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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Wednesday 24 April 2024, at 4.30 p.m., at the Peace Palace,

President Salam presiding,

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

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le mercredi 24 avril 2024, à 16 h 30, au Palais de la Paix,

sous la présidence de M. Salam, président,

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

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Judges *ad hoc*	Daudet
		Koroma
	Registrar	Gautier

Présents : M. Salam, président
M^me^ Sebutinde, vice-présidente
MM. Tomka
Abraham
M^me^ Xue
MM. Bhandari
Iwasawa
Nolte
M^me^ Charlesworth
MM. Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi, juges
MM. Daudet
Koroma, juges *ad hoc*

M. Gautier, greffier

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Le PRÉSIDENT : Veuillez vous asseoir. L'audience est ouverte.

Pour des raisons dont il m'a dûment fait part, M. le juge Yusuf n'est pas en mesure de participer à l'audience de ce jour. La Cour se réunit cet après-midi pour entendre le second tour de plaidoiries de la République d'Arménie sur les exceptions préliminaires qu'elle a soulevées en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Azerbaïdjan c. Arménie)*. Je donne à présent la parole à M. Lawrence Martin. You have the floor, Sir.

Mr MARTIN

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THE COURT LACKS JURISDICTION *RATIONE TEMPORIS* OVER AZERBAIJAN'S CLAIMS RELATING TO THE PERIOD BEFORE 15 SEPTEMBER 1996

1. Mr President, distinguished Members of the Court, good afternoon.

2. As I did on Monday, I will address Armenia's preliminary objection concerning the scope of the Court's jurisdiction *ratione temporis*. I will focus only on certain key points.

3. The first such one is a general point that touches on all the speeches we heard yesterday, very much including, but not limited to, Professor Lowe's intervention on jurisdiction *ratione temporis*. In what was clearly a co-ordinated effort, all of yesterday's speakers made repeated reference to a so-called "ethnic cleansing campaign" that was said to be ongoing even now, 30 years since the end of the First Nagorno-Karabakh War[1]. Professor Lowe said, for example, "[t]he ongoing and systematic nature of Armenia's campaign of ethnic cleansing, spanning three decades, can in no sense be considered to have been 'completed' before September 1996"[2]. All of his colleagues got in on the action too[3]. Even the questions of landmines and the environment were said to be elements of this so-called "campaign".

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[1] See e.g. CR 2024/22, p. 10, para. 3 (Mammadov); p. 18, para. 5 (Fietta); p. 28, para. 35 (Lowe); p. 40, para. 12, (Wordsworth); p. 54, para. 25 (Aughey); p. 59, para. 22 (Boisson de Chazournes).

[2] CR 2024/22, p. 28, para. 35 (Lowe).

[3] See e.g. CR 2024/22, p. 18, para. 5 (Fietta); p. 28, para. 35 (Lowe); p. 33, para. 4 (Talmon); p. 40, para. 12, (Wordsworth); p. 54, para. 25 (Aughey); p. 59, para. 22 (Boisson de Chazournes).

4. The purpose of this co-ordinated effort was undoubtedly to make it seem that the issue of the critical date in this case is unimportant because what happened more than three decades ago is all bound up together with what is still happening now in a single package encompassing the entire period. Our friends' effort, however, is seriously misguided.

5. There can be no doubt on this matter. As I said on Monday, Armenia roundly rejects Azerbaijan's ethnic cleansing accusations, but that is not the point now. What matters now is that *even on Azerbaijan's own factual allegations*, any alleged ethnic cleansing was completed by 1994, well before the critical date in September 1996.

6. On Monday, I observed that Azerbaijan had not provided a definition of ethnic cleansing. Yesterday, Professor Lowe obliged by providing one. It is, he said, "a purposeful policy designed by one ethnic or religious group *to remove* by violent and terror-inspiring means *the civilian population* of another ethnic or religious group *from certain geographic areas*"[4]. "To remove . . . the civilian population . . . from certain geographic areas." This, of course, is just a different formulation of the Court's definition from the *Bosnia* case[5]. Both come from the UN Commission on the Former Yugoslavia[6], and under both definitions, the point is that once the civilian population of an area has been removed, once everyone has left, the ethnic cleansing is over. To be sure, the effects may continue afterwards but the act is completed.

7. The Court should not be tempted by Azerbaijan's transparent ploy of relabelling what are obviously subsequent, discrete events as part of this supposedly continuing "campaign of ethnic cleansing". The acts alleged by Azerbaijan may or may not constitute discrete breaches of the CERD, but they are certainly not part of a purported wrong that took place, and ended, 30 years ago.

8. Turning then more specifically to the question of the Court's jurisdiction *ratione temporis*, on Monday I discussed how the only sensible interpretation of Article 22 is that it should be

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[4] CR 2024/22, p. 27, para. 32 (Lowe) (emphasis added).

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43, para. 190.

[6] UN Commission on the Former Yugoslavia, *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN doc. S/25274 (10 February 1993), p. 16; UN Commission on the Former Yugoslavia, *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN doc. S/1994/674 (27 May 1994), p. 33, paras. 129-130.

temporally limited to acts and facts that occurred at a time when the parties to a dispute are both parties to the Convention; in other words, when the Convention is in force between them.

9. To find otherwise risks creating serious irregularities that the drafters of the CERD cannot have intended. Could the drafters really have intended that States that only later accepted their obligations under the Convention should somehow acquire a procedural advantage over States that accepted those same obligations at an earlier moment in time? Professor Lowe notably had nothing to say about the absurdity of such an approach.

10. As we also explained on Monday, allowing Azerbaijan to raise claims relating to the pre-1996 period would raise serious retroactivity issues. Yesterday, Professor Lowe responded confidently that "[t]here is no question of retroactivity in the present case because the relevant conduct underpinning Azerbaijan's claims of breach occurred after CERD's entry into force for Armenia in 1993"[7]. With respect, this misconstrues the nature of the problem. This is not the retroactivity issue we are talking about.

