INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

AZERBAIJAN
v.
ARMENIA

PRELIMINARY OBJECTIONS OF THE REPUBLIC OF ARMENIA

VOLUME I

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Table of Contents

CHAPTER 1. INTRODUCTION

1. In accordance with the Court's Statute and Rules, the Republic of Armenia ("**Armenia**") submits these Preliminary Objections requesting the Court to find that it is without jurisdiction over a number of claims and contentions made by the Republic of Azerbaijan ("**Azerbaijan**") under the International Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**" or "**Convention**"), or that such claims and contentions are inadmissible.

2. The Court has consistently recalled the fundamental principle that no State may be subject to its jurisdiction without consent.[1]

3. Under Article 22 of the CERD, Armenia has consented to the jurisdiction of the Court only with regard to "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention".[2]

4. Just as Azerbaijan has repeatedly filed unfounded provisional measures requests in transparent reaction to requests filed by Armenia in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, Azerbaijan's entire case was brought solely to mirror Armenia's own institution of proceedings before the Court. Yet as explained in these Preliminary Objections, many aspects of Azerbaijan's case plainly exceed the scope of the Court's jurisdiction. Armenia should not be

[1] *See, e.g.*, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Preliminary Objections, Judgment I.C.J Reports 2018,* p. 292, para. 42; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 6, paras. 65, 88.

[2] CERD, Art. 22.

compelled to defend itself on the merits of issues as to which it has not provided consent.[3]

5. These issues include, first and foremost, the primary focus of Azerbaijan's entire Memorial; namely, the period preceding, during and immediately after the First Nagorno-Karabakh War, which ended in 1994. Armenia too has countless grievances pertaining to that tragic period. But the First Nagorno-Karabakh War began more than three *decades ago* and ended two years *before* the CERD even entered into force between the Parties on 15 September 1996. As explained in **Chapter 2** below, Azerbaijan's claims pertaining to that period are therefore plainly outside the jurisdiction of the Court *ratione temporis* (or are, in any event, inadmissible).

6. In Armenia's own Memorial in the proceedings it initiated against Azerbaijan, Armenia took care to distinguish between events occurring before and after that critical date.[4] In its hasty attempt to mirror, Azerbaijan has entirely ignored that distinction. In fact, Azerbaijan makes its complaints stemming from the First Nagorno-Karabakh War the very centrepiece of its Memorial. That deliberate choice shows that Azerbaijan is intent on using these proceedings for purely political purposes wholly untethered to the Parties' consent to the Court's jurisdiction under the CERD.

7. Azerbaijan's claims concerning the First Nagorno-Karabakh War are not the only ones that are plainly outside the Court's jurisdiction. Its Memorial makes

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[3] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, *Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 44 (stating that the Court will not join a preliminary objection to the merits "except for good cause, seeing that the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits").

[4] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, Memorial of Armenia (23 January 2023), paras. 1.23, 2.1, 3.1, 6.82 (hereinafter "**Memorial of Armenia**") (confidential) (**Annex 14**).

other claims and contentions that, irrespective of the date of occurrence of the alleged wrongful conduct, also fall outside the Court's jurisdiction *ratione materiae*.

8. As explained in **Chapter 3.I**, the Court has made clear that the CERD "*exclusively* concerns the prohibition of racial discrimination" as defined in Article 1(1);[5] claims that do not concern racial discrimination *ipso facto* fall outside the Convention's scope.[6] The Court has also made clear that the acts complained of must, in addition, fall within the particular *substantive* provisions of the treaty invoked.[7] Despite these clear requirements, Azerbaijan complains about acts that plainly have nothing to do with racial discrimination, and in some cases do not fall within any of the CERD's substantive provisions in any event.

9. First, as shown in **Chapter 3.II**, Azerbaijan continues to argue that Armenia's alleged use of landmines and booby traps, and its purported withholding of information about them, somehow violate the CERD. It does so even though the Court has already found, on two separate occasions (including once *after* Azerbaijan submitted its Memorial) and on the basis of a nearly identical body of "evidence", that the CERD does not even *plausibly* impose "any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease

[5] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 104 (emphasis added).

[6] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112.

[7] *See, e.g*., *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 80; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France*), *Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, para. 117.

and desist from planting landmines".[8] Nothing has changed since the Court reached those determinations.

10. Even accepting Azerbaijan's factual allegations as true (*quod non*), the acts about which it complains were not "based on" race, colour, descent, or national or ethnic origin as the definition of "racial discrimination" in Article 1(1) of the CERD requires. Nor did they have the "purpose or effect" of nullifying or impairing ethnic Azerbaijanis' equal enjoyment of human rights and fundamental freedoms as Article 1(1) also requires. To the contrary, such weapons are indiscriminate by nature, as demonstrated by the region's tragic history of death and injury arising therefrom. Moreover, Azerbaijan's own evidence makes clear that any landmines were laid exclusively for self-defence purposes. As such, and in line with the Court's reasoning in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*,[9] even if the measures concerning landmines and booby traps of which Azerbaijan complains were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.

11. The same is true about Azerbaijan's claims concerning alleged harms to the environment. As demonstrated in **Chapter 3.III**, like landmines and booby traps, environmental harm is inherently indiscriminate. It recognizes no national or other boundaries, and is incapable of distinguishing between members of different

[8] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 405, para. 53. *See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 22 February 2023*, paras. 22-23.

[9] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112 ("Thus, the Court concludes that, even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention").

national or ethnic groups. Even if environmental harm were in principle capable of constituting racial discrimination in exceptional circumstances, the facts alleged here make clear that no such circumstances exist in this case. Rather, Azerbaijan's own case is that many of the acts alleged to have harmed the environment were prompted by economic development, not racial discrimination. Such claims therefore fall outside the scope of the CERD.

12. The contrived nature of Azerbaijan's environmental claims is laid bare by their stark inconsistency with the rest of its case. The central thrust of Azerbaijan's *other* claims is that Armenia "ethnically cleansed" Azerbaijanis from the so-called "Occupied Territories" and then replaced them with ethnic Armenian "settlers",[10] all the while planting landmines and taking other steps to make sure that ethnic Azerbaijanis never returned.[11] In circumstances in which, according to Azerbaijan, ethnic Azerbaijanis had already been expelled from the relevant areas and were never expected to return, it is impossible to understand how Armenia's alleged actions related to the environment could have been "based on" Azerbaijani national or ethnic origin, or had the "purpose or effect" of nullifying or impairing ethnic Azerbaijanis' rights. On the contrary, it follows inescapably from Azerbaijan's own arguments that the ethnic *Armenians* in the area would have been the ones most affected by any environmental harm.

13. It is precisely for that reason that, even though Azerbaijan has raised virtually identical environmental claims in other fora, it has done so without any suggestion that the environment was destroyed on the basis of race. For example, just *five days* before Azerbaijan submitted its Memorial in these proceedings, it

[10] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, Memorial of Azerbaijan, paras. 2, 12-20, 51, 93-132, 217, 419-458 (hereinafter "**Memorial**").

[11] *See* Memorial, paras. 273-290, 419, 446-453.

submitted a Notice of Arbitration against Armenia under the Bern Convention on the Conservation of European Wildlife and Natural Habitats. That arbitration also concerns alleged environmental destruction in the "Occupied Territories". Not once do the words "race," "discrimination" and "national" or "ethnic origin" appear anywhere in that 75-page Notice.[12]

14. Even if Azerbaijan's environmental allegations were somehow capable of constituting racial discrimination—and they are not—the majority of them would still be outside the Court's jurisdiction for another reason: they do not fall within any of the CERD's substantive provisions. To cite just one example, the "right to health" under the CERD does not encompass the so-called right to "return to a healthy environment" invoked by Azerbaijan.[13] Most of the environmental claims as Azerbaijan itself has articulated them therefore necessarily fall outside the scope of the CERD for that reason, too.

15. In light of these and other considerations discussed throughout these Preliminary Objections, Armenia respectfully requests that the Court adjudge and declare that it does not have jurisdiction over the particular claims and contentions identified in these Preliminary Objections or, in the alternative, that those claims and contentions are inadmissible.

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16. In formulating these Preliminary Objections, Armenia has focused only on objections that have an exclusively preliminary character. As such, it has not addressed other important issues, such as whether various alleged acts or omissions

[12] *The Republic of Azerbaijan* v. *The Republic of Armenia,* Notice of Arbitration under the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 (18 January 2023) (confidential) (**Annex 13**).

[13] *See* Memorial, para. 473.

in Nagorno-Karabakh about which Azerbaijan complains are attributable to Armenia. Armenia therefore does not address Azerbaijan's countless accusations that "Armenia" has or has not taken certain actions in the so-called "Occupied Territories". Much less does it address the underlying merits of such accusations. For the avoidance of doubt, Armenia expressly denies all of Azerbaijan's allegations and reserves all rights to respond to them at the appropriate stage, including on jurisdictional grounds.

CHAPTER 2. THE COURT LACKS JURISDICTION *RATIONE TEMPORIS* OVER AZERBAIJAN'S CLAIMS RELATING TO THE FIRST NAGORNO-KARABAKH WAR AND ITS PRE-15 SEPTEMBER 1996 AFTERMATH, WHICH ARE INADMISSIBLE IN ANY EVENT

17. Azerbaijan seeks to transform these proceedings under the CERD, instituted in 2021, into a vehicle for airing its historic grievances pertaining to the First Nagorno-Karabakh War, which ended in 1994.[14] The opening paragraphs of Azerbaijan's Memorial make clear that its allegations about Armenia's purported acts and omissions "[i]n the run up to and during the First Garabagh War" constitute the focal point of its entire case.[15] The Table of Contents similarly reveals that the "Facts Underlying Azerbaijan's Claims"[16] include over 75 pages of allegations specifically concerning events leading up to and during the First Nagorno-Karabakh War.[17] The vast majority of its other factual allegations pertain to the *status quo* that resulted from that armed conflict.[18]

18. At no point in its Memorial, however, does Azerbaijan actually explain how or why the Court's temporal jurisdiction under the CERD encompasses events alleged to have occurred during that period. As explained in **Section I** below, the Court's jurisdiction *ratione temporis* under Article 22 of the CERD does not and cannot extend to the period prior to its entry into force between the Parties on 15 September 1996. As such, as detailed in **Section II** below, Azerbaijan's claims concerning the First Nagorno-Karabakh War—which ended over two years *before* that critical date—fall outside the Court's jurisdiction. Finally, **Section III** explains

[14] *See* Memorial of Armenia, paras. 2.71-72, 2.84 (confidential) (**Annex 14**); Memorial, paras. 2, 131.

[15] Memorial, para. 3.

[16] Memorial, p. i (title of § II).

[17] *See,* Memorial, §§ II.A.1-9 (pp. 21-86), II.C.1 (pp. 199-207).

[18] *See, e.g.*, Memorial, §§ II.B, II.D.

that, even if the Court were to find that it has jurisdiction over the aforementioned claims (*quod non*), they are, at very least, manifestly inadmissible.

19. Azerbaijan's attempt to blur the lines of the Court's jurisdiction is as telling as it is unconvincing. True to form, Azerbaijan's casting of its historical grievances concerning the First Nagorno-Karabakh War in terms of the CERD is little more than an attempt to shift attention away from the State racism fostering the war of aggression Azerbaijan has waged against the ethnic Armenians of Nagorno-Karabakh and Armenia since 2020. Indeed, it was only on 8 December 2020—*i.e.*, less than one month after Armenia's own notification of claims under the CERD, nearly three decades after the end of the First Nagorno-Karabakh War, and more than 25 years since its own accession to the CERD—that Azerbaijan chose to institute proceedings.[19] As explained below, however, Azerbaijan's claims pertaining to events prior to 15 September 1996 fall outside the Court's temporal jurisdiction under the CERD.

20. To be clear, Armenia itself has innumerable grievances against Azerbaijan for acts of racial discrimination that occurred in the context and immediate aftermath of the First Nagorno-Karabakh War. Hundreds of thousands of ethnic Armenians were forcibly removed from their ancestral lands, never to return. Even so, Armenia has meticulously respected the temporal limits of the Court's jurisdiction under the CERD, as well as the requirements of the good administration of justice, in the context of the proceedings it has instituted against Azerbaijan. That said, should Azerbaijan's claims in these proceedings be permitted to proceed to the merits (*quod non*), Armenia would have no choice but to raise counterclaims

[19] *See* Memorial, para. 378. *Cf.* Memorial of Armenia, para. 5.4 (confidential) (**Annex 14**).

against Azerbaijan pertaining to that same time period. Armenia reserves all of its rights in that regard

I. Article 22 Does Not Confer upon the Court Jurisdiction to Apply the CERD to Events Prior to 15 September 1996, the Date of the CERD's Entry into Force between the Parties

21. Armenia deposited its instrument of accession to the CERD on 23 June 1993. In accordance with Article 19, the CERD therefore "enter[ed] into force on the thirtieth day after the date of the deposit of [Armenia's] … instrument of accession",[20] *i.e.*, on 23 July 1993. For its part, Azerbaijan deposited its instrument of accession after the conclusion of the First Nagorno-Karabakh War, on 16 August 1996, and the CERD entered into force for it on 15 September 1996. As such, the CERD entered into force between the Parties on the latter of the two States' dates of succession, *i.e.,* on 15 September 1996.[21]

22. The Court's jurisdiction is based on Article 22 of the CERD, which provides:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".[22]

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[20] CERD, Art. 19.

[21] *See, e.g.*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 20 (since Russia deposited its instrument of ratification on 4 February 1969 and Georgia deposited its instrument of accession on 2 June 1999, the "CERD entered into force between the Parties on 2 July 1999").

[22] CERD, Art. 22.

23. While Armenia had no obligations under the CERD whatsoever prior to its entry into force for Armenia on 23 July 1993,[23] as between Azerbaijan and Armenia, Article 22 only gives the Court jurisdiction over the application of the CERD to events that occurred after its entry into force between the Parties on 15 September 1996. That is true for at least five interrelated reasons.

