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**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2021

Public sitting

held on Monday 18 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
(Azerbaijan v. Armenia)**

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le lundi 18 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
(Azerbaïdjan c. Arménie)**

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

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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,

Ms Sabina Sadigli, First Secretary, Embassy of Azerbaijan in the Netherlands,

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,

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comme conseillers.

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

Mr. KIRAKOSYAN:

AGENT'S INTRODUCTION

1. Madam President, distinguished Members of the Court, it is an honour and great privilege to appear before you in this case as the Agent of the Republic of Armenia.

2. This morning, you heard Azerbaijan's oral submissions regarding the request for provisional measures. That request is replete with issues patently outside the parameters of the CERD. It is an exercise in false equivalencies, a tactic engineered to create a fog of information, one designed to give the impression that Azerbaijan is the true victim. Azerbaijan's Application is a disingenuous, knee-jerk reaction to manufacture parity — to "mirror" Armenia's well-founded claims.

3. It was Armenia who notified Azerbaijan of its claims under the CERD on 11 November 2020. Thereafter, Azerbaijan responded not by engaging, but by mirroring. Armenia raised claims of hate speech. Azerbaijan mirrored. Armenia raised claims of destruction of cultural heritage. Azerbaijan mirrored. It was Armenia who filed its Application in September instituting proceedings before the Court, along with the Request for provisional measures. Azerbaijan mirrored again, exactly one week later.

4. Azerbaijan's claims are manufactured and defensive moves. Once the fog clears, one finds no substance to such claims. Azerbaijan's Agent's flagrant misrepresentations as to Khojaly are a case in point.

5. Azerbaijan wants to lift the carpet further. We can lift it completely off the floor. Should I start talking about the massacres and pogroms of ethnic Armenians in Sumgait, Baku, Maragha, Gandzak among many others which have stained that carpet a deep, ugly red? No, I am not going to do that since now is not the time, and I cannot imagine how that could be productive for the Court.

6. My esteemed colleagues will show that Azerbaijan's request presents problems for prima facie jurisdiction and advances claims that have no plausible link to rights arising under the CERD. Moreover, there is no urgency or irreparable harm to any rights under the CERD.

7. Azerbaijan's request as to landmines compels the Court to imagine discrimination where it does not, and cannot, actually exist. The purported evidence in Azerbaijan's casefile contains absolutely no evidence as to *who* planted mines, *where* they were planted, *when* and *why* those mines were planted. It is worth underscoring that hundreds of thousands of landmines were planted by Azerbaijan itself in the beginning of the 1990s. The presence of mines in the conflict region has affected everybody. Sadly, we have all suffered because of mines and my country regrets the tragic loss of every single life, regardless of ethnic origin.

8. For decades, we strived to complete a comprehensive demining process. However, Azerbaijan persistently blocked all such humanitarian efforts because persons of Armenian origin would be the primary beneficiaries. Only now, when such persons have been forced to flee, does Azerbaijan suddenly discover the value of demining.

9. That said, the Prime Minister of Armenia has repeatedly stated that Armenia is prepared to meet with the President of Azerbaijan, including to discuss the issues relating to landmines. Armenia has already provided minefield maps to Azerbaijan on two separate occasions. In the context of resolving all outstanding humanitarian issues, we stand ready to provide any more maps in our possession regarding minefields located behind the lines currently held by Azerbaijani armed forces, which now present solely humanitarian concerns. And Armenia has made this offer despite the fact that it is under *no* legal obligation to provide such maps.

10. Yet, Azerbaijan baselessly accuses Armenia of engaging in "ongoing operations to salt Azerbaijan's territory with more landmines" and requests that the Court order Armenia to stop. Madam President, while such a request is blatantly outside the scope of the CERD, I wish to make clear: Armenia is *not* planting landmines in the territory of the Republic of Azerbaijan or the Republic of Artsakh. Armenia respects and abides by its obligation to refrain from the threat or use of force under Article 2, paragraph 4, of the Charter of the United Nations, unlike the Republic of Azerbaijan. Even as we appear before the Court today, Azerbaijan violates the ceasefire régime and has troops illegally located deep within undisputed Armenian sovereign territory. In fact, during these very

proceedings, Azerbaijani forces continue to shell villages and target civilians in Armenia and Artsakh.

11. Azerbaijan further accuses Armenia of facilitating and tolerating purported “anti-Azerbaijani hate groups” and sponsoring online campaigns to disseminate hate. These accusations are factually bankrupt. Quite the contrary, the Armenian Government, including Prime Minister Pashinyan, actively pursues an agenda of peace and security and reconciliation in the greater region. Indeed, the recently adopted Action Plan of the Government explicitly defines a goal to open “a new era of peaceful development for our country and our region”.

12. Last week you heard our counsel displaying verbatim the hateful rhetoric President Aliyev uses to describe my people. I will not repeat these appalling insults here again. Azerbaijan’s case file, of course, is completely devoid of any such language even remotely close to such hate speech that is attributable to my Government. Instead, Azerbaijan brings to the attention of the Court statements of few individuals or non-governmental organizations engaged in emergency and self-defence trainings.

13. Let me be clear: Armenia does not endorse or condone racially derogatory statements and takes all of its obligations and responsibilities under CERD very seriously. But the fact that Azerbaijan has opted to bring such allegations to the attention of the Court — while actually defending the horrendous statements of its own President and State officials — demonstrates only one thing: its desperation to mirror Armenia’s case no matter how vacuous its own claims are.

14. Azerbaijan’s requested measure regarding the preservation of evidence is no better. It simply misses the mark. This request relates to a purported right that is not in any sense a plausible right under CERD. Armenia is currently investigating crimes allegedly committed by Armenian servicemen against Azerbaijanis. However, Azerbaijan cannot transform CERD into a mutual legal assistance treaty. Moreover, to the extent that the request concerns evidence located in the territories now controlled by Azerbaijan, such evidence would not be in Armenia’s control. Our counsel will elaborate on these fundamental deficiencies and still others as to this unwarranted request by Azerbaijan.

15. Madam President, distinguished Members of the Court, Armenia’s learned counsel will now thoroughly demonstrate to you that Azerbaijan’s request for provisional measures must be rejected in full.

16. First, Professor Kolb will address the *prima facie* jurisdiction of the Court.

17. Second, Professor Murphy will demonstrate why Azerbaijan's requests relating to landmines and alleged cross-border actions do not satisfy the Court's requirements for provisional measures, Azerbaijan's requests fail as a matter of *prima facie* jurisdiction, advance no plausible CERD rights and suffer from still other fatal deficiencies.

18. Third, Dr. Salonidis will address why Azerbaijan's request relating to the alleged incitement of racial hatred targeted at Azerbaijanis also does not comply with the requirements for provisional measures or state a plausible CERD violation. Azerbaijan's evidence neither establishes the *espousal* or *incitement* of racial hatred or violence, nor any state conduct warranting the invocation of CERD.

19. Professor d'Argent will conclude Armenia's presentation by explaining why Azerbaijan's request for the collection and preservation of evidence is inappropriate and, in any case, does not meet the requirements for provisional measures. Azerbaijan's request in this respect is outside the scope of CERD and the Court's jurisprudence.

I thank you, Madam President, distinguished Members of the Court, for your kind attention. I now kindly ask that you invite Professor Kolb to address the Court.

The PRESIDENT: I thank the Agent of Armenia for his statement. I now invite Professor Robert Kolb to take the floor.

M. KOLB :

COMPÉTENCE *PRIMA FACIE*

1. Madame la présidente, Mesdames et Messieurs les juges, je réponds cet après-midi aux observations du professeur Lowe sur la condition des négociations. L'Azerbaïdjan veut que vous l'appreciez de manière différente dans les deux affaires en cause¹. Au contraire, l'Arménie estime qu'aucune distinction à cet effet ne peut être faite entre les deux instances.

¹ CR 2021/24, p. 24-26, par. 15-18 (Lowe) ; voir également CR 2021/23, p. 12, par. 15-16 (Lowe).

2. En particulier, elle reconnaît que la condition de l'échec des négociations est satisfaite dans la présente espèce. Je vous rappelle que l'Azerbaïdjan l'avait fermement rejeté dans l'affaire connexe dont nous avons traité la semaine dernière². La Cour appréciera la différence.

3. Ce nonobstant, l'Arménie est convaincue que certaines demandes conservatoires s'égareront hors du champ matériel de la convention contre la discrimination raciale. A titre d'exemple : quel lien établir entre la convention et les mines terrestres ? Mes collègues développeront ces aspects. Je m'en trouve dès lors déchargé.

4. Je ne puis m'empêcher de noter qu'en appliquant les critères stricts de lien, de nécessité et d'urgence, ainsi que de caractère concret des mesures demandées, tels que ventilés par la Partie adverse la semaine dernière, les mesures demandées par l'Azerbaïdjan prennent l'eau de toute part. Appliquez leurs critères à leurs demandes. C'est édifiant.

5. Il est indispensable de comprendre la nature des pourparlers dans le creuset tourmenté de ces affaires croisées. C'est un motif péremptoire pour en traiter. Je souhaite aborder quatre aspects. *Le caractère unique des négociations. Les tactiques dilatoires de la Partie adverse. L'aggravation du différend par cette même Partie. La prétendue faute de l'Arménie dans la rupture des négociations.*

I. Le caractère unique des négociations

6. La négociation des deux affaires devant vous ces jours n'a jamais été entièrement séparée. L'Azerbaïdjan a insisté sur le caractère conjoint des pourparlers³. Il n'a voulu traiter des aspects en discordance que de manière jointe. Les pièces en votre possession le démontrent. Vous en voulez des preuves ? D'abord, l'Azerbaïdjan a notifié ses demandes dans la même lettre du 8 décembre 2020 par laquelle il acceptait l'invitation de l'Arménie de négocier sur les revendications de cette dernière⁴. En même temps, il les rejetait catégoriquement⁵. Ensuite, dans sa lettre du 11 juin 2021, l'Azerbaïdjan insistait particulièrement sur le regroupement des sujets de négociation de chaque

² CR 2021/21, p. 16, par. 3-4 (Lowe) ; CR 2021/23, p. 12, par. 16 (Lowe).

³ Délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 3 June 2021* (11 juin 2021) (Arménie, annexe 36).

⁴ Lettre du ministre des affaires étrangères de la République d'Azerbaïdjan au ministre des affaires étrangères de la République d'Arménie (8 décembre 2020) (Azerbaïdjan, annexe 6).

⁵ Lettre du ministre des affaires étrangères de la République d'Azerbaïdjan au ministre des affaires étrangères de la République d'Arménie (8 décembre 2020) (Azerbaïdjan, annexe 6).

Partie⁶. En effet, les deux séries de négociations portaient fondamentalement sur le même objet, à savoir la convention de 1965. Enfin, dans ses contre-propositions, l'Azerbaïdjan a mêlé la question du musée des trophées militaires et l'organisation VoMA⁷.

7. J'en tire la conséquence que la Cour ne saurait disjoindre les deux affaires s'agissant de la compétence de première face. Elle ferait violence au creuset unique des négociations. C'est que la distinction est artificielle au regard des faits. Elle ne repose que sur des fins tactiques et cherche à créer un déséquilibre entre les deux affaires sur ce point. Il n'est pas fréquent qu'une disharmonie conduise à la justice.

II. Les tactiques dilatoires

8. Ce matin nos adversaires ont noté que les négociations sur le fond n'ont pas commencé immédiatement après les premiers échanges entre les ministres des affaires étrangères des deux Parties⁸. Pourquoi ? C'est que des tactiques dilatoires ont constamment été utilisées par l'Azerbaïdjan pour s'assurer l'avantage putatif de la procrastination. Vous en doutez ? Votre dossier dans la présente affaire en donne une illustration cinglante.

9. Ainsi, il a fallu presque une année, des dizaines d'échanges de notes et des entrevues multiples, pour enfin pouvoir s'occuper du fond du litige. La Partie adverse freinait, entravait et tergiversait sans cesse. Les modalités de la négociation devaient être précisées⁹ ! Attente. Les contenus à aborder devaient être mieux cernés¹⁰ ! Renvoi. Le personnel appelé à se rencontrer devait être calibré¹¹ ! Patience. Je ne vous prendrai pas le temps d'y revenir en détail. Comparez à cela

⁶ Délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 3 June 2021* (11 juin 2021) (Arménie, annexe 36).

⁷ Lettre de Vaqif Sadiqov à Elnur Mammadov (9 octobre 2021) (Arménie, annexe 43).

⁸ CR 2021/24, p. 25-26, par. 17 (Lowe).

⁹ Lettre du ministre des affaires étrangères de la République d'Azerbaïdjan au ministre des affaires étrangères de la République d'Arménie (17 février 2021) (Azerbaïdjan, annexe 9).

¹⁰ Lettre du ministre des affaires étrangères de la République d'Azerbaïdjan au ministre des affaires étrangères de la République d'Arménie (17 février 2021) (Azerbaïdjan, annexe 9) ; lettre du ministre des affaires étrangères de la République d'Azerbaïdjan au ministre des affaires étrangères de la République d'Arménie (1^{er} mars 2021) (Arménie, annexe 8) ; délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 30 April 2021* (7 mai 2021) (Arménie, annexe 29) ; délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 22 May 2021* (28 mai 2021) (Arménie, annexe 31).

¹¹ Délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 26 April 2021* (29 avril 2021) (Arménie, annexe 26) ; délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan to the Republic of Armenia's Reply Dated 3 June 2021* (11 juin 2021) (Arménie, annexe 36).

l'attitude de l'Arménie. Elle a tenté dès le début d'aborder le fond du litige, sans circonvolutions, sans méandres, sans dédales. Dans tout cela je vois quelqu'un qui se dirige franchement vers le règlement et quelqu'un qui cherche à se dérober. Je vois aussi quelqu'un qui tend des pièges afin d'éviter que l'article 22 de la convention puisse avoir un effet utile.