11. The retroactivity issue here is that Azerbaijan is trying to use Article 22 to reach back in time and claim the right to raise questions about Armenia's compliance with its obligations under the CERD in relation to a period of time when Armenia did not owe those obligations to Azerbaijan. In our view, Article 22 simply cannot be used that way.

12. The character of the CERD's *substantive* obligations only underscores the impermissibility of what Azerbaijan is trying to do.

13. Yesterday, for the first time, Azerbaijan acknowledged that the *substantive* obligations at issue in this case are not obligations *erga omnes*, but obligations *erga omnes partes*. These obligations, sometimes also referred to as obligations *erga omnes contractantes*, are owed by States parties to a treaty to other States parties. In his remarks yesterday, Professor Lowe appeared to agree. He stated:

> "The *erga omnes partes* and *jus cogens* character of the obligations under the CERD and similar treaties supports the principle that those obligations are engaged for every party from the date that the treaty comes into force for that party. The Court's reasoning in *Belgium* v. *Senegal* is again on point. Obligations in conventions such as the Convention against Torture, in that case, or the CERD in the present case, are owed

[7] CR 2024/22, p. 26, para. 25 (Lowe).

> to all States parties . . . and any State party can call out those who break the commitment."[8]

14. This is fine, so far as it goes. The issue lies in what Professor Lowe does not say. Obligations *erga omnes partes* are indeed owed "to all States parties". They are not, however, owed to non-States parties.

15. Thus, from July 1993 to September 1996, Armenia owed its obligations *erga omnes partes* to those 140 or so States parties that were in fact *partes* to the CERD at that time. But because Azerbaijan was not then a party to the Convention, Armenia did not owe it any obligations *erga omnes partes*.

16. As from the entry into force of CERD for Azerbaijan in 1996, Armenia and Azerbaijan owed each other procedural rights under Article 22. But the creation of that *procedural* right did not transform the character of the *substantive* obligations that Armenia owed under the Convention prior to that date. Armenia's obligations from 1993 to 1996 remain as they were before Azerbaijan became a party to the Convention — that is to say, they were owed to all of the States *then* parties to the CERD. Azerbaijan's ratification of the CERD three years later did not expand — retroactively — the pool of States to whom Armenia owed the *substantive* obligations under the CERD before that date. To argue otherwise distorts basic logic and the principle of intertemporal law.

17. The fact that *erga omnes partes* obligations are owed only to States that are actually *partes* is reflected in the language the Court used in *Belgium* v. *Senegal*. As you can see on the screen, the Court stated that "[t]hese obligations may be defined as 'obligations *erga omnes partes*' in the sense that *each State party* has an interest in compliance with them *in any given case*"[9].

18. Support for all this can also be found in the resolution of the Institut de droit international on "Obligations and rights *erga omnes* in international law", for which Judge Gaja was rapporteur. You can find that resolution at tab 2 of your judges' folder. As you can see, the resolution addresses both obligations *erga omnes* and obligations *erga omnes partes*. The latter are defined in paragraph *(b)* of the first article as:

> "an obligation under a multilateral treaty that a State party to the treaty owes in any given case *to all the other States parties to the same treaty*, in view of their common

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[8] *Ibid.*, p. 25, para. 23 (Lowe).

[9] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68 (emphasis added).

> values and concern for compliance, so that a breach of that obligation enables *all these States* to take action"[10].

19. In other words, the obligation is owed to a group of States, such that a breach of that obligation enables all those same States to take action. Such a breach, of course, occurs at a specific moment in time. And that moment in time defines the States to which the obligation is owed and for which the breach creates a cause of action.

20. This comes through unmistakably in the next article in the resolution, which states: "When a State commits a breach of an obligation *erga omnes*, all the States to which the obligation is owed are entitled . . . to claim."[11]

21. Professor Lowe stated yesterday that "[i]t is not a matter of . . . the standing of particular States"[12]. But that is *precisely* what it is. Article 3 of the resolution states:

> "In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes and a State to which the obligation is owed, the latter State has standing* to bring a claim to the International Court of Justice."[13]

22. Little more need be said. The extent of the *erga omnes partes* obligation is assessed at the time of the putative breach. It is owed to the States then party to the multilateral treaty containing the obligation. When there is a jurisdictional link, those States — and only those States — have standing to claim for that breach. The obligation itself, the identity of the States to which it is owed and the standing of those States does not change, retroactively, when *other* States adhere to the convention years or decades later.

23. Much the same point can be made using a different lens. Yesterday, Professor Lowe took you to Article 28 of the Vienna Convention on the Law of Treaties. It is worth looking at it again; it is on the screen before you.

24. It says, if I may paraphrase, the provisions of a treaty do not bind a party in relation to any act or fact which took place before entry into force of the treaty with respect to that party. That, of course, makes perfect sense. But there is a corollary. Treaty rights and obligations are a package

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[10] Institut de droit international, Resolution: Obligations and rights erga omnes in international law (G. Gaja, Rapporteur) (Krakow, 2005), Art. 1 (emphases added).

[11] *Ibid.*, Art. 2.

[12] CR 2024/22, p. 25, para. 23 (Lowe).

[13] Institut de droit international, Resolution: Obligations and rights erga omnes in international law (G. Gaja, Rapporteur) (Krakow, 2005), Art. 3 (emphasis added)

deal[14]. And in our case, if a State has no obligations with respect to any fact or act which took place before the treaty enters into force for it, neither can it have any rights with respect to such acts or facts. That means that Azerbaijan should not be permitted to use the right it acquired to access ICJ jurisdiction under Article 22 of the CERD in 1996 to raise complaints in relation to acts or facts which allegedly took place before that date. They are, in short, outside the scope of the Court's jurisdiction *ratione temporis*.

25. I explained on Monday that Azerbaijan cannot save its claims relating to the pre-1996 period by relying on a theory of composite breach. Yesterday, Azerbaijan appeared to change its position. Professor Lowe said yesterday that "the relevant contrast here is not between completed acts and composite acts, but between completed acts and continuing acts"[15].

