



# INTERNATIONAL COURT OF JUSTICE

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## Summary

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

#### **Request for the indication of provisional measures**

The Court begins by recalling that, on 16 September 2021, Armenia filed in the Registry of the Court an Application instituting proceedings against Azerbaijan concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter “CERD” or the “Convention”). In its Application, Armenia contends that “[f]or decades, Azerbaijan has subjected Armenians to racial discrimination” and that, “[a]s a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse”. According to Armenia, these violations are directed at individuals of Armenian ethnic or national origin regardless of their actual nationality. The Application contained a Request for the indication of provisional measures, seeking “to protect and preserve Armenia’s rights and the rights of Armenians from further harm, and to prevent the aggravation or extension of [the] dispute, pending the determination of the merits of the issues raised in the Application”.

#### **I. INTRODUCTION (PARAS. 13-14)**

The Court sets out the general historical background to the dispute. It recalls in this regard that Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 21 September 1991 and 18 October 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity (“oblast”) that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties’ competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020 (hereinafter the “2020 Conflict”), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the “Trilateral Statement”. Under the terms of this statement, as of 10 November 2020, “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared”. Noting that the differences between the Parties are longstanding and wide-ranging, the Court points out however that the Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present proceedings, and that the scope of the case is therefore circumscribed by that Convention.

## II. PRIMA FACIE JURISDICTION (PARAS. 15-43)

### 1. General observations (paras. 15-18)

The Court recalls that, pursuant to its jurisprudence, it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

The Court notes that Armenia and Azerbaijan are both parties to CERD and that neither Party made reservations to Article 22 or to any other provision of CERD.

### 2. Existence of a dispute relating to the interpretation or application of CERD (paras. 19-29)

The Court recalls that Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. Since Armenia has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.

The Court observes that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them. In so doing, it pays special attention to “the author of the statement or document, their intended or actual addressee, and their content”. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure.

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

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

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

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

### **3. Procedural preconditions** (paras. 30-42)

Turning to the procedural preconditions set out in Article 22 of CERD, the Court observes that, under that Article, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court recalls in that regard that it has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court. The Court further recalls that it has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative. Since Armenia does not contend that its dispute with Azerbaijan was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes in this respect that neither Party contends that they have agreed to another mode of settlement. Thus, at this stage of the proceedings, the Court will examine whether it appears, *prima facie*, that Armenia genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Armenia pursued these negotiations as far as possible.

Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".

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

The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Armenia and Azerbaijan, by letters dated 11 November 2020 and 8 December 2020 respectively, and the last bilateral meeting held on 14-15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Armenia's allegations of Azerbaijan's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15-16 July 2021, 30-31 August 2021 and 14-15 September 2021 shows a lack of progress in reaching common

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

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

#### **4. Conclusion as to *prima facie* jurisdiction (para. 43)**

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

### **III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 44-68)**

In considering the rights whose protection is sought, the Court observes that the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

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

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. It further notes that that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination and recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

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

The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention. In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, the Court observes that Armenia asserts two distinct rights: the right

to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD. The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan. The Court also considers plausible the rights allegedly violated through incitement and promotion to racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage.

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

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

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

#### **IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 69-88)**

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

The Court then considers whether irreparable prejudice could be caused to those rights which it found to be plausible and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 (a), (b), (c), (d) and (e) are of such a nature that prejudice to them is capable of causing irreparable harm. The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD. The Court further observes that, as it has noted previously, individuals subject to inhuman and degrading treatment or torture could be exposed to a serious risk of irreparable prejudice. The Court also recalls that it has recognized that psychological distress, like bodily harm, can lead to irreparable prejudice.

In the view of the Court, acts prohibited under Article 4 of CERD — such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin — can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the State. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress. The Court has also indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage “has been the scene of armed clashes between the Parties” and when “such clashes may reoccur”.

After reviewing the information placed before the Court by the Parties, the Court concludes that the alleged disregard of the rights deemed plausible by the Court may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

#### **V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 89-97)**

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that Azerbaijan must, in accordance with its obligations under CERD, protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law; take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and, take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.

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

Finally, the Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In the present case, having considered all the circumstances, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute. With regard to Armenia's request that the Court indicate provisional measures directing Azerbaijan "to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD" and to provide regular reports on the implementation of provisional measures, the Court considers that, in the particular circumstances of the case, these measures are not warranted.

