 2020, for example, Azerbaijan: arrested and charged two Azerbaijani servicemen with “insulting acts by destroying Armenian gravestones” in a cemetery; expressly — and publicly — denounced such vandalism as “unacceptable”¹⁵⁰; and referred the cases to military court for adjudication¹⁵¹. In addition, the Ministry of Culture makes clear that it will continue to provide support for investigations for all credible allegations of harm to historical and cultural sites and cemeteries used by ethnic Armenians¹⁵².

13. In contrast to these concrete actions and undertakings, in its Request and again this morning, Armenia fails to identify *any* heritage sites allegedly in imminent danger of destruction (as opposed to what it calls “alteration”, which I will address in a moment). 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, including with respect 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 Temple¹⁵³. It then asks the Court to infer that Azerbaijan will repeat the alleged conduct in fundamentally different circumstances — that is, Azerbaijan’s efforts to repair the harm visited upon its people and land in the course of two wars and a 30-year occupation. But damage in the context of active hostilities cannot reasonably support an assertion of imminent harm once active hostilities ceased, and cannot be translated into the current context of Azerbaijan’s reconstruction efforts. While Armenia alleges the destruction of a cemetery in the specific context of reconstruction, that example does not demonstrate urgency taken in light of Azerbaijan’s undertaking to protect and preserve Armenian heritage sites equally irrespective of

¹⁴⁹ See Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding restoration and reconstruction works, dated 8 Oct. 2021.

¹⁵⁰ See Office of the Prosecutor General of the Republic of Azerbaijan, “Detained Four Servicemen Accused of Insulting Bodies of Armenian Servicemen and Tombstones Belonging to Armenians” (14 Dec. 2020), available at <https://genprosecutor.gov.az/az/post/3272>.

¹⁵¹ See Ann. 20, Letter from Elchin Mammadov, First Deputy Prosecutor General, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding criminal cases initiated and investigations conducted by the Prosecutor General’s Office, dated 6 Oct. 2021, No. 14/çix67–21 (with enclosures).

¹⁵² Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding restoration and reconstruction works, dated 8 Oct. 2021.

¹⁵³ See Application and Request for provisional measures of Armenia, paras. 113, 115-116.

national or ethnic origin and the concrete steps it has taken to punish acts of vandalism specific to cemeteries. Armenia's suggested approach of inference for purposes of establishing the risk of real and imminent irreparable prejudice has no basis.

14. In short, Armenia has demonstrated neither plausible rights under CERD nor urgency, where Azerbaijan has affirmed its obligation to protect heritage sites equally and irrespective of national or ethnic origin, and it is demonstrably doing so.

C. Alleged "alteration" of cultural heritage sites

15. *Third*, this morning and in its Request, what Armenia refers to as "destruction" is actually the incorrect contention that Azerbaijan is unlawfully "altering" alleged Armenian heritage sites¹⁵⁴. Again, Armenia has no plausible right under CERD, nor can Armenia establish urgency.

16. Azerbaijan's domestic laws not only prohibit the destruction of monuments on the State Registry¹⁵⁵, but also require that any reconstruction work protect the monuments consistent with their "original condition"¹⁵⁶. This approach applies equally to all historical and cultural monuments in Azerbaijan, whether mosques or madrasas, churches or museums¹⁵⁷. In May 2021, the Ministry of Culture retained experts with extensive experience in international preservation and restoration standards approved by UNESCO¹⁵⁸. Among other tasks, these experts conduct *in situ* inspections and periodically monitor the progress of the restoration work¹⁵⁹.

¹⁵⁴ See Application and Request for provisional measures of Armenia, paras. 127, 131.

¹⁵⁵ See Ann. 4, The Law of the Republic of Azerbaijan On the Protection of the Historical and Cultural Monuments of the Republic of Azerbaijan, Arts. 6, 10; Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding restoration and reconstruction works, dated 8 Oct. 2021.