26. Assuming that this is indeed now Azerbaijan's primary theory, it too is insufficient to save Azerbaijan's case in so far as it relates to acts and facts alleged to have occurred in the pre-1996 period. Armenia, of course, does not dispute that an act can be continuing and can start before the critical date and continue thereafter. But that fact is of no assistance to Azerbaijan. The ILC commentary to the Draft Articles on State Responsibility makes clear that when an act continues in such a way as to straddle the critical date, the elements of the act that occurred before the critical date are outside a court or tribunal's jurisdiction. Only the elements that occurred after the critical date come within the jurisdiction *ratione temporis*. I refer you in particular to paragraphs 9 through 11 of the ILC's commentary to Article 14 of the Draft Articles.

27. Professor Lowe also offered a curious new theory that "[c]omposite acts are just one kind of continuing act"[16]. He reminded us that "a composite act 'extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation'"[17].

28. But both of these new theories fail for the reason I already addressed at the outset. In concluding his discussion of Azerbaijan's theory of continuing breaches, Professor Lowe stated:

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[14] ILC, Fourteenth report on reservations to treaties, by Mr Alain Pellet, Special Rapporteur, UN doc. A/CN.4/614 (2009), p. 49, paras. 273, 274, available at: https://legal.un.org/ilc/documentation/english/a_cn4_614.pdf.

[15] CR 2024/22, p. 26, para. 27 (Lowe).

[16] CR 2024/22, p. 27, para. 29 (Lowe).

[17] *Ibid.*

"Azerbaijan says that Armenia's cumulative or aggregated acts and omissions amount to a practice of ethnic cleansing which, like apartheid, is itself a distinct breach of the CERD"[18]. He then stated the definition of ethnic cleansing I quoted earlier. This argument fails because, as I said, even on Azerbaijan's own case, the alleged expulsion of civilians (which Armenia denies) was complete no later than May 1994, the date of the ceasefire ending the First Nagorno-Karabakh War. Whatever may have happened thereafter was conduct of a different character that cannot genuinely be characterized as a continuing act. Nor can it be a "continuing composite" breach spanning the critical date for the same reason.

29. Professor Lowe asked yesterday why Armenia has not yet raised counter-claims in this case[19]. Well, the answer is simple: it is found in Article 80, paragraph 2, of the Rules of Court, which states that counter-claims "shall" be made in the Counter-Memorial. Lest there be any doubt, if the Court upholds Azerbaijan's theory that the displacement of populations before the critical date can be swept into the Court's jurisdiction by virtue of other acts of racial discrimination after the critical date, Armenia will have no shortage of claims to bring.

30. Mr President, distinguished Members of the Court, two other quick points about a couple of cases Professor Lowe cited. First, the *Bosnia Genocide* case. Yesterday, he argued that Armenia is in the same position as Yugoslavia in that case, and that, in response to Yugoslavia's objection *ratione temporis*, the Court established a general rule that compromissory clauses under multilateral treaties grant jurisdiction over "facts which occurred prior to the Convention entering into force between the Parties"[20]. But that 1996 Judgment does not, in fact, establish any such clear-cut rule.

31. Azerbaijan hangs a lot of its case on a single sentence in which the Court "confine[s] itself" to the "observation" in question[21]. There is no analysis establishing a general principle that can be applied neatly to all situations. And as I mentioned on Monday and Azerbaijan ignored, this same issue continues to be the subject of debate by parties before the Court. *Belgium* v. *Senegal* is instructive. Members of the Court may recall that Judge Donoghue posed pointed questions on this

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[18] *Ibid.*, para. 32 (Lowe).

[19] *Ibid.*, p. 31, para. 52 (Lowe).

[20] CR 2024/22, p. 23, para. 15 (Lowe).

[21] *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 (II)*, p. 617, para. 34.

issue from the Bench, and that Belgium then took care to formulate its claims in such a way that would avoid retroactive application of the compromissory clause[22].

32. I also mentioned on Monday several layers of complicating and distinguishing factors from *Bosnia*, including the fact that both States were successors to the Convention; there were contested issues of recognition; and there was temporal equality between the parties[23]. Azerbaijan had nothing to say about any of that.

33. Professor Lowe also curiously cited the Court's 2012 Judgment in the first *Nicaragua* v. *Colombia* case for the proposition that "Colombia was entitled to invoke Nicaragua's obligations as a State party to the UNCLOS, even though Colombia itself never became a party to the UNCLOS"[24]. Now, I know that Professor Lowe and I both have a fondness for that case, but I confess I do not understand what use he is trying to make of it. All the Court said in that case is the fact that Colombia was not a party to UNCLOS did not relieve Nicaragua of its obligation under the convention to submit its claim to a continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf[25].

34. And that, Mr President, brings me to my final point. Armenia's objections concerning jurisdiction *ratione temporis* have an exclusively preliminary character and are ripe for determination now. Yesterday, Professor Lowe seemed to invite you to join the objections to the merits, suggesting they may not have an exclusively preliminary character. He is mistaken. The first issue on which we request a ruling — that concerning the critical date — could not be a purer question of law. There is no reason it cannot be decided now and Azerbaijan has not pointed to any.

35. The second issue — whether Azerbaijan's pre-1996 claims can be saved by the assertion that they constitute part of a so-called continuing campaign of ethnic cleansing — is equally ripe for determination at this stage. The Parties agree on the definition of ethnic cleansing and there is no allegation that any Azerbaijani population was removed or displaced after 1994. There is therefore no impediment to deciding the issue as a preliminary matter.

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[22] See CR 2012/5, p. 44 (Donoghue); CR 2012/5 (Wood), p. 52, para. 52.

[23] CR 2024/21, p. 30, para. 58 (Martin).

[24] CR 2024/22, p. 25, para. 24 (Lowe).