24. *First*, the ordinary meaning of Article 22, which carefully circumscribes the jurisdiction of the Court to disputes "between two or more *States Parties* with respect to the interpretation or *application*" of the CERD,[24] makes clear that it does not apply to acts or facts that preceded the CERD's entry into force as between the States parties concerned. Nothing in Article 22 thus derogates from the customary international law principle of non-retroactivity of treaties, reflected in Article 28 of the Vienna Convention on the Law of Treaties (the "**VCLT**").[25] Article 28 provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".[26]

[23] "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs". International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission 2001,* Vol. II, Part Two, Art. 13 (**Annex 9**). It thus goes without saying that the Court does not enjoy jurisdiction over allegations pertaining to events that took place prior to 23 July 1993. Even if established, such allegations are not capable of constituting a breach of the CERD by Armenia and are therefore outside the Court's jurisdiction.

[24] CERD, Art. 22 (emphasis added).

[25] *See, e.g.*, *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 100.

[26] Vienna Convention on the Law of Treaties, Art. 28.

25. In its commentary on the draft form of that provision, the International Law Commission specifically noted that "when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause".[27] This echoed a similar observation made by Sir Humphrey Waldock, the Commission's last special rapporteur on the law of treaties, who noted that "when a jurisdictional clause is found *not in a treaty of arbitration or judicial settlement* but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause".[28]

26. The Court itself has endorsed such a distinction between "a general provision for the settlement of disputes" and a compromissory clause designed to provide for jurisdiction over the application of the "substantive provisions" of the treaty in which it is contained.[29]

27. Article 22 of the CERD is not a "general provision for the settlement of disputes" such as those found in treaties concerning the peaceful resolution of disputes,[30] nor can it be equated to unilateral declarations made by States pursuant to Article 36(2) of the Court's Statute.[31] Rather, it confers upon the Court a specific

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[27] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission 1966*, Vol. II, p. 212, para. 2 (**Annex 7**).

[28] *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, UN Doc. A/CN.4/167 and Add.1-3 (1964), p. 11, para. 4 (emphasis added) (**Annex 6**).

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 93.

[30] *See, e.g.*, Revised General Act for the Pacific Settlement of International Disputes (entered into force 20 September 1950); American Treaty on Pacific Settlement (entered into force 6 May 1949); European Convention for the Peaceful Settlement of Disputes (entered into force 30 April 1958).

[31] R. Kolb, "The Compromissory Clause of the Convention" in THE UN GENOCIDE CONVENTION: A COMMENTARY (P. Gaeta ed., 2009), p. 421 (**Annex 20**) ("As far as compromissory clauses are concerned, the general rule as to the nonretroactivity of treaties enshrined in Articles 4 and 28 of

and limited jurisdiction, which is designed to secure the application of the CERD as between States parties to it. It is only upon the "entry into force of CERD between the Parties"[32] in question that Article 22 can begin to operate to secure the CERD's application "as between"[33] them by conferring compulsory jurisdiction to the Court.[34] It is from this date forward that the two States' acts and omissions become justiciable as between them.[35]

28. This was the conclusion of the Court in *Ambatielos*, when, applying the same principle now enshrined in Article 28 of the VCLT, it held that a compromissory clause does not have retroactive effect absent "any special clause

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the 1969 Vienna Convention on the Law of Treaties, and specially recalled in certain conventions, may be held to limit the temporal reach of jurisdiction without any necessity to invoke a specific reservation. Here too, then, the optional clause system appears to impose a closer knit of obligations (the presumption being against time limitation) than the compulsory clauses system (the presumption being in favor of time limitation)").

[32] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 20 (since Russia deposited its instrument of ratification on 4 February 1969 and Georgia deposited its instrument of accession on 2 June 1999, the "CERD entered into force between the Parties on 2 July 1999"). *See also Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 61; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, para. 41 ("The entry into force of UNCLOS as between the Parties in 1999 means that the principles of maritime delimitation to be applied by the Court in this case are determined by paragraph 1 of Articles 74 and 83 thereof").

[33] *Case concerning certain German interests in Polish Upper Silesia (The Merits) (Germany* v. *Poland), Judgment No. 7, 1926, P.C.I.J. Series A, No. 7*, p. 29 ("A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States").

[34] *See e.g.*, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, para. 38 ("*[T]he scope of the Court's action is defined by that agreement*, which embodies the consent of the parties to the settlement by the Court of the dispute between them") (emphasis added).

[35] *See, e.g.*, *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963, Separate Opinion of Judge Fitzmaurice, I.C. J. Reports 1963*, p. 129 ("An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one. Similarly, such acts or events could not in themselves have constituted, or retroactively have become, violations of the Trust *in relation to the Applicant State*, since the Trust confers rights only on Members of the United Nations, and the Applicant State was not then one") (emphasis in original).

or any special object necessitating retroactive interpretation".[36] No such special clause or object can be found in Article 22, or anywhere within the CERD for that matter.

29. In fact, the opposite intention appears in Article 11 concerning inter-State proceedings before the CERD Committee, which, as an alternative precondition to the Court's jurisdiction under Article 22,[37] provides important context for the interpretation of Article 22.[38] Article 11(1) provides that, "[i]f a State Party considers that another State Party *is not giving effect* to the provisions of this Convention, it may bring the matter to the attention of the Committee".[39] The use of the present tense makes clear that, as between two States parties, the CERD's dispute resolution mechanisms do not apply to the period prior to the CERD's entry into force as between those States parties.

30. *Second*, "[w]hen considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it".[40] As such, in the interpretation of a compromissory clause, "account must be taken not only of … the grammatical and logical meaning

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[36] *Ambatielos case (jurisdiction) (Greece* v. *United Kingdom), Judgment of July 1st, 1952: I.C.J. Reports 1952*, p. 40.

[37] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 558, para. 113.

[38] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports* 2019, p. 558, para. 108 ("Article 22 of CERD must be interpreted in its context. Article 22 refers to two preconditions, namely negotiation and the procedure before the CERD Committee governed by Articles 11 to 13 of the Convention").

[39] CERD, Art. 11(1) (emphasis added).

[40] *Case concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), Judgement No. 8, 1927, P.C.I.J. Series A, No. 9*, p. 32.

of the words used, but also and *more especially of the function which*, in the intention of the contracting Parties, is to be attributed to this provision".[41] There is no indication in the *travaux préparatoires* that the parties negotiating the CERD had an intention to create a jurisdictional basis for unknown future parties to invoke the CERD's provisions retroactively. Nor is there any evidence that any of the 182 States now party to the CERD ever understood Article 22 to function in this way. In fact, of the 37 reservations made to Article 22 since the CERD's adoption in 1965, not a single one concerns the non-retroactive application or extension to third States of that provision.[42] The absence of such reservations evidences an understanding that Article 22 was intended to function in a reasonable and predictable way, and that there was no need to make such reservations to its scope.[43]

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[41] *Case concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), Judgement No. 8, 1927, P.C.I.J. Series A, No. 9*, p. 24.

[42] *See* United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the International Convention on the Elimination of All Forms of Racial Discrimination* (entered into force 4 January 1969), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf (**Annex 8**). Reservations to Article 22 are currently maintained by 25 States (Afghanistan, Bahrain, China, Cuba, Egypt, Equatorial Guinea, India, Indonesia, Iraq, Israel, Kuwait, Lebanon, Libya, Madagascar, Morocco, Mozambique, Nepal, Saudi Arabia, Singapore, Syria, Thailand, Turkey, United States, Vietnam and Yemen). *See ibid*., pp. 3-10. Reservations to Article 22 were once maintained by 12 States that no longer exist or have since withdrawn their reservations (Belarus, Bulgaria, Czechoslovakia, East Germany, Hungary, Mongolia, Poland, Romania, Rwanda, Spain, Ukraine, and USSR). *See ibid*., notes 3, 20, 21, 27, 29-33.

[43] Nor have States made any such temporal reservations to compromissory clauses providing for the Court's jurisdiction contained in other multilateral treaties. *See, e.g.,* United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (entered into force 26 June 1987), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf; United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention on the Political Rights of Women* (entered into force 7 July 1954), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVI/XVI-1.en.pdf; United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention relating to the Status of Stateless Persons* (entered into force 9 June 1960), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf; United Nations Treaty Collection, *List of States Parties,*

31. *Third*, Article 22 cannot be understood as conferring rights on States corresponding to a time during which they were not parties to the CERD. This is in accordance with the customary international law principle of *pacta tertiis nec nocent nec prosunt*, enshrined in Article 34 of the VCLT:

> "A treaty does not create either obligations or rights for a third State without its consent".[44]

32. As concerns the period during which it was a third State to the CERD, Azerbaijan has no rights under Article 22. That is to say, as concerns the period prior to 15 September 1996, the CERD "cannot be relied on as against"[45] Armenia by Azerbaijan.

33. As the Court's predecessor held in *Certain German Interests*, "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States".[46] The Permanent Court of International Justice similarly emphasized in the *Free Zones* case that there can be no presumption in favour of the creation of rights for third States, absent the

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Declarations and Reservations to the Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf; and United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the International Convention for the Protection of All Persons from Enforced Disappearance* (entered into force 23 December 2010), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-16.en.pdf.

[44] VCLT, Art. 34. *See also* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission 1966*, Vol. II, pp. 226-227 (**Annex 7**); E. David, "Treaties and Third States, Art. 34 1969 Vienna Convention" in THE VIENNA CONVENTION ON THE LAW OF TREATIES (O. Corten & P. Klein, eds., 2011), pp. 887-888 ("The customary character of the rule is not in doubt") (**Annex 21**).

[45] *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J. Series A, No. 23*, p. 22.

[46] *Case concerning certain German interests in Polish Upper Silesia (The Merits), Judgment No. 7, 1926, P.C.I.J. Series A, No. 7*, p. 29.

demonstration of such an intent.[47] This exception to the rule of *pacta tertiis* was later codified in Article 36 of the VCLT, which provides:

> "A right arises for a third State from a provision of a treaty *if the parties to the treaty intend the provision to accord that right* either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides".[48]

34. As noted above, no intention to accord the rights of Article 22 to third States can be found in its text, context or object and purpose.

35. *Fourth*, and in this connection, ignoring the intended function of Article 22 would lead to far reaching consequences risking the Convention's objectives. For example, a State that is not yet a party could accede to the CERD in 2023 and institute proceedings against an original State party concerning events that occurred as far back as 1969. Given that more than half a century has passed since the CERD's entry into force, there is already a wide disparity in the dates of entry into force of the CERD among its current States parties, with 58 States parties having ratified or acceded since 1990.[49] As such, a retroactive interpretation of Article 22 would open up a vast universe of potential historic claims.

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[47] *Case of the Free Zones of Upper Savoy and the District of Gex, Judgment No. 17, 1932, P.C.I.J. Series A/B, Fascicule No. 46*, pp. 147-148. *See also* International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission 1966*, Vol. II, p. 228, para. 4 (**Annex 7**).

[48] VCLT, Art. 36 (emphasis added).

[49] *See* United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the International Convention on the Elimination of All Forms of Racial Discrimination* (entered into force 4 January 1969), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf (**Annex 8**).

36. Similar situations exist under other multilateral treaties.[50] There are thus important repercussions that the retroactive interpretation of a standard compromissory clause in a substantive treaty would have for the multilateral treaty system in general, including the withdrawal of States from treaties containing compromissory clauses. Indeed, a retroactive interpretation of a standard compromissory clause would dissuade States from becoming party to any treaty containing such a clause without making a reservation to it, or even create reluctance to include provisions giving jurisdiction to the Court in future treaties.[51]

37. *Fifth*, and relatedly, extending the application of Article 22 to events prior to the entry into force of the CERD as between the Parties would ignore the element

[50] *See e.g.*, United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention relating to the Status of Stateless Persons* (entered into force 9 June 1960), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf (a 61 year gap in entry into force; States have acceded as recently as 2021, whereas the treaty entered into force in 1960); United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention on the Political Rights of Women* (entered into force 7 July 1954), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVI/XVI-1.en.pdf (a 61 year gap in entry into force; States have acceded as recently as 2015, whereas the treaty entered into force in 1954); United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention on the Elimination of All Forms of Discrimination against Women* (entered into force 3 September 1981), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf (a 34 year gap in entry into force; States have acceded as recently as 2015, whereas the treaty entered into force in 1981); United Nations Treaty Collection, *List of States Parties, Declarations and Reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (entered into force 26 June 1987), *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf (a 34 year gap in entry into force; States have acceded as recently as 2021, whereas the treaty entered into force in 1987).

[51] This might be the case, for example, in the context of the adoption of a future convention on the prevention and punishment of crimes against humanity. *See* International Law Commission, Draft Articles on Prevention and Punishment of Crimes against Humanity, *Yearbook of the International Law Commission 2019*, Vol. II, Part Two, Art. 15(2) ("Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration") (**Annex 11**).

of reciprocity inherent in compromissory clauses accepting the Court's jurisdiction. In the words of Rosenne:

> "Reciprocity is a general feature of international law and international relations, and to say that reciprocity is an element of jurisdiction is no more than to say that in matters of jurisdiction, as in matters of substance, the function of applying the law between parties is the function of establishing the rules of law reciprocally binding the parties".[52]

38. Indeed, the "principles of reciprocity and equality of States" are fundamental to a State's consent to the jurisdiction of the Court.[53] Reciprocity is therefore not limited to the context of declarations accepting the compulsory jurisdiction of the Court, but applies to all titles of jurisdiction.[54] However, unlike a unilateral declaration, for which the element of reciprocity is accomplished

[52] M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2016), Vol. II, p. 550, note 66 (**Annex 22**).

[53] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* p. 3, para. 35. *See also* M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2016), Vol. II, pp. 549-554 (**Annex 22**); C. Tomuschat, "Article 36" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann & C. Tams, eds., 2019), p. 735 ("reciprocity ensures fairness relating to the conditions of access and subjection to the Court") (**Annex 23**).

[54] C. Tomuschat, "Article 36" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann & C. Tams, eds., 2019), p. 734 ("The term 'reciprocity' appears solely in Article 36, para. 3, but permeates the provision on the jurisdiction of the Court in its entirety") (**Annex 23**). *See also* M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2016), Vol. II, p. 756 ("[R]eciprocity is an element of jurisdiction of the Court as such, and not merely a peculiarity of the compulsory jurisdiction") (**Annex 22**).

through the explicit wording of the Statute,[55] a compromissory clause contained in a treaty is by its very nature reciprocal.[56]

39. To interpret Article 22 in a non-reciprocal manner contrary to the ordinary functions of a compromissory clause would amount to an exception to the fundamental requirement of consent. However, as the Court has explained, it will not easily find "an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States". [57] Rather, "an exception of this kind could not be admitted unless it were very clearly expressed."[58] No such clear renunciation of reciprocity can be found in Article 22. It follows that Azerbaijan cannot be permitted to invoke Armenia's obligations under the CERD prior to the entry into force of the CERD for Azerbaijan on 15 September 1996.