¹⁵⁶ Ann. 4, The Law of the Republic of Azerbaijan On the Protection of the Historical and Cultural Monuments of the Republic of Azerbaijan, Art. 25. See also Ministry of Culture of the Republic of Azerbaijan, "The Restoration of the Gazanchy Church in Shusha Demonstrates the Care of the Azerbaijani State for Not Only Its Own Cultural Heritage, but Also for the Christian Heritage As a Whole" (7 May 2021), available at <http://www.mct.gov.az/en/common-news/13571>; Ministry of Foreign Affairs of the Republic of Azerbaijan, No.:153/21, Commentary of the Press Service Department of the Ministry of Foreign Affairs of the Republic of Azerbaijan on the Statement of the Ministry of Foreign Affairs of the Republic of Armenia on the Restoration Work Carried Out by Azerbaijan in Shusha, available at <https://mfa.gov.az/en/news/7310/view>.

¹⁵⁷ Ministry of Culture of the Republic of Azerbaijan, "The Restoration of the Gazanchy Church in Shusha Demonstrates the Care of the Azerbaijani State for Not Only Its Own Cultural Heritage, but Also for the Christian Heritage As a Whole" (7 May 2021), available at <http://www.mct.gov.az/en/common-news/13571>.

¹⁵⁸ Ministry of Culture of the Republic of Azerbaijan, "The Restoration of the Gazanchy Church in Shusha Demonstrates the Care of the Azerbaijani State for Not Only Its Own Cultural Heritage, but Also for the Christian Heritage As a Whole" (7 May 2021), available at <http://www.mct.gov.az/en/common-news/13571>.

¹⁵⁹ *Ibid*. See also Ann. 25, Letter from Sevda Mammadaliyeva, Deputy Minister of Culture, to Elnur Mammadov, Deputy Minister of Foreign Affairs, regarding restoration and reconstruction works, dated 8 Oct. 2021.

17. If one looks carefully at Armenia’s Request, it becomes clear that it is not alleging impermissible inequality of treatment in the enjoyment of a right protected by CERD. Armenia does not allege, for example, that Azerbaijan’s restoration efforts prevent Armenians from practising their religion or participating in cultural activities on the basis of national or ethnic origin under Articles 5 (d) (vii) and 5 (e) (vi), respectively. Armenia appears to concede this, and argued this morning not the direct application of these rights themselves, but only that these rights “implicque” a right not contained in Article 5, that is to “respect and preserve” sites identified by Armenia in the condition dictated by Armenia¹⁶⁰. Armenia’s requested order to prevent or prohibit alleged “alteration” is tantamount to a prohibition on Azerbaijan pursuing reconstruction and restoration of existing damage in its own sovereign territory — “without”, to quote Armenia, “consulting Armenia”¹⁶¹. As illustrated by Armenia’s objection to the restoration of the Gazanchi Church¹⁶², which was referenced this morning in detail, Armenia’s request assumes a right to “enjoy” monuments reconstructed to its specifications. Nowhere in CERD is there a plausible basis for any such demand. In effect, Armenia posits a right to consultation when no such right exists under CERD.

18. Further, determination of questions around architectural preservation or restoration is highly technical and driven by complex historical, sociological and ethnographic factors; it would require the Court to go far beyond the bounds of provisional measures to attempt to make those determinations on this record, and impermissibly prejudge the merits, as Mr. Donovan will address.

19. Further, Armenia asks the Court to prejudge complex historical origin disputes without a reliable evidentiary basis. For just one example, Armenia accuses Azerbaijan of “recast[ing]” an Armenian church in the village of Hunarli, and describes it as built in the seventeenth century¹⁶³. This church was also depicted this morning at slide PD-16. But the Armenian Ombudsman — on whose reports Armenia relies extensively as evidence in support of its requests¹⁶⁴ — takes the

¹⁶⁰ CR 2021/20 (d’Argent).

¹⁶¹ See Application and Request for provisional measures of Armenia, paras. 116, 131.