10. De surcroît, l'Azerbaïdjan n'a pas voulu que ses attitudes visant à retarder et à repousser soient visibles en pleine lumière. Il a insisté à d'innombrables reprises sur la confidentialité des documents de négociation¹². Ces questions relatives au secret ont contribué à consommer du temps.

III. L'aggravation du différend

11. Tout au long des négociations, l'Azerbaïdjan a continué à aggraver le différend par des actions parfois intempestives, souvent discutables et toujours variées. Je vous en donnerai trois exemples. D'abord, l'inauguration du parc des trophées militaires. Récemment, l'Azerbaïdjan a enlevé certains mannequins faisant scandale. Rien de plus clair pour attester que leur présence enflammait et envenimait le différend. Est-ce créer entre parties une atmosphère propice à la recherche d'un accord ? Ensuite, la destruction de cimetières arméniens et d'autres biens culturels. Une référence particulière doit être faite à la décapitation de la cathédrale de Shushi et du mémorial au génocide. Enfin, les mauvais traitements infligés aux prisonniers et captifs.

IV. La rupture des négociations

12. On tente de vous faire croire que la faute de l'échec des négociations retombe sur l'Arménie. L'argument est déjà en soi médiocre. Pourquoi dans une négociation la faute serait-elle simplement de l'autre ? Je rappelle par ailleurs que l'Arménie a initié les négociations. Ce fait suggère de manière palpable qui avait intérêt à les faire avancer.

13. Pourquoi l'Arménie n'a-t-elle plus fait de propositions après les contre-propositions de l'Azerbaïdjan ? Il n'y a aucune obligation de faire des contre-propositions aux contre-propositions après presque une année de négociation. C'est encore moins le cas lorsque l'on sait ce que l'Azerbaïdjan faisait d'une main tout en prétendant négocier de l'autre.

¹² Délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan Concerning the Issues Discussed During the Meetings of 2-3 March 2021* (23 mars 2021) (Azerbaïdjan, annexe 10) ; délégation de la République d'Azerbaïdjan, *Response of the Delegation of the Republic of Azerbaijan Concerning the Issues Discussed During the Meetings of 2-3 March 2021* (2 avril 2021) (Arménie, annexe 14) ; délégation de la République d'Azerbaïdjan, *Draft Procedural Modalities* (6 avril 2021) (Arménie, annexe 17).

14. L'Arménie s'est rendu compte que l'Azerbaïdjan ne souhaitait pas négocier sur ses demandes. Les contre-propositions de la Partie adverse visaient précisément à éloigner les négociateurs de ce périmètre. Regardez avec attention : ces contre-propositions s'égarèrent loin au-delà des bornes de la convention de 1965. Rien sur le traitement humain ou le rapatriement des prisonniers de guerre. Rien sur l'abandon des destructions de propriété culturelle. Rien sur l'arrêt des discours de haine de leur président¹³.

15. L'Arménie était dès lors fondée à penser qu'il ne servirait plus à rien de continuer une négociation devenue stérile *d'*abord par l'action de sape sur le terrain, ensuite par la procrastination et les leurre, enfin par le détournement de l'objet des pourparlers. Elle l'était d'autant plus vu l'urgence de la situation et les menaces pesant sur les droits en cause.

16. Dans ces conditions, je vois mal comment il est possible d'invoquer avec succès la maxime des propres torts («own wrongdoing») à l'encontre de l'Arménie. Mais qu'à cela ne tienne ! Si l'Azerbaïdjan croit pouvoir l'avancer, l'Arménie peut s'appuyer sur cette maxime à bien plus forte raison. Mes développements précédents le démontrent.

17. En somme, les exigences relatives à la négociation étaient réunies dans les contextes un peu diaphanes des affaires *Mavrommatis* ou *Qatar c. Emirats arabes unis*. Comment imaginer que ce ne soit pas le cas ici à plus forte raison ?

18. Ces réflexions achèvent ma présentation. Je vous remercie de m'avoir prêté votre précieuse attention. Je vous prie, Madame la présidente, d'appeler à la barre M. Sean Murphy.

The PRESIDENT: I thank Professor Kolb. I shall now give the floor to Professor Sean Murphy. You have the floor, Professor.

Mr. MURPHY:

¹³ Lettre de Vaqif Sadiqov à Elnur Mammadov (9 octobre 2021) (Arménie, annexe 43).

**AZERBAIJAN'S REQUESTS RELATING TO LANDMINES
MUST BE REJECTED**

1. Thank you, Madam President. It is an honour to appear before the Court and to do so on behalf of the Republic of Armenia. I will be addressing why Azerbaijan's requests with respect to landmines do not satisfy the Court's requirements for interim measures of protection.

2. As a reminder, Azerbaijan's requests are essentially twofold: that Armenia be ordered to take all necessary steps to enable Azerbaijan to remove landmines laid in Azerbaijan's territory¹⁴, and that Armenia be ordered to stop planting landmines in Azerbaijan's territory¹⁵.

I. Factual background relevant to Azerbaijan's requests

3. I will begin with six points that serve as relevant factual background to Azerbaijan's two requests.

4. *First*, landmines are *defensive* weapons that have been used in armed conflict for almost two centuries. As explained by the encyclopaedia *Britannica*, "[I]and mines are typically used to disrupt or prevent the massed attack of tanks and/or infantry"¹⁶. Tribunals such as the Eritrea-Ethiopia Claims Commission have noted the defensive use of landmines — that landmines are used defensively — and their legality as a matter of customary international law¹⁷. In other words, typically, landmines are *not* laid for offensive purposes, and certainly not for the purpose of racial discrimination.

5. *Second*, landmines were used by all the relevant parties, including Azerbaijan, during the First Nagorno-Karabakh War, principally in the period of 1991 to 1994¹⁸. Thus, the problem of landmines in this geographic area is long standing and has led to casualties from the 1990s onward. Moreover, the problem is not just landmines, but also explosive remnants of war¹⁹, to include

¹⁴ Azerbaijan's Request, para. 39 (a).

¹⁵ Azerbaijan's Request, para. 39 (b).

¹⁶ See definition of "Mine", *Britannica*, available at <https://www.britannica.com/technology/mine-weapon>.

¹⁷ Eritrea-Ethiopia Claims Commission, Ethiopia's Claim 2, Partial Award of 28 April 2004, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVI, pp. 155-194, para. 95.

¹⁸ See e.g. Landmine and Cluster Munition Monitor, Nagorno-Karabakh Mine Action (last updated 15 Nov. 2018), available at <http://www.the-monitor.org/en-gb/reports/2019/nagorno-karabakh/mine-action.aspx>; Tyler Bird, "Map of the Month: Landmine Removal in Nagorno-Karabakh", Carto (10 July 2017), available at <https://carto.com/blog/map-of-the-month-landmine-removal-nagorno-karabakh/>.

¹⁹ See e.g. Landmine Action, Explosive Remnants of War and Mines other than Anti-Personnel Mines: Global Survey 2003-2004 (Mar. 2005), available at <https://article36.org/wp-content/uploads/2008/10/global-impact-survey.pdf>, pp. 24-26.

unexploded cluster munitions, of which Azerbaijan made extensive use in its aerial and artillery attacks during the First Nagorno-Karabakh War²⁰. Persons have been killed by these mines and ordnance from the 1990s right up to the outbreak of the conflict in September 2020²¹, as was noted by opposing counsel this morning²², and that fact must be kept in mind when considering similar civilian deaths occurring thereafter. In other words, it remains the case today that a civilian death that occurs in the region may well be the consequence of mines or ordnance from the First Nagorno-Karabakh War.

6. *Third*, for years Armenia has supported the idea of regulating and even banning the use of landmines, but only if its neighbours, including Azerbaijan, agree to the same. For that reason, after the adoption in 1997 of the Ottawa Treaty on Landmines²³, Armenia voted in favour of the 1998 United Nations General Assembly resolution²⁴ calling upon all States to adhere to the Ottawa Treaty; by contrast, Azerbaijan did not vote in favour of that resolution²⁵. Indeed, Armenia said at the 2017 meeting of the States Parties to the Ottawa Treaty that Armenia's full participation in the Treaty is contingent upon a similar level of political commitment by other parties in the region²⁶. Alas, a similar commitment has not been forthcoming from Azerbaijan, such that today neither State is a party to the Ottawa Treaty, nor to Protocol II of the Convention on Conventional Weapons²⁷.

²⁰ Hafiz Safikhanov, "Cluster Munitions Information Campaign in Azerbaijan", 12 (2) *Journal of Conventional Weapons Destruction* 48 (March 2008), available at <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1562&context=cisr-journal>.

²¹ See e.g. Parliamentary Assembly of the Council of Europe, Report on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan, doc. 15363 (13 Sept. 2021), para. 73, available at <https://pace.coe.int/pdf/a61ff5e0981ae42e02f02336c51f639d66ae587b74fd95634b36e68c4bcbe7a6/doc.%2015363.pdf>; ICRC, Nagorno-Karabakh conflict a disturbing reminder of war, (31 May 2019), available at <https://www.icrc.org/en/document/nagorno-karabakh-conflict-landmines-disturbing-reminder-war>.

²² CR 2021/24 (Amirfar), p. 33, para. 12.

²³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 18 September 1997, entered into force 1 March 1999), United Nations, *Treaty Series (UNTS)*, Vol. 2056, p. 211.

²⁴ United Nations General Assembly, resolution 53/77, doc. A/RES/53/77 (12 Jan. 1999), Section N, para. 1.

²⁵ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, resolution A/RES/53/77N, Voting Summary (4 Dec. 1998), available at <https://digitallibrary.un.org/record/285297?ln=en>.

²⁶ Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Status of Universalization of the Anti-Personnel Mine Ban Convention, UN doc. APLC/MSP.16/2017/WP.8 (8 Dec. 2017), p. 4.

²⁷ See International Committee of the Red Cross, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996): List of States Parties, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=575.

7. *Fourth*, in the aftermath of the Nagorno-Karabakh War, Armenia strongly supported international efforts to remove landmines in Nagorno-Karabakh. Of particular note, Armenia supported the demining program funded by the United States Government and carried out by the United Kingdom-based non-profit organization called Halo Trust. Over the course of nearly two decades, Halo Trust cleared thousands of landmines and more than twice that of explosive ordinance from the areas where civilians were living²⁸. Yet it is important to note that Halo Trust *only* cleared mines that “no longer play a political or military role” and, therefore, it did “not work along the line of contact” between the military forces. In other words, it was understood that certain mines had been laid for *defensive* purposes along the “line of contact” in the eastern and northern part of Nagorno-Karabakh, which were to be left in place given the military purpose that they served²⁹. I note that the Organization for Security and Co-operation (OSCE) in Europe monitored this line of contact throughout this time period, visiting the military forces arrayed on all sides, as is clear from Azerbaijan’s own evidence³⁰. Further, Armenia worked closely with the OSCE on demining in Nagorno-Karabakh, but those efforts were effectively brought to an end by Azerbaijan in 2016³¹.

8. *Fifth*, this historic problem of landmines and explosive remnants of war was, of course, aggravated during the conflict that erupted in September 2020. What landmines, if any, were laid at that time is unclear. Yet the 2020 conflict certainly spawned a fresh set of explosive remnants of war, for which Azerbaijan as the aggressor³² is to blame. Indeed, a Human Rights Watch investigation in the densely populated areas of Nagorno-Karabakh, uncovered “numerous incidents in which Azerbaijan’s forces used inherently indiscriminate cluster munitions and artillery rockets and other

²⁸ See e.g. Skye Jacobs, “The Halo Trust in Nagorno Karabakh”, The Borgen Project (15 Jan. 2021), available at <https://borgenproject.org/the-halo-trust-2/>.

²⁹ “Your Crash Course on Removing Landmines from Artsakh”, 1A Blob (31 July 2018), available at <https://blog.onearmenia.org/faq-about-removing-landmines-from-artsakh-2911943c9c7a>.

³⁰ Azerbaijan, Ann. 16, Note Verbale from the Office of the Personal Representative of the Chairperson-in-Office on the Conflict Dealt with by the OSCE Minsk Conference to the Ministry of Foreign Affairs of the Republic of Azerbaijan (4 June 2015).

³¹ OSCE Special Meeting of the Permanent Council, Statement by the Delegation of Azerbaijan, PC.JOUR1126 (31 Dec. 2016), available at <https://www.osce.org/files/f/documents/5/e/292951.pdf>, p. 4.

³² President of the Republic of Azerbaijan, Ilham Aliyev, “Ilham Aliyev met with members of general public of Khojavand district” (10 Oct. 2021), available at <https://en.president.az/articles/53402>.

weapons that did not distinguish between military targets and civilian objects”³³. Similarly, Amnesty International reported on Azerbaijan’s use of such cluster munitions, finding that they pose a “threat to civilians similar to anti-personnel landmines” and “inflict suffering for civilian populations years after their use”³⁴.

9. *Sixth*, and finally on the factual background, since the time of the Trilateral Statement of November 2020, there unfortunately has continued to be a very difficult military situation in Nagorno-Karabakh, with repeated violations of the ceasefire, notwithstanding the presence of the Russian peacekeeping forces³⁵. Military forces remain arrayed against each other in and around various parts of Nagorno-Karabakh, and minefields still exist that are important for military purposes. The border between Armenia and Azerbaijan is also a location of great concern, given statements by senior Azerbaijani officials, such as Azerbaijan’s President Aliyev, about “returning” to places in Armenia³⁶ and, given the regular firing of weapons by Azerbaijan’s armed forces across the border in incidents that have killed Armenian soldiers and civilians in Armenia³⁷. Of particular concern is

³³ Human Rights Watch, Azerbaijan: Unlawful Strikes in Nagorno-Karabakh (11 Dec. 2020), available at <https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh>. See also Jack Losh, “One woman’s bomb-filled garden in Nagorno-Karabakh points to lingering perils from war”, *The Washington Post* (26 Feb. 2021), available at https://www.washingtonpost.com/world/europe/nagorno-karabakh-war-bomb-removal-armenia-azerbaijan/2021/02/25/c8126f3a-73bb-11eb-8651-6d3091eac63f_story.html.