[55] *See* Statute, Art. 36(2) ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, *in relation to any other state accepting the same obligation*, the jurisdiction of the Court") (emphasis added); Art. 36(3) ("The declarations referred to above may be made unconditionally or *on condition of reciprocity*") (emphasis added).

[56] M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2016), Vol. II, p. 551 ("[I]t is true that generally speaking, where the jurisdiction rests on a treaty or convention in force (Statute, Article 36, paragraph 1) the elements of mutuality and reciprocity are largely absorbed into the treaty") (**Annex 22**). *See also*, C. Tomuschat, "Article 36" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann & C. Tams, eds., 2019), p. 734 ("Whenever a compromissory clause is contained in an international agreement ('treaties and conventions in force') in accordance with Article 36, para. 1, it applies obviously to all the parties concerned in a like manner, provided that the parties have not opted for a different formula") (**Annex 23**).

[57] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* p. 3, para. 35.

[58] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* p. 3, para. 35.

40. In light of the foregoing, the Court lacks jurisdiction over all of Azerbaijan's claims concerning alleged acts and omissions that occurred prior to 15 September 1996, as explained below.

II. Azerbaijan Has Impermissibly Brought Claims Based on Events Predating the CERD's Entry into Force between the Parties

41. As explained, Azerbaijan fails to acknowledge any temporal restrictions on the Court's jurisdiction under the CERD, and instead advances a great number of factual allegations and claims pertaining to the First Nagorno-Karabakh War and other events that occurred before 15 September 1996.[59] In fact, many such events even occurred before Armenia acceded to the CERD on 23 July 1993, and thus at a time when Armenia was not a party to the CERD and could not possibly have breached its provisions.

42. The temporal flaws in Azerbaijan's case pervade its nearly three-hundred-page account of the "Facts Underlying Azerbaijan's Claims".[60] Despite the challenges posed by Azerbaijan's confused presentation of its case, and without accepting the veracity of any of its allegations, Armenia sets forth below examples of such allegations that fall outside the Court's jurisdiction *ratione temporis*. These allegations include (i) those that Azerbaijan itself expressly dates to the period before 15 September 1996; and (ii) those that Azerbaijan asserts in ambiguous terms such that they cannot be connected to specific events that occurred after the critical date.

43. *First*, entire sections of Azerbaijan's Memorial are dedicated to recounting events that, on Azerbaijan's own case, occurred prior to 15 September 1996. For

[59] *Supra* paras. 17-19.

[60] Memorial, p. i (title of § II).

example, Section II.A of Azerbaijan's Memorial, entitled "Armenia's Campaign of Ethnic Cleansing and Cultural Erasure Directed Against Azerbaijanis", contains a litany of allegations against Armenia based on events from as early as 1917[61] and running through 1994.

44. The central allegation of Section II.A—which totals nearly 70 pages—appears to be that "[f]rom 1987 to 1994, more than one million Azerbaijanis were forcibly expelled from their homes as a result of Armenia's conduct".[62] Azerbaijan then develops these allegations—which predate by at least two years the entry into force of the CERD between the Parties—by focusing on specific periods.

45. For example:

- In Section II.A.4, entitled "The Ethno-Nationalists Galvanized a Militant Movement to Incorporate the NKAO into the Armenian SSR", Azerbaijan purports to describe a supposed Armenian "ethno-nationalist movement" which allegedly "spurred discriminatory attacks against Azerbaijanis" in the 1980s;[63]

- In Section II.A.6, entitled "Expulsions and Targeting of Azerbaijanis in Armenia (1987-1989)", Azerbaijan alleges "forced expulsions in this period"[64] and "Armenia's erasure of Azerbaijanis from Armenia";[65]

[61] Memorial, para. 57.

[62] Memorial, para. 51.

[63] Memorial, para. 65.

[64] Memorial, para. 88.

[65] Memorial, para. 90.

- In Section II.A.7, entitled "Ethnic Cleansing of Azerbaijanis During the First Garabagh War (1991–July 1993)", Azerbaijan makes grave allegations about "Armenia's conduct"[66] during the First Nagorno-Karabakh War, including that "from December 1991 onwards, Azerbaijani villages were systematically destroyed"[67] and that Armenia participated in the "Khojaly massacre" which "began on the evening of 25 February 1992" (*i.e.*, more than a year before Armenia even acceded to the CERD);[68]

- In Section II.A.8, entitled "Continued Ethnic Cleansing of Azerbaijanis During the First Garabagh War (July 1993-1994)", Azerbaijan makes further grave allegations about "Armenia's direct involvement in the ethnic cleansing" of Azerbaijanis.[69]

46. Azerbaijan's express allegations pertaining to the First Nagorno-Karabakh War are not limited to Section II.A. For instance, Azerbaijan devotes the entirety of Section II.C.1 to allegations about "The Brutality of Armenia's Conduct in the First Garabagh War".[70]

47. Such allegations underlie many of Azerbaijan's claims of violation of the CERD set forth in Part IV of its Memorial. For example:

- Paragraph 419 of the Memorial claims that "Armenia's brutal campaign to ethnically cleanse the then-occupied territories of all Azerbaijanis, in

[66] Memorial, para. 105.

[67] Memorial, para. 99.

[68] Memorial, para. 102.

[69] Memorial, para. 123.

[70] *See also*, Memorial, paras. 199-200, 216, 236, 276.

pursuit of a 'united Armenia' free of ethnic Azerbaijanis, violated Armenia's obligations under CERD. Armenia drove Azerbaijanis out of the area" in a campaign that, according to Azerbaijan, was carried out before the end of the First Nagorno-Karabakh War;[71]

- Paragraph 425 of the Memorial claims that "Armenia's ethnic cleansing of Azerbaijanis from Armenia and the then-occupied territories, and its subsequent exclusion of Azerbaijanis from those areas, was an egregious violation of Articles 2 and 5 of CERD";

- Paragraph 429 of the Memorial claims that Armenia "violated Article 2(1), Article 5(b) and Article 5(d)(i) of CERD through its use of violence and terror to expel more than 700,000 Azerbaijanis from the then-occupied territories on the basis of their ethnic and national origin during the course of the First Nagorno-Karabakh War";

- Paragraph 432 of the Memorial claims that "the forced exclusion of Azerbaijanis from their homes" entailed Armenia's violation of "the entire raft of political, economic, social and cultural rights protected by Article 5";

- Paragraph 449 of the Memorial claims that Armenia breached the CERD when "the Armed Forces of Armenia, including its Installed

[71] *See, e.g.*, Memorial, para. 51 ("From 1987 to 1994, *more than one million Azerbaijanis* were forcibly expelled from their homes as a result of Armenia's conduct, comprised of: nearly all of the more than 200,000 Azerbaijanis from Armenia, more than 700,000 Azerbaijanis from the occupied territories, and more than 100,000 Azerbaijanis from areas adjacent to the border with Armenia and its occupying military forces"). *See also ibid*., para. 108 (alleging that "by mid-1992, virtually all of the more than 40,000 Azerbaijanis who had resided in the former NKAO had been expelled or killed").

Regime, sealed off the then-occupied territories from the rest of Azerbaijan"; and

- Paragraph 520 of the Memorial claims that "[i]n addition to violating Articles 2 and 5 as discussed above, Armenia's program of ethnic cleansing violated the prohibition on racial segregation in Article 3".

48. In fact, in support of its claims that Armenia breached the CERD, Azerbaijan expressly incorporates its allegations concerning events that occurred prior to 15 September 1996 by citing to its factual presentations in Sections II.A and II.C.1.[72]

49. *Second*, in addition to raising allegations and claims of breach of the CERD based on events that Azerbaijan has expressly acknowledged occurred prior to the critical date of 15 September 1996, Azerbaijan also advances myriad ambiguous allegations that it fails to connect to events that occurred after the critical date.

50. These include Azerbaijan's allegations that, following its military conquest in 2020 of territories now under its control, certain property was found destroyed or environmental damage was ascertained.[73] In most instances, Azerbaijan has not even attempted to state a case for when such damage to property or the environment actually occurred. In other cases, it simply alleges that the relevant damage

[72] *See, e.g.*, Memorial, paras. 419 (note 1007, citing Section II.A); para. 420 (note 1012, citing Section II.A-B); para. 425 (note 1020, citing Section II.A); para. 433 (notes 1036-1037, citing Section II.A, Section II.C.1 and paras. 120-127); para. 532 (note 1227, citing Sections II.A-B); para. 533 (note 1229, citing Section II.A.6).

[73] *See, e.g.*, Memorial, paras. 143 (referring to "[i]nspections conducted by the Prosecutor General's Office of Azerbaijan after liberation of the territories"); para. 158 (stating that "[f]rom November 2020 through March 2021, the Prosecutor General's Office of the Republic of Azerbaijan investigated 536 settlements in the liberated territories using photo and video footage"); para. 159 (stating that "[t]he most extensive inventorying of the tangible cultural heritage in the region from November 2020 onwards is being conducted by Azerbaijan's Ministry of Culture").

occurred "during the occupation",[74] which is Azerbaijan's term for the period following the May 1994 ceasefire ending the First Nagorno-Karabakh War and up to the Second Nagorno-Karabakh War.

51. The temporal ambiguity of Azerbaijan's allegations is particularly apparent in light of the evidence it has adduced. For example, Azerbaijan relies extensively on the results of "[i]nspections conducted by the Prosecutor General's Office of Azerbaijan after liberation of the territories", which are set forth in Annex 25 to Azerbaijan's Memorial.[75] As explained by Azerbaijan's own Deputy Prosecutor General in a letter dated 30 December 2022, "[f]rom November 2020 until present period, the investigators of the Investigation Department of the Prosecutor General's Office conducted inspections of the liberated territories to assess damage to and destruction of buildings, monuments, cultural objects, cemeteries and other sites in the liberated territories".[76]

52. At no point in its reporting, however, does the Prosecutor General's Office take a position on when exactly the alleged damage or destruction took place. Rather, the various reports are composed of before and after "statistics",[77] purporting to indicate the number of properties damaged or destroyed since the "pre-occupation" time.[78] In other words, Azerbaijan's contention is that, at some

[74] *See, e.g.*, Memorial paras. 153, 167, 172, 174, 176, 178, 209.

[75] Memorial, para. 143.

[76] Letter *from* Elchin Mammadov, First Deputy Prosecutor General of the Republic of Azerbaijan, *to* Elnur Mammadov, Deputy Minister of Foreign Affairs of the Republic of Azerbaijan, dated 30 December 2022, p. 4 (Memorial, Annex 25).

[77] *See* Prosecutor General's Office of the Republic of Azerbaijan, *Reference concerning investigations into the destruction of and damage to cultural objects and buildings, including cemeteries* (14 April 2022), p. 18 (Memorial, Annex 25, Exhibit A-1-a).

[78] *See* Prosecutor General's Office of the Republic of Azerbaijan, *Reference concerning investigations into the destruction of and damage to cultural objects and buildings, including cemeteries* (14 April 2022), p. 13 (Memorial, Annex 25, Exhibit A-1-a).

point between an unspecified[79] "pre-occupation" date and November 2020, certain destructions or damage took place. However, absent more information, it is impossible to determine whether the damage allegedly documented in 2020 occurred after 15 September 1996, and not, for example, during the First Nagorno-Karabakh War.

53. A similar problem arises with regard to Azerbaijan's attempts to support its allegations through photographic evidence. In its Memorial, Azerbaijan relies extensively on "before and after" photographic evidence, with the "before" photos dating to the period *prior* to 15 September 1996, and thus failing to establish that the relevant event actually occurred after the CERD's entry into force between the Parties, rather than in the period between when the photo was taken and 15 September 1996.[80] Many other photographic comparisons are simply undated.[81] Yet other figures in its Memorial are not comparisons at all, but simply photographs dated to 2020 or later.[82]

54. The same problems pervade the Annexes to Azerbaijan's Memorial purporting to contain photographic evidence on which its claims of breach rely. For example, Annex 1, styled as a "Compendium of images showing the destruction

[79] According to the Prosecutor General's Office, "[s]tatistical information on pre-occupation buildings … in each district's settlements was obtained and analyzed during the inspections from the district executive authorities". *See* Prosecutor General's Office of the Republic of Azerbaijan, *Reference concerning investigations into the destruction of and damage to cultural objects and buildings, including cemeteries* (14 April 2022), p. 13 (Memorial, Annex 25, Exhibit A-1-a). However, the sources for these statistics have not been identified or produced, let alone connected to a specific date during the "pre-occupation" period. Instead, the Prosecutor General's Office specifies that "the investigation body has no further information". *Ibid*., p. 18.

[80] *See, e.g.*, Memorial, p. 125 (Figure 27) ("[S]howing Panah Khan Imarat Complex and Tomb of Natavan in March 1992 and on 25 February 2021").

[81] *See, e.g.*, Memorial, p. 122 (Figure 25); p. 144 (Figure 38); p. 156 (Figures 43-44); p. 160 (Figures 46-47).

[82] *See, e.g.*, Memorial, pp. 98-100 (Figures 13-15); pp. 102-103 (Figures 16-17).

and erasure of Azerbaijani cities, villages, cultural and religious sites", is replete with undated photographs,[83] "before" photos from the 1980s,[84] and photos taken after the Second Nagorno-Karabakh War in 2020 with no "before" comparators.[85]

55. Another example is Annex 7, which is the "Affidavit of Reza Deghati" an "independent photojournalist".[86] Mr. Deghati explains that his photographic evidence derives from "visits between March 1992 and April 1992 and between October 2020 and November 2022", and that his "affidavit contains true and authentic copies of photographs [he] took during [his] time in the Garabagh region".[87] However, out of 92 photographs submitted, only four date from his 1992 visit, of which two are portraits of individuals.[88] Mr. Deghati's remaining photographs, which all date from 2020-2022, cannot establish that alleged damage and destruction to property actually occurred after 15 September 1996.