[25] See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 668-669, paras. 126, 127.

36. Mr President, distinguished Members of the Court, thank you again for allowing me the privilege of appearing before you. Would you kindly invite Professor d'Argent to the podium?

The PRESIDENT: I thank Mr Martin for his statement. J'invite maintenant M. le professeur Pierre d'Argent à prendre la parole.

M. D'ARGENT : Merci, Monsieur le président.

LES DEMANDES DE L'AZERBAÏDJAN RELATIVES À LA PREMIÈRE GUERRE DU HAUT-KARABAKH ET SES SÉQUELLES ANTÉRIEURES À 1996 SONT IRRECEVABLES

1. Monsieur le président, Mesdames et Messieurs les juges, je répondrai au professeur Talmon au sujet de l'irrecevabilité des demandes de l'Azerbaïdjan en commençant par relever que les Parties s'accordent sur le test juridique applicable en la matière, lequel ressort de la jurisprudence de la Cour dans l'affaire de *Nauru* et des travaux de la CDI. À la lumière de ces derniers travaux, l'Azerbaïdjan affirme que le désavantage résultant d'une demande tardive pour le défendeur existe « only if it could reasonably have expected that the claim would no longer be pursued »[26]. L'Azerbaïdjan accepte donc que le défendeur est nécessairement désavantagé par l'introduction d'une réclamation tardive dès l'instant où il est établi qu'il pouvait raisonnablement s'attendre à ce qu'elle ne soit pas poursuivie.

2. Et puisque le test juridique est celui-là, l'analyse doit porter sur trois questions qu'il appartient à la Cour de trancher à ce stade :

— La première est celle de savoir si et quand l'Azerbaïdjan a présenté à l'Arménie une « claim » à proprement parler.
— La deuxième question est celle de savoir si le délai s'étant écoulé entre les faits dont il est tiré grief et la formulation de cette « claim » a pu raisonnablement donner à penser à l'Arménie qu'elle ne ferait pas l'objet d'une procédure contentieuse, de telle manière à la considérer tardive et irrecevable pour cette raison.
— La troisième question est celle de savoir si les circonstances peuvent excuser le retard du demandeur dans la présentation de sa demande.

[26] CR 2024/22, p. 35, par. 20 (Talmon).

3. S'agissant de la première question, l'Arménie considère que l'Azerbaïdjan ne lui a jamais présenté de réclamation juridique au titre de la convention à propos des événements de la première guerre du Haut-Karabakh avant le 8 décembre 2020. L'Azerbaïdjan prétend au contraire qu'il a fait connaître à l'Arménie ses « grievances » à de multiples reprises[27].

4. Je relève tout d'abord que l'Azerbaïdjan n'a pas contesté ce que j'ai dit au sujet de sa lettre du 8 décembre 2020 et des documents mentionnés dans ses observations écrites analysés devant vous lundi[28]. Le professeur Talmon a dès lors inséré en note de plaidoirie[29] une série de documents communiqués entre 1993 et 1997 aux Nations Unies où il est affirmé que ses citoyens auraient été victimes d'un nettoyage ethnique durant la première guerre du Haut-Karabakh. Deux points à ce sujet :

— Les « grievances » formulées dans ces documents portent sur un « nettoyage ethnique » qui aurait eu lieu et qui était déjà achevé en 1994. Ces documents ne font en rien mention d'un nettoyage ethnique qui se poursuivrait au-delà. Et ceci confirme, Mesdames et Messieurs les juges, que la manière dont l'Azerbaïdjan a configuré sa réclamation devant la Cour est artificielle et purement opportune. Le nettoyage ethnique continu durant 30 ans a été inventé à partir de décembre 2020, en réponse à la réclamation de l'Arménie afin de contourner d'évidents obstacles en termes de compétence, tant matérielle que temporelle.

— Deuxième point : l'Arménie ne conteste pas avoir eu à faire face aux « grievances » de l'Azerbaïdjan. Mais telle n'est pas la question. Pour les besoins de l'exception d'irrecevabilité déduite du retard mis à présenter une réclamation, la question est de savoir si les « grievances » de l'Azerbaïdjan constituent une réclamation juridique. Le professeur Talmon a soutenu qu'il suffisait que « the grievances raised "relate to the subject-matter" of the treaty »[30] et qu'il importait peu, dès lors, que la convention n'ait pas été mentionnée comme telle. La jurisprudence invoquée par le professeur Talmon concerne la survenance d'un différend, et non la formulation d'une réclamation juridique. Ainsi, avant même de savoir si la convention se cachait derrière les

[27] CR 2024/22, p. 34, par. 14 et 15 (Talmon).

[28] CR 2024/21, p. 35-36, par. 13-17 (d'Argent).

[29] CR/2024/22, p. 34, par. 14, notes 76 et 77 (Talmon).

[30] CR 2024/22, p. 34-35, par. 15 (Talmon).

« grievances » de l'Azerbaïdjan, la question fondamentale est de savoir si, avant le 8 décembre 2020, l'Azerbaïdjan avait présenté à l'Arménie une quelconque *réclamation juridique* en tant que telle, c'est-à-dire une demande articulant une prétention juridique fondée sur la mise en cause de la responsabilité internationale de l'Arménie et non sur la responsabilité politique ou morale de ses dirigeants[31]. Monsieur le président, tous les jours, des dizaines d'États formulent les uns envers les autres des doléances, des reproches, des accusations — bref, des « grievances » — et les accusations *ad personam* hélas se multiplient aussi. Mais pour que des « grievances » comptent au regard des principes applicables au contentieux en matière d'irrecevabilité des demandes tardives, il faut qu'elles constituent une « claim », une réclamation juridique à proprement parler. Et cela fut le cas dans l'affaire de *Nauru*, le demandeur ayant formulé à quatre reprises une prétention juridique en termes de responsabilité internationale[32]. Dès lors se posait la question de savoir si le demandeur pouvait s'attendre, après un certain temps, à ce que la réclamation ne soit plus poursuivie. Il ne suffit donc pas qu'une situation factuelle soit exposée, ni même qu'une qualification que le droit connaît également soit utilisée pour résumer ou déplorer une telle situation factuelle ; il faut plus fondamentalement qu'une prétention juridique, une demande, soit formulée. Sans une telle demande juridique, sans une mise en cause de responsabilité internationale de l'État, il peut bien sûr y avoir un différend, mais il n'y a pas de « claim » à proprement parler. Et c'est ce que j'indiquais déjà lundi en soulignant que l'Arménie pouvait — je me cite ! — « raisonnablement s'attendre à ce qu'aucune réclamation au titre de la convention ne fût formulée et, *a fortiori*, poursuivie »[33]. Avant le 8 décembre 2020, aucune réclamation juridique, je le répète, mettant en cause la responsabilité internationale de l'Arménie pour les faits de la première guerre du Haut-Karabakh n'avait été présentée par l'Azerbaïdjan. Il ne pourrait donc être question du « renouvellement »[34] d'une réclamation inexistante. L'Arménie