³⁴ “Armenia/Azerbaijan: Civilians must be protected from use of banned cluster bombs,” Amnesty International (5 Oct. 2020), available at <https://www.amnesty.org/en/latest/press-release/2020/10/armenia-azerbaijan-civilians-must-be-protected-from-use-of-banned-cluster-bombs/>.

³⁵ See e.g. “Russian peacekeepers investigate killing of Armenian farmer by Azerbaijani sniper fire”, ArmenPress (11 Oct. 2021), available at <https://armenpress.am/eng/news/1065224.html>; “Azerbaijani military opens fire at civilian settlements in Artsakh, village home damaged, ArmenPress (7 Sept. 2021), available at <https://armenpress.am/eng/news/1062554.html>; “France calls for immediate end to military operations around Artsakh”, ArmenPress (27 Sept. 2021), available at <https://armenpress.am/eng/news/1029003.html>; “Azerbaijan’s policy of terrorism seeks to achieve exodus of Armenians from Artsakh, warns Stepanakert”, ArmenPress (15 Oct. 2021), available at <https://armenpress.am/eng/news/1065691.html>.

³⁶ Ismi Aghayev, “Azerbaijani experts debate causes of recent escalation”, OC Media (23 Aug. 2021), available at <https://oc-media.org/features/azerbaijani-experts-debate-causes-of-recent-escalation>.

³⁷ See e.g. “Armenia soldier killed in latest Azerbaijani provocation at state border”, ArmenPress (16 Sept. 2021), available at <https://armenpress.am/eng/news/1027833.html>; “Armenia Claims Soldier Killed By Azerbaijani Sniper Near Border”, Radio Free Europe/Radio Liberty (2 Sept. 2021), available at <https://www.rferl.org/a/armenia-azerbaijan-soldier-killed/31438715.html>; “Armenian Soldier Wounded In Skirmish Along Border With Azerbaijan”, Radio Free Europe/Radio Liberty (17 Aug. 2021), available at <https://www.rferl.org/a/armenia-border-skirmish-azerbaijan-/31415413.html>; “Two Armenian Troops Killed In Latest Shoot-Out Along Azerbaijani Border”, Radio Free Europe/Radio Liberty (16 Aug. 2021), available at <https://www.rferl.org/a/armenia-azerbaijan-shooting-karabakh/31412867.html>; “Azerbaijan, Armenia Trade Blame Over Latest Deadly Border Clashes”, Radio Free Europe/Radio Liberty (28 July 2021), available at <https://www.rferl.org/a/azerbaijan-armenia-border-clashes/31381068.html>; “Three Armenian servicemen killed in ongoing Azerbaijani attacks,” ArmenPress (28 July 2021), available at <https://armenpress.am/eng/news/1059251.html>; “Azerbaijani, Armenian Forces Exchange Fire Along Tense Border Section”, Radio Free Europe/Radio Liberty (19 July 2021), available at <https://www.rferl.org/a/armenia-azerbaijan-yeraskh-naxcivan-/31367348.html>; “Armenia Says Soldier Killed In Shoot-Out With Azerbaijani Forces”, Radio Free Europe/Radio Liberty (25 May 2021), available at <https://www.rferl.org/a/armenia-azerbaijan-shootout-soldier-killed/31273112.html>; “Armenian serviceman killed as result of firefight after Azeri troops opened fire”, ArmenPress (25 May 2021), available at <https://armenpress.am/eng/news/1053361.html>.

the movement of Azerbaijan's troops into Armenia's sovereign territory since 12 May of this year³⁸, which has prompted calls — such as from the French Government³⁹, the Greek Government⁴⁰ and the United States Government — for Azerbaijan “to pull back all forces immediately and cease further provocation”⁴¹.

10. I mention this final factual point to highlight the situation today in Nagorno-Karabakh and along the Armenia-Azerbaijan border. It remains quite fraught; there are military forces deployed throughout the area, as well as peacekeeping forces, and military and security concerns remain paramount. As such, any order by the Court that were to require Armenia to divulge information that would compromise the security of military forces in this area would be deeply problematic.

II. Azerbaijan's request relating to Armenia helping Azerbaijan to undertake demining fails as a matter of prima facie jurisdiction and advances no plausible CERD rights

11. Madam President, Members of the Court, I turn now to Armenia's legal arguments with respect to Azerbaijan's two requests, starting with the request for an order that Armenia help Azerbaijan to undertake demining in Azerbaijan's territory⁴².

12. Armenia is well aware of the dangers to civilians of landmines and unexploded ordnance. For that reason, when the Council of Europe Parliamentary Assembly, on 27 September of this year, adopted a resolution calling for Armenia to release all mine maps in its possession⁴³, Armenian

³⁸ United Nations Security Council, Letter dated 14 May 2021 from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council, doc. S/2021/467 (14 May 2021); United Nations Security Council, Letter dated 29 July 2021 from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council, doc. S/2021/693 (30 July 2021).

³⁹ Emmanuel Macron (@EmmanuelMacron), “Azerbaijani armed forces have crossed into Armenian territory. They must withdraw immediately. I say again to the Armenian people: France stands with you in solidarity and will continue to do so”, Twitter (13 May 2021), available at <https://mobile.twitter.com/emmanuelmacron/status/1392965873187659778?lang=en>; see also Élysée, Entretien téléphonique avec M. Nikol Pachinian, Premier ministre d'Arménie (13 May 2021), available at <https://www.elysee.fr/emmanuel-macron/2021/05/13/communiqué-situation-arménie>.

⁴⁰ “Greece MFA: Armenia territorial integrity must be respected”, news.am (20 May 2021), available at <https://web.archive.org/web/20210520070750/https://news.am/eng/news/644523.html>.

⁴¹ United States Department of State, Press Briefing (14 May 2021), available at <https://www.state.gov/briefings/department-press-briefing-may-14-2021/>; see also United States Senate Committee on Foreign Relations, Statement from Chairman Menendez on Azerbaijan's Violation of Armenian Sovereignty (13 May 2021), available at <https://www.foreign.senate.gov/press/chair/release/statement-from-chairman-menendez-on-azerbaijans-violation-of-armenian-sovereignty>.

⁴² Azerbaijan's Request, para. 39 (a).

⁴³ Parliamentary Assembly of the Council of Europe, Resolution 2391: Humanitarian consequences of the conflict between Armenia and Azerbaijan / Nagorno-Karabakh conflict (2021), available at <https://pace.coe.int/en/files/29483/html>, para. 10.3.

deputies — without hesitation — voted in favour of the resolution. By contrast, as Professor d'Argent recalled last week, all Azerbaijan deputies voted against the resolution⁴⁴, perhaps because it expressed deep concern about Armenian POWs and civilians detained by Azerbaijan, perhaps because the resolution criticized the unacceptable racially intolerant overtones exacerbated by Azerbaijan's Military Trophies Park, and perhaps because the resolution expressed deep concern about Armenian cultural heritage in Nagorno-Karabakh.⁴⁵

13. But in any event, Armenia approaches the issue of landmines in good faith and is fully willing to cooperate with United Nations and regional systems, with non-governmental organizations, to promote the safety and well-being of the people in the region. Armenia has already provided maps to Azerbaijan. Moreover, Armenia's Prime Minister has publicly announced his willingness to bring, to a meeting with Azerbaijan's President, maps of minefields that do not separate the militaries of Armenia and Azerbaijan from one another, meaning maps that have a humanitarian significance, rather than a military or civilian significance⁴⁶. Our Agent today, before this Court, confirmed that willingness, when he said: "we stand ready to provide any more maps in our possession regarding minefields located behind the lines currently held by Azerbaijani armed forces, which now present solely humanitarian concerns"⁴⁷.

14. But that good will of Armenia is very different from saying that Armenia has a legal obligation to "enable" Azerbaijan to undertake demining activities, let alone an obligation arising under CERD. Indeed, the extraordinary breadth of a purported "obligation to enable" another country to do something alone casts great doubt on the obligation's existence.

⁴⁴ See Parliamentary Assembly of the Council of Europe, Vote on Resolution – Doc. 15363: Humanitarian consequences of the conflict between Armenia and Azerbaijan (27 Sept. 2021), available at <https://pace.coe.int/en/votes/38611>.

⁴⁵ Parliamentary Assembly of the Council of Europe, Resolution 2391: Humanitarian consequences of the conflict between Armenia and Azerbaijan / Nagorno-Karabakh conflict (2021), available at <https://pace.coe.int/en/files/29483/html>, paras. 6, 19 (2).

⁴⁶ "I am ready to take with me all mine field maps and I call on Aliyev to bring all captives' – Pashinyan", ArmenPress (3 Oct. 2021), available at <https://armenpress.am/eng/news/1064673/>; "Pashinyan: Armenia ready to hand over minefield maps to Azerbaijan in exchange for captives", news.am (15 Oct. 2021), available at <https://news.am/eng/news/667663.html>.

⁴⁷ CR 2021/25, para. 9 (Kirakosyan).

III. Lack of prima facie jurisdiction

15. Allow me to begin the legal analysis by indicating two problems in finding prima facie jurisdiction over this request.

16. One problem concerns jurisdiction *ratione materiae*. The Court found in the *Qatar v. United Arab Emirates* case that such jurisdiction does not exist when the measure complained of by a party is based on adverse effects caused to *nationals* of a party, since discrimination under CERD does not include discrimination based on nationality⁴⁸. Yet this request concerning demining is clearly based on alleged harmful effects to Azerbaijan *nationals* as a whole, not to persons of any particular ethnic origin. Professor Lowe this morning himself referred to the harm from landmines to “people of Azerbaijan”⁴⁹. He did not say harm to persons of Azerbaijani ethnicity.

17. Indeed, if as claimed in Azerbaijan’s Application, Azerbaijan is a “multi-ethnic” country, one that includes substantial numbers of Armenians⁵⁰ — indeed, a country “comprised of over fifty ethnic groups”⁵¹ — then a concern with demining in Azerbaijan necessarily is a concern for Azerbaijan *nationals generally*, and not to any particular ethnic group. Indeed, virtually every landmine victim listed in Azerbaijan’s Annex 37 is listed as a *citizen of the Republic of Azerbaijan*, and none are listed as a member of an ethnic group.

18. Another problem concerns jurisdiction *ratione temporis*. CERD entered into force between the two Parties in 1996. Yet, as I will soon explain, the only “confirmed mined areas” according to Azerbaijan’s Application in this case⁵² are along the line of contact between military forces that arose at the end of the First Nagorno-Karabakh War. If that is correct, then the “confirmed mined areas” were laid during, and in the immediate aftermath of, a war that ended in 1994⁵³, and thus the alleged breach is dominantly if not exclusively based on acts or facts that took place⁵⁴ before your temporal jurisdiction begins.

⁴⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021*, para. 105.

⁴⁹ CR 2021/24, para. 10 (Lowe).

⁵⁰ Azerbaijan’s Application, para. 3.

⁵¹ CR 2021/21, para. 2 (Mammadov); see also *ibid.*, para. 11.

⁵² Azerbaijan’s Request, p. 6, Figure 1.

⁵³ See Azerbaijan’s Application, para. 49.

⁵⁴ Vienna Convention on the Law of Treaties (open for signature 23 May 1969, entered into force 27 January 1980), *UNTS*, Vol. 1155, p. 331, Art. 28.

IV. Lack of plausibility of, and link to, CERD rights

19. Madam President, in case the Court finds prima facie jurisdiction over this request, allow me to turn to whether there are any plausible CERD rights that can be linked to it.

20. In Azerbaijan's Request for provisional measures, it does not explain exactly why it thinks this request is plausibly linked to rights under CERD. Instead, it just vaguely says that "Armenia's policies and practices target Azerbaijanis for discriminatory treatment falling within the scope of" the CERD⁵⁵. The presentations by Professor Lowe and Ms Amirfar this morning seemed to focus on an overall practice of what Azerbaijan calls "ethnic cleansing" that began well before your temporal jurisdiction, of which the issue of handing over maps is "the latest chapter"⁵⁶. But the exact policy or practice of Armenia still remains unclear. Is it an Armenian practice of laying mines starting in the 1990s and up until the Trilateral Statement? Or is it a practice relating to a single alleged incident of mining since the Trilateral Statement? Or is it a policy by Armenia of being willing to meet to discuss, among other things, which maps Armenia may possess relating to mines that are not pertinent to military defence?

21. Whatever Azerbaijan's view is as to the Armenian policy or practice, arguing a plausible connection to CERD rights is rather difficult given a simple fact: landmines, by their nature, do not engage in ethnic discrimination when it comes to the victims that they claim. It matters not to the mine who or what steps on it.

22. In fact, the landmines and explosive remnants remaining from the past three decades of armed conflict in this area have harmed Armenians, Azerbaijanis and others alike, sometimes in the fields they farm, and sometimes in their streets and gardens⁵⁷. Indeed, sometimes the same explosion harms persons of *multiple* backgrounds. For example, in November of last year, a landmine in Nagorno-Karabakh killed an Azerbaijani officer, wounded several ethnic Armenian officials, and wounded a Russian peacekeeper⁵⁸. Clearly the mine made no distinction as to the ethnicity or

⁵⁵ Azerbaijan's Request, para. 34.

⁵⁶ CR 2021/24, para. 5 (Amirfar).

