

DISSENTING OPINION OF JUDGE YUSUF

Objection to the rejection of the second preliminary objection on jurisdiction ratione materiae — Alleged conduct does not conform to requirements for a claim under CERD — No differentiation based on prohibited grounds is shown — No consideration of a comparator standard — No ascertainment of nullification of rights or of putting the individuals or groups concerned in a disadvantageous position — No CERD provisions appear to be implicated — The majority’s decision undermines the objectives and integrity of CERD — It may also give the wrong signal about the jurisdiction of the Court — In particular for those trying to stuff their claims into CERD for lack of other jurisdictional grounds — The Court should have put an end to such misuse of CERD.

I. INTRODUCTION

1. I do not agree with the majority’s decision to reject the second preliminary objection of Azerbaijan relating to the jurisdiction *ratione materiae* of the Court in the instant case. I do not think that Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter “CERD” or the “Convention”) can serve as a basis of jurisdiction for most of the claims of Armenia in the present case. As I pointed out in a declaration regarding an earlier phase of this case: “A regrettable tendency seems to have developed, whereby any State that fails to find a valid basis of jurisdiction of the Court for its claims, but still wishes to bring a case before it, tries to stuff those claims into the framework of CERD”¹; or, I should add, some other conventions that have hardly anything to do with the real dispute between the parties. This case is typical of such a tendency. The Court should have used this opportunity to reject the practice of using CERD as a “fourre-tout” for jurisdictional purposes and upheld the objections of Azerbaijan.

II. BACKGROUND

2. Azerbaijan’s second preliminary objection to the jurisdiction of the Court under Article 22 of CERD concerns Armenia’s claims with respect to: (a) the alleged breach by Azerbaijan of its obligations under Articles 2 (1), 4 (a) and 5 (b) of CERD by engaging in the discriminatory murder, torture and inhumane treatment of Armenian combatants and civilians during the armed conflict between the two States; (b) the alleged breach by Azerbaijan of its obligations under Articles 2 and 5 (a) of CERD through the discriminatory subjection of ethnic Armenians to arbitrary detention during the conflict; and (c) the alleged breach by Azerbaijan of its obligations also under Articles 2 and 5 (a) of CERD by subjecting ethnic Armenians to enforced disappearance during the same conflict.

3. By a letter dated 5 April 2024, citing the lower threshold required to find the Court’s jurisdiction at this stage and “in the interests of the efficient conduct of the proceeding”, Azerbaijan informed the Court that it sought to withdraw some of its objections to Armenia’s claims. It referred to those objections relating to the alleged violation of Articles 2 (1), 4 (a) and 5 (b) of CERD with regard to the mistreatment of ethnic Armenian civilians during the armed conflict. It mentioned specifically those allegations “which Armenia has particularised with reference to specific evidence purportedly indicating misconduct ‘capable’ of falling within CERD”. Nevertheless, Azerbaijan noted in its letter that it seeks to retain the remainder of its objections under Part VI, Chapter 3,

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023, declaration of Judge Yusuf, p. 31, para. 3.*

Section I, including those concerning the alleged mistreatment of Armenia's armed forces during active hostilities and the rest of Armenia's CERD claims concerning the mistreatment of ethnic Armenian civilians during active hostilities "to which Armenia has presented no specific evidence of purported misconduct on the basis of ethnic or national origin".

4. The Judgment correctly notes in paragraph 73 that

"both Parties acknowledge that conduct that may be incompatible with international humanitarian law can simultaneously implicate obligations under CERD, provided that such conduct conforms to the requirements for establishing a claim under that Convention".

Thus, the main issue which divides the Parties, at this jurisdictional phase of the dispute, and which should be resolved by the Court, is not the applicability of CERD in situations of armed conflict in general, as seems to be implied by the Judgment (see paragraphs 74-77). Rather, the issue is whether the conduct complained of by Armenia in the instant case falls within the scope of CERD. Such conduct can only implicate CERD if it involves racial discrimination as defined in Article 1 (1) of CERD and, consequently, "conforms to the requirements for establishing a claim under that Convention" as stated in paragraph 73 of the Judgment. This is where, in my view, the Judgment fails subsequently to engage with the requirements that have to be met for a claim regarding alleged violation of obligations under CERD to fall within the scope of the Convention, and to apply the requirements that the Judgment itself lays down (see paragraphs 73 and 78) as a condition for establishing a claim under CERD.