56. Azerbaijan's case on jurisdiction *ratione temporis* for its undated claims thus depends on the illogical assumption that, rather than having occurred at the height of hostilities in the relevant areas—*i.e.,* in 1991, 1992, 1993 or early 1994—

[83] Compendium of images showing the alleged destruction and erasure of Azerbaijani cities, villages, cultural and religious sites, p. 1 (Figure 2); p. 6 (Figure 10); p. 7 (Figure 11); p. 17 (Figure 24); p. 20 (Figure 29); p. 26 (Figure 38); p. 30 (Figure 43, which is an "archival photo" in black and white with the characteristic appearance of photography from the first half of the 20th century) (Memorial, Annex 1).

[84] Compendium of images showing the alleged destruction and erasure of Azerbaijani cities, villages, cultural and religious sites, p. 1 (Figure 1); p. 8 (Figures 13-14, comparing photographs from 1980 and 2022); pp. 15-16 (Figures 22-23, comparing photographs from 1980 and 2022) (Memorial, Annex 1).

[85] Compendium of images showing the alleged destruction and erasure of Azerbaijani cities, villages, cultural and religious sites, p. 2 (Figure 2); p. 3 (Figure 4); p. 9 (Figure 15); p. 13 (Figure 20); p. 37 (Figure 51) (Memorial, Annex 1).

[86] Affidavit of Reza Deghati (10 January 2023), p. 1 (title, para. 1) (Memorial, Annex 7).

[87] Affidavit of Reza Deghati (10 January 2023), pp. 1-2 (paras. 4-5) (Memorial, Annex 7).

[88] Affidavit of Reza Deghati (10 January 2023), Exhibit A, pp. 1-5 (Memorial, Annex 7).

various instances of alleged damage to property or the environment occurred after 15 September 1996, *i.e.,* more than two years after the end of hostilities.

57. Accordingly, while many of Azerbaijan's allegations are explicitly linked to events prior to the critical date for the Court's jurisdiction *ratione temporis*, other allegations are also jurisdictionally flawed by virtue of Azerbaijan's failure to substantiate their timing. Basic considerations of due process, procedural efficiency, and the need for the Parties' consent to the hearing of the case on the merits require that Azerbaijan demonstrate that its allegations fall within the scope of the Court's jurisdiction at this stage.

III. Azerbaijan's Historical Claims are Inadmissible

58. Although an authoritative statement of principle concerning the Court's jurisdiction *ratione temporis* would contribute greatly to legal security and predictability in the operation of compromissory clauses contained in multilateral

treaties,[89] fundamental considerations of party equality, judicial propriety, fairness, and good faith would in any event operate to render Azerbaijan's claims inadmissible in the case at hand.

59. Indeed, "the principle of equality of the Parties follows from the requirements of good administration of justice".[90] The Court has therefore found that, in accordance with its Statute, it must ensure that such equality is maintained

[89] In at least four cases in the past three decades, the Court was faced with the question of the application of compromissory clauses contained in multilateral conventions to events predating the entry into force of the convention between the parties. However, no *jurisprudence constante* has emerged. *First*, in *Bosnia and Herzegovina* v. *Yugoslavia*, a case which involved questions of State succession to the Genocide Convention, the Court "confine[d] itself to the observation that the Genocide Convention - and in particular Article IX - does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, para. 34. *Second*, in *Georgia* v. *Russian Federation*, it was not necessary for the Court to decide Russia's fourth preliminary objection that "any jurisdiction the Court might have is limited *ratione temporis* to the events which occurred after the entry into force of CERD as between the Parties, that is, 2 July 1999". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, paras. 22, 185. *Third*, in *Belgium* v. *Senegal*, the Court explicitly noted that its jurisdiction encompassed the parties' compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as of the date on which the applicant State, Belgium, became a party to the Convention, which was two years after its entry into force for Senegal, the respondent State. *See Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 104 ("The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal"). *Fourth*, in *Croatia* v. *Serbia*, Serbia argued that the Court's jurisdiction did not extend to "claim[s] in relation to events alleged to have taken place before" Croatia, the applicant State, became a party to the Genocide Convention, and that such claims would in any event be inadmissible. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, paras. 119, 442. However, the Court did not decide the question, instead dismissing the claims on other grounds.

[90] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 86.

in practice.[91] As with the principle of reciprocity discussed above,[92] this is fundamentally a question of fairness.[93] Moreover, since "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith",[94] States cannot be permitted to pursue claims that threaten the equality of the parties, fundamental fairness and the good administration of justice.

60. The Court has thus held that, when the good administration of justice is threatened, or there are "reasons why the Court should not proceed to an examination of the merits",[95] the Court is empowered to decline to exercise its jurisdiction.[96] Accordingly, even if the Court were to find that it has jurisdiction over some of Azerbaijan's historical claims against Armenia but not over Azerbaijan's own conduct during the same period (*quod non*), this would create an impermissible situation of inequality and fundamental unfairness, privileging one party for acceding later in time than another, that would, in Armenia's respectful submission, compel the Court to decline to exercise its jurisdiction.

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[91] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 85.

[92] *See supra* paras. 37-39.

[93] C. Tomuschat, "Article 36" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann & C. Tams, eds., 2019), p. 735 (**Annex 23**).

[94] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 457, para. 49; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, para. 46.

[95] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, para. 29. *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 118.

[96] *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 29 ("It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore").

61. Azerbaijan's three-decade delay in bringing its claims is yet another factor militating against the admissibility of its claims. Such a delay prejudices Armenia's ability to mount its defence, which would require investigating and obtaining evidence pertaining to events that occurred in the early 1990s. Relevant evidence has inevitably been lost or destroyed due to the passage of time, and many custodians of evidence or witnesses may no longer be living. Indeed, as explained above, Azerbaijan's own evidence is ambiguous and unsubstantiated, with Azerbaijan relying principally on contemporary conjectures about what may have happened and when. Through its unjustified delay in instituting these proceedings, Azerbaijan has not only prejudiced Armenia's defence, but also the Court's ability to ascertain the truth.

62. It is in light of such considerations that the Court has held that "delay on the part of a claimant State may render an application inadmissible".[97] Unless otherwise provided for by treaty, it is "for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible".[98] In the case at hand, nearly 29 years have passed since the conclusion of the First Nagorno-Karabakh War in May 1994 and more than 26 years have passed since Azerbaijan's accession to the CERD in September 1996. Notwithstanding Azerbaijan's objectives in instituting these proceedings, the objective reality is that the passage of time has substantially limited the availability of relevant evidence and irretrievably hindered the Court's ability to assess and decide the case before it. In these circumstances, in which Armenia's ability to

[97] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 32.

[98] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 32.

defend against far-reaching allegations is gravely undermined, the Court should reach the conclusion that Azerbaijan's delay has rendered its claims inadmissible.[99]

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63. For the reasons explained above, the Court plainly lacks jurisdiction over Azerbaijan's claims pertaining to the period prior to the CERD's entry into force as between the Parties on 15 September 1996, which are inadmissible in any event.

64. As such, the entirety of Azerbaijan's allegations pertaining to events that took place prior to 15 September 1996, including those set forth in Sections II.A and II.C.1 of its Memorial, cannot form the basis for establishing a breach of the CERD. Moreover, absent substantiation that they pertain to events postdating 15 September 1996, Azerbaijan's vague allegations described above must also be found to fall outside the Court's temporal jurisdiction, or be deemed inadmissible.

[99] Should Azerbaijan's claims be deemed to fall within the Court's jurisdiction and to be admissible, Armenia reserves all of its rights to request any relief that may be necessary to remedy any prejudice caused by Azerbaijan's delay in seising the Court. *See Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 36 ("[I]t will be for the Court, in due time, to ensure that [the applicant's] delay in seising it will in no way cause prejudice to [the respondent] with regard to both the establishment of the facts and the determination of the content of the applicable law").

CHAPTER 3. THE COURT LACKS JURISDICTION *RATIONE MATERIAE* OVER AZERBAIJAN'S CLAIMS AND CONTENTIONS CONCERNING LANDMINES, BOOBY TRAPS AND ENVIRONMENTAL HARM

65. In its Memorial, Azerbaijan alleges that by purportedly planting landmines and booby traps, and by engaging in conduct that allegedly caused environmental harm, Armenia committed acts of racial discrimination in violation of the CERD. This Chapter demonstrates that these claims and contentions do not fall within the scope of the Convention and that the Court therefore does not have jurisdiction *ratione materiae* to consider them. **Section I** lays out the legal standard governing questions of jurisdiction *ratione materiae*. **Section II** then shows that the Court has no jurisdiction *ratione materiae* under the CERD with respect to Armenia's alleged placement of landmines or booby traps. Finally, **Section III** shows that the Court has no jurisdiction *ratione materiae* under the CERD over Azerbaijan's claims and contentions concerning alleged environmental harm.

I. The Legal Standard Governing Questions of Jurisdiction *Ratione Materiae*

66. As stated, Azerbaijan invokes Article 22 of the CERD as the basis for the Court's jurisdiction. Article 22 provides that only disputes "with respect to the interpretation or application of" the CERD may be referred to the Court. Accordingly, only such disputes fall within the Court's jurisdiction *ratione materiae*.

67. The Court has not yet determined whether it has jurisdiction *ratione materiae* over this dispute. In its Orders on provisional measures, the Court merely concluded that it had *prima facie* jurisdiction to entertain the case pursuant to

Article 22.[100] That conclusion required the Court to decide only whether, on a *prima facie* basis, "at least *some of* the acts and omissions alleged by Azerbaijan to have been committed by Armenia are *capable* of falling within the provisions of the Convention"[101] and "whether, as a consequence, the dispute is one which the Court *could have* jurisdiction *ratione materiae* to entertain".[102]

68. It now falls to the Court to determine whether it in fact has jurisdiction *ratione materiae* over all the claims Azerbaijan presents. The analysis at this stage must necessarily be more exacting than that undertaken in the context of the provisional measures requests. Indeed, the Court must now "bring a detailed analysis to bear"[103] and examine "each of the provisions on which [Azerbaijan]

[100] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 405, para. 40; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 22 February 2023*, para. 13.

[101] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 405, para. 27 (emphasis added).

[102] *See, e.g., Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018,* p. 623, para. 30 (emphasis added). *See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia) Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 405, para. 15 ("The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction *could be founded*, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case") (emphasis added).

[103] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection (Separate Opinion of Judge Higgins), Judgment, I.C.J. Reports 1996*, p. 803, para. 29.

relies, in order to ascertain whether it permits [Azerbaijan's claims] to be considered as falling within the scope *ratione materiae* of the [CERD]".[104]

69. In carrying out this analysis, the Court must examine (1) any relevant provisions that define the scope of the treaty as a whole, and (2) the scope of any other substantive provisions on which the Applicant relies.

70. With respect to the scope of the treaty as a whole, the Court has explained that determining whether the acts complained of fall within the provisions of a treaty "may require the interpretation of the provisions that define the scope of the treaty".[105] In the context of the CERD in particular, the Court has further explained that its scope "exclusively concerns the prohibition of racial discrimination"[106] as defined under Article 1(1).[107]

71. Article 1(1) provides:

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[104] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J Reports 2019*, p. 7, para. 52. *See also Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, para. 16; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgement, I.C.J. Reports 1998*, p. 432, para. 38 ("[I]t is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, 'whether the force of the arguments militating in favor of jurisdiction is preponderant, and to 'ascertain whether an intention of the part of the Parties exists to confer jurisdiction upon it'").

[105] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2019,* p. 558, para. 57.

[106] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 104.

[107] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 113 ("[T]he Court does not have jurisdiction *ratione materiae* to entertain Qatar's third claim, since the measures complained of therein by that State do not entail, either by their purpose or by their effect, racial discrimination within the meaning of Article 1, paragraph 1, of the Convention").

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[108]

72. In determining whether the acts complained of fall within the provisions of the CERD, the Court must therefore determine (a) whether there is a distinction, exclusion, restriction or preference which is "based on" race, colour, descent, or national or ethnic origin; and, if so, (b) whether it has had the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms.

73. The Court's Judgment on Preliminary Objections in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* provides helpful guidance in determining whether the acts complained of in a particular case fall within the scope of Article 1 of the CERD.

74. In that case, the Court rejected Qatar's primary argument that the CERD prohibits discrimination "based on" current nationality.[109] Importantly, the Court *also* rejected Qatar's alternative argument that the acts complained of had also been taken "based on" national origin in the more narrow historical-cultural sense that

[108] CERD, Art. 1(1).

[109] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112.

unquestionably does fall within the scope of the CERD.[110] In the Court's words, "the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group *on the basis of their national origin*".[111]

75. The Judgment thus shows that the Court need not accept an Applicant's characterisation of the alleged "basis" on which the acts complained of were taken, but must instead independently evaluate whether the acts complained of were in fact taken "based on" race, colour, descent, or national or ethnic origin as required by Article 1.[112] If, even after accepting the Applicant's factual allegations as true (as opposed to the Applicant's *characterisation* of those allegations),[113] the Court

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[110] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 50 ("Qatar points out that the UAE's measures are not exclusively addressed to Qataris on the basis of their current nationality … It alleges that the measures imposed by the UAE penalize persons of Qatari national origin based on their identification with Qatari national traditions and culture, their Qatari accent or their Qatari dress. It further alleges that these measures discriminate against persons who are not Qatari citizens on the basis of their cultural identification as 'Qataris'"); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Written Statement of Qatar Concerning the Preliminary Objections of the United Arab Emirates* (30 August 2019), para. 18 (asserting that the UAE "intentionally target[ed] … persons of Qatari 'national origin' in the historical-cultural sense, irrespective of their present nationality").

[111] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021*, p. 71, para. 112 (emphasis added).

[112] As the Court recently confirmed in the *Ukraine* v. *Russia (ICSFT & CERD)* case, although "an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted", during this phase of the proceedings, the Court must "consider the questions of law and fact that are relevant to the objection to its jurisdiction". *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgement, I.C.J. Reports 2019,* p. 558, para. 58.

[113] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112 ("[T]he Court concludes that, even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention").

finds that the acts complained of were not taken "based on" race, colour, descent, or national or ethnic origin, they fall *ipso facto* outside the provisions of the CERD.