⁵⁷ Jack Losh, "One woman's bomb-filled garden in Nagorno-Karabakh points to lingering perils from war", *The Washington Post* (26 Feb. 2021), available at https://www.washingtonpost.com/world/europe/nagorno-karabakh-war-bomb-removal-armenia-azerbaijan/2021/02/25/c8126f3a-73bb-11eb-8651-6d3091eac63f_story.html.

⁵⁸ "Land Mine Kills Officer as Search Continues for Armenian, Azerbaijani Missing", Radio Free Europe/Radio Liberty (23 Nov. 2020), available at <https://www.rferl.org/a/land-mine-kills-officer-search-for-armenian-azerbaijani-missing/30965287.html>.

nationality of its victims; all were affected without any such discrimination. Professor Lowe himself this morning said mines are “indiscriminate”⁵⁹, as has Azerbaijan’s Commissioner for Human Rights and Ombudsperson, who has stressed that “[m]ines are indiscriminate by nature”⁶⁰ and that mines “have indiscriminate effects”⁶¹.

23. Yet I wish to reiterate that such explosions are not just the product of mines. For example, earlier this year an ethnic Armenian woman found 32 unexploded shells in her garden in Kaghartsi, which is about 16 miles east of Stepanakert, from one of the cluster bombs that was used in the fighting in Nagorno-Karabakh⁶². In that instance, the cluster bombs were clearly dropped by Azerbaijan, which uses Israeli-made cluster munitions that are distinctive for their pink ribbons⁶³. No doubt others have found such shells, and perhaps mistaken them for mines. In fact, I note that the photographs presented by Azerbaijan in its Annex 36, which contain many duplicates of the same scene⁶⁴, are actually often of unexploded ordnance, not of mines.

24. This is not to say that Azerbaijan citizens in Nagorno-Karabakh have not been harmed by landmines or explosive remnants of war. They have, and that loss of life is deeply, deeply regrettable. Unfortunately, Azerbaijan’s media report that since the Trilateral Statement many Azerbaijan citizens attempting to visit areas in Nagorno-Karabakh do so in violation of Azerbaijan’s law⁶⁵. Apparently, in many cases these individuals “traveled on uncleared roads or cut across open fields to avoid Azerbaijan’s military checkpoints”⁶⁶.

⁵⁹ CR 2021/24, para. 6 (Lowe).

⁶⁰ Ad Hoc Report of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, Mine Problem in the Liberated Areas (undated), available at <https://www.ombudsman.az/upload/editor/files/Ad%20Hoc%20Report%20of%20the%20Ombudsman%20on%20landmine%20problem.pdf>, p. 4.

⁶¹ *Ibid.*, p. 15.

⁶² Jack Losh, “One woman’s bomb-filled garden in Nagorno-Karabakh points to lingering perils from war”, *The Washington Post* (26 Feb. 2021), available at https://www.washingtonpost.com/world/europe/nagorno-karabakh-war-bomb-removal-armenia-azerbaijan/2021/02/25/c8126f3a-73bb-11eb-8651-6d3091eac63f_story.html.

⁶³ *Ibid.*

⁶⁴ 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, No. 414/M (11 June 2021) (certified translation) (with enclosure), Photos 4 and 6, Photos 5, 7 and 8, Photos 11, 12 and 13, Photos 15 and 16 (Azerbaijan Annex 36).

⁶⁵ Ron Synovitz, “Dying to go home: Displaced Azerbaijanis risk mines, munitions to see homeland”, Radio Free Europe/Radio Liberty (18 Feb. 2021), available at <https://www.rferl.org/a/azerbaijan-idps-karabakh-return-home-mines-munitions-risks/31110165.html>.

⁶⁶ *Ibid.*

25. But the point is that Armenia has never used mines to target persons of Azerbaijani ethnic origin: not before the armed conflict in 2020, not during that armed conflict and not thereafter. There is zero evidence in the record of any such intent, no matter what you hear from counsel on the other side. Any speculation along those lines is just that, sheer speculation with no evidentiary foundation. You cannot point to a photograph of a mine sitting in a field and simply say “aha, it was planted specifically and deliberately for the purpose or effect of racial discrimination”!

26. Indeed, it would be very odd for military authorities in control of a territory to lay mines throughout that territory based on a belief that, at *some* unknown point in the future, they would lose control of *some* of that territory, and on a belief that persons of a specific ethnicity would then come into the territory and would be uniquely harmed by such mines.

27. And it would be equally odd, in the heat of a sudden military attack, to spend precious time laying mines for anything other than defensive manoeuvres. Indeed, I sadly note that a reason why the Trilateral Statement provided for the return of the bodies of dead soldiers was because retreating forces did not even have the time to evacuate the bodies of fallen comrades. It is simply not credible to think that they ignored their brothers-in-arms so as to hatch a devious plot of ethnic discrimination.

28. So why would mines have been laid in areas in and around Nagorno-Karabakh? Certainly, it was not for the purpose or effect of racial discrimination. It was for the purpose of military defence. And that is clear from Azerbaijan’s own pleadings before the Court, especially if one looks at that Figure 1 from Azerbaijan’s Request for provisional measures, which counsel for Azerbaijan placed before you this morning⁶⁷. You see now Figure 1 on your screen. We are told by Azerbaijan that Figure 1 is a map produced by Azerbaijan’s Mine Action Agency. Assuming for the sake of argument that there is some accuracy to this map, what does it tell us about the laying of mines in this area?

29. Notice first the title of the map: it is referring not just to mines but also to unexploded ordnance. Thus, while the legend of the map says in various places “mines” or “minefields”, this appears to be a map that is concerned with both mines and unexploded ordnance. And, typically, in the aftermath of a battle, the number of unexploded ordnance will vastly exceed the number of mines, and that is a fact worth bearing in mind when considering the dots on this map. Moreover, that

⁶⁷ Azerbaijan’s Request, p. 6, Figure 1.

ordnance is due to actions by *all* sides in the conflict; let's not pretend that this map is showing exclusively conduct by Armenia.

30. But let's assume this map is, to some extent, showing the location of mines. Where is it that Azerbaijan says that the location of mines is "confirmed" and is "most concentrated"? Well, it is that thick red line, which is clearly following the "line of contact" between opposing militaries that existed for some three decades. Any mines located in that area were clearly laid by opposing sides for defensive purposes.

31. Azerbaijan's Mine Action Agency, in Azerbaijan's Annex 32, characterizes the mines in this area as "traditional military doctrine barrier defences", which exist alongside "tank ditches, large berms, and barbed wire entanglements"⁶⁸. So what are these "confirmed" mines? They are traditional military defence mines, not some crafty form of ethnic discrimination. Even the website of Azerbaijan's Military Trophies Park refers to this line as part of the "enemy's defensive wall"⁶⁹.

32. What about the mines in other areas, away from this three-decades-old line of contact? Well, on *this* map the areas shaded in orange and yellow are relevant, according to Azerbaijan. Look at the legend of the map. It indicates that, for these colours, the existence of "minefields" is "suspected", which means that it is not certain they exist. Moreover, for both the orange and yellow areas, the legend refers to them not just as minefields, but as "minefields and battlefields" — "and battlefields" — apparently meaning that they "suspect" that there are mines in these areas because these areas were "battlefields". And please look even more closely and notice that virtually all of these "suspected minefields and battle fields" in the yellow and orange areas fall along *lines*, a classic indication that these were further "lines of contact" as military forces are positioning and repositioning themselves, such as during a six-week retreat. Indeed, Azerbaijan's own Mine Action

⁶⁸ *Extract from Mine Action Agency of the Republic of Azerbaijan, Assistance Required for the Republic of Azerbaijan in Humanitarian Mine Action for Safe Reconstruction and Return of IDPs to the Conflict Affected Territories of Azerbaijan (2021), Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elnur Mammadov, Deputy Minister for Foreign Affairs, No. 0612/04/21/01 (9 Oct. 2021), p. 5 (Azerbaijan Ann. 32).*

⁶⁹ Official website for the Military Trophies Park, "The enemy's defensive wall", available at <https://herbiqenimetlerparki.az/en/page/pavilyonlar/dusmenin-mudafie-seddi>.

Agency, in Annex 32, says it characterizes these locations as “*military* positions with patterned mine lines”⁷⁰.

33. Azerbaijan’s Annex 36, also referred to by counsel this morning, does not take things much further. At best, it shows that a handful of mines have been found by Azerbaijan in areas at a distance from the line of “contact”, yet those mines easily may have been laid for defensive purposes, including in agricultural fields, by retreating forces. Indeed, while the Mine Action Agency concludes that they were “deliberately” laid, that conclusion is consistent with them being laid for defensive, and not racial, reasons.

34. So in general, we submit that it makes no sense to say that any mines “confirmed” along this thick red “line of contact”, or mines “suspected” elsewhere on “battle fields”, were laid as a policy or a practice of racial discrimination. They were laid for defensive purposes; there is no other way to look at it. And *if* a belligerent has to lay mines in farmland while retreating so as to slow down an advancing belligerent, that is no less done for the purpose of lawful self-defence. It equally makes no sense to say that sharing, or not sharing, of any existing maps of such minefields is some clever scheme of racial discrimination that somehow violates some provision of the CERD. This is especially the case if, as Azerbaijan says, it is allowing “the return of displaced persons, regardless of their national or ethnic origin”, so that someday “Armenians and Azerbaijanis . . . will live side-by-side”⁷¹.

35. As such, we submit, there are no plausible CERD rights being advanced that are linked to this request.

V. Azerbaijan’s request relating to the planting or promoting of planting of landmines in Azerbaijan is based on incorrect and unproven facts, advances no plausible CERD rights, and in any event is moot

36. Madam President, Members of the Court, Azerbaijan has also requested a provisional measure that “Armenia shall immediately cease and desist from . . . planting or promoting or

⁷⁰ Azerbaijan, Ann. 32, *Extract from Mine Action Agency of the Republic of Azerbaijan, Assistance Required for the Republic of Azerbaijan in Humanitarian Mine Action for Safe Reconstruction and Return of IDPs to the Conflict Affected Territories of Azerbaijan (2021)*, p. 5; Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elmur Mammadov, Deputy Minister for Foreign Affairs, No. 0612/04/21/01 (9 Oct. 2021), p. 4; *emphasis added*.

⁷¹ CR 2021/21, p. 14, para. 12 (Mammadov).

facilitating the planting of landmines in Azerbaijan's territory"⁷². I note that this second request seems directed solely at the planting of landmines "near the border between Armenia and Azerbaijan"⁷³, and not elsewhere.

37. Azerbaijan's request is based on an incorrect factual claim. As was stated by our Agent this afternoon to the Court: "Armenia is *not* planting landmines in the territory of the Republic of Azerbaijan or the Republic of Artsakh."⁷⁴ Because Azerbaijan's factual assertion about transboundary laying of mines is incorrect, it is no surprise that Azerbaijan's evidence of any such conduct is severely lacking. Indeed, the *only* factual basis for Azerbaijan's request is a single incident that purportedly occurred on 27 May of this year⁷⁵. According to Azerbaijan, on that day, it caught Armenian military forces attempting to plant landmines just across the border in Azerbaijan's territory. As we explained last week, Azerbaijan has its facts wrong; in reality, it was Azerbaijan's military forces that crossed into undisputed *Armenian territory* on that day and unlawfully abducted six Armenian soldiers⁷⁶. Unfortunately, Azerbaijan military units continue to be present in such territory even today.

38. But even if — even if — one were to assume, *arguendo*, the facts as asserted by Azerbaijan, would that single incident of alleged cross-border mining plausibly implicate rights under the CERD? According to Azerbaijan, these were Armenian soldiers who *tried to mine the supply routes leading to the positions of the Azerbaijani army on the border*, and who were then surrounded, neutralized and detained by the Azerbaijan military⁷⁷. In other words, these were not Armenian soldiers attempting some devious plot of racial discrimination; they were — on Azerbaijan's own account — trying to secure a military objective, which was to defend Armenia

⁷² Azerbaijan's Request, para. 39 (b).

⁷³ Azerbaijan's Request, para. 15; see also Azerbaijan's Application, para. 84.

⁷⁴ CR 2021/25, para. 8 (Kirakosyan).

⁷⁵ Azerbaijan's Request, para. 15; see also United Nations General Assembly & Security Council, Letter dated 9 August 2021 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, doc. A/75/986-S/2021/721 (12 Aug. 2021).

⁷⁶ United Nations General Assembly & Security Council, Letter dated 27 May 2021 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, doc. A/75/897-S/2021/508 (28 May 2021).

⁷⁷ Armenia Ann. 35, Letter from Çingiz Əsgərov, Agent of the Republic of Azerbaijan before the European Court of Human Rights, to Johan Callewaert, Deputy Grand Chamber Registrar, European Court of Human Rights, No. 8/2-1401 (4 June 2021), attaching Decisions on the initiation of the criminal case and on charges (Ann. 1 translated from Azerbaijani, p. 1).

against Azerbaijan military operations on the border with Armenia. Even on Azerbaijan's account, there are no plausible CERD rights at issue.

39. In any event, we submit Azerbaijan's request is clearly moot and presents no issue of urgency. Our Agent said clearly to the Court this afternoon, in his opening statement, that Armenia is not planting any landmines in Azerbaijan or Artsakh. Moreover, he assured the Court that "Armenia respects and abides by its obligation to refrain from the threat or use of force under Article 2, paragraph 4, of the Charter of the United Nations"⁷⁸.

40. In light of those statements, the request advanced by Azerbaijan no longer has any object, if it ever did. And it follows that the issuance by the Court of such a preliminary measure would have no *raison d'être*⁷⁹.

41. Madam President, this concludes my presentation. I thank the honourable Members of the Court for their kind attention. If it please the Court, I ask you to now call upon Dr. Salonidis.

The PRESIDENT: I thank Professor Murphy. I now invite Mr. Contantinos Salonidis to take the floor.

Mr. SALONIDIS: Madam President, Members of the Court, good afternoon.