III. THE REQUIREMENTS FOR ESTABLISHING THAT CERTAIN CLAIMS FALL WITHIN THE PROVISIONS OF CERD

5. These requirements are no mystery to the Court. They are to be found in Article 1 (1) of CERD. They should have been rigorously applied in the present case. Article 1 (1) defines racial discrimination as follows:

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

In *Ukraine v. Russia*, the Court observed that the prohibition of racial discrimination consists of two elements. First, the "'distinction, exclusion, restriction or preference' must be 'based on' one of the prohibited grounds . . . 'race, colour, descent, or national or ethnic origin'". Second, it should have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an *equal footing*, of human rights"².

6. Thus, in the first place, there has to be a distinction or differentiation between individuals or groups of individuals based on one of the prohibited grounds; and, second, such distinction must have for purpose or effect the nullification or impairment of the enjoyment or exercise of human rights or fundamental freedoms by such individuals on an equal footing with others; in other words, to place them in an unfavourable or disadvantageous position as compared to others. Consequently,

² *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment of 31 January 2024*, para. 195 (emphasis added).

these are the two requirements against which the claims of Armenia have to be tested in order to determine whether they fall within the scope of CERD. However, the Judgment does not, unfortunately, examine the alleged breaches by Azerbaijan of the provisions of CERD, as claimed by Armenia, in light of the two fundamental requirements of (a) differentiation based on prohibited grounds, such as ethnic or national origin; and (b) having the purpose or effect of nullifying or impairing the human rights of an individual or group of individuals as compared to others.

7. Moreover, the requirement of nullification of rights or of putting the individuals or groups concerned in a disadvantageous position as compared to others, which involves a comparator standard, receives no consideration whatsoever in the Judgment. However, it is not clear how a certain conduct could fall within the provisions of CERD in the absence of a comparator standard without which discrimination cannot effectively exist. The distinction or exclusion must occur not only on the basis of a prohibited ground, but it must also amount to a denial or impairment of rights in comparison to others. Otherwise, there is no discrimination, but simply a violation of human rights. The differentiation of individuals on the basis of prohibited grounds and the denial or impairment of their rights, as compared to others, is what distinguishes racial or ethnic discrimination from other human rights violations. In the absence of those requirements, racial or ethnic discrimination, as defined by CERD, cannot be said to exist. The comparator standard, which is at the heart of the applicability of CERD provisions to a claim, is neither considered nor applied in the present Judgment.

IV. THE CONTEXT OF THE ALLEGATIONS AND CLAIMS BY ARMENIA

8. It is important to recall that most of the allegations and claims by Armenia relate to events that have taken place either in the course of active armed hostilities between the Parties during or immediately after the “Second Nagorno-Karabakh/Garabagh War” (hereinafter the “2020 Conflict”) or during the earlier armed conflict between the two countries in 2016. Thus, the context in which discriminatory murder, torture, detention or enforced disappearance is alleged is that of an active armed conflict, which has opposed the two neighbouring countries for at least 30 years. Armenia alleges that during the armed clashes between the troops of the two States, in 2016 and also during the “2020 Conflict”, Azerbaijan committed atrocities against ethnic Armenians including the murder and mutilation of the bodies of ethnic Armenian servicemen and civilians, in “clear expressions of racially motivated hate”³. It particularly cites the clashes in 2016, alleging that Azerbaijan’s military attacks in “Nagorno-Karabakh/Garabagh”, which led to its control over some territory in the region, resulted the murder and torture of ethnic Armenian civilians and service members and the mutilation of the bodies of the deceased⁴.

9. Given the above context, the question arises whether such alleged acts ought to be considered as serious breaches of international humanitarian law or whether, notwithstanding the context in which they are said to have taken place, they would also fall within the scope of CERD due to the fact that the individuals involved in the armed conflict were of different ethnic and national origins. As pointed out above, conduct attributed to a State which may be considered to be in breach of international humanitarian law can also implicate CERD if such conduct involves differentiation based on prohibited grounds whose purpose or effect is the denial of the enjoyment or exercise of human rights on an equal footing with others. Therefore, the test that should have been applied by the Court, under the circumstances, in order to determine that the conduct complained of by Armenia could also fall within the scope of CERD is the one described above (paras. 5-7) based on the two factor requirements of Article 1 (1) of CERD.

³ Memorial of Armenia, pp. 587-588, para. 6.84.

⁴ *Ibid.*, pp. 96-100, paras. 3.59, 3.62-3.63.

10. It is quite interesting that the Judgment states in paragraph 78 that “the Court must ascertain whether the specific acts complained of by Armenia are capable of establishing discriminatory treatment based on the victims’ Armenian national or ethnic origin”. This creates the expectation that a test based on the requirements described above would be applied in the subsequent analysis of the Parties’ arguments, so as to enable the Court to determine whether the acts alleged by Armenia fall within the scope of CERD. However, no such ascertainment of the specific acts complained of by Armenia is carried out in the Judgment. This is utterly regrettable.