76. In determining whether the acts complained of were taken "based on" race, colour, descent, or national or ethnic origin, the Court has found that it is not enough to establish merely an indirect *effect* on a protected group.[114] The plain language of Article 1(1) makes clear that the requirement that the impugned acts be taken "based on" race, colour, descent, or national or ethnic origin is prior to and distinct from the requirement that the acts complained of also have the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms.[115] In other words, only if the Court finds that there was a distinction, exclusion, restriction or preference "based on" race, colour, descent, or national or ethnic origin does the *separate* threshold question of whether the acts complained of had the further "purpose or effect" of nullifying or impairing the equal enjoyment of human rights even become relevant.[116]

77. As noted above, in addition to examining the question of whether the acts complained of fall within the scope of the treaty as a whole (in this case by constituting racial discrimination under Article 1(1)), the acts complained of must also fall within the particular substantive provisions invoked. Thus, in *Certain*

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[114] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, paras. 109, 112 ("According to Qatar, a measure may be considered as 'based on' one of the grounds listed in Article 1 if, by its effect, it implicates a protected group … In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention").

[115] CERD, Art. 1(1).

[116] CERD, Art. 1(1).

Iranian Assets, the Court granted the United States of America's Preliminary Objection after concluding that Iran's claims with respect to sovereign immunity did not fall under the particular provisions of the Treaty of Amity invoked.[117] Similarly, in *Equatorial Guinea* v. *France*, the Court held that particular alleged violations of the Palermo Convention, concerning the purported overextension of France's jurisdiction in relation to the predicate offenses of money laundering, were not capable of falling within the provisions of the Palermo Convention upon which the relevant claims were based.[118] The Court therefore determined that it lacked jurisdiction to entertain that aspect of the dispute.

78. More generally, in determining whether the acts complained of fall within the provisions of the treaty, "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the [treaty]".[119] In other words, the acts complained of cannot have "too tenuous a connection" with the provisions upon which the Applicant seeks to establish the Court's jurisdiction.[120] Rather, "it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked".[121]

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[117] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 80 ("The Court concludes from all of the foregoing that none of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled, is of such a nature as to justify such a finding").

[118] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France*), *Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, para. 117.

[119] *Ambatielos case (merits: obligation to arbitrate), Judgement of May 19th, 1953: I.C.J Reports 1953,* p. 18.

[120] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 79.

[121] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 89.

79. It is ultimately for the Court to determine, "from all the facts and taking into account all the arguments advanced by the Parties", "whether an intention on the part of the Parties exists to confer jurisdiction upon it".[122] As explained below, no such intention can be discerned with respect to Azerbaijan's claims as they relate to landmines and booby traps (**Section II**) or alleged environmental harm (**Section III**).

II. The Court Lacks Jurisdiction *Ratione Materiae* over Azerbaijan's Claims and Contentions Concerning Landmines and Booby Traps

80. Armenia respectfully submits that the Court should find that it lacks jurisdiction *ratione materiae* with respect to Azerbaijan's claims and contentions concerning the alleged placement of landmines and booby traps because—even if they were accepted as true (*quod non*)—Armenia's alleged laying of landmines and booby traps, and any withholding of information about them, are not acts of racial discrimination that fall within the scope of the CERD.[123] These claims and contentions may or may not implicate other sources of law,[124] but they certainly do not implicate Armenia's obligations under CERD.

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[122] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 432, para. 38.

[123] Azerbaijan's factual submissions in this regard are at Memorial, paras. 116, 223, 273-283, and its legal submissions at Memorial, paras. 19, 446, 449-451, 532-534. *See also* Memorial, paras. 568-570, 574.

[124] For example, any obligation (and hence any claim relating to a failure in that regard) to provide information on the location of landmines after the end of a conflict is regulated by rules in the field of arms control. Those rules are found in treaties such as Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Convention On Prohibitions Or Restrictions On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects As Amended On 21 December 2001 and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. Similarly, any obligation (and hence any claim relating to a failure in that regard) not to plant landmines or booby traps in areas of either active armed conflict or along lines of contact after the cessation of hostilities—such as what constitute feasible precautions for protecting civilians from the effects of such weapons—are regulated by the laws of war, notably the 1907 Regulations concerning the Laws and Customs of War on Land and

81. As stated, at this stage in the proceedings, to find it has jurisdiction *ratione materiae*, the Court must determine whether the acts of which Azerbaijan complains fall within the provisions of the CERD.[125] In order to do so, Azerbaijan must show that the acts complained of constitute a distinction, exclusion, restriction or preference "based on" national or ethnic origin (the only categories its claims invoke),[126] and that they had "the purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms.

82. Azerbaijan fails to show that Armenia's alleged use of landlines and booby traps amount to a distinction, exclusion or restriction "based on" national or ethnic origin (**Section A**), or that its actions had either the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms (**Section B**). Indeed, virtually all of the allegations in Azerbaijan's Memorial simply restate evidence that it previously presented in its two requests for provisional measures, which the Court decided was insufficient to establish, even *prima facie*, that Armenia's alleged conduct constituted racial discrimination under the CERD. Azerbaijan's claims and contentions regarding Armenia's alleged use of landmines and booby traps therefore not only have "too tenuous a connection"[127] with any substantive CERD provision, but they also fall

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Additional Protocols I and II of the 1949 Geneva Conventions. The Court may naturally take account of the regulation of a matter by other sources of law when considering the scope of its jurisdiction under a particular instrument.

[125] *See supra*, para. 68.

[126] *See, e.g.*, Memorial, para. 451 ("Where, as here, the targeted civilians are selected on the basis of ethnic origin or national origin, the use of landmines against them constitutes a violation of CERD").

[127] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 79. *See also Ambatielos case (merits: obligation to arbitrate), Judgement of May 19th, 1953: I.C.J Reports 1953,* p. 18; *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 89.

outside the scope of the Convention in its entirety and must be dismissed in full at this stage.

A. ARMENIA'S ALLEGED USE OF LANDMINES AND BOOBY TRAPS DOES NOT CONSTITUTE A DISTINCTION, EXCLUSION, RESTRICTION OR PREFERENCE "BASED ON" NATIONAL OR ETHNIC ORIGIN

83. Even accepting Azerbaijan's factual allegations as true (*quod non*), Armenia's alleged use of landmines and booby traps would not constitute a distinction, exclusion, restriction or preference "based on" national or ethnic origin, and therefore could not constitute racial discrimination within the meaning of Article 1(1) of the CERD.

84. By their nature, landmines are indiscriminate weapons that are incapable of making a distinction based on national or ethnic origin. The toll that these weapons, and other remnants of war, has exacted on all sides of the conflict is heavy.[128] Azerbaijan itself has acknowledged and accepted this fact.[129] So has Azerbaijan's Commissioner for Human Rights and Ombudsperson, who has stressed not only that landmines are "indiscriminate by nature",[130] but also that they "have

[128] *See, e.g.*, "Nagorno-Karabakh conflict: Landmines, a disturbing reminder of war", *ICRC* (31 May 2019), *available at* https://www.icrc.org/en/document/nagorno-karabakh-conflict-landmines-disturbing-reminder-war (**Annex 17**); Artak Beglaryan, *Facebook* (4 April 2023), *available at* https://www.facebook.com/Artak.A.Beglaryan/posts/6344191602285690 (in which the former Human Rights Ombudsman of the Republic of Artsakh states, *inter alia*, that "[t]housands of Nagorno-Karabakh citizens, including at least 1,076 civilian persons (many of them children and women), have been killed or injured as a result of landmine and other unexploded ordnance explosions", and notes that he himself was "one of the victims of those accidents") (**Annex 28**).

[129] *See, e.g.*, CR 2021/24, p. 22, para. 6 (Lowe).

[130] Ad Hoc Report of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *Mine Problem in the Liberated Areas* (June 2021), *available at* https://www.ombudsman.az/upload/editor/files/Ad%20Hoc%20Report%20of%20the%20Ombudsman%20on%20landmine%20problem.pdf, p. 4 (**Annex 12**).

indiscriminate effects".[131] Such statements, and actual events in Nagorno-Karabakh, both confirm that landmines are *per se* non-discriminatory.[132]

85. None of the facts alleged by Azerbaijan in any way suggest that Armenia's use of landmines amounts to a distinction "based on" national or ethnic origin. On the contrary, and as Armenia demonstrated in response to Azerbaijan's two requests for provisional measures, any placing of landmines by Armenia was done exclusively for defensive military purposes and only along the line of contact between military forces.[133]

86. Booby traps, like landmines, are also indiscriminate by nature. They can cause harm to individuals of any national or ethnic origin. Azerbaijan agrees with this proposition as well, claiming that booby traps "are a real and present threat to Azerbaijani IDPs and *anyone else* engaged in clearance and reconstruction operations in the liberated territories".[134] Moreover, Armenia has always denied and continues to deny ever laying booby traps,[135] and Azerbaijan has not produced any evidence to the contrary.

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[131] Ad Hoc Report of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, *Mine Problem in the Liberated Areas* (June 2021), *available at* https://www.ombudsman.az/upload/editor/files/Ad%20Hoc%20Report%20of%20the%20Ombudsman%20on%20landmine%20problem.pdf, p. 15 (**Annex 12**).

[132] As one example presented by Armenia during the first provisional measures hearing shows, a single landmine can injure individuals of multiple backgrounds. In the situation referred to, an Azerbaijani officer was killed and several ethnic Armenians and a Russian peacekeeper were injured when a landmine exploded. *See* CR 2021/25, p. 27, para. 22 (Murphy) (citing to "Land Mine Kills Officer as Search Continues for Armenian, Azerbaijani Missing", *Radio Free Europe/Radio Liberty* (23 November 2020), *available at* https://www.rferl.org/a/land-mine-kills-officer-search-for-armenian-azerbaijanimissing/30965287.html (**Annex 25**)).

[133] *See* CR 2021/25, pp. 22-23, paras. 7-9 (Murphy); CR 2023/4, pp. 12-13, paras. 3-5 (Murphy); *ibid*., pp. 17-26, paras. 20-48 (Murphy).

[134] *See, e.g.*, Memorial, para. 282.

[135] *See* CR 2023/4, p. 28, para. 54 (Murphy).

87. The Court has already twice decided, at the provisional measures stage, that the evidence presented by Azerbaijan was insufficient to establish, even *prima facie*, that Armenia's alleged conduct constituted racial discrimination under the CERD.[136] None of the facts alleged in the Memorial—which was already before the Court by the time it issued its second Order on provisional measures—in any way suggest that Armenia's alleged use of landmines and booby traps was "based on" national or ethnic origin. On the contrary, as demonstrated in Annex 15 submitted with these Preliminary Objections,[137] Azerbaijan's Memorial does little more than simply restate the allegations made during the provisional measures phase, relying almost entirely on evidence produced there.

88. There are only three new allegations impugning Armenia (allegedly supported by only three new annexes) not previously presented in Azerbaijan's provisional measures requests, none of which support the contention that Armenia's alleged actions related to landmines and booby traps are "based on" national or ethnic origin.

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[136] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 7 December 2021*, p. 405, para. 53; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 22 February 2023*, para. 23. In particular, and as discussed in Section 3.III.B below, the Court found that Azerbaijan had "not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 7 December 2021*, p. 405, para. 53. While the Court did not explicitly address the separate requirement that the acts complained of be "based on" national or ethnic origin, its conclusion that there was no evidence indicating that Armenia's alleged conduct had the "purpose" of impairing the equal enjoyment of human rights strongly suggests that Armenia also could not have acted "based on" national or ethnic origin, and that the acts complained of fall outside the scope of the CERD for that reason as well.

[137] *See* Azerbaijan's Allegations Concerning Landmines and Booby Traps (April 2023) (**Annex 15**).

89. Two of these new allegations are very closely associated with the facts presented by Azerbaijan in its requests. The first is that Armenia "seeded the Line of Contact with anti-personnel landmines", which relies on factual findings by the Mine Action Agency of the Republic of Azerbaijan.[138] Similar evidence advanced in Azerbaijan's first request expressly stated that landmines had been "confirmed" only along the Line of Contact and characterised the mines in this area as "traditional military doctrine barrier defences",[139] making clear that even on Azerbaijan's own case, they were there for defensive purposes unrelated to the CERD.

90. The second allegation is that maps provided by Armenia are inaccurate, which also relies entirely on findings by the Mine Agency of the Republic of Azerbaijan.[140] The provision of maps by Armenia to Azerbaijan was also part of Azerbaijan's allegations at the provisional measures stage.[141] These "new" allegations and their supporting evidence clearly change nothing from the Court's prior assessment.

91. The third new allegation presented by Azerbaijan is that Armenia allegedly planted landmines and booby traps in Shahumyan (Kalbajar) district in 1993.[142] This proposition, which relies exclusively on one interview by Colonel Koryun Gumashyan (given almost thirty years after the alleged event), obviously relates to

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[138] Memorial, para. 223.

[139] *See* CR 2021/25, p. 30, paras. 30-31 (Murphy) (citing to 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) (Azerbaijan's Request for Provisional Measures (23 September 2021), Annex 32)).

[140] Memorial, para. 275.

[141] *See* Azerbaijan's Request for Provisional Measures (23 September 2021), paras. 11-14; CR 2021/25, paras. 12-14 (Murphy); CR 2021/27, paras. 2, 5, 6, 13-16 (Murphy); CR 2023/4, para. 66 (Murphy).

[142] Memorial, paras. 116, 276.

a period of armed conflict and defensive manoeuvres by opposing forces, with any claim of discrimination purportedly based on the prospect that at some future point ethnic Azerbaijanis *might* return to the Shahumyan (Kalbajar) district. The remoteness of this alleged fact—which occurred well before the CERD even entered into force between the two States—to any discrimination under the CERD is obvious.

92. In sum, there is nothing in Azerbaijan's Memorial to establish that Armenia's alleged laying of booby traps could have been "based on" national or ethnic origin, and could therefore constitute racial discrimination. The acts complained of thus do not fall within the provisions of the CERD for that reason alone.

B. Armenia's Alleged Use of Landmines and Booby Traps Does Not Have a Discriminatory Purpose or Effect

93. Azerbaijan's claims and contentions *also* fail because, even accepting Azerbaijan's allegations as true (which Armenia categorically does not), Armenia's alleged planting of landmines and booby traps did not have "the purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms. Azerbaijan's claims and contentions concerning landmines and booby traps therefore fall outside the scope of the CERD for that reason as well.

94. To begin with, Azerbaijan cannot even identify who exactly laid the landmines and booby traps about which it complains. Rather than presenting facts suggesting any actual discriminatory purpose, its position rests entirely on conjecture. As noted above,[143] and as demonstrated in Armenia's responses to

[143] *See supra*, para. 85.