**AZERBAIJAN'S REQUEST RELATING TO THE ALLEGED INCITEMENT TO RACIAL HATRED
AND VIOLENCE MUST BE REJECTED**

1. My task today is to explain why Azerbaijan's allegations of incitement of ethnic hatred and violence through an alleged failure to sanction or punish so-called armed hate groups, and through an alleged "ongoing" disinformation campaign⁸⁰, are not plausible. There is also no urgent risk of irreparable harm with respect to either part of Azerbaijan's third request.

**I. The alleged Twitter campaign does not meet the requirements for the indication
of provisional measures**

2. One part of that request asks the Court to order Armenia to "cease and desist incitement based on the fabrication of public and private hate speech attributed to Azerbaijanis on Twitter and

⁷⁸ CR 2021/25, p. 13, para. 8 (Kirakosyan).

⁷⁹ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 271, para. 56.

⁸⁰ CR 2021/24, p. 47, para. 22 (Boisson de Chazournes).

other social media and traditional media channels”. As we heard earlier today from Professor Lowe, Azerbaijan argues essentially that “[a]ccounts posing as Azerbaijani officials carried messages promoting hatred towards Armenians, in order to stir up anti-Azerbaijani sentiment”⁸¹.

3. At the outset, this is, with respect, a bizarre allegation. As we saw last week, there is no need for Armenian agents to pose as Azerbaijanis for the purposes of spreading hateful words; the Azerbaijani Government, from the top down, already spreads such hate on its own, and hatred is already widespread on Azerbaijani social media⁸².

4. I should also say that the allegation is *also not* in good faith, given Azerbaijan’s well-documented exploitation of social media platforms⁸³, including in relation to “tensions between Armenia and Azerbaijan, [and] Armenia’s actions during past escalations in Nagorno-Karabakh”⁸⁴.

5. In any case, Azerbaijan has not put before the Court evidence that affords a sufficient basis to find it plausible that Armenia is engaging in cyber disinformation operations to incite anti-Azerbaijani hate⁸⁵. Recall that the entire allegation rests on a *single* statement by a social media company last February. In its Request, Azerbaijan represented to the Court that on 23 February 2021, Twitter “announced its discovery that the Government of Armenia was conducting a coordinated campaign on the social media platform that was *deliberately designed to stoke ethnic tensions between Armenians and Azerbaijanis*”⁸⁶.

6. On the right side of the slide on your screens: what Twitter *actually* said. Twitter claimed that it had investigated and removed 35 accounts with “ties to the Government of Armenia” that had been created “in order to advance narratives that were targeting *Azerbaijan* and were *geostrategically*

⁸¹ CR 2021/24, p. 28, para. 28 (Lowe).

⁸² The Human Rights Defender of Armenia & The Human Rights Ombudsman of Artsakh, Ad Hoc Public Report Organized Hate Speech and Animosity Towards Ethnic Armenians in Azerbaijan as Root Causes of Ethnically-Based Torture and Inhuman Treatment by Azerbaijani Armed Forces (September-November 2020) (7 Dec. 2020), available at <https://artsakhombuds.am/en/document/780>. See also “UEFA suspends soccer official for anti-Armenia online abuse”, AP (4 Nov. 2020), available at <https://apnews.com/article/race-and-ethnicity-media-social-media-azerbaijan-armenia-1e1fb075b9f279f461c7e858b2c9e7d2>; “UEFA bans former Qarabag official for racist behavior”, Reuters (26 Nov. 2020), available at <https://www.reuters.com/article/uk-soccer-uefa-qarabag/uefa-bans-former-qarabag-official-for-racist-behaviour-idUKKBN2861QX>.

⁸³ Facebook, “Removing Coordinated Inauthentic Behavior”, available at <https://about.fb.com/news/2020/10/removing-coordinated-inauthentic-behavior-september-report/>.

⁸⁴ *Ibid.* See also David L. Phillips, “Genocide and Mass Media,” Columbia University, Institute for the Study of Human Rights (4 Dec. 2020), available at <http://www.humanrightscolumbia.org/news/genocide-and-mass-media>.

⁸⁵ Azerbaijan’s Request, para. 6.

⁸⁶ *Ibid.*, para. 19.

*favorable to the Armenian government*⁸⁷. I am not sure how one can make the jump from this statement by Twitter to Azerbaijan’s claim of a campaign “deliberately designed to stoke ethnic tensions between Armenians and Azerbaijanis”⁸⁸.

7. So we looked at Azerbaijan’s other “evidence” to see if there was anything there to justify this characterization. Annex 34 to Azerbaijan’s Request includes three tweets that Azerbaijan says support its claim. Professor Boisson de Chazournes displayed two of those earlier today. I have three observations with respect to this evidence.

8. First, Twitter itself acknowledged the possibility that the accounts from which these three tweets presumably originated were actually *real* and thus not a government subterfuge. Professor Boisson de Chazournes argued that there is “no doubt that Armenia has direct ties to these accounts”⁸⁹, but as you can see on the screen, Twitter is not so sure. Twitter states that the accounts were hashed to “reduce the potential negative impact on *authentic* or compromised accounts”⁹⁰.

9. Second, as you can see on the next slide, the three tweets prompted *zero* retweets, quotes and replies⁹¹. The Stanford Cyber Policy Institute report Professor Boisson de Chazournes referred to this morning states of the tweets more generally, that “[t]he per tweet engagement, which we calculate as sum of quote tweets, retweets, replies and likes, averaged less than *0.1* per tweet”⁹², and that “Twitter users called out the accounts as fake”⁹³. I would respectfully encourage the Members of the Court to look at that Stanford report more generally, as it does not in *any way* suggest that Armenia attempted to spread ethnic hatred of any kind.

10. My third point is that it is difficult to see how any of the three tweets actually support Azerbaijan’s claim of incitement. Recall the Azerbaijani thesis that Armenian government agents are

⁸⁷ Twitter Safety, “Disclosing networks of state-linked information operations” (23 Feb. 2021), available at https://blog.twitter.com/en_us/topics/company/2021/disclosing-networks-of-state-linked-information-operations-; emphasis added.

⁸⁸ Azerbaijan’s Request, para. 19.

⁸⁹ CR 2021/24, p. 40 et seq. (Boisson de Chazournes).

⁹⁰ Twitter Transparency, Information Operations, available at <https://transparency.twitter.com/en/reports/information-operations.html> (with certified translation), containing datasets including the referenced “Armenia (February 2021) — 35 Accounts” dataset, Azerbaijan, Ann. 34; emphasis added.

⁹¹ *Ibid.*

⁹² E. Cryst & S. Grossman, “Sockpuppets Target Nagorno-Karabakh”, Stanford Internet Observatory, Cyber Policy Center (23 Feb. 2021), available at <https://cyber.fsi.stanford.edu/io/publication/sockpuppets-target-nagorno-karabakh-takedown>, p. 8; emphasis added.

⁹³ *Ibid.*, p. 2.

posing as Azerbaijanis to incite racial hatred. One of the three tweets, however, appears to criticize *Azerbaijan*. The second one actually calls for “peace”. And the third one, the Martian tweet Professor Boisson de Chazournes read for us earlier today, is clearly satirical *hardly* an inspiration to engage in ethnic violence even for the one person who liked it.

11. The rights for which Azerbaijan seeks protection through the second part of its third request are therefore not plausible on the face of Azerbaijan’s own evidence. There is also no urgency: all three tweets were posted more than *five years* ago, in April or May 2016. You can see the time stamps drawn from Azerbaijan’s exhibit on the screens.

12. In fact, the Stanford Cyber Policy Institute report explicitly stated that “most of the tweets” were sent “before 2017”⁹⁴. And now on your screens, you can see an image from the report showing the tweet activity.

13. Moreover, even if Azerbaijan’s allegations were to be taken at face value, the alleged network of 35 accounts has *already been taken down*, which Azerbaijan admits in its Request⁹⁵.

14. Azerbaijan points to no other evidence to support its allegation of an “ongoing”⁹⁶ disinformation campaign. There is thus plainly no urgency, let alone an imminent risk, of irreparable harm.

II. The alleged actions of VoMA and other non-governmental actors do not meet the requirements for the indication of provisional measures

15. I now move to the second part of Azerbaijan’s third request. It asks the Court to order Armenia to take “all necessary steps effectively to prevent organizations operating in Armenian territory, including the VoMA organization, from engaging in the incitement of racial hatred and racially-motivated violence targeted at Azerbaijanis”⁹⁷.

16. Two preliminary observations are in order. First, while this part of Azerbaijan’s request implies concern with organizations other than VoMA, it does not mention any such groups. Late last week, in what appears to have been an afterthought, Azerbaijan submitted a new Annex containing

⁹⁴ E. Cryst & S. Grossman, “Sockpuppets Target Nagorno-Karabakh”, Stanford Internet Observatory, Cyber Policy Center (23 Feb. 2021), available at <https://cyber.fsi.stanford.edu/io/publication/sockpuppets-target-nagorno-karabakh-takedown>, p. 2.

⁹⁵ Azerbaijan’s Request, para. 22.

⁹⁶ Azerbaijan’s Request, Part II.B. See also *ibid.*, para. 36.

⁹⁷ Azerbaijan’s Request, para. 39 (c).

a Facebook post by another organization called Statehood as a Supreme Value, or POGA, which was also mentioned this morning. My remarks will therefore be limited to these two organizations.

17. My second preliminary observation is that both VoMA, which stands for “Art of Survival”, and POGA are non-governmental actors. They are *not* State entities. Armenia has not endorsed, and does not endorse or condone, the speech of these organizations. Azerbaijan’s entire argument of endorsement rests on a single commendation letter allegedly given to 12 volunteers by the Armed Forces and an alleged joint “fire preparation exercise”⁹⁸. This cannot possibly constitute endorsement of the group’s ideology. I should also mention that Professor Lowe was very liberal with the record in claiming that VoMA members “have been invited by the Armenian Government to join its military efforts”⁹⁹. There is absolutely no trace of such a thing, as the evidence Professor Lowe cites for his purposes makes clear¹⁰⁰.

18. The speech in question is therefore purely private; it is not government speech, let alone presidential speech, which we think sharply distinguishes Azerbaijan’s request from Armenia’s request last week.

19. The Court should not find any plausible violation of CERD rights with respect to the speech of these two organizations for the following two reasons.

20. First, Azerbaijan has blatantly mischaracterized the character of both organizations and their activities. Neither one is an “armed hate group”¹⁰¹, as Azerbaijan suggests. Their objectives have nothing to do with incitement to ethnic discrimination.

21. I begin with VoMA. VoMA is a non-governmental organization engaged in emergency and civil-military defence preparedness, education and training. Its objectives are laid out in its charter and they include increasing “overall combat viability,” “developing physical preparation,” and “fostering military-patriotic spirit”¹⁰².

⁹⁸ CR 2021/24, p. 41, para. 2 (Boisson de Chazournes).

⁹⁹ CR 2021/24, p. 28, para. 29 (Lowe).

¹⁰⁰ *Ibid.*, fn. 31 (Lowe).

¹⁰¹ Azerbaijan’s Request, para. 23.

¹⁰² Charter of Vokhj Mnalu Arvest [The Art of Survival] (registered 1 June 2016) (certified translation from Armenian provided of the cover page, chapter headings, and chapter 2).

22. On your screens, you can see the organization's online description of itself as a "non-governmental militant nationalist movement that aims to strengthen the *defences* of the Republic of Armenia and raise the spirits of the Armenian people"¹⁰³. Next to it, there is Azerbaijan's gloss, which Professor Boisson de Chazournes reiterated this morning. Nothing in the organization's online self-description suggests that "VoMA is based on the principle of ethnic superiority" or that it conveys "ethnic hatred against Azerbaijanis"¹⁰⁴.

23. The organization's focus is *clearly* self-defence and emergency response. The main slogan on its website states, as translated from Russian: "IF YOU WANT *PEACE*, PREPARE FOR WAR . . . Armenia's 100,000 trained and armed citizens are an opportunity to maintain armed *neutrality* or to *stand up* to any *potential adversaries* and enemies."¹⁰⁵ Other VoMA statements refer to the need to "fortify" territory¹⁰⁶ and secure the "Motherland's safety"¹⁰⁷. And as I will explain in a few moments, Azerbaijan's racist rhetoric and aggressive actions regrettably make the need for self-defence perfectly clear.

24. The second reason why Azerbaijan's alleged rights are not plausible is that the private speech that Azerbaijan has selectively cited does not constitute speech that Armenia must seek to prevent under the CERD.

25. By all objective international standards and in contrast to Azerbaijan, Armenia is a democracy that values open discussion and debate. Free speech that does not constitute hate speech is protected, consistent with the "due regard" clause in Article 4 of the Convention.

26. Article 4 requires State Parties to take measures designed to eradicate acts of discrimination "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention"¹⁰⁸. Those rights include the right to "freedom

¹⁰³ VoMA Special Training Center, *About Us*, available at <https://www.voma.center/en/who-we-are>, emphasis added; see also Azerbaijan's Request, para. 23.

¹⁰⁴ CR 2021/24, pp. 43-44, para. 12 (Boisson de Chazournes).

¹⁰⁵ VoMA Special Training Center, available at <https://www.voma.center>; emphasis added.

¹⁰⁶ VoMA Special Training Center, *About Us*, available at <https://www.voma.center/en/who-we-are>.

¹⁰⁷ Azerbaijan, Ann. 35, Voxj Mnalu Arvest (VoMA) Social Media Posts (certified translation).

¹⁰⁸ CERD Convention, Art. 4.

of opinion and expression” as well as the freedom of association as laid out expressly in Article 5 (viii) and (ix), respectively¹⁰⁹.