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[31] CR 2024/22, p. 34, par. 14 (Talmon).

[32] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 254, par. 33 et suiv.

[33] CR 2024/21, p. 34, par. 10 (d'Argent). Voir aussi CR 2024/21, p. 32, par. 2 ; p. 36, par. 16 ; p. 40, par. 28 (d'Argent).

[34] Institut de droit international, « La prescription libératoire en droit international public », Rapporteurs : MM. Nicolas Politis et Charles De Visscher, accessible à l'adresse suivante : https://www.idi-iil.org/app/uploads/2017/06/1925_haye_01_fr.pdf.

considère que le retard mis par l'Azerbaïdjan à cet égard lui est préjudiciable car elle pouvait raisonnablement s'attendre à ce qu'une telle réclamation ne soit pas présentée.

5. J'aborde la deuxième question. Mesdames et Messieurs les juges, en admettant même que ces « grievances » communiquées par lettres adressées à l'ONU puissent compter au titre de réclamation juridique, l'Arménie pouvait raisonnablement penser qu'elle ne serait pas *poursuivie* par voie judiciaire plus de 23 ans plus tard puisque la lettre la plus récente, déposée hier par l'Azerbaïdjan, date du 25 août 1997[35].

6. La première raison est que la convention n'était pas en vigueur entre Parties au moment de la première guerre du Haut-Karabakh. Même postérieures à 1996, les « grievances » devaient donc avoir un autre fondement juridique que la convention. La seconde raison découle de cette réalité juridique et elle est essentielle : depuis le cessez-le-feu de 1994 et la médiation sous les auspices de l'OSCE, l'Azerbaïdjan s'était engagé à résoudre les conséquences de la première guerre du Haut-Karabakh par la négociation. Et il réitéra solennellement cet engagement en adhérant au Conseil de l'Europe[36]. L'Azerbaïdjan viola cet engagement 20 ans plus tard en déclenchant la seconde guerre du Haut-Karabakh en septembre 2020.

7. Ainsi, l'Azerbaïdjan ne donna jamais à penser, durant cette longue période, que ses « grievances » feraient un jour l'objet d'une réclamation juridique articulant des prétentions au titre de la convention et du droit de la responsabilité internationale.

8. En revanche, puisque la seconde guerre du Haut-Karabakh mit, selon le président Aliyev, fin au processus diplomatique[37] et qu'elle constitua l'apogée des pratiques discriminatoires de l'Azerbaïdjan ainsi que l'occasion de nouvelles violations de la convention, l'Arménie formula sa réclamation juridique et invita l'Azerbaïdjan à négocier au titre de l'article 22, le lendemain même de la déclaration trilatérale. La fausse équivalence que le professeur Talmon a essayé d'établir en recyclant « what is sauce for the goose » est donc totalement déplacée[38].

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[35] Letter dated 23 August 1997 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, S/1997/662 (25 August 1997), accessible à l'adresse suivante : https://digitallibrary.un.org/record/242618?ln=ru&v=pdf.

[36] Demande d'adhésion de l'Azerbaïdjan au Conseil de l'Europe, Assemblée parlementaire, Conseil de l'Europe, accessible à l'adresse suivante : https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16816.

[37] Ilham Aliyev, « War Was Inevitable; Minsk Group Dead », *Hetq*, accessible à l'adresse suivante : https://hetq.am/en/article/145646.

[38] CR 2024/22, p. 33, par. 8 (Talmon).

9. J'aborde la troisième question : l'Azerbaïdjan peut-il être excusé de n'avoir présenté sa réclamation juridique au titre de la convention qu'après avoir eu accès au Nagorno-Karabakh ?

10. Selon le professeur Talmon, l'Arménie prétendrait qu'une « reasonable expectation was created because Azerbaijan allegedly had all the material to bring a claim upon its accession to the Convention in 1996, but did not do so »[39]. Ce que j'ai soutenu lundi est pourtant très différent et bien plus simple, à savoir que l'Azerbaïdjan avait, bien avant 2020, tous les éléments de preuve à sa disposition pour formuler une réclamation juridique au titre de la convention en bonne et due forme et que son excuse fondée sur son absence d'accès au Haut-Karabakh durant 30 ans n'en est pas une. Pourquoi, Mesdames et Messieurs les juges ? Parce que sa réclamation concerne, ainsi que son agent l'a affirmé, « a 30-year campaign of ethnic cleansing »[40]. Mais, si la réclamation de l'Azerbaïdjan porte sur une campagne et non des faits spécifiques, on voit mal en quoi l'accès au territoire pour récolter des preuves particulières aurait été nécessaire. L'excuse du non-accès n'en est pas une, n'explique par le retard, et la prétendue campagne de nettoyage ethnique durant 30 ans a pour seul but de grossir le dossier avec les prétentions relatives aux mines terrestres et à l'environnement afin, je l'ai dit, de contourner les limites temporelles et matérielles de votre compétence.