Azerbaijan's two requests for provisional measures,[144] Armenia only used landmines for military defence purposes along the lines of contact.

95. Azerbaijan's allegations related to booby traps and their connection to the CERD are equally flawed. The alleged use of booby traps set up by unknown persons in Lachin town, Aghavno (Zabukh) village and Sus village,[145] areas that were under the control of the Russian peacekeeping contingent at the time in question, bears no relationship to any provision of the CERD.[146] Not only has Azerbaijan failed to provide any evidence that these devices were planted by the Armenian Armed Forces, as it suggests, but it has also failed to demonstrate any discriminatory purpose or intent.

96. Azerbaijan has similarly failed to show that the acts complained of had a discriminatory *effect* on Azerbaijanis as a national or ethnic group. To the extent the placement of landmines and booby traps could be said to specially affect a particular group, that group could only be Azerbaijani *nationals* who are members of the Armed Forces. Azerbaijani nationals are not all ethnic Azerbaijanis—this much Azerbaijan proudly acknowledges. In fact, Azerbaijan has touted its multi-ethnic society on countless occasions, claiming that it "encapsulates the diversity found throughout the Caucasus region", and that it "encompasses *an array of other ethnic groups*, including substantial numbers of Armenians, Russians, Ukrainians, Lezgis, Talyshs, Avars, Kurds, Jews and Tatars".[147] Azerbaijan's own characterisation underscores that an effect on its citizens is not an effect on

[144] *See* CR 2021/25, pp. 22-23, paras. 7-9 (Murphy); CR 2023/4, pp. 12-13, paras. 3-5 (Murphy); *ibid*. pp. 17-26, paras. 20-48 (Murphy).

[145] *See* Memorial, para. 281.

[146] *See* CR 2023/4, pp. 27-29, paras. 52-59 (Murphy).

[147] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, Application of Azerbaijan, para. 3 (emphasis added).

individuals of a particular national or ethnic group. As the Court clearly held in *Qatar* v. *United Arab Emirates*, it does not have jurisdiction under the CERD when the measure complained of by a party is predicated on adverse effects caused to *nationals* of a party.[148] As such, these allegations cannot fall within any of the specific provisions of the CERD.

97. Consistent with these conclusions, in its 7 December 2021 Order on provisional measures, the Court stated that although

> "a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD … Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin".[149]

98. The Court repeated that conclusion in its 22 February 2023 Order on provisional measures, saying that the same conclusion applied to the "new" facts presented in Azerbaijan's second request.[150] Moreover, the Court found the same conclusion also applied to Azerbaijan's facts concerning booby traps.[151]

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[148] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, para. 105.

[149] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 7 December 2021*, p. 405, para. 53.

[150] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 22 February 2023*, para. 23.

[151] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 22 February 2023*, para. 23.

99. There is nothing set forth in Azerbaijan's Memorial—which, as noted above, had in fact already been submitted by the time the Court issued its 22 February 2023 Order—that can change the Court's conclusion that the CERD does not even *plausibly* impose "any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines".[152] As discussed above,[153] virtually all of Azerbaijan's allegations in the Memorial simply cite back to the evidence Azerbaijan presented at the provisional measures phase, providing no basis for revisiting the position taken by the Court with respect to Azerbaijan's two requests for provisional measures of protection. As such, Azerbaijan still "has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin".[154] Azerbaijan's claims with respect to landmines and booby traps therefore do not fall within the provisions of the CERD for that reason as well.

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100. In sum, and to again borrow the words of the Court in *Qatar* v. *United Arab Emirates*, "even if the measures [concerning landmines and booby traps] of which [Azerbaijan] complains … were to be proven on the facts, they are not capable of

[152] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 7 December 2021*, p. 405, para. 53.

[153] *See supra*, paras. 87-91.

[154] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 7 December 2021*, p. 405, para. 53; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, *Order of 22 February 2023*, para. 23.

constituting racial discrimination within the meaning of the Convention".[155] The acts complained of were not "based on" national or ethnic origin, nor did they have the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms. As such, they not only have "too tenuous a connection"[156] with the substantive provisions on which Azerbaijan relies, but they fall entirely outside the scope of the Convention. They are therefore outside the Court's jurisdiction *ratione materiae* and must be dismissed at the preliminary stage.

III. The Court Lacks Jurisdiction *Ratione Materiae* over Azerbaijan's Claims and Contentions Concerning Alleged Environmental Harm

101. This Section demonstrates that the Court does not have jurisdiction *ratione materiae* over Azerbaijan's claims and contentions concerning alleged environmental harm.[157]

102. **Section A** explains why, even accepting the acts complained of as true (*quod non*), they do not constitute "racial discrimination" within the meaning of Article 1(1) of the CERD and therefore fall outside the Court's jurisdiction. **Section B** then explains why the acts complained of do not fall within the scope of two of the three particular rights on which Azerbaijan relies.

[155] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112.

[156] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 79.

[157] Azerbaijan's factual submissions in this regard are at Memorial, paras. 291-344, and its legal submissions at Memorial, paras. 459-485. *See also* Memorial, para. 591(1)(a)(iii).

A. THE ACTS COMPLAINED OF DO NOT CONSTITUTE RACIAL DISCRIMINATION

103. As stated,[158] for the Court to have jurisdiction, Azerbaijan must establish that the alleged acts and omissions for which it claims Armenia is responsible constitute "racial discrimination" as defined in Article 1(1) of the CERD. As also stated,[159] for an act or omission to constitute "racial discrimination" under Article 1(1), it must be (a) a distinction, exclusion, restriction or preference "based on" race, colour, descent, or national or ethnic origin, that (b) has the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms.

104. Azerbaijan has not shown any of these elements in stating its environmental claims. Indeed, even assuming *arguendo* that its allegations are true, the acts of which it complains do not constitute a distinction, exclusion, restriction or preference that was "based on" national or ethnic origin (**Section 1**). They also did not have the "purpose or effect" of nullifying or impairing ethnic Azerbaijanis' equal enjoyment of human rights and fundamental freedoms (**Section 2**). In the absence of such showings, the environmental harms complained of do not fall within the CERD and are therefore outside the Court's jurisdiction *ratione materiae*.

1. *Armenia's alleged actions causing harm to the environment do not constitute a distinction, exclusion, restriction or preference "based on" national or ethnic origin*

105. Even viewing Azerbaijan's claims and contentions in the light most favourable to it, Armenia's alleged acts or omissions causing harm to the environment would not constitute distinctions, exclusions, restrictions or

[158] *See supra*, para. 70.

[159] *See supra*, para. 72.

preferences that are "based on" national or ethnic origin.[160] They therefore once again cannot constitute "racial discrimination" within the meaning of Article 1(1) of the CERD for that reason alone.

106. Like landmines and booby traps, environmental harm is indiscriminate by nature. Whether the harm is to land, air or water, it does not and cannot distinguish, exclude, restrict or prefer its victims based on national or ethnic origin. In some cases, environmental harm can also be transboundary, simultaneously affecting several geographic areas and populations. In fact, in the arbitration it recently instituted under the Bern Convention on the Conservation of European Wildlife and Natural Habitats, Azerbaijan has brought claims against Armenia for the alleged transboundary pollution of rivers that flow through Armenia, Nagorno-Karabakh and Azerbaijan. Given the very nature of environmental harm, it is difficult even to conceive of a scenario in which a State might use such harm as a form of differential treatment to target a particular group.

107. That being the case, it is not surprising that nowhere in the almost 50 pages that Azerbaijan devotes to arguing that Armenia's alleged acts or omissions harming the environment constituted racial discrimination does Azerbaijan suggest that Armenia's conduct was expressly "based on" national or ethnic origin. To the contrary, Azerbaijan accepts that many of Armenia's alleged acts were *economically* motivated. For example, Azerbaijan's nominal environmental experts "determined that … logging was done '*for commercial purposes*'".[161]

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[160] As with Azerbaijan's claims concerning landmines and booby traps, these are the only two protected categories its environmental claims invoke. *See, e.g.*, Memorial, para. 465 ("Armenia's deleterious conduct towards the environment had both the *purpose* and the *effect* of harming Azerbaijanis in the exercise of their protected rights *based on their* ***national or ethnic origin***") (some emphasis added).

[161] Memorial, para. 310 (citing to Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan, for Use in Proceedings*

Similarly, according to Azerbaijan, "forests were also clear-cut *to make way for mines, hydropower plants, and associated infrastructure, such as access roads and powerlines*".[162] These acts were therefore not taken "based on" national or ethnic origin. Even on Azerbaijan's own case, they were undertaken for more prosaic reasons: economic development.

108. Rather than argue that Armenia's conduct was expressly "based on" national or ethnic origin, Azerbaijan asserts instead that the ethnic motivation of Armenia's actions can somehow be *inferred*. In particular, Azerbaijan focuses on the so-called "differential treatment" of areas that it claims were populated predominantly by ethnic Azerbaijanis (more than 75%) before the First Nagorno-Karabakh War, as compared to areas populated predominantly by ethnic Armenians (again, more than 75%).[163] Azerbaijan also makes much of the claim that Armenia allegedly mismanaged the Sarsang Reservoir and other water infrastructure, thus depriving Azerbaijanis of water.[164] "The only credible *inference*", Azerbaijan argues, is that Armenia's environmental conduct was "purposely aimed at Azerbaijanis as an ethnic or national group".[165]

109. The fact that Azerbaijan must resort to an "inference" is by itself telling. But even accepting all of the evidence Azerbaijan adduces as true (*quod non*), there is no basis for the inference it asks the Court to make. Consistent with its Judgement

Before the International Court of Justice in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia) (12 January 2023), p. 13 (emphasis added) (Memorial, Annex 65)).

[162] Memorial, para. 311 (emphasis added).

[163] Memorial, paras. 301, 466, p. 245 (Figure 67).

[164] Memorial, para. 467.

[165] Memorial, para. 468 (emphasis added).

in *Qatar* v. *United Arab Emirates*, the Court may therefore reject that inference even at this preliminary stage.

110. The ethnic Armenians of Nagorno-Karabakh have long claimed the region, including the surrounding areas that Azerbaijan calls the "Liberated Territories" or "Azerbaijani districts", as their homeland. An article Azerbaijan itself cites emphasizes that, for the ethnic Armenians of Nagorno-Karabakh, these districts "[are] not occupied territories—they're their homeland".[166]

111. As such, those territories are protected by the founding instruments of the Nagorno-Karabakh Republic. Its 1992 Declaration of Independence, for example, was made on the "understanding [of] the responsibility for the fate of the historical Motherland".[167] Similarly, the 2006 Constitution of the Nagorno-Karabakh Republic affirmed the people of Artsakh's "responsibility for the fate of [their] historic Homeland before present and future generations".[168] And the 2017 Constitution continues in the same spirit and recognizes that the people of Artsakh "stay[] faithful to the dream of their ancestors to freely live and create in their homeland".[169]

112. Thus, even if the environmental damage Azerbaijan alleges were attributable to Armenia (*quod non*), such damage occurred in areas that, on

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[166] J. Kucera, "For Armenians, they're not occupied territories – they're the homeland", *Eurasianet* (6 August 2018), *available at* https://eurasianet.org/for-armenians-theyre-not-occupied-territories-theyre-the-homeland, PDF p. 1 (**Annex 24**).

[167] Office of the Nagorno Karabakh Republic, *Declaration on State Independence of the Nagorno Karabakh Republic* (6 January 1992), *available at* http://www.nkrusa.org/nk_conflict/declaration_independence.shtml, PDF p. 3 (**Annex 30**).

[168] Constitution of the Nagorno Karabakh Republic (2006), *available at* http://www.nkrusa.org/country_profile/constitution.shtml, PDF p. 2 (**Annex 32**).

[169] Constitution of the Republic of Artsakh (2017), *available at* http://president.nkr.am/media/documents/constitution/Constitution-eng2017.pdf, PDF. p. 1 (**Annex 33**).

Azerbaijan's own case, ethnic Armenians viewed as historically Armenian and in which they intended to continue living. To argue ethnic motivation behind the alleged environmental damage is thus counterintuitive and not credible at all.

113. Relatedly, the heart of Azerbaijan's case is that during the First Nagorno-Karabakh War, Armenia conducted an "ethnic cleansing" campaign to create "an ethnically 'pure' Armenian settlement" in Nagorno-Karabakh.[170] Azerbaijan contends that "virtually no Azerbaijanis remain[ed]" in the region after 1994.[171] The alleged environmental harms Azerbaijan complains of, however, took place between the First and Second Nagorno-Karabakh War; that is, *after* the Azerbaijani population had allegedly been "ethnically cleansed" from the region. According to Azerbaijan's Memorial, for example:

- "8900 hectares of forest [were] verified as lost from the-then occupied territories *during the occupation period*";[172]

- "Of the registered natural monument trees in the then-occupied territories, at least 38 were destroyed *during Armenia's occupation*";[173]

- "'[T]he total amount of agricultural land lost from productivity' *during the occupied period between 1995 and 2015* [was] 54,544 hectares";[174]

[170] Memorial, para. 93.

[171] Memorial, paras. 54, 93.

[172] Memorial, para. 303 (emphasis added).

[173] Memorial, para. 317 (emphasis added).

[174] Memorial, para. 324 (emphasis added).

- "'[H]undreds of kilometres' of irrigation canals in the liberated territories were abandoned, unmaintained, and blocked *during Armenia's occupation*".[175]

114. It is thus simply not credible to assert that the ethnic Armenians of Nagorno-Karabakh, or Armenia for that matter, have engaged in the alleged conduct "based on" national or ethnic origin when, according to Azerbaijan's own case, ethnic Azerbaijanis no longer lived in the relevant territories and the Armenian population had no intention of allowing them to return.[176] The Court need not look beyond this fundamental contradiction in Azerbaijan's own case before concluding that it has no jurisdiction over the alleged environmental harm claims.

115. With respect to Azerbaijan's claims about the destruction and degradation of forests in the "Liberated Territories" in particular, there is still another reason why Azerbaijan's "inference" is not credible. According to Azerbaijan's own environmental experts, "[t]he primary identifiable cause of forest harm, and one that occurred in every district, is fire".[177] Yet nowhere in its Memorial does Azerbaijan claim that Armenia was responsible for causing those wildfires, much less that it did so "based on" ethnic origin. Azerbaijan has also produced no evidence that Armenia failed to control wildfires only in "Azerbaijani districts" to

[175] Memorial, para. 333 (emphasis added).