27. The CERD Committee has rightly condemned expressions of racial hatred. But it has also noted the “obligation to respect the right to freedom of opinion and expression when implementing article 4”¹¹⁰. Similarly, it has recommended that a State party “guarantee respect for the freedoms of expression and association in its implementation of Article 4 (a) and (b)”¹¹¹.

28. The Committee has further made clear that, to fall outside the protection of the due regard clause in Article 4, the speech must be of a “*exceptionally/manifestly* offensive character”¹¹². None of the statements relied on by Azerbaijan approach that standard¹¹³. Nationalistic and patriotic talk, sometimes offensive and even controversial? Certainly. Critical of the State of Azerbaijan? Absolutely. But incitement to ethnic hatred and violence against an ethnic group? Absolutely not. I would encourage the Court to compare those statements to the statements referred to by the Committee and found to be in breach of the CERD in the case in footnote¹¹⁴. Or the statements that the European Court of Human Rights found to be undeserving of protection under the European Convention on Human Rights in the cases cited in footnote as well¹¹⁵.

29. According to Professor Boisson de Chazournes this morning, “VoMA propaganda has the effect of dehumanizing Azerbaijanis by erasing their humanity and ethnic identity”¹¹⁶. The issue appears to be statements referring to Azerbaijanis as “Turks”¹¹⁷. Yet, according to the father of Azerbaijan’s current President, “Turkey and Azerbaijan are *one nation in two states*”, a statement

¹⁰⁹ CERD Convention, Arts. 5 (viii) and 5 (ix).

¹¹⁰ CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, UN doc. CERD/C/65/CO/2 (10 Dec. 2004), para. 8.

¹¹¹ CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, UN doc. CERD/C/65/CO/5 (10 Dec. 2004), para. 13.

¹¹² CERD Committee, *Communication No. 30/2003*, UN doc. CERD/C/67/D/30/2003 (22 Aug. 2005), para. 10.5; emphasis added.

¹¹³ Azerbaijan, Ann. 35, Voxj Mnalı Arvest (VoMA) Social Media Posts (certified translation); Azerbaijan, Ann. 59, transcript, translated excerpts from YouTube interview of Vova Vartanov (27 May 2021), available at <https://www.youtube.com/watch?v=eQTszEQU5CM> (certified translation); Azerbaijan, Ann. 61, Compendium of Social Media Posts, Voxj Mnalı Arvest (VoMA) (certified translation).

¹¹⁴ See CERD Committee, *Communication No. 30/2003*, UN doc. CERD/C/67/D/30/2003 (22 Aug. 2005).

¹¹⁵ See e.g. *Pavel Ivanov v. Russia*, ECtHR, App. No. 35222/04, Decision (27 Aug. 2004); *Orban and Others v. France*, ECtHR, App. No. 20985/05, Decision (15 Jan. 2009), para. 35; *Garaudy v. France*, ECtHR, App. No. 65831/01, Decision (24 Jun. 2003).

¹¹⁶ CR 2021/24, p. 44, para. 13 (Boisson de Chazournes).

¹¹⁷ Azerbaijan’s Request, paras. 24-25, note 24.

which President Aliyev has recalled repeatedly¹¹⁸. The statements are distasteful, but nothing in them incites racial hatred against a particular ethnic group¹¹⁹.

30. Professor Boisson de Chazournes also argued this morning that “[b]y not condemning or banning anti-Azerbaijani paramilitary groups, Armenia has allowed these groups to proliferate in its territory”¹²⁰. With respect, this is not a serious argument. If we are to look for what led to the creation of POGA, which is the other organization Azerbaijan’s request raises, we should look no further than Azerbaijan’s racist and threatening rhetoric. I need not address Azerbaijan’s racist speech, which was one of the objects of the hearing last week. But I should mention that President Aliyev has repeatedly threatened Armenians with Azerbaijan’s “strength”¹²¹, “force”¹²², “iron fist”¹²³ and “power”¹²⁴,

¹¹⁸ See e.g. President of the Republic of Azerbaijan, Ilham Aliyev, *Azerbaijani, Turkish presidents made press statements* (15 June 2021), available at <https://en.president.az/articles/52116>; emphasis added.

¹¹⁹ See e.g. Azerbaijan, Ann. 35, Voxj Mnalı Arvest (VoMA) Social Media Posts (certified translation), pp. 2 and 5; Azerbaijan, Ann. 61, Compendium of Social Media Posts, Voxj Mnalı Arvest (VoMA) (certified translation), pp. 25 and 31.

¹²⁰ CR 2021/24, pp. 45-46, para. 16 (Boisson de Chazournes).

¹²¹ See e.g. President of the Republic of Azerbaijan Ilham Aliev, *Ilham Aliev addressed the nation* (1 Dec. 2020), available at <https://en.president.az/articles/48205>; President of the Republic of Azerbaijan, *Ilham Aliyev attended opening of Military Trophy Park in Baku* (12 Apr. 2021), available at <https://en.president.az/articles/51067>; State Committee for Affairs of Refugees and Internally Displaced Persons of the Republic of Azerbaijan, *President Ilham Aliyev attended ceremony to lay foundation stone for restoration of Aghdam city met with members of general public* (28 May 2021), available at <http://idp.gov.az/en/news/1205>; President of the Republic of Azerbaijan Ilham Aliyev, *Ilham Aliyev met with leadership and a group of military personnel of Azerbaijani Army on Armed Forces Day* (26 Jun. 2021), available at <https://en.president.az/articles/52331>.

¹²² See e.g. President of the Republic of Azerbaijan, Ilham Aliyev, *Speech by Ilham Aliyev at the 7th Congress of New Azerbaijan Party* (5 Mar. 2021), available at <https://en.president.az/articles/50805>; President of the Republic of Azerbaijan Ilham Aliyev, *Ilham Aliyev met with leadership and a group of military personnel of Azerbaijani Army on Armed Forces Day* (26 Jun. 2021), available at <https://en.president.az/articles/52331>.

¹²³ President of the Republic of Azerbaijan, Ilham Aliyev, *Victorious Commander-in-Chief, President Ilham Aliyev addressed the nation on the occasion of the Remembrance Day* (27 Sept. 2021), available at <https://en.president.az/articles/53224>; see e.g. President of the Republic of Azerbaijan, Ilham Aliev, *Ilham Aliev addressed the nation* (1 Dec. 2020), available at <https://en.president.az/articles/48205>; President of the Republic of Azerbaijan, Ilham Aliyev, *Opening speech by Ilham Aliyev at the meeting in a video format on results of 2020* (7 Jan. 2021), available at <https://en.president.az/articles/49937>; President of the Republic of Azerbaijan, Ilham Aliyev, *Ilham Aliyev attended opening of Military Trophy Park in Baku* (12 Apr. 2021), available at <https://en.president.az/articles/51067>; “President Aliyev gives interview to Azerbaijan Television,” *MENA FN* (24 July 2021), available at <https://menafn.com/1102500513/President-Aliyev-gives-interview-to-Azerbaijan-Television&source=26>; “President: The iron fist is still there, it has not gone anywhere, it is still in place,” *APA* (4 Oct. 2021), available at <https://apa.az/en/xeber/official-chronicle/president-the-iron-fist-is-still-there-it-has-not-gone-anywhere-it-is-still-in-place-359170>.

¹²⁴ See e.g. President of the Republic of Azerbaijan Ilham Aliev, *Ilham Aliev addressed the nation* (1 Dec. 2020), available at <https://en.president.az/articles/48205>; President of the Republic of Azerbaijan, Ilham Aliyev, *Speech by Ilham Aliyev at the 7th Congress of New Azerbaijan Party* (5 Mar. 2021), available at <https://en.president.az/articles/50805>.

which, according to him, “no one can protect” Armenians from¹²⁵, not even their “defeated”¹²⁶, “crushed”¹²⁷, and “annihilated” army¹²⁸. Two weeks ago, he warned Armenians to “behave” if they are to “live safely”¹²⁹.

31. And Azerbaijan’s aggressive actions have matched this rhetoric. The Russian Federation, which has deployed peacekeeping forces in accordance with the November 2020 Trilateral Statement, has explicitly blamed Azerbaijan for violating the ceasefire¹³⁰. As both our Agent and Professor Murphy have noted, Azerbaijan has conducted numerous armed attacks in border regions and even in Armenia itself, killing Armenian servicemen and prompting Armenia to address the United Nations Security Council and invoke its right to self-defence under Article 51 of the Charter¹³¹. *Less than two weeks ago*, an Armenian civilian was murdered by an Azerbaijani sniper near the town of Martakert in Artsakh¹³². Just last Thursday, *while we were in hearings before this Court*, in yet another violation of the ceasefire, Azerbaijan wounded six ethnic Armenian soldiers in Artsakh¹³³.

32. None of Azerbaijan’s evidence establishes that these organizations seek to incite racial hatred, let alone that they have done so, such that the Government must act with due diligence to

¹²⁵ “It was the likes of Serzhik Sarkisyan who lost the war, he now wants to blame defeat on Pashinyan - Azerbaijani president,” *Trend* (4 Oct. 2021), available at <https://en.trend.az/azerbaijan/politics/3493480.html>.

¹²⁶ See e.g. President of the Republic of Azerbaijan, Ilham Aliyev, *Speech by Ilham Aliyev at the 7th Congress of New Azerbaijan Party* (5 Mar. 2021), available at <https://en.president.az/articles/50805>; State Committee for Affairs of Refugees and Internally Displaced Persons of the Republic of Azerbaijan, *President Ilham Aliyev attended ceremony to lay foundation stone for restoration of Aghdam city met with members of general public* (28 May 2021), available at <http://idp.gov.az/en/news/1205>.

¹²⁷ President of the Republic of Azerbaijan, Ilham Aliyev, *Ilham Aliyev attended opening of Military Trophy Park in Baku* (12 Apr. 2021), available at <https://en.president.az/articles/51067>.

¹²⁸ See e.g. President of the Republic of Azerbaijan, Ilham Aliyev, *Ilham Aliyev addressed the nation* (1 Dec. 2020), available at <https://en.president.az/articles/48205>.

¹²⁹ “It was the likes of Serzhik Sarkisyan who lost the war, he now wants to blame defeat on Pashinyan - Azerbaijani president,” *Trend* (4 Oct. 2021), available at <https://en.trend.az/azerbaijan/politics/3493480.html>.

¹³⁰ “Russia Blames Azerbaijan for Breach of Karabakh Truce in Post-Ceasefire First”, *The Moscow Times* (13 Aug. 2021), available at <https://www.themoscowtimes.com/2021/08/13/russia-for-the-first-time-blames-azerbaijan-for-breach-of-karabakh-truce-reports-a74782>.

¹³¹ United Nations, Security Council, Letter dated 29 July 2021 from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council, UN doc. S/2021/693 (30 July 2021).

¹³² “Artsakh civilian, 55, killed by Azerbaijan sniper”, news.am (9 Oct. 2021), available at <https://news.am/eng/news/666711.html>.

¹³³ “Six wounded in Karabakh as Azerbaijan breaks ceasefire”, CivilNet (15 Oct. 2021), available at <https://www.civilnet.am/news/636138/six-wounded-in-karabakh-as-azerbaijan-breaks-ceasefire/?lang=en>.

prevent their speech. As such, the rights Azerbaijan seeks to protect through this request are not plausible.

33. In the absence of any evidence of incitement, Azerbaijan naturally cannot demonstrate urgency. Its own evidence shows VoMA's defensive character and desire for peace¹³⁴. Its own evidence shows that neither VoMA, nor POGA, pose an imminent risk of irreparable prejudice to any ethnic group. And indeed, it is difficult to understand how organizations seeking to train Armenians to prepare for another attack waged by an aggressive Azerbaijani State pose any threat whatsoever justifying the indication of provisional measures in this case¹³⁵.

34. For all these reasons, the first part of Azerbaijan's third request is as deficient as the second.

35. Madam President, distinguished Members of the Court, this concludes my presentation this afternoon. I thank you for your attention and consideration, and kindly request that you now ask Professor d'Argent to address the Court.

The PRESIDENT: I thank Mr. Salonidis and I shall now invite Professor Pierre d'Argent to address the Court.

M. D'ARGENT :

**LA DEMANDE DE L'AZERBAÏDJAN RELATIVE À LA RÉCOLTE
ET LA PRÉSERVATION DES PREUVES DOIT ÊTRE REJETÉE**

1. Madame la présidente, Mesdames et Messieurs les juges, *comme vous l'avez entendu ce matin*, la quatrième mesure conservatoire sollicitée par l'Azerbaïdjan se lit comme suit — elle devrait apparaître sur vos écrans :

«Armenia shall take effective measures to collect, and to prevent the destruction and ensure the preservation of, evidence related to allegations of ethnically-motivated crimes against Azerbaijanis of which it is aware, including those identified in communications from the Republic of Azerbaijan.»¹³⁶

¹³⁴ See Azerbaijan Ann. 61, Compendium of Social Media Posts, Voxj Mnalı Arvest (VoMA) (certified translation), pp. 2 and 25.

¹³⁵ See e.g. *ibid.*, pp. 25, 31 and 38.

¹³⁶ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Request for the Indication of Provisional Measures of Protection (23 September 2021), par. 39 d).

2. Par comparaison, la demande dont vous avez été saisis la semaine dernière par l'Arménie, et qui est *mutatis mutandis* identique à celle que vous aviez indiquée en 2020 au Myanmar¹³⁷, se lisait comme suit : «Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD»¹³⁸.

3. Mis à part, bien sûr, l'Etat destinataire de la mesure, celle sollicitée par l'Azerbaïdjan dans la présente instance se distingue donc de celle dont vous étiez saisis la semaine dernière par les termes suivants qui apparaissent en jaune sur votre écran.

4. Les demandes respectives des Parties en matière de preuves ne sont donc pas identiques. En réalité, comme vous l'avez vu de prime abord à l'écran et comme je vais vous le montrer, elles sont profondément différentes.