11. Instead of analysing the two requirements prescribed by Article 1 (1) of CERD, the Judgment simply asserts in paragraph 89:

“The Court is of the view that the acts alleged by Armenia are capable of constituting discrimination against members of armed forces and civilians ‘based on’ their Armenian national or ethnic origin carried out with the purpose or effect of interfering with rights protected under Articles 2 (1), 4 (a) and 5 (b) of CERD.”

Where is the reasoning or analysis of Article 1 (1) of CERD that leads to such a conclusion? Where is the comparator standard? Where is the differentiation as compared to others?

12. One of the claims of Armenia is that CERD applies to the situation of an “ethnic Armenian serviceman, lying wounded on the ground, being shot in the head, multiple times, by an Azerbaijani soldier, who is yelling an expletive against what he refers to as ‘your people’”⁵. This narrative was perhaps meant to demonstrate that an expletive against “one’s people” in the battlefield constitutes racial or ethnic discrimination under CERD. However, a hateful insult hurled at an enemy soldier in a theatre of war cannot qualify as falling within the provisions of CERD. However vile or hateful may be the language used by soldiers on opposite sides of a war, it cannot amount under any standard or measure to a violation of the provisions of CERD. To hold otherwise would be tantamount to a misinterpretation and misconception of CERD, and would be contrary not only to the objectives, but also to the letter and spirit of this important multilateral convention.

V. FAILURE TO APPLY THE REQUIREMENTS OF ARTICLE 1 (1) OF CERD

A. Murder, torture and inhumane treatment: alleged violations of Articles 2 (1), 4 (a) and 5 (b) of CERD

13. Although the Judgment indicates in the general section on the applicability of CERD (paras. 69-78) certain clear standards that may be applied to determine whether the acts complained of by Armenia fall within the scope of CERD (see, in particular, paragraphs 73 and 78), neither such standards nor the need to ascertain the discriminatory character of such acts are subsequently taken up in the Judgment to establish whether the Court has jurisdiction under CERD with respect to the specific conduct alleged by Armenia. This applies both to allegations of murder, torture and inhumane treatment as well as to allegations of arbitrary detention and enforced disappearance.

14. Armenia’s allegations concerning Azerbaijan’s conduct in the “2020 Conflict”, particularly its alleged murder, torture, and mistreatment of ethnic Armenian service members and prisoners of war, concern an issue that is primarily regulated by international humanitarian law. Given that Armenia and Azerbaijan were engaged in an armed conflict, and that their armed forces were composed predominantly of ethnic Armenians and Azeris, respectively, it is to be assumed that the actions of Azerbaijan’s armed forces, including those which could amount to violations of

⁵ CR 2024/18, p. 36, para. 10 (Murphy).

international humanitarian law, would impact ethnic Armenians who are members of Armenia's armed forces. Such an impact, whatever may be its nature or form, cannot be considered to fall within the scope of CERD unless other factors corresponding to the requirements under Article 1 (1) of CERD can be shown to be involved. Whatever happens on the battleground to the soldiers of either side is not due to their ethnic or national origin, but to their engagement in a war for the State of their nationality, and any alleged violations of the ground rules of armed hostilities would belong to international humanitarian law and not to CERD.

15. Ethnic Armenians might have been subjected to violations of their rights because of their status as enemy combatants, but this does not *ipso facto* implicate CERD because of their different ethnicity or national origin. For CERD to enter into the equation, there has to be differentiation based on prohibited grounds which gives rise to the nullification of the rights of the individuals concerned as compared to others. Alleged acts of murder, torture and mistreatment of combatants or prisoners of war in the context of an active armed conflict between two States can hardly be said to lead inevitably to a violation of CERD or to fall within the scope of its provisions unless the requirements under Article 1 (1) are met. They should be treated as serious alleged violations of international humanitarian law or of human rights in the context of an armed conflict, but not of CERD, unless discriminatory treatment based on a prohibited ground can be demonstrated.

16. If, for instance, the comparator standard under Article 1 (1) of CERD is applied to such a situation, it will become clear that there is absolutely nothing in the case file which shows, even in an incipient manner, that ethnic Armenian service members or prisoners of war were treated by Azerbaijan less favourably in comparison to other similarly situated rights holders during the conflict. Thus, the question arises: discrimination as compared to whom in an armed conflict which involved the members of two ethnic groups? Differentiation with respect to which other persons? These are the kind of questions that the Judgment should have addressed to determine whether the alleged breaches fall within the scope of CERD.

17. However, instead of addressing such questions or applying the test specified in paragraph 73 of the Judgment, it is stated in paragraph 91 that

“[w]hether the material submitted by Armenia in support of its claims is sufficient to demonstrate that the alleged acts of discrimination in question were in fact based on the national or ethnic origin of the victims is a matter for the merits and cannot be determined at this stage of the proceedings”.