¹⁶² *Ibid.*

¹⁶³ Application and Request for provisional measures of Armenia, para. 77. See also *ibid.*, para. 117.

¹⁶⁴ See Application and Request for provisional measures of Armenia, para. 44, fn. 67, para. 48, fn. 77, para. 52, fn. 85, 86, para. 95, fn. 171, para. 104, fn. 176, para. 104, fn. 177, 178, para. 107, fn. 183, para. 108, fn. 186.

position that the same church dates back to the twelfth century, contradicting Armenia's position before the Court by 500 years¹⁶⁵.

D. Alleged “impediments” to preservation efforts

20. *Finally*, Armenia claims that an order is necessary to prevent Azerbaijan from “placing any impediment on efforts to protect and preserve” alleged Armenian heritage sites¹⁶⁶. Armenia never specifies in its Request or this morning what, if any, actions Azerbaijan is allegedly taking to impede such efforts¹⁶⁷, and as Professor Lowe pointed out, this general request is badly framed and is unnecessary on its own terms.

21. To the extent that this measure is directed at Armenia's passing reference to a UNESCO technical mission in its Request¹⁶⁸, and in the presentation this morning by Professor d'Argent¹⁶⁹, it still fails. You will find UNESCO's relevant correspondence at tab 18¹⁷⁰, which makes clear that while there is no legal obligation to do so, Azerbaijan agreed to host a UNESCO technical mission and has been discussing the terms of reference and list of sites to visit with UNESCO¹⁷¹. The Minister of Culture recently reiterated this agreement on 22 September 2021¹⁷².

22. Regrettably, the Armenian Foreign Minister has admitted publicly Armenia's “targeted efforts” at shaping the UNESCO mission on Armenia's terms¹⁷³, and resolving even basic matters — such as whether the terms of reference will acknowledge the obvious fact that the mission will take

¹⁶⁵ See “Armenian Ombudsman reveals facts of religious hatred on state level in Azerbaijan”, *Public Radio Armenia* (19 Mar. 2021), available at <https://en.armradio.am/2021/03/19/armenian-ombudsman-reveals-facts-of-religious-hatred-on-state-level-in-azerbaijan/>; “‘Ethnic hatred at the highest level’ — Armenia Ombud on Aliyev's remarks”, *PanArmenian* (19 Mar. 2021), available at <https://www.panarmenian.net/m/eng/news/291315>.

¹⁶⁶ Application and Request for provisional measures of Armenia, para. 131.

¹⁶⁷ Application and Request for provisional measures of Armenia, paras. 113-118.

¹⁶⁸ See Application and Request for provisional measures of Armenia, paras. 76, 114.

¹⁶⁹ CR 2021/20 (d'Argent).

¹⁷⁰ See Ann. 13, Letter from Permanent Delegation of the Republic of Azerbaijan to UNESCO to the Secretariat of UNESCO, dated 19 Aug. 2021, No. AZ.410.21 (with enclosure).

¹⁷¹ *Ibid.*

¹⁷² Ann. 29, Minister of Culture of the Republic of Azerbaijan, Statement by H.E. Anar Karimov at the 48th session of the Human Rights Council (22 Sept. 2021), transcript available at https://hrcmeetings.ohchr.org/HRCSessions/HRCDocuments/46/OTH/OTH_1951_76_d95b204d_d6b6_4946_a458_e2c459717303.docx, video available at <https://media.un.org/en/asset/k16/k16xeug5mv>.

¹⁷³ Ministry of Foreign Affairs of the Republic of Armenia, Interview of the Foreign Minister of Armenia Ararat Mirzoyan to “Ria Novosti” News Agency (1 Sept. 2021), available at https://www.mfa.am/en/interviews-articles-and-comments/2021/09/01/Mirzoyan_Interview_Ria/11053.

place on Azerbaijan's sovereign territory or that Azerbaijani heritage sites will be included in addition to Armenian¹⁷⁴ — have resulted in delay.