[176] *See, e.g.*, Memorial, para. 409 ("Armenia is not willing to support withdrawal from the seven occupied districts around Nagorno-Karabakh, or allow the return of Azerbaijani [IDPs] to Nagorno-Karabakh"); para. 453 ("[I]n preventing the return of Azerbaijanis who had been expelled from the then-occupied territories or from Armenia, Armenia uprooted their entire lives"); para. 533 ("Armenia not only expelled Azerbaijanis as an ethnic or national origin group, but also took steps to ensure Azerbaijanis could not and would not return to their homes").

[177] *See* Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan, for Use in Proceedings Before the International Court of Justice in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (12 January 2023), p. 14 (Memorial, Annex 65).

target ethnic Azerbaijanis.[178] Moreover, even accepting that "Azerbaijani districts" suffered from more significant forest loss than other districts (*quod non*), Azerbaijan's own environmental experts admit that "[f]or a significant portion of forest reduction across the Formerly Occupied Area, *no specific cause has yet been identified*".[179] Without a cause, there can be no genuine claim of responsibility, still less responsibility for conduct "based on" national or ethnic origin.

116. Similarly, with respect to Azerbaijan's claims concerning the alleged mismanagement of the Sarsang Reservoir, Azerbaijanis living downstream from the Reservoir are not the only population that depends on it for water. On the contrary, the Reservoir irrigates thousands of hectares of farmland in Nagorno-Karabakh and supplies water for the largest and most important hydroelectric plant in the area.[180] Its management has therefore been critical to the survival of the ethnic Armenian population in the region, and it is inconceivable that the Reservoir would have been mismanaged "based on" Azerbaijani national or ethnic origin.

117. Just as the Court refused in *Qatar* v. *United Arab Emirates*, at the preliminary stage, to accept Qatar's argument that the acts complained of had been "based on" national origin in the historical-cultural sense (rather than just

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[178] *See* Memorial, paras. 312-315.

[179] Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan, for Use in Proceedings Before the International Court of Justice in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (12 January 2023), p. 14 (emphasis added) (Memorial, Annex 65).

[180] Council of Europe, Parliamentary Assembly, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (12 December 2015), *available at* https://pace.coe.int/en/files/22290, paras. 9, 10 (**Annex 29**). *See also* "Water Security and the Nagorno-Karabakh Conflict", *Planetary Security Initiative* (4 October 2022), *available at* https://www.planetarysecurityinitiative.org/news/water-security-and-nagorno-karabakh-conflict, PDF p. 2 ("Located on the Tartar River, which flows through climate-vulnerable agricultural regions in Azerbaijan, the Sarsang dam accounts for roughly half of the hydropower production of Nagorno-Karabakh") (**Annex 18**).

nationality),[181] it can and should reject Azerbaijan's wholly baseless claim that Armenia's alleged acts or omissions affecting the environment were "based on" national or ethnic origin. The Court need not further look into the merits of issues that manifestly have nothing to do with conduct "based on" national or ethnic origin, and Azerbaijan's claims with respect to the environment must be dismissed for that reason alone.

2. *Armenia's alleged acts or omissions causing environmental harm also did not have a discriminatory purpose or effect*

118. In addition to not being "based on" national or ethnic origin, the acts about which Azerbaijan complains also did not have the "purpose or effect" of nullifying or impairing ethnic Azerbaijanis' equal enjoyment of human rights and fundamental freedoms. The Court lacks jurisdiction *ratione materiae* over Azerbaijan's environmental claims for that reason too.

119. As stated, stripped to its essence, Azerbaijan's case is that Armenia occupied portions of its territory, claimed that territory as its historic homeland, and drove out the Azerbaijani inhabitants with no intention of allowing them to

[181] *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 50 ("Qatar points out that the UAE's measures are not exclusively addressed to Qataris on the basis of their current nationality … It alleges that the measures imposed by the UAE penalize persons of Qatari national origin based on their identification with Qatari national traditions and culture, their Qatari accent or their Qatari dress. It further alleges that these measures discriminate against persons who are not Qatari citizens on the basis of their cultural identification as 'Qataris'"); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Written Statement of Qatar Concerning the Preliminary Objections of the United Arab Emirates* (30 August 2019), para. 1.18 (asserting that the UAE "intentionally target[ed] … persons of Qatari 'national origin' in the historical-cultural sense, irrespective of their present nationality"); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Preliminary Objections, Judgement, I.C.J. Reports 2021,* p. 71, para. 112 ("[T]he various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin").

return. At the same time, Azerbaijan also asks the Court to entertain the claim that over the following three decades, Armenia damaged the environment in a manner that constituted racial discrimination against persons who had already allegedly been "forcibly expelled from" and "prevent[ed] [from] return[ing] to" the territories where the alleged environmental harm occurred,[182] and who were purportedly not expected to live there in the future.[183] In other words, Azerbaijan alleges that (a) Armenia harmed the environment of territory in which it was purportedly determined to—and allegedly did—settle *Armenians*, simply because Azerbaijanis had *previously* lived there, and that (b) this amounts to "racial discrimination" against the former Azerbaijani population, inflicted through the bizarre means of harming the lands and the environment where Armenia purportedly wanted its *own* people to settle. As discussed further below, it is impossible in such circumstances to discern *either* a discriminatory "purpose" *or* a discriminatory "effect".

120. The lack of a discriminatory "purpose" follows *ipso facto* from the fact that the acts complained of were not "based on" ethnicity or national origin. After all, acts that were not "based on" on national or ethnic origin—whether facially or with a hidden intent—could not possibly have had the "purpose" of impairing a protected group's equal enjoyment of human rights and fundamental freedoms.

[182] Memorial, paras. 3, 13, 51, 228.

[183] As to the present day, see for example Azerbaijan's case as set out at Memorial, para. 228: "In practice, Armenia's actions to exclude Azerbaijanis as a group and prevent their return to their rightful homes and lands continues to be felt today". *See also* Memorial, para. 233 (claiming that Armenia, while an "occupying power", "implemented policies affirmatively encouraging the settlement of ethnic Armenians throughout the then-occupied territories, including in areas that prior to occupation had been inhabited entirely or primarily by Azerbaijanis", and thereby "cemented its cleansing of all Azerbaijanis from the then-occupied territories and ensured the newly monoethnic Armenian character of these territories"); para. 459 (describing the alleged environmental damage as having been committed by Armenia "[i]n pursuit of its campaign of ethnic cleansing").

Indeed, it is absurd to speak of a "purpose" of impairing the equal enjoyment of rights by a group that, on Azerbaijan's own case, was never intended to return.

121. It is precisely because, even accepted as true, the acts complained of do not show a discriminatory purpose that Azerbaijan is forced to fall back on the argument that Armenia's alleged acts constitute "racial discrimination" under Article 1(1) merely because they are said to have a disproportionate *effect* on ethnic Azerbaijanis.[184] As discussed above,[185] in the absence of a distinction, exclusion, restriction or preference that is "based on" national or ethnic origin, mere disparate impact is not enough. But even if it were, Azerbaijan's claims would still fail for two different reasons, discussed in turn below.

(a) The alleged acts or omissions causing environmental harm could not have had a disproportionate effect on the equal enjoyment of the rights of Azerbaijanis who Azerbaijan claims did not live in Nagorno-Karabakh

122. The alleged acts and omissions of which Azerbaijan complains fall into six categories: (a) destruction and degradation of forests in the so-called "Liberated Territories";[186] (b) destruction and degradation of natural monument trees in the "Liberated Territories";[187] (c) destruction and pillaging of water infrastructure in the "Liberated Territories";[188] (d) destruction and degradation of vital agricultural land and vineyards in the "Liberated Territories";[189] (e) destruction and degradation of land and water quality through strip mining in the "Liberated

[184] *See* Memorial, para. 469.

[185] *See supra*, para. 76.

[186] Memorial, paras. 303-316.

[187] Memorial, paras. 317-318.

[188] Memorial, paras. 319-322.

[189] Memorial, paras. 323-328.

Territories";[190] and (f) neglecting and mismanaging water infrastructure in the "Liberated Territories", particularly the Sarsang Reservoir, allegedly affecting the Azerbaijani population living downstream from the reservoir in Azerbaijan.[191]

123. Except for the last category (namely, the neglect and mismanagement of water infrastructure), Azerbaijan's *sole* basis for claiming a discriminatory effect is that the alleged acts took place in, and impacted, the areas said to have been predominantly populated by Azerbaijanis *before* the First Nagorno-Karabakh War.

124. Unsurprisingly, Azerbaijan offers no evidence that ethnic Azerbaijanis, who had allegedly been "ethnically cleansed" from the very same areas long before the alleged environmental harm occurred, were *actually* impacted, let alone disproportionately.

(b) In any event, the alleged environmental harms would have had a similar effect on other ethnic groups

125. The alleged acts of environmental destruction, degradation and neglect, even if proven, would have impacted many ethnic groups, not just ethnic Azerbaijanis, particularly given that ethnic Armenians continued to live in Nagorno-Karabakh at the time of such acts. In fact, on Azerbaijan's own articulation of its case, if any ethnic group was disproportionately impacted by the acts about which it complains, it would have to have been the ethnic Armenians who lived in the areas in which the environment was allegedly harmed.

126. As stated, Azerbaijan's own evidence shows that a majority ethnic Armenian population lived in Nagorno-Karabakh and the surrounding territories when the alleged environmental harms occurred. For example, Azerbaijan claims

[190] Memorial, paras. 329-331.

[191] Memorial, paras. 332-343.

that, by 2005, thousands of ethnic Armenian settlers had populated the Shahumyan (Kalbajar) and Karshatagh (Zangelan and Gubadly) districts, and the eastern-most parts of Askeran and Martakert (Aghdam) districts, where the alleged destruction of forests, natural monumental trees, water infrastructure and agricultural land took place.[192] According to Azerbaijan, at that time "137,380 ethnic Armenians resid[ed] in the then-occupied territories, [accounting for] 99.7% of its population".[193] Similarly, Azerbaijan claims that, in 2015, ethnic Armenians accounted for 95% of the population in Nagorno-Karabakh.[194] If the alleged harm indeed occurred, it would have been felt first and foremost by the ethnic Armenians who lived in Nagorno-Karabakh and the surrounding districts until forcibly removed by Azerbaijan, not ethnic Azerbaijanis who Azerbaijan says had left the area.

127. Azerbaijan's only claim about alleged environmental harm that allegedly disproportionately affected ethnic Azerbaijanis living *outside* Nagorno-Karabakh and the surrounding territories concerns the Sarsang Reservoir. According to Azerbaijan, the Reservoir was mismanaged by Armenia, depriving 400,000 Azerbaijanis living in the lower Karabakh region of fresh water.[195] On Azerbaijan's own evidence, however, there were 138,000 inhabitants of Nagorno-Karabakh who *also* depended on the Sarsang Reservoir for water and energy[196]—and the ones who have survived Azerbaijan's campaign of ethnic cleansing still do. Thus, the

[192] Memorial, para. 242.

[193] Memorial, para. 242 (citing to Republic of Nagorno-Karabakh, *De Jure Population (Urban, Rural) by Age and Ethnicity* (2002), *available at* http://census.stat-nkr.am/nkr/5-1.pdf (**Annex 31**)).

[194] *See* Memorial, note 60 (citing to *Chiragov and Others* v. *Armenia*, ECtHR, Application No. 13216/05, Judgment (16 June 2015)).

[195] *See* Memorial, para. 334.

[196] *See* Council of Europe, Parliamentary Assembly, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (12 December 2015), *available at* https://pace.coe.int/en/files/22290, para. 9 (**Annex 29**).

alleged mismanagement of the Reservoir would have affected those inhabitants as much as it affected ethnic Azerbaijanis. Similarly, the alleged lack of irrigated water would also have affected more than 40,000 hectares of land in Nagorno-Karabakh that adjoin the Sarsang Reservoir, interfering with agricultural activities of ethnic Armenian inhabitants as well.[197]

128. Azerbaijan's blockade of Nagorno-Karabakh since 12 December 2022[198] further calls into question the real extent of the Sarsang Reservoir's impact on Azerbaijanis. The blockade, which has triggered an energy crisis in Nagorno-Karabakh, has forced the Republic of Artsakh to release more water from the Sarsang Reservoir for the operation of its main hydropower plant and resulted in the depletion of the Reservoir's water resources, the water level of which is reportedly dropping 50 centimetres daily.[199] On Azerbaijan's own case, the blockade would therefore deprive the Azerbaijani population living downstream of equal access to water. As of the time of this submission, however, Azerbaijan has taken no steps at its disposal to ensure the "unimpeded movement of persons, vehicles and cargo along the Lachin Corridor", and thereby end the blockade.

129. Moreover, even if the alleged environmental harms concerning the Sarsang Reservoir could have affected ethnic Azerbaijanis in Azerbaijan (alongside ethnic Armenians in the so-called "Occupied Territories"), they would have had a similar

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[197] *See* "Water Politics Anger Armenia", *Institute for War & Peace Reporting* (22 February 2016), *available at* https://iwpr.net/global-voices/water-politics-angers-armenia, PDF p. 4 (**Annex 16**).

[198] *See, e.g.*, "Azerbaijan: Blockade of Lachin corridor putting thousands of lives in peril must be immediately lifted", *Amnesty International* (9 February 2023), *available at* https://www.amnesty.org/en/latest/news/2023/02/azerbaijan-blockade-of-lachin-corridor-putting-thousands-of-lives-in-peril-must-be-immediately-lifted/ (**Annex 19**).

[199] *See* "Sarsang water levels drop at alarming rate amid blockade, farmers in both Nagorno Karabakh and Azerbaijan to be affected", *Artsakh News* (17 March 2023), *available at* https://artsakh.news/en/news/262005, PDF p. 1 (**Annex 27**); "Sarsang Reservoir resources reduced, Azerbaijan farmers will have no irrigation water", *News.am* (27 February 2023), *available at* https://news.am/eng/news/747156.html (**Annex 26**).

effect on other ethnic groups in Azerbaijan as well. As explained in Section II in relation to landmines, Azerbaijan proudly claims that it is a multi-ethnic country, with "more than fifty diverse ethnicities, religions, and/or nationalities", including "Armenians, Russians, Ukrainians, Lezgins, Talyshs, Avars, Kurds, and Tatars".[200] The multi-ethnic nature of the Azerbaijani population has been recognized by the CERD Committee itself.[201] Any alleged environmental harms causing effects in Azerbaijani territory would thus implicate *all* these ethnicities, not just ethnic Azerbaijanis. In this respect, Azerbaijan has not placed before the Court any evidence that ethnic Azerbaijanis were disproportionately impacted by the alleged environmental conduct compared to other ethnic groups in Azerbaijan.