## VI. OPERATIVE PARAGRAPH (PARA. 98)

The full text of the final paragraph of the Order reads as follows:

"For these reasons,

THE COURT,

*Indicates* the following provisional measures:

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

(a) By fourteen votes to one,

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

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

AGAINST: *Judge* Yusuf;

(b) Unanimously,

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

(c) By thirteen votes to two,

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

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

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

(2) Unanimously,

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

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

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### **Dissenting opinion of Judge Yusuf**

In his dissenting opinion, Judge Yusuf explains the reasons for his disagreement with subparagraphs 1 (a) and 1 (c) of the *dispositif* of the Order, which he considers as relating to rights that do not fall, even prima facie, within the scope of CERD. He expresses his concern that through this Order, the Court may transform CERD into a receptacle in which all sorts of asserted rights may be stuffed. He disagrees with the indication by the Court of provisional measures for the protection of all persons captured by Azerbaijan in relation to the 2020 Conflict from violence and bodily harm without at least some evidence that they are being held or allegedly mistreated due to their ethnic or national origin, thus bringing their situation under CERD. In his view, such persons should certainly be protected from bodily harm and violence, but CERD is neither applicable to their detention nor to their treatment. In this context, he refers to paragraph 60 of the Order, which states that “Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin”. For Judge Yusuf, if the Court is not satisfied that these persons are being detained by reason of their national or ethnic origin, it is difficult to understand by what means the Court has come to be persuaded, even prima facie, that the same persons are allegedly being mistreated because of their national or ethnic origin. It is his view that there are no justifiable grounds in CERD in the present case for the Court to exercise the powers granted to it by Article 41 of the Statute with respect to the alleged mistreatment of such detainees.

Judge Yusuf expresses similar views and concerns with regard to the indication of provisional measures on the prevention and punishment of alleged acts of vandalism and desecration of cultural heritage sites. In his view, considerations of race and racial discrimination cannot and do not apply to the protection of monuments, groups of buildings, sites and artifacts. Also, there is neither a direct link nor a consequential relationship between Article 5 (e) (vi) of CERD and the protection of cultural or religious sites, which falls within the ambit of other instruments of international law. Furthermore, Judge Yusuf considers it untenable to assert that religious heritage, in the sense of churches, cathedrals or other places of worship, is plausibly protected under CERD since, amongst other reasons, the drafters of CERD decided not to address religious discrimination or religious intolerance in this Convention, and consequently Article 1, paragraph 1, of CERD does not list religion or creed amongst the prohibited grounds for the purposes of “racial discrimination”.

### **Declaration of Judge Iwasawa**

Judge Iwasawa observes that, in accordance with Article 4 of CERD, measures designed to eradicate incitement to racial hatred must be adopted “with due regard to the principles of the Universal Declaration of Human Rights”, including freedom of expression. The exercise of the right to freedom of expression may be subject to certain restrictions, which are, however, only permitted under specific conditions. Measures designed to eradicate incitement to racial hatred must meet those conditions.

The Parties to the present case were twice engaged in large-scale hostilities against each other in their recent history. Judge Iwasawa emphasizes that it is in these circumstances that the Court indicates that Azerbaijan shall take all necessary measures to prevent the incitement and promotion of racial hatred targeted at persons of Armenian national or ethnic origin.

### **Declaration of Judge *ad hoc* Keith**

Judge *ad hoc* Keith addresses two matters.

First, he offers an additional reason for the rejection of the request by Armenia for the release of detainees. The relief sought by Armenia in its Application does not include a request for the release

or repatriation of detainees, and Armenia's discussion supporting the request for provisional measures does not go beyond the treatment of detainees, which is the subject of the first provisional measure indicated by the Court.

Second, Judge *ad hoc* Keith explains his negative vote on the measure relating to cultural property. He argues that CERD does not accord protection to cultural property itself. Additionally, access to sites that include Armenian cultural property, to the extent that it is protected under CERD, is made difficult by landmines, rather than because of the national or ethnic origin of those seeking access. Further, restoration works on war-damaged property and public works are not plausible breaches of CERD. Finally, Judge *ad hoc* Keith is unable to find evidence of a real and imminent risk that irreparable prejudice will be caused to the relevant right.

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