23. By this request, Armenia in effect suggests obligations in the context of provisional measures that it itself refused to do when it was occupying Azerbaijan's territory. In fact, UNESCO noted in 2005 that it was "prevented from sending a [mission] to verify the state of cultural property in the area", because of its inability "to enter these territories since their occupation by Armenian military forces"¹⁷⁵.

24. In short, Armenia's fifth requested measure fails in every respect: there is neither a plausible CERD violation, nor the necessary link, nor urgency.

25. For all of these reasons, Armenia's fourth and fifth requested measures should be rejected.

26. Madam President, honourable Members of the Court, that concludes my observations before you for today. I thank the Court for its kind attention and request that the Court call Mr. Donovan to the podium.

The PRESIDENT: I thank Ms Amirfar and I now invite Mr. Donald Francis Donovan to address the Court. You have the floor.

Mr. DONOVAN:

VI. CONCLUDING OBSERVATIONS

1. Madam President, Members of the Court, it is my honour to address you once again, and to close the first round of submissions by the Republic of Azerbaijan.

2. It would be useful as we close to recall several fundamental points about provisional measures. The Court has long emphasized the exceptional character of its power to order provisional

¹⁷⁴ See Ann. 13, Letter from Permanent Delegation of the Republic of Azerbaijan to UNESCO to the Secretariat of UNESCO, dated 19 Aug. 2021, No. AZ.410.21 (with enclosure).

¹⁷⁵ UNESCO, *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two 1954 and 1999 Protocols: Report on the Activities from 1995 to 2004*, UN doc. CLT-2005/WS/6 (2005), p. 7, available at <https://uscbs.org/assets/unesco-report-1995-2004.pdf>. See also UNESCO, *Nagorno-Karabakh: Reaffirming the obligation to protect cultural goods*, UNESCO proposes sending a mission to the field to all parties (20 November 2020), available at <https://en.unesco.org/news/nagorno-karabakh-reaffirming-obligation-protect-cultural-goods-unesco-proposes-sending-mission>; UNESCO, *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two 1954 and 1999 Protocols: Report on the Activities from 1995 to 2004*, UN doc. CLT-2005/WS/6 (2005), p. 7, available at <https://uscbs.org/assets/unesco-report-1995-2004.pdf>.

measures¹⁷⁶, given that, by definition, a request asks the Court to act before the parties have developed a full evidentiary record and before the Court has been able to hear the parties' competing accounts of the facts and the law in a plenary merits hearing. In order to ensure that it exercises its provisional measures power with discipline, the Court has developed specific criteria by which to determine a request. And the discipline with which it approaches provisional measures has assumed even greater importance since the Court, in *LaGrand*, confirmed the effect of its provisional measures to impose a *binding legal* obligation on the restrained State¹⁷⁷.

3. Armenia wholly loses sight of that discipline. Armenia wholly disregards its 30 years of unlawful occupation, ethnic cleansing and acts of aggression against Azerbaijan and its people. It wholly disregards the fundamental points of dispute on issues of fact and law that its claims raise. And it rides roughshod over the settled criteria that guide the Court's assessment of a request for provisional measures.

4. As a result, Armenia requests the Court to indicate provisional measures that suffer from three overriding defects — *first*, they would cause irreparable prejudice to *Azerbaijan*; *second*, they would *prejudge* the merits of the dispute; and *third*, they fail to identify, with the requisite *specificity* and *precision* in each case, the act or forbearance from acting that would satisfy the Court's settled criteria for provisional measures.

5. The mandate for taking account of Azerbaijan's rights comes directly from Article 41, which directs the Court to preserve the "*respective rights of either party*"¹⁷⁸. The Statute does *not* focus exclusively on the rights of the requesting party. The Zimmerman commentary on the Statute confirms that the rights to be considered "are the rights of both parties" and the Court must therefore ensure "that none of the parties is put at a disadvantage . . . and that any impression of bias is avoided"¹⁷⁹.

¹⁷⁶ See e.g. *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, dissenting opinion of Judges Winiarski and Badawi Pasha, p. 96 ("interim measures of protection are exceptional in character and in derogation of general rights").