11. J'aborde enfin la question des désavantages pour l'Arménie.

12. Le professeur Talmon se réfugie derrière l'adage *actori incumbit probatio* pour soutenir que l'extrême retard de l'Azerbaïdjan ne serait en rien préjudiciable à l'Arménie[41]. C'est oublier que l'Arménie a le droit de se défendre et que cela suppose d'être en mesure de le faire, preuves à l'appui. Le professeur Talmon soutient que l'Arménie aurait eu 26 ans pour collecter des preuves pour sa défense et encore près de trois ans entre 2020 et 2023[42]. C'est oublier, d'une part, que, selon le principe juridique qu'il admit lui-même, le désavantage existe dès l'instant où le défendeur « could reasonably have expected that the claim would no longer be pursued »[43] et j'ajoute, puisque tel est le cas ici, « or would no longer be made ». Pendant 26 ans, l'Azerbaïdjan n'a formulé aucune réclamation juridique et il a légitimement donné à penser qu'il n'en formulerait pas ou qu'il ne la

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[39] CR 2024/22, p. 35, par. 16 (Talmon).

[40] CR 2024/22, p. 10, par. 3 (Mammadov) ; p. 13, par. 15 (Mammadov) ; p. 59, par. 25 (Boisson de Chazournes).

[41] CR 2024/22, p. 36, par. 22 (Talmon).

[42] CR 2024/22, p. 36, par. 23 (Talmon).

[43] CR 2024/22, p. 35, par. 20 (Talmon).

poursuivrait pas. Malgré cela, l'Arménie aurait dû préparer sa défense ?! C'est oublier, d'autre part, que durant la période séparant le 8 décembre 2020 de l'attaque finale de septembre 2023, le corridor de Lachine était contrôlé par le contingent russe avant d'être finalement bloqué pendant 9 mois par l'Azerbaïdjan. C'est oublier, enfin, que l'Azerbaïdjan fit main basse sur les archives du gouvernement indépendantiste qui dut fuir précipitamment et dont les principaux dirigeants furent arrêtés.

13. S'agissant de l'inégalité procédurale dénoncée lundi au sujet des demandes reconventionnelles, je relève enfin que le professeur Talmon a confirmé que ce problème existait tout en trouvant la chose normale, étant la conséquence du Règlement de la Cour (on le savait) ou du fait que les obligations conventionnelles naissent à partir de leur acceptation (on le savait aussi). Bref, alors qu'il aurait pu et qu'il peut toujours formuler des demandes reconventionnelles dans l'autre affaire, l'Azerbaïdjan assume parfaitement sa tactique procédurale dans celle-ci et ne nie en rien qu'il en résultera une justice historique à sens unique. Il serait — me semble-t-il — étonnant que la Cour n'y voie pas un problème.

14. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, je vous remercie pour votre bienveillante attention tout au long de ces deux semaines et puis-je vous demander, Monsieur le président, de bien vouloir appeler mon collègue M[e] Salonidis à la barre ?

Le PRÉSIDENT : Je remercie M. d'Argent pour son intervention, and I now invite Mr Salonidis to take the floor. You have the floor, Sir.

Mr SALONIDIS:

THE COURT LACKS JURISDICTION *RATIONE MATERIAE* OVER AZERBAIJAN'S CLAIMS CONCERNING LANDMINES AND BOOBY TRAPS

1. Mr President, Madam Vice-President, distinguished Members of the Court, I will be responding today to the points raised by Mr Wordsworth and Mr Aughey yesterday concerning Armenia's preliminary objection with respect to Azerbaijan's claims and contentions concerning landmines and booby traps.

I. The proper characterization of Azerbaijan's claims and contentions

2. I begin with my first point, which concerns the proper characterization of Azerbaijan's claims and contentions.

3. Mr Wordsworth yesterday insisted that Azerbaijan is *not* alleging a free-standing claim of breach of the CERD in relation to landmines and booby traps[44]. In support of this position, Mr Wordsworth pointed to the Court's December 2021 Order, where the Court stated "Azerbaijan claims that this conduct" — that is, Armenia's alleged placement of landmines — "is part of a longstanding campaign of ethnic cleansing"[45]. Our response is that this statement by the Court in no way undermines its powers to interpret for itself the submissions of the parties[46] and to identify what Azerbaijan is claiming on an objective basis[47] — powers that Mr Wordsworth did not contest yesterday.

4. Mr Wordsworth also did not address the *abundance* of evidence that I pointed to on Monday — in Azerbaijan's Application, in Azerbaijan's first Request for provisional measures and at the hearing on that Request, in Azerbaijan's second Request for provisional measures and at the hearing on that Request, and in Azerbaijan's Memorial — *all* showing that Azerbaijan *does* in fact allege that Armenia's alleged laying of landmines and booby traps violates the CERD[48].

5. Instead, Mr Wordsworth jumped straight to the submissions at the end of Azerbaijan's Memorial and noted that they do not expressly isolate the alleged placement of landmines and booby traps as an independent violation of the CERD[49]. But the Court is by no means bound by the framing

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[44] CR 2024/22, p. 40, para. 10 (Wordsworth).

[45] *Ibid.*, para. 9 (citing *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. 425, para. 53).

[46] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 614, para. 43; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment*, *I.C.J. Reports 2021,* p. 9, para. 52; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, *Order of 22 September 1995, I.C.J. Reports 1995,* p. 288, para. 56.

[47] *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. 42. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 292, para. 48; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 9, para. 59; *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 (II)*, p. 558, para. 24.

[48] CR 2024/21, pp. 45-46, paras. 10-15 (Salonidis).

[49] CR 2024/22, p. 42, paras. 19-20 (Wordsworth).

adopted by the applicant in its submissions[50]. Otherwise, as the Court has held in another context, "parties would be in a position themselves to control [the Court's] competence, which would be inadmissible"[51]. That is, if Azerbaijan were correct that the Court must defer to its framing of its claims in the submissions, then Azerbaijan could throw any and all allegations — even those entirely unrelated to racial discrimination — into its bucket of "ethnic cleansing", without giving Armenia any chance to exclude them from the Court's consideration at the preliminary objections stage. This cannot be correct.