130. Accordingly, just as the acts about which Azerbaijan complains were not "based on" national or ethnic origin and did not have the "purpose" of discriminating against ethnic Azerbaijanis, they also did not have the "effect" of impairing their equal recognition, enjoyment or exercise of human rights and fundamental freedoms. They therefore could not constitute "racial discrimination" as defined in Article 1(1) and thus do not fall within the provisions of the CERD.

B. CERTAIN ACTS COMPLAINED OF DO NOT FALL WITHIN THE SCOPE OF THE RIGHTS UNDER THE CERD AZERBAIJAN INVOKES

131. As explained, the environmental harms about which Azerbaijan complains do not give rise to a claim of "racial discrimination" and therefore do not fall within the Convention as a whole. That said, there is still another reason that the majority of Azerbaijan's environmental claims and contentions must be rejected at this preliminary stage: the acts complained of do not fall within the scope of two of the

[200] Memorial, para. 43.

[201] Memorial, para. 43 (citing to Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined tenth to twelfth periodic reports of Azerbaijan*, UN Doc. CERD/C/AZE/CO/10-12 (22 September 2022), para. 35 (**Annex 5**)).

three particular rights on which Azerbaijan relies. Specifically, the alleged acts or omissions in question do not fall within the right to health (**Section 1**) or the right to property (**Section 2**) that Azerbaijan invokes in this part of its case.[202]

1. *The Right to Health*

132. Azerbaijan's legal case on the right to health is comprised of two parts: *first*, that Armenia deliberately targeted historically "Azerbaijani districts" for the infliction of environmental harm, thereby having "a disproportionate and continuing effect on people of Azerbaijani ethnic or national origin, who continue to be prevented from exercising their right to return home due to Armenia's actions"[203]; and *second*, that Armenia polluted the soil and water in the "occupied territories", thereby harming ethnic Azerbaijanis living *near* the "occupied territories".[204]

133. Turning to the first argument, Azerbaijan's position is not that Azerbaijanis are *in fact* suffering harm to their health as a result of Armenia's alleged environmental harm. The nominal harm complained of is that they are being prevented from exercising their alleged right to return home, and even then not simply to return home *per se*, but "to return to a healthy environment, which is crucial to human health".[205]

134. The sleight of hand here, of course, is to elide (a) the proposition that a healthy environment is crucial to human health (an uncontroversial position in the abstract), with (b) the contrived proposition that the right to health entails a right

[202] *See* Memorial, paras. 470-474 (health), paras. 482-485 (property).

[203] Memorial, para. 474.

[204] Memorial, para. 473.

[205] Memorial, para. 473.

"to return to a healthy environment". Article 5 of the CERD does not articulate a right to return to a healthy environment and Azerbaijan cites no authority for the existence of such a right, either as an aspect of the right to health or the right to return or otherwise.

135. Indeed, the legal materials that Azerbaijan cites have no relevance to its argument. Its legal authorities can be divided into two categories: (a) uncontroversial statements of general principle as to the importance of a healthy environment (materials which do not take Azerbaijan's specific argument any further forward); and (b) findings by the CERD Committee in relation to the right to health or the right to a healthy environment of indigenous peoples, but not the right to return to a healthy environment.

136. Thus, to take the materials cited by Azerbaijan at paragraph 471 of the Memorial, every one of the CERD Committee's concluding observations that Azerbaijan cites relates to potential and actual health risks caused (by matters such as chemical pollution from mining and oil extraction activities) to indigenous peoples on traditional lands on which they *currently* reside. In its concluding observations on Slovakia, the Committee emphasized the importance of healthcare access to the Roma community in Slovakia precisely because of the statistics as to their current health detriments, including "higher mortality rates … poorer nutrition levels, and low levels of awareness of maternal and child health".[206] The Committee's recommendations were thus based on evidence as to the actual health problems faced by an ethnic group which was physically resident in Slovakia's territory.

[206] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Slovakia*, UN Doc. CERD/C/304/Add.110 (1 May 2001), para. 14 (**Annex 2**).

137. Similarly, the Committee has called on Suriname to "take specific measures to ensure that no mercury is used or dispersed on *territories occupied by indigenous and tribal people*".[207]

138. The Committee likewise expressed concern to the United States over "reports of adverse effects of economic activities connected with the exploitation of natural resources … on the right to land, health, living environment and the way of life of *indigenous peoples living in these regions*".[208] There is nothing in these CERD Committee's findings that supports the existence of a right under the CERD of a displaced population to return to a healthy environment.

139. Without a right to return to a healthy environment, Azerbaijan's claims and factual allegations in this regard are not capable of falling within the scope of the right to health under the CERD. To put it differently, there can be no violation of the right to health or even the right to a healthy environment of ethnic Azerbaijanis when, according to Azerbaijan itself, they did not live in areas in which the alleged environmental damage took place.

140. Azerbaijan's second argument concerning the right to health—namely, that Armenia polluted the soil and water in the "Liberated Territories" and thereby harmed ethnic Azerbaijanis living *nearby*—also does not involve allegations falling within the scope of the CERD. *First*, to once again state the obvious, it is simply absurd to suggest that Armenia would seek to harm ethnic Azerbaijanis by harming the environment in areas in which *Armenians*, not Azerbaijanis, resided.

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[207] Memorial, para. 471 (citing to Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname*, UN Doc. CERD/C/SUR/CO/13-15 (25 September 2015), para. 28 (emphasis added) (**Annex 4**)).

[208] Memorial, note 1100 (citing to Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 30 (emphasis added) (**Annex 3**)).

Second, even if this were accepted as true, Azerbaijan's Memorial only describes the impact of mining activities on the soil and water "across the occupied territories".[209] It has placed no evidence before the Court that the alleged pollution of soil and water in the "Liberated Territories" had any effect on the right to health of Azerbaijanis living nearby but not on Armenians residing in those territories. The acts complained of therefore have "too tenuous a connection"[210] with the right to health and do not fall within the CERD.

2. *The Right to Property*

141. Azerbaijan's attempt to bring its claims within the scope of the right to property[211] faces structural difficulties similar to those faced by its case on the right to health. Perhaps recognizing those difficulties, Azerbaijan devotes only four short paragraphs to this part of its legal case.[212] Again, the CERD Committee materials which it cites[213] deal exclusively with the situation of indigenous peoples resident on their traditional lands. The relationship between indigenous peoples and their lands is, of course, a unique one which has been recognised by international law as

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[209] *See* Memorial, paras. 329-331.

[210] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 79. *See also Ambatielos case (merits: obligation to arbitrate), Judgement of May 19th, 1953: I.C.J. Reports 1953*, p. 18 (stating that, in determining whether the acts complained of fall within the relevant treaty, "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the [treaty]"); *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956*, p. 89 ("[I]t is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked").

[211] The property in question is described as "forests, monument trees, water sources and infrastructure, agricultural land, and vineyards in the Azerbaijani districts of the occupied territories". Memorial, para. 485.

[212] *See* Memorial, paras. 482-485.

[213] *See* Memorial, para. 483.

requiring special protection.[214] The CERD Committee itself has specifically called for the protection of the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, considering that they "have lost their lands and resources to colonists, commercial companies and State enterprises" and thus have had the preservation of their culture and their historical identity jeopardized.[215] The materials cited by Azerbaijan in relation to indigenous peoples therefore provide no support for its case, which arises out of a fundamentally different factual background. For the same reasons as in respect of the right to health, Azerbaijan's allegations have "too tenuous a connection" with the right to property it invokes to fall within CERD.

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142. In sum, even if accepted as true (*quod non*), the acts of which Azerbaijan complains with respect to the environment could not constitute racial discrimination because they were not "based on" national or ethnic origin, and did not have the "purpose or effect" of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms. In addition, and separately, the majority of the acts complained of do not fall within the particular provisions of the CERD Azerbaijan invokes. For either or both reasons, Azerbaijan's claims and contentions are outside the Court's jurisdiction *ratione materiae*.

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[214] *See*, *e.g.*, UN General Assembly, *United Nations Declaration on the Rights of Indigenous People,* UN Doc. A/RES/61/295 (13 September 2007), p. 2 ("Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources") (**Annex 10**).

[215] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997), para. 3 (**Annex 1**).

SUBMISSIONS

143. In view of the foregoing, the Republic of Armenia respectfully requests the Court to adjudge and declare that it lacks jurisdiction over the claims and contentions described above and/or that those claims and contentions are inadmissible. Specifically, the Republic of Armenia requests that the Court adjudge and declare:

a) That it lacks jurisdiction *ratione temporis* with respect to Azerbaijan's claims and contentions concerning events that transpired prior to the entry into force of the CERD as between the Parties on 15 September 1996, or that such claims and contentions are inadmissible;

b) That it lacks jurisdiction *ratione materiae* with respect to Azerbaijan's claims and contentions concerning the alleged placement of landmines and booby traps; and

c) That it lacks jurisdiction *ratione materiae* with respect to Azerbaijan's claims and contentions concerning alleged environmental harm.

144. The Republic of Armenia reserves the right to amend and supplement this submission in accordance with the provisions of the Statute and the Rules of Court. The Republic of Armenia also reserves the right to submit further objections to the jurisdiction of the Court and to the admissibility of Azerbaijan's claims in any subsequent phase.

Respectfully submitted,

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Dr. Yeghishe Kirakosyan

AGENT OF THE REPUBLIC OF ARMENIA

21 APRIL 2023

CERTIFICATION

I certify that the Annexes are true copies of the documents referred to and that the translations provided are accurate.

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Dr. Yeghishe Kirakosyan

AGENT OF THE REPUBLIC OF ARMENIA

21 APRIL 2023

LIST OF ANNEXES

VOLUME II

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION DOCUMENTS

OTHER UNITED NATIONS DOCUMENTS

DOCUMENTS OF THE REPUBLIC OF ARMENIA AND THE REPUBLIC OF AZERBAIJAN

Annex 14 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, Memorial of Armenia (23 January 2023) (excerpt) (confidential)

Annex 15 Azerbaijan's Allegations Concerning Landmines and Booby Traps (April 2023)

NON-GOVERNMENTAL AND NON-PROFIT ORGANIZATIONS DOCUMENTS

Annex 16 "Water Politics Anger Armenia", *Institute for War & Peace Reporting* (22 February 2016), *available at* https://iwpr.net/global-voices/water-politics-angers-armenia

Annex 17 "Nagorno-Karabakh conflict: Landmines, a disturbing reminder of war", *ICRC* (31 May 2019), *available at* https://www.icrc.org/en/document/nagorno-karabakh-conflict-landmines-disturbing-reminder-war

Annex 18 "Water Security and the Nagorno-Karabakh Conflict", *Planetary Security Initiative* (4 October 2022), *available at* https://www.planetarysecurityinitiative.org/news/water-security-and-nagorno-karabakh-conflict

Annex 19 "Azerbaijan: Blockade of Lachin corridor putting thousands of lives in peril must be immediately lifted", *Amnesty International* (9 February 2023), *available at* https://www.amnesty.org/en/latest/news/2023/02/azerbaijan-blockade-of-lachin-corridor-putting-thousands-of-lives-in-peril-must-be-immediately-lifted/

BOOKS

Annex 20 R. Kolb, "The Compromissory Clause of the Convention" in THE UN GENOCIDE CONVENTION: A COMMENTARY (P. Gaeta ed., 2009) (excerpt)

Annex 21 E. David, "Treaties and Third States, Art. 34 1969 Vienna Convention" in THE VIENNA CONVENTION ON THE LAW OF TREATIES (O. Corten & P. Klein, eds., 2011) (excerpt)

Annex 22 M. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2016) (excerpt)

Annex 23 C. Tomuschat, "Article 36" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann & C. Tams, eds., 2019) (excerpt)

NEWS ARTICLES AND SOCIAL MEDIA POSTS

Annex 24 J. Kucera, "For Armenians, they're not occupied territories – they're the homeland", *Eurasianet* (6 August 2018), *available at* https://eurasianet.org/for-armenians-theyre-not-occupied-territories-theyre-the-homeland (excerpt)

Annex 25 "Land Mine Kills Officer as Search Continues for Armenian, Azerbaijani Missing", *Radio Free Europe/Radio Liberty* (23 November 2020), *available at* https://www.rferl.org/a/land-mine-kills-officer-search-for-armenian-azerbaijanimissing/30965287.html

Annex 26 "Sarsang Reservoir resources reduced, Azerbaijan farmers will have no irrigation water", *News.am* (27 February 2023), *available at* https://news.am/eng/news/747156.html

Annex 27 "Sarsang water levels drop at alarming rate amid blockade, farmers in both Nagorno Karabakh and Azerbaijan to be affected", *Artsakh News* (17 March 2023), *available at* https://artsakh.news/en/news/262005

Annex 28 Artak Beglaryan, *Facebook* (4 April 2023), *available at* https://www.facebook.com/Artak.A.Beglaryan/posts/6344191602285690

OTHER

Annex 29 Council of Europe, Parliamentary Assembly, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (12 December 2015), *available at* https://pace.coe.int/en/files/22290 (excerpt)

Annex 30 Office of the Nagorno Karabakh Republic, *Declaration on State Independence of the Nagorno Karabakh Republic* (6 January 1992), *available at* http://www.nkrusa.org/nk_conflict/declaration_independence.shtml

Annex 31 Republic of Nagorno-Karabakh, *De Jure Population (Urban, Rural) by Age and Ethnicity* (2002), *available at* http://census.stat-nkr.am/nkr/5-1.pdf (excerpt)

Annex 32 Constitution of the Nagorno Karabakh Republic (2006), *available at* http://www.nkrusa.org/country_profile/constitution.shtml (excerpt)

Annex 33 Constitution of the Republic of Artsakh (2017), *available at* http://president.nkr.am/media/documents/constitution/Constitution-eng2017.pdf (excerpt)