¹⁷⁷ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, paras. 102 and 109.

¹⁷⁸ Statute of the International Court of Justice, Art. 41; emphasis added.

¹⁷⁹ A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford University Press, 2019), p. 1145, para. 20.

6. As one example, the Court took account of the impact of the requested measures on the responding party's rights in the recent *Treaty of Amity* case¹⁸⁰.

7. I will now walk concretely through the measures sought by Armenia and explain why, if indicated, they would prejudice Azerbaijan's rights.

8. *First*, Armenia requests the immediate release of all Armenian detainees in Azerbaijan's custody who were detained in the 2020 hostilities and their aftermath. That measure should be rejected because it will cause irreparable prejudice to Azerbaijan's right — indeed, its duty — to investigate and, if appropriate, prosecute and punish crime.

9. Two fundamental principles of criminal jurisdiction are beyond question. *One*, States have the right to proscribe and punish crime within their territories. That function is fundamental to the rule of law, the maintenance of personal security, and the general welfare. *Two*, States have the right to restrict individual liberty for persons suspected or convicted of committing criminal acts. Without that power, the exercise of criminal jurisdiction would be toothless.

10. Lord Goldsmith walked you through the detainees held by Azerbaijan. These persons have either been charged with, or convicted of, serious crimes, including acts of torture. If those detainees were to be indiscriminately handed over to Armenia now, simply because they are Armenian, there would be no realistic prospect that they might be returned to Azerbaijan to undergo trial or serve out their sentences in accordance with law. Azerbaijan would thereby be *permanently and irreparably* deprived of its right to exercise criminal jurisdiction over these individuals because they would no longer be in Azerbaijan's custody. That would be an especially unsettling result given that, by contrast, Armenia has done little or nothing to prosecute even a single perpetrator of heinous crimes during the First and Second Garabagh Wars, including the Khojaly massacre of over 600 Azerbaijanis in one day.

11. *Second*, Armenia requests that all Armenian detainees be treated in accordance with CERD; and *third*, that Azerbaijan "refrain from espousing hatred of people of Armenian ethnic or national origin". Both of these measures should be rejected because they request nothing more than a restatement of Azerbaijan's existing obligations under CERD.

¹⁸⁰ *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. 623, para. 94.*

12. Azerbaijan strongly rejects the contention that its treatment of detainees, or that any of its statements or communications, have violated CERD. But the determination of those issues is squarely for the merits. It is not the function of provisional measures to restate existing legal obligations in general terms. To protect the rights of the State to be restrained, the requesting party must prove that *plausible* rights are at *imminent* risk of *irreparable* prejudice and — this is the key point here — in *specific* circumstances. Unless the requesting party can prove that the responding party, *first*, contests the asserted right, or contests its application in the specific circumstances, and *second*, intends to act in a specific manner that will cause irreparable injury to that right in those specific circumstances, there is no warrant for provisional measures.

13. Were the Court to act in the absence of that kind of showing, it would cause two unacceptable consequences. *First*, the Court would be prejudging the issues in question. *Second*, the Court would deprive the restrained party — here, Azerbaijan — of a full opportunity to be heard. To be blunt, the Court should not indulge Armenia by issuing to Azerbaijan legally duplicative reminders to adhere to CERD obligations that Azerbaijan has already assumed.

14. Further, given that Armenia's third requested measure attaches to expression, there is an additional danger arising from its imprecision and overbreadth. To be clear: Azerbaijan does *not* condone hate speech. As Agent and Deputy Minister Mammadov confirmed and as Professor Boisson de Chazournes explained, Azerbaijan has taken concrete steps to address Armenia's concerns by removing mannequins and helmets from the Military Trophies Park and undertaking not to display them in the new Memorial Museum. But the sheer breadth of the third measure leaves unclear precisely what speech would be encompassed. In reality, the measure would become a political tool for Armenia to wield broadly against any speech it deems critical of its actions, especially speech critical of its Government.