First of all, the ascertainment announced by the Judgment itself in paragraph 78 did not require “sufficient” demonstration, but “whether the specific acts complained of by Armenia are capable of establishing discriminatory treatment based on the victims’ Armenian national or ethnic origin”. Thus, “sufficient” demonstration is never part of the standard specified in the Judgment itself, nor is it relevant in the present circumstances. Second, this statement raises a question that begs to be answered: how does the Court determine that it has jurisdiction under CERD and on the basis of which criteria or requirements if not by answering whether the condition laid down in paragraph 73 of the Judgment is met? In other words, do the alleged acts conform to the requirements for establishing a claim under CERD? These are the questions that should have been answered in the Judgment. The fact that it is a judgment on jurisdiction does not exempt it from an analysis of the requirements under which claims may be established under CERD so that the Court can exercise its jurisdiction under the compromissory clause of that Convention.

18. Finally, it should be recalled, for instance, that the Ethiopia-Eritrea Claims Commission found that Eritrea had violated the equality of treatment of prisoners required under international humanitarian law, as Tigrayan prisoners of war “were treated *worse than other*” prisoners of war⁶. The arbitrators in this case applied a comparator standard to evaluate whether acts of discriminatory treatment were committed by Eritrea with respect to Ethiopian prisoners of different ethnic origins. The Court should have also applied such a comparator standard, without which acts of racial or ethnic discrimination cannot be assumed to have taken place, even at the jurisdictional phase.

**B. Arbitrary detention and enforced disappearance:
alleged violations of Articles 2 and 5 (a) of CERD**

19. The failure to apply the requirements under Article 1 (1) of CERD is even clearer here. It is very unusual that a judgment on jurisdiction simply summarizes the views of the Parties on such serious allegations as arbitrary detention and enforced disappearance due to the ethnic or national origin of the individuals concerned and then makes a cross-reference to what has been said previously with respect to totally different allegations relating to murder and torture to conclude:

“Based on the above, and taking into account in particular the reasons set forth in paragraphs 90-94, the Court is of the view that the acts alleged by Armenia in relation to arbitrary detention and enforced disappearance of ethnic Armenian civilians are capable of constituting discriminatory treatment ‘based on’ Armenian national or ethnic origin carried out with the purpose or effect of interfering with rights protected under Article 2 and Article 5 (a) of CERD. This includes the treatment of ethnic Armenians who reside in Nagorno-Karabakh.” (Judgment, para. 102.)

20. There is no analysis of the arguments of the Parties, no analysis of the requirements under Article 1 (1) of CERD, no reasoning that leads to a conclusion; only a cross-reference to a previous section and a bare assertion that the acts alleged by Armenia are capable of constituting discriminatory treatment. The Court cannot establish its jurisdiction *ratione materiae* on the basis of simple assertions and general statements without legal justification or reasoning. The two Parties to this case disagree on almost everything and, in order to make the Court’s conclusions sufficiently persuasive for both of them, and for all those who are interested in the Court’s jurisprudence and its interpretation and application of the law, the Court has an obligation to provide a solid legal basis for its conclusions. In this case, such legal analysis is all the more necessary in view of the clear attempt to stuff into CERD alleged acts that have nothing to do with its provisions. The Court’s failure to do so in a clear manner, by applying the requirements of Article 1 (1) of CERD, may encourage similar attempts in the future and further contribute to a misuse of its jurisdiction for propaganda purposes, thus diverting attention from its real mission of settling actual disputes between States for which it has jurisdiction with a view to promoting peace and security in the world.

VI. CONCLUSION

21. The finding that the Court has jurisdiction under CERD, and that the Convention is applicable to the alleged acts of murder, torture, inhumane treatment, arbitrary detention and enforced disappearance, in the context of an armed conflict between two States, and most often in the midst of a battlefield, without showing that the requirements of Article 1 (1) of CERD are even superficially met, undermines the objectives and integrity of CERD. It opens the gates of CERD to

⁶ See Eritrea-Ethiopia Claims Commission, *Partial Award, Prisoners of War, Ethiopia’s Claim 4, Decision of 1 July 2003*, United Nations, *Reports of International Arbitral Awards*, Vol. XXVI, p. 99, para. 83 (emphasis added).

all kinds of claims that have nothing to do with its provisions or its object and purpose. It may also give the wrong signal about the exercise of the jurisdiction of the Court for those trying to bring cases before it for which proper jurisdictional grounds are not available. The Court should have, and could have, avoided such an unsatisfactory outcome.

(Signed) Abdulqawi Ahmed YUSUF.