5. De ces différences, il résulte que la mesure sollicitée par l'Azerbaïdjan doit être rejetée car elle n'est pas conforme à la jurisprudence de la Cour en matière de préservation des preuves et elle ne vise pas à protéger un droit plausible au regard de la convention pour l'élimination de la discrimination raciale. Ce sera le premier point de ma plaidoirie.

6. Je montrerai ensuite que, même réduite à des termes identiques à ceux utilisés la semaine dernière par l'Arménie, une mesure conservatoire plus limitée en matière de préservation des preuves serait également sans fondement. Plusieurs raisons, juridiques et factuelles, l'expliquent. Et j'y reviendrai dans la deuxième partie de ma présentation.

I. La mesure conservatoire sollicitée par l'Azerbaïdjan n'est pas conforme à la jurisprudence de la Cour en matière de préservation des preuves et elle ne vise pas à protéger un droit plausible au regard de la convention

7. Madame la présidente, à titre conservatoire, et ainsi que je viens de le rappeler, l'Arménie vous a demandé la semaine dernière, d'ordonner à l'Azerbaïdjan de prendre toutes mesures efficaces

¹³⁷ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 31, par. 86 3) («La République de l'Union du Myanmar doit prendre des mesures effectives pour prévenir la destruction et assurer la conservation des éléments de preuve relatifs aux allégations d'actes entrant dans le champ d'application de l'article II de la convention pour la prévention et la répression du crime de génocide» [«The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.»]).

¹³⁸ *Application of the International Convention on the Elimination of All Forms of Discrimination (Armenia v. Azerbaijan), Application Instituting Proceedings and Request for Provisional Measures (16 September 2021)*, p. 58, par. 131.

pour empêcher la destruction et assurer la préservation des éléments de preuve liés aux allégations de tout acte entrant dans le champ d'application de la convention afin de lui permettre de revendiquer utilement ses droits sur le fond. Cette demande visait la préservation de toutes les preuves. En matière pénale, bien sûr, mais cette demande couvrait aussi les preuves relatives, notamment, au patrimoine culturel arménien et aux autres violations commises par l'Azerbaïdjan. Ces éléments de preuve se trouvent à Bakou et dans les territoires que l'Azerbaïdjan contrôle désormais, et c'est bien la raison pour laquelle la préservation des preuves lui revient. C'est d'autant plus le cas que, comme je l'ai montré la semaine dernière, l'Azerbaïdjan est en train actuellement d'altérer, souvent sans retour possible au *statu quo ante*, des éléments du patrimoine culturel arménien. Tel sera le cas des églises arméniennes que le président Aliyev entend «restaurer», c'est-à-dire transformer, en églises albano-caucasiennes. Comme ce fut le cas de la mesure provisoire que vous avez accordée à la Gambie, la mesure sollicitée par l'Arménie en matière de préservation de preuves vient donc en complément et au soutien des autres mesures provisoires sollicitées.

8. L'Azerbaïdjan vous demande aujourd'hui quelque chose qui, en réalité, est totalement différent de cela. La mesure sollicitée en matière de recherche et de préservation des preuves est indépendante des autres mesures sollicitées, et elle est sans rapport avec ces autres mesures puisqu'elle est spécifiquement formulée en matière pénale. On pourrait dire qu'elle «tient toute seule», qu'elle n'est pas ajoutée, ou encore, pour emprunter les termes de Lord Goldsmith la semaine dernière, qu'elle n'est pas «[an] «add on» to [Azerbaijan's] other requests»¹³⁹. La mesure provisoire sollicitée par l'Azerbaïdjan en matière de collecte et de préservation des preuves est donc différente dans son objet et dans son but de celle que vous avez ordonnée en vue de protéger les droits de la Gambie¹⁴⁰ et de celle sollicitée par l'Arménie la semaine dernière.

9. Ainsi, lorsque vous ordonnez une mesure conservatoire relative aux preuves, il s'agit d'assurer leur préservation et non leur collecte ou leur recherche, et c'est toujours au soutien des autres mesures ordonnées protégeant les droits en litige, afin que ceux-ci puissent être utilement revendiqués sur le fond. A ce jour, la Cour n'a jamais ordonné une mesure de récolte de preuves. Et

¹³⁹ CR 2021/21, p. 36, par. 44 (Goldsmith).

¹⁴⁰ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020, p. 31, par. 86 3).*

lorsque vous ordonnez de préserver des preuves, ce n'est jamais de manière autonome et sans lien avec les autres mesures indiquées. Cela devrait suffire pour rejeter la demande provisoire sollicitée.

10. Toutefois, un autre élément, bien plus fondamental, y fait également obstacle.

11. En effet, la mesure postulée par l'Azerbaïdjan est également, vous l'avez vu, substantiellement différente de celle sollicitée par l'Arménie. Comme je l'ai rappelé, selon la mesure conservatoire sollicitée, l'Arménie devrait rechercher et préserver les preuves de crimes commis contre des Azerbaïdjanais dont l'Arménie a connaissance, y compris parce que l'Azerbaïdjan les lui a dénoncés.

12. La mesure conservatoire sollicitée vise donc à permettre à l'Azerbaïdjan d'être en mesure d'exiger de l'Arménie qu'elle recueille et qu'elle conserve des preuves sur dénonciation de l'Azerbaïdjan en vue d'assurer, selon ses termes, «the possibility of prosecutions for these grave crimes»¹⁴¹.

13. Mesdames et Messieurs de la Cour, vous constaterez toutefois que la demande est très ambiguë sur le point de savoir *quel* Etat devrait ainsi être assuré de pouvoir exercer l'action publique répressive. Et M^e Reid ne vous a pas éclairé à cet égard ce matin. L'Azerbaïdjan ne vous demande pas d'ordonner à l'Arménie de récolter et de préserver des preuves afin que l'Arménie soit elle-même en mesure de poursuivre d'éventuels crimes. Non, de manière bien plus large, et sans exclure cette première possibilité, l'Azerbaïdjan vous demande aussi que, par la mesure conservatoire sollicitée, il soit le cas échéant en mesure de punir lui-même les violations qu'il dénonce.

14. Il faut en effet se souvenir que la demande de l'Azerbaïdjan sur le fond utilise une formule qui, tant par son verbe que par son objet, est suffisamment large pour inclure le fait que l'Arménie devrait permettre à l'Azerbaïdjan de punir lui-même ces crimes : sur le fond, l'Azerbaïdjan demande que l'Arménie soit condamnée à «assurer» («ensure»)¹⁴² que puissent être menées les enquêtes pénales relatives aux crimes qu'il dénonce et que leur répression soit ainsi assurée. Voici ce que demande l'Azerbaïdjan à cet égard dans sa requête introductive d'instance, sur le fond :

¹⁴¹ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Request for the Indication of Provisional Measures of Protection (23 September 2021), p. 18, par. 29.

¹⁴² *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application Instituting Proceedings (23 September 2021), p. 71, par. 99 C) h).

«Armenia must take all steps necessary to comply with its obligations under CERD, including to ... [e]nsure the investigation and punishment of acts of discrimination, including but not limited to war crimes committed by Armenian forces, etc.»¹⁴³

15. Le prétendu droit que l'Azerbaïdjan entend protéger par la mesure conservatoire sollicitée est donc le suivant : le droit qu'aurait l'Azerbaïdjan d'exiger de l'Arménie qu'elle prenne toute mesure permettant soit à l'Arménie, soit à l'Azerbaïdjan lui-même d'enquêter sur les crimes qu'il dénonce, d'en poursuivre les auteurs et de les punir.

16. Madame la présidente, Mesdames et Messieurs les juges, un tel droit n'est toutefois pas plausible au titre de la convention pour l'élimination de la discrimination raciale et la mesure provisoire sollicitée par l'Azerbaïdjan n'est en lien avec aucun droit auquel cet Etat peut prétendre au titre de la convention. En d'autres termes, la mesure sollicitée ne vise pas à permettre à l'Azerbaïdjan de faire valoir utilement sur le fond d'éventuels droits prévus par la convention.

17. Pourquoi ? Tout simplement parce que cette convention n'est pas un instrument de coopération pénale internationale. Certes, l'article 4 a) de la convention oblige les Etats parties à ériger en «délits punissables par la loi» certains comportements, mais la convention n'en organise pas la répression par la coopération pénale entre parties. Et c'est bien pourquoi, sur le fond de l'instance dont vous avez eu à connaître la semaine dernière, l'Arménie demande seulement de condamner l'Azerbaïdjan à cesser ses violations continues de la convention et en conséquence à punir tous les actes de discrimination raciale¹⁴⁴. L'Arménie ne demande rien de plus sur le fond car il n'y a pas de fondement dans la convention pour demander plus.

18. En réalité, par la mesure provisoire qu'il sollicite, l'Azerbaïdjan dénature profondément la convention : d'instrument protecteur des droits de l'homme visant à protéger les particuliers par des obligations *erga omnes partes*, l'Azerbaïdjan veut en faire un traité d'entraide judiciaire contenant des obligations bilatérales entre Etats. Mais d'autres procédures et d'autres instruments existent pour

¹⁴³ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application Instituting Proceedings (23 September 2021), p. 70-71, par. 99 C) h).

¹⁴⁴ *Application of the International Convention on the Elimination of All Forms of Discrimination (Armenia v. Azerbaijan)*, Application Instituting Proceedings and Request for Provisional Measures (16 September 2021), p. 40, par. 97 : «punish[] all acts of racial discrimination, both public and private, against Armenians, including those taken by public officials».

cela, dont la convention de Minsk de 1993 à laquelle les deux Parties sont liées et qui gouverne entre elles l'entraide judiciaire, y compris en matière pénale¹⁴⁵.

19. Ainsi, même au provisoire, l'Azerbaïdjan n'a pas le droit d'exiger de l'Arménie qu'elle recueille des preuves et assure des poursuites sur dénonciation de l'Azerbaïdjan. L'Azerbaïdjan n'a pas non plus le droit d'exiger de l'Arménie qu'elle prenne toutes mesures permettant à l'Azerbaïdjan de réprimer lui-même des crimes qui, selon lui, auraient été commis par l'Arménie ou ses ressortissants. De telles exigences vont bien au-delà de la protection de droits plausibles au regard de la convention.

20. La mesure conservatoire sollicitée par l'Azerbaïdjan n'a aucun fondement dans la convention, elle ne vise pas à protéger un droit plausible au regard de celle-ci et elle est sans aucun lien avec les droits auxquels l'Azerbaïdjan peut prétendre au titre de la convention¹⁴⁶. Cette mesure doit donc être rejetée.

II. Une mesure conservatoire plus limitée en matière de préservation des preuves n'est pas non plus justifiée

21. Madame la présidente, j'en viens à la deuxième partie de ma plaidoirie.

22. L'Azerbaïdjan peut-il prétendre à une mesure conservatoire moins ambitieuse en matière de conservation des éléments de preuves ? Il est assurément tentant de traiter les deux Parties de la même manière à cet égard et d'accorder à l'Azerbaïdjan, dans la présente instance, ce qui serait accordé à l'Arménie dans la précédente. D'ailleurs, c'est sans nul doute un des objectifs principaux de la procédure miroir introduite une semaine après celle de l'Arménie.

23. Mais, pourtant, même formulée dans des termes identiques à ceux utilisés la semaine dernière par l'Arménie, l'indication d'une mesure conservatoire plus limitée ne se justifie en l'occurrence nullement, et cela pour plusieurs raisons.

¹⁴⁵ Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases (open for signature 22 January 1993, entered into force 19 May 1994), 263 UNTS 1860; *see also* Temur Tsindeliani, "Compendium of the National Legal Requirements for International Judicial Cooperation in Southern Caucasus Countries (Armenia, Azerbaijan, Georgia)", *UNODC* (20 November 2020), available at https://www.unodc.org/documents/organized-crime/GPTOC/GPTOC2/AM_AZ_GEO_-_Legislation_ICCM.pdf.

¹⁴⁶ *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017, p. 126, par. 63-64, 86.*

24. Tout d'abord, première raison, dans sa formule réduite, la mesure deviendrait donc une mesure «add on», une mesure non autonome des autres mesures sollicitées. Ainsi que mes collègues viennent de le démontrer, ces autres mesures n'ont toutefois pas lieu d'être indiquées. Dès lors, une mesure conservatoire en matière de preuves, même réduite, «must fail» «[as there is] no independent basis to sustain it» pour reprendre à nouveau Lord Goldsmith¹⁴⁷.

25. Ensuite, deuxième raison, même si l'une des autres mesures provisoires sollicitées devait par impossible être ordonnée, la mesure réduite relative à la préservation des preuves serait sans aucun rapport matériel avec aucune d'entre elles. Elle n'aurait donc pas lieu d'être.

26. Troisième raison : au soutien de la mesure conservatoire qu'il sollicite, l'Azerbaïdjan soutient que l'Arménie n'aurait pas enquêté sur les violations de droit international commises durant le conflit de 1991-1994, ni sur celles prétendument survenues lors du dernier conflit, en 2020. Cela a été répété ce matin. L'Azerbaïdjan conclut au paragraphe 29 de sa demande en indication de mesures conservatoires :

«There is a serious risk that alleged perpetrators will flee in order to escape prosecution, that witnesses to these crimes will be unable to be located, and that evidence will deteriorate or become wholly unavailable.»¹⁴⁸

27. Et M^e Reid ne vous a rien dit de différent ce matin.

28. S'agissant de la prétendue disparition des preuves relatives à la *première* guerre de 1991-1994, le dossier de l'Azerbaïdjan est particulièrement indigent à cet égard, ainsi que vous pourrez le constater. De plus, et quoi que vous en a dit l'agent de l'Azerbaïdjan ce matin, on voit mal comment cet Etat peut reprocher à l'Arménie de manquer de réprimer des actes qui se seraient produits avant que la convention n'entre en vigueur entre les Parties en 1996. *A fortiori* en va-t-il ainsi de la récolte de preuves relatives à ces faits. Les principes de la non-rétroactivité des traités¹⁴⁹ et de la contemporanéité en droit de la responsabilité internationale¹⁵⁰ s'y opposent. Il y a là un troisième obstacle, juridique, insurmontable, à l'indication d'une mesure conservatoire, même

¹⁴⁷ CR 2021/21, p. 36, par. 44 (Goldsmith).