II. The Court's power to dismiss subdivisions of claims

6. This brings me to my second point, which is that *even if* Azerbaijan were correct that its claims and contentions in relation to landmines and booby traps are only a "subdivision" — to use Mr Wordsworth's term[52] — of its overarching claim of ethnic cleansing, the Court may *still* uphold Armenia's preliminary objection with respect to this so-called subdivision.

7. In *Certain Iranian Assets*, for example, Iran in the submissions of its Memorial asserted that the United States had breached its obligations under many provisions of the bilateral Treaty of Amity by allegedly engaging in a wide variety of conduct[53]. In response, the United States observed "[u]nder almost every article of the Treaty [Iran] invokes, Iran complains that rules of State immunity have been disregarded"[54] and the United States filed a preliminary objection asking the Court to dismiss

> "as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity . . . to the Government of Iran, Bank Markazi, or Iranian State-owned entities"[55].

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[50] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, para. 32 (citing *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126; *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 52; *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 16).

[51] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.

[52] CR 2024/22, p. 43, para. 23 (Wordsworth).

[53] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, Memorial of the Islamic Republic of Iran (1 February 2017), p. 126, para. 8.1 *(a)*.

[54] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, Preliminary Objections of the United States of America (1 May 2017), p. 78, para. 8.1.

[55] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 25, para. 48.

The Court upheld the objection[56], thereby dismissing, at the preliminary objections stage, the subdivision of each of Iran's claims predicated on its sovereign immunity contention.

8. Another example of the Court upholding a preliminary objection with respect to a subdivision of a claim may be found in the *Diallo* case. There, Guinea, in the submissions of its Memorial, stated, as a single claim, that the Democratic Republic of the Congo was responsible for, among other things, not respecting Mr Diallo's rights under the Vienna Convention on Consular Relations, mistreating him and depriving him of his rights of ownership and management over his companies[57]. At the preliminary objections stage, the Court upheld the Democratic Republic of the Congo's objection regarding Guinea's lack of standing *but only* "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of [his companies]"[58]. This, again, was a dismissal of a subdivision of a claim.

9. In summary, regardless of whether the Court exercises its power to characterize Azerbaijan's claims or not, it has the power to uphold Armenia's jurisdiction *ratione materiae* with respect to Azerbaijan's claims and contentions concerning the alleged placement of landmines and booby traps.

III. The relevance of the Court's findings of implausibility

10. My third point relates to Mr Wordsworth's remarks regarding the relevance of the Court's finding of implausibility at the provisional measures stage.

11. Mr Wordsworth yesterday unsurprisingly sought to rely on the Court's decision in the *Ukraine* v. *Russia* case with respect to claims under the International Convention for the Suppression of the Financing of Terrorism[59]. There, the Court found at the provisional measures stage that the presence of the requisite elements of intention and knowledge was *not* plausible[60]. But then, at the

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[56] *Ibid.*, p. 44, para. 126 (2).

[57] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Memorial of the Republic of Guinea (23 March 2001), p. 108, para. 5.1 (1).

[58] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 617, para. 98 (1) *(b)*.

[59] CR 2024/22, p. 39, paras. 6-7 (Wordsworth).

[60] *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, para. 75.

preliminary objections stage, the Court considered that ascertaining these elements was "properly a matter for the merits"[61].

12. The Court in that case did *not*, however, say that a finding of implausibility at the provisional measures stage is *never* relevant for ascertaining its jurisdiction *ratione materiae* at the preliminary objections stage.

13. Mr Wordsworth gave the impression otherwise by quoting from paragraph 58 of the Court's Judgment in that case. What the Court stated: "At the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted"[62]. But aside from the fact that the Court was careful to *not* state an absolute exclusion, there the Court was speaking of the plausibility of *claims*, not the plausibility of *rights*. Only the latter is determined by the Court at the provisional measures stage. If the *rights* invoked by the applicant under the treaty are not even *plausible*, then there is serious doubt indeed as to whether the Court has jurisdiction *ratione materiae* over the claims based on those very rights.

14. At the end of the day, the Court has already twice found that the alleged rights asserted by Azerbaijan with respect to landmines and booby traps are not plausible[63]. The measures of which Azerbaijan complains — that is, the placement of landmines and booby traps — are therefore not capable of having an adverse effect on rights protected under the CERD, such that the Court does not have jurisdiction *ratione materiae* with respect to those measures.

15. The Court should feel comforted in this conclusion considering the evidence Azerbaijan has sought to rely on, to which I now turn.

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[61] *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 (II)*, p. 586, para. 63.

[62] CR 2024/22, p. 39, para. 6 (Wordsworth) (quoting *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 (II)*, p. 584, para. 58).

[63] *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. 425, para. 53; *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. 23.

IV. Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct amounts to racial discrimination

16. Mr Aughey's presentation yesterday morning was the first time that Azerbaijan attempted an evidentiary showing at this stage of the proceedings[64], and we welcome the opportunity to remind the Court why Azerbaijan's claims are not capable of falling under the CERD.

17. Mr Aughey argued yesterday that Azerbaijan has put forward "more than sufficient evidence" showing two things[65]. First, that what he calls Armenia's forces "placed landmines and booby traps in civilian areas, far from the former line of contact"[66]. And second, that Armenia "continued [to] refus[e] to share complete and accurate information on the location of the minefields and booby traps, long after the cessation of hostilities"[67]. I shall address the two points in turn by focusing on the evidence that Mr Aughey relied on in his presentation.