15. *Fourth* and *fifth*, Armenia requests measures regarding cultural property, which I will also take together.

16. The request for access to particular sites must be rejected because it threatens to irreparably prejudice Azerbaijan's rights by — literally — putting human lives at risk. As Azerbaijan will develop next week, and as has already been mentioned today, Armenia has deliberately planted *hundreds of thousands* of landmines in the formerly occupied territories of Azerbaijan, and it flatly

refuses to provide the detailed maps necessary to clear those mines. Out of an objective to preserve the life, health and safety of the surrounding populations, regardless their ethnic origin or nationality, Azerbaijan has restricted access to *all* civilians to virtually all of those areas. Out of deference to its authority to protect life, health and safety, as well as sheer humanitarian reasons, its efforts to restrict access should not be impeded.

17. Taking *next* the request regarding alleged vandalism, destruction and alteration, that too would prejudice Azerbaijan's rights, in this case its right to undertake reconstruction and restoration efforts in its territory on an equal, non-discriminatory basis.

18. As an initial matter, as Ms Amirfar has explained, Azerbaijan is fully entitled to conduct these efforts on an equal, non-discriminatory basis. These works are being performed on sovereign Azerbaijani territory that Armenia unlawfully occupied for three decades and, during that occupation, cleansed of ethnic Azerbaijanis. Armenia should not now be permitted to obstruct the enormous amount of work, over years and years, that will need to be done to repair the damage Armenia caused, both human and material, by insisting that Azerbaijan put down tools on all restoration efforts, or by insisting that it must first consult Armenia before it undertakes any works.

19. Finally, Armenia's Request suffers from a fatally flawed premise: it assumes that any and all restoration efforts will irreparably prejudice Armenia and render the situation a *fait accompli*. In *Pulp Mills*, the Court rejected that reasoning¹⁸¹. Here too, if the Court determines on the merits that Armenia has a CERD right that was breached by Azerbaijan's restoration efforts, reparation could be achieved, if appropriate, by an order of modification or dismantlement.

20. *Sixth*, Armenia requests a sweeping evidence preservation order, even though it has offered no evidence that Azerbaijan has destroyed or is threatening to destroy relevant evidence. An all-encompassing order to preserve "all" evidence "related to" all "allegations" made by Armenia is of breath-taking breadth. It would be impossible to comply with such an order, and no such order should be issued.

21. Madam President, Members of the Court, I would like to turn briefly now to Armenia's request for a general order that Azerbaijan take no action to aggravate or extend the existing

¹⁸¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 13 July 2006*, *I.C.J. Reports 2006*, p. 113, para. 78. See also *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 12, para. 31.

dispute¹⁸². If the Court agrees that none of Armenia's requests for specific provisional measures should be indicated, the Court should not indicate provisional measures solely on the basis of non-aggravation. The Court so held in *Qatar v. United Arab Emirates*¹⁸³.

22. *Finally*, because Armenia's first seven requests fail, the final, reporting measure should also be rejected.

23. Madam President, Members of the Court, the Court could not indicate provisional measures in response to Armenia's request without repudiating decades of settled jurisprudence — and abandoning the discipline it has long practiced — in exercising its Article 41 authority.

24. I thank the Court for its kind attention. This concludes the first round of Azerbaijan's oral submissions on Armenia's Request.

The PRESIDENT: I thank Mr. Donovan, whose statement brings to an end the first round of oral arguments *by of* Azerbaijan, as well as this afternoon's sitting. The Court will meet again tomorrow, Friday 15 October 2021, at 10 a.m., to hear the second round of oral observations *by of* Armenia. Azerbaijan will also present its second round of oral observations tomorrow, at 5 p.m. I recall that, for the second round, each Party will have a maximum of 60 minutes to present its observations.

The sitting is adjourned.

The Court rose at 5.55 p.m.

¹⁸² Application and Request for provisional measures of Armenia, para. 131 ("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").

¹⁸³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I)*, p. 361, para. 28.