¹⁴⁸ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Request for the Indication of Provisional Measures of Protection (23 September 2021), p. 18, par. 29.

¹⁴⁹ Vienna Convention on the Law of Treaties (open for signature 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Art. 28.

¹⁵⁰ UN General Assembly, *Resolution adopted by the General Assembly*, UN Doc. A/RES/56/83 (28 January 2002), Art. 13.

reformulée à la baisse et visant des événements sortant du champ d'application temporel de la convention. En toute hypothèse, Mesdames et Messieurs de la Cour, comment la préservation de la preuve de faits vieux de plusieurs décennies pourrait-elle revêtir aujourd'hui la moindre urgence en attendant que la Cour statue sur le fond ?

29. S'agissant ensuite des preuves relatives aux faits qui se sont produits durant la dernière guerre en 2020, de nombreuses vidéos d'abus ont été déposées par l'Azerbaïdjan.

30. Un nombre important de ces vidéos, annexées sous les numéros 56.1 à 56.11, concernent des abus et des crimes commis par des soldats azerbaïdjanais contre des soldats arméniens. Il est inutile de vous rappeler que certaines victimes arméniennes de tels crimes sont encore détenues en Azerbaïdjan ; et ces vidéos confirment que leur vulnérabilité perdure.

31. L'Azerbaïdjan vous a longuement entretenu ce matin du sérieux avec lequel son procureur général enquêtait sur les crimes commis par les membres de ses forces armées contre des soldats arméniens. Voici toutefois la manière dont le procureur général azerbaïdjanais parle des vidéos concernant les crimes commis contre des soldats arméniens et déposées par l'Azerbaïdjan dans la présente instance. La phrase qui apparaît sur votre écran est extraite du document reproduit à l'onglet n° 10 du dossier d'audience qui vous a été remis ce matin, c'est-à-dire une lettre du service du procureur général : «Although some of the videos were found to be fake, there are serious doubts as to whether some of them are true and reflect reality.»

32. Certaines vidéos sont fausses, tandis que d'autres sont douteuses : voilà le sérieux avec lequel le procureur général de l'Azerbaïdjan considère les preuves dont il dispose quand elles concernent des victimes arméniennes. De telles déclarations provenant du service chargé des poursuites pénales pourront évidemment être utilisées pour obtenir l'acquittement de soldats azerbaïdjanais poursuivis.

33. D'autres vidéos déposées par l'Azerbaïdjan semblent concerner des abus et des crimes commis par des soldats arméniens contre des soldats azerbaïdjanais. Il s'agit des annexes 38 à 52 dans les pièces soumises la semaine dernière par l'Azerbaïdjan sur lesquelles M^e Reid est revenue ce matin.

34. Contrairement à ce que l'Azerbaïdjan paraît suggérer, la question devant retenir votre attention pour décider de la mesure provisoire sollicitée n'est pas celle de déterminer quel Etat est le

plus diligent dans la répression des crimes commis durant le récent conflit, même si, comme le professeur Murphy vous l'a expliqué la semaine dernière, le bilan de l'Azerbaïdjan à cet égard est loin, vraiment loin, d'être convaincant. Comme vous l'avez entendu ce matin, l'Azerbaïdjan aime beaucoup parler de ses prétendus efforts visant à réprimer les crimes de ses soldats, et il les compare toujours à ceux de l'Arménie. Cette supériorité morale autoproclamée reflète très exactement le discours officiel discriminatoire et anti-arménien de Bakou. Voici en effet les mots utilisés par le procureur général de l'Azerbaïdjan pour décrire à la fois la bravoure des forces armées de son pays et les crimes de certains de ses membres. Je me réfère à nouveau au document reproduit à l'onglet n° 10 du dossier d'audience qui vous a été remis ce matin¹⁵¹.

35. Selon le procureur général, le respect du droit international humanitaire par les forces armées azerbaïdjanaises «[is] demonstrating the high culture and humanism of our people». En revanche, quand les soldats azerbaïdjanais commettent des crimes de guerre, en voici la seule raison possible :

«It is regrettable to note that mistakes in the understanding of the methods and techniques of struggle against the enemy by some servicemen under the influence of the severe psychological state caused by the war led to committing illegal acts that could overshadow the bravery and zeal shown by the Armed Forces, as well as the victory gained.»

36. Mais pourquoi ces crimes ternissent-ils la victoire ? M^e Reid vous a dit ce matin que ce serait parce que ces crimes étaient «unacceptable». Certes, mais voici la réponse complète du procureur : si les crimes commis par les soldats azerbaïdjanais sont inacceptables, c'est bien sûr parce que ces crimes «contradict the mentality of the Azerbaijani people, which is tolerant, highly appreciates multicultural values and is historically distinguished by its humanism».

37. Entendez, rien de tel en Arménie. Eh bien, quant à l'Arménie, Mesdames et Messieurs les juges, elle condamne sobrement les abus qui ont pu être commis par des membres de ses forces armées et elle prend au sérieux ses obligations en matière d'enquête et de poursuites, ainsi que les preuves qui y sont relatives. Et je remercie d'ailleurs à cet égard M^e Reid de vous avoir renvoyés ce

¹⁵¹ 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 December 2020), available at <https://genprosecutor.gov.az/az/post/3272>, Azerbaijan's Judges' Folder (18 October 2021) (**Tab 10**).

matin aux communications adressées par l'Arménie à la Cour européenne des droits de l'homme car ces communications établissent clairement le sérieux avec lequel l'Arménie prend ses obligations.

38. Mais quoi qu'il en soit, Mesdames et Messieurs de la Cour, comme je vous le disais, vous n'avez pas à comparer les Parties dans la poursuite de ces crimes pour statuer sur la demande de l'Azerbaïdjan. La seule question en lien avec la demande qui vous retient cette semaine est celle de savoir si les éléments factuels soumis par l'Azerbaïdjan permettent de justifier une mesure conservatoire, réduite par rapport à celle qu'il sollicite, en matière de préservation des preuves parce qu'il existerait un péril imminent de disparition ou de destruction des preuves relatives à ces crimes. Tel n'est pas le cas : rien ne l'établit et rien ne permet de le penser.

39. En effet, vous trouverez à l'onglet n° 2 de votre dossier d'audience une déclaration certifiée du procureur général adjoint de l'Arménie rapportant que ses services ont ouvert six dossiers répressifs pour violations graves du droit international humanitaire commises durant les hostilités de l'an dernier à charge de membres des forces armées arméniennes¹⁵². Vous avez entendu ce matin M^e Reid vous dire qu'il n'y avait rien de plus, rien d'autre dans le dossier de l'Arménie. Elle s'est également appuyée sur un rapport de mai 2021 de l'*International Partnership of Human Rights and Truth Hounds* et sur le rapport de septembre de cette année de l'Assemblée parlementaire du Conseil de l'Europe qui a préparé la résolution que tous les députés azerbaïdjanais ont rejetée.

40. Ces deux institutions, ainsi que M^e Reid, ont manifestement oublié que dans une communication du 2 avril 2021¹⁵³ — donc antérieure aux deux rapports sur lesquels ma collègue s'est appuyée —, transmise à trois rapporteurs spéciaux des Nations Unies en réponse à une demande d'information du 2 février¹⁵⁴, l'Arménie a décrit plus en détail les six dossiers pénaux dont fait état la lettre de son procureur général adjoint. Vous trouverez la demande des trois rapporteurs spéciaux onusiens, ainsi que la réponse arménienne, dans votre dossier d'audience aux onglets n^{os} 3 et 4. Ces

¹⁵² Letter from Gevorg Baghdasaryan, Deputy Prosecutor General, Third Class State Counselor of Justice, Prosecutor General's Office of the Republic of Armenia (7 October 2021), attaching Article 390: Grave breaches of the norms of international humanitarian law in time of armed conflicts (**Armenia, Annex 42**).

¹⁵³ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>.

¹⁵⁴ Letter from the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur in the Field of cultural Rights; and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment to Azerbaijan, Ref. AL AZE 1/2021 (2 February 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25857>.

documents sont publics et disponibles sur le site du Haut-Commissariat des Nations Unies aux droits de l'homme. Les rapporteurs spéciaux s'inquiétaient en particulier des crimes filmés dans les vidéos annexées par l'Azerbaïdjan sous les numéros 38 et 52. Ainsi qu'il ressort clairement de la communication en réponse de l'Arménie en date du 2 avril, ces deux crimes font l'objet des deux premiers dossiers répressifs ouverts pour violation du droit international humanitaire¹⁵⁵. Il en va de même des faits relevant des vidéos annexées par l'Azerbaïdjan sous les numéros 39¹⁵⁶, 41¹⁵⁷, 49¹⁵⁸ et 50¹⁵⁹. Ces six vidéos sont relatives aux violations les plus manifestes et les plus choquantes. L'Arménie fait donc bien diligence pour enquêter, poursuivre, punir ces crimes et conserver les preuves qui y sont relatives.

41. Ainsi que je l'ai relevé la semaine dernière¹⁶⁰, l'Azerbaïdjan a également reçu le 2 février 2021 une demande d'information semblable de la part des trois rapporteurs spéciaux des Nations Unies au sujet de crimes commis par des membres des forces armées azerbaïdjanaises contre des Arméniens. A la différence de l'Arménie, l'Azerbaïdjan n'a pas daigné répondre à cette demande d'information.

42. S'agissant des autres vidéos soumises par l'Azerbaïdjan, vous pourrez constater qu'elles sont pour la plupart relatives à des faits qui ne revêtent pas la même gravité. Ce qui ne signifie pas qu'ils seraient acceptables et ne seraient pas susceptibles d'être poursuivis. Mais la question n'est pas là : ces éléments de preuve sont désormais entre les mains de l'Arménie et son agent m'a autorisé

¹⁵⁵ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>, question 2, bullet points 1 and 2 (dossiers répressifs/criminal files 1 et/and 2).

¹⁵⁶ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>, bullet point 5 (dossier répressif/criminal file no. 5).

¹⁵⁷ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>, bullet point 3 (dossier répressif/criminal file no. 3).

¹⁵⁸ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>, bullet point 4 (dossier répressif/criminal file no. 4).

¹⁵⁹ Letter from the Permanent Mission of the Republic of Armenia to the United Nations Office and other international Organizations in Geneva to the Office of the United Nations High Commissioner for Human Rights (2 April 2021), available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36114>, bullet point 6 (dossier répressif/criminal file no. 6).

¹⁶⁰ CR 2021/22, p. 31-32, par. 13 (d'Argent).

à vous informer qu'elle s'engage à les conserver et qu'elle les transmettra à ses autorités judiciaires même si celles-ci les possèdent sans doute déjà.

43. Contrairement à ce que M^e Reid a soutenu, il n'est donc en rien établi que l'Arménie ne ferait rien pour enquêter sur les abus et les crimes commis par les membres de ses forces armées. Bien au contraire, il est clairement établi que l'Arménie prend ses obligations répressives au sérieux. Ainsi, il n'existe aucun risque de disparition ou de destruction des preuves relatives aux abus et aux crimes commis contre des membres des forces armées de l'autre Partie. Contrairement au procureur général de l'Azerbaïdjan, l'Arménie prend ces éléments de preuve au sérieux, s'abstient prudemment de toute déclaration préjudiciable à leur propos, et ne les considère pas de prime abord comme étant des faux.

44. C'est la quatrième raison pour laquelle, même reformulée à la baisse, il n'y a pas lieu d'ordonner à l'Arménie de préserver et de ne pas détruire des preuves pénales puisque l'Arménie fait toute diligence à cet égard.

45. Madame la présidente, dans sa demande en indication de mesures conservatoires, l'Azerbaïdjan semble en réalité concéder que l'Arménie procède bien à des poursuites pénales puisqu'il soutient qu'il existerait un risque — je reprends le paragraphe 29 de la demande — que «[the] alleged perpetrators will flee in order to escape prosecution»¹⁶¹. Mais si les auteurs de crimes risquent de fuir afin d'échapper aux poursuites et à la répression, c'est bien parce que l'Arménie organise cette répression et poursuit effectivement les crimes de guerre commis par des Arméniens... A moins, bien sûr, qu'il ne faille comprendre que l'Azerbaïdjan ne concède rien à ce sujet et vise en réalité par ces mots les poursuites qu'il entend diligenter lui-même. Et ceci conforterait alors ce que je vous ai dit il y a quelques instants au sujet du détournement de la convention en traité d'entraide judiciaire.

46. Quoi qu'il en soit, Mesdames et Messieurs les juges, la mesure conservatoire de l'Azerbaïdjan en matière de preuves est sans aucun fondement et aucune mesure de cette sorte ne doit être indiquée à charge de l'Arménie dans la présente instance car les conditions pour ce faire ne sont en rien réunies.

¹⁶¹ *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Request for the Indication of Provisional Measures of Protection (23 September 2021), p. 18, par. 29.

47. Madame la présidente, ceci met fin au premier tour des plaidoiries de la République d'Arménie dans cette affaire. Je remercie la Cour pour sa bienveillante et habituelle attention.

The PRESIDENT: I thank Professor d'Argent, whose statement brings to an end the first round of oral observations of Armenia, as well as this afternoon's sitting. The Court will meet again tomorrow, Tuesday 19 October 2021, at 10 a.m., to hear the second round of oral observations of Azerbaijan. Armenia 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 6 p.m.