18. First, the argument on the alleged placement of mines and booby traps. For the sake of argument, I will accept that it was Armenia's armed forces that planted mines and not Azerbaijan's or Nagorno-Karabakh's armed forces. I will also accept that it was Armenia's armed forces that planted booby traps, and not Nagorno-Karabakh's armed forces or persons with military experience who were being forced to leave their homes. I will further accept that mines and booby traps existed where Azerbaijan says they did. For the avoidance of any doubt, Armenia does not accept any of these points[68], but we recognize that they belong to the merits.

19. I will, however, test Mr Aughey's assertion that the evidence shows, *on its face*, that the alleged conduct "ha[s] had *no* defensive purpose"[69]. I will do that by starting with Azerbaijan's update to Figure 3 of Annex 22 of its "Additional Annexes for the Hearing on its Request for Provisional Measures" of 31 January 2023, which Azerbaijan submitted to the Court a couple of days ago[70]. Let us look at this map, which is now on your screens. Yesterday, Mr Aughey made much of

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[64] CR 2024/22, p. 54, para. 25 (Aughey).

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*.

[68] See CR 2021/25, p. 13, para. 13 (Kirakosyan); CR 2023/4, p. 11, paras. 7-8 (Kirakosyan); CR 2021/25, pp. 20-32, paras. 5-38 (Murphy); CR 2023/4, pp. 12-33 (Murphy).

[69] CR 2024/22, p. 54, para. 25 (Aughey) (emphasis added).

[70] Letter *from* Elnur Mammadov, Agent of the Republic of Azerbaijan, *to* HE Mr Philippe Gautier, Registrar of the International Court of Justice (19 April 2024).

this map for the point that the locations where mines have exploded were not confined to the line of contact[71]. This may be taken as true in the current phase of the proceedings, but it does *not* prove in and of itself that Azerbaijan's claims are capable of falling under the CERD, for the reason I will explain shortly.

20. The next slides will show to the Court the progression of Azerbaijani forces during the Second Nagorno-Karabakh War and the consequent retreat of the Armenian forces. The first slide shows the situation that prevailed on 27 September 2020, just before the outbreak of the Second Nagorno-Karabakh War. The area shaded in red represents the areas under Nagorno-Karabakh's control. Then, on 10 October 2020, you can start seeing in blue the advancement of Azerbaijani forces into the territory. Finally, at the end of the war, a month later on 10 November 2020, you can see most of the area now in blue and under Azerbaijan's control.

21. Now, let us compare the map on your screens to the one Mr Aughey showed you yesterday. I kindly ask the Court to focus its attention on the bottom half of the map, depicting locations where mines have reportedly exploded away from the line of contact. As you can see, they match very closely the areas that were progressively falling under Azerbaijan's control, as ethnic Armenian defence lines were collapsing and Armenian forces were retreating in haste. Armenian forces retreated across the very area where you can see the red dots depicting minefields. Those minefields would have protected the armed forces retreating from the advancing army.

22. Now let us focus on the red dots depicting minefields on the top half of the map.

23. The next slide shows the situation prevailing on the ground just before Azerbaijan's most recent aggression on Nagorno-Karabakh, as of 19 September 2023[72]. Again, the area shaded in red is the one remaining under Nagorno-Karabakh's control and the one shaded in blue is the one which fell under Azerbaijan's control pursuant to the Trilateral Statement. I should pause here to note that the Trilateral Statement did not defuse the military situation in Nagorno-Karabakh, as there were repeated violations of the ceasefire, notwithstanding the presence of the Russian peacekeeping

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[71] CR 2024/22, pp. 49-50, paras. 7-8 (Aughey).

[72] "Azerbaijani forces strike Armenian-controlled Karabakh, raising risk of new Caucasus war", *Reuters* (19 September 2023), available at https://www.reuters.com/article/armenia-azerbaijan-idCAKBN30P0L9 (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, Request for provisional measures of Armenia (28 September 2023), Annex 56).

forces[73]. The next slide shows the situation prevailing after 20 September 2023, with the entire Nagorno-Karabakh region now under Azerbaijan's control[74].

24. Now, let us compare the map on the eve of last September's attack with the one Mr Aughey showed you yesterday. As you can see on your screens now, the red areas to which ethnic Armenians retreated pursuant to the Trilateral Statement also very closely match the remaining red dots on Azerbaijan's updated map.

25. And what of the remaining sporadic dots to the left side of the map? These are remnants of the First Nagorno-Karabakh War, per Azerbaijan's own evidence which I list in footnote[75].

26. Mr President, Members of the Court, I need not belabour a point which should be obvious to everyone in this room. This comparison, based on Azerbaijan's own evidence and objective facts, should be sufficient to show that any landmines — new or old — were placed there for defensive purposes only, including during the retreat of military forces[76]. Landmines planted to obstruct the progress of the enemy and protect the retreat of armed forces cannot possibly amount to racial discrimination.

27. Mr Aughey cited to a number of other documents which, on their face, similarly do not establish the Court's jurisdiction *ratione materiae* over Azerbaijan's claim. Annexes 32 and 36 to Azerbaijan's first Request for provisional measures were thoroughly addressed by Professor Murphy at the first hearing on provisional measures and the relevant references are included in footnote[77]. The Court examined this evidence in its Order on Azerbaijan's first request, holding that it failed to indicate that Armenia's alleged conduct constituted racial discrimination[78].

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[73] CR 2021/25, pp. 23-24, paras. 9-10 (Murphy).

[74] "Last bus of fleeing Armenians leaves Nagorno-Karabakh to bring end to exodus: 'It's a ghost town'", *Independent* (2 October 2023), available at https://www.independent.co.uk/news/world/europe/armenia-flee-nagorno-karabakh-azerbaijan-b2422474.html.

[75] Extract from Mine Action Agency of the Republic of Azerbaijan, Assistance Required for the Republic of Azerbaijan in Humanitarian Mine Action for Safe Reconstruction and Return of IDPs to the Conflict Affected Territories of Azerbaijan (2021), p. 2 (Request for provisional measures of Azerbaijan (23 September 2021) (Annex 32)). See also CR 2021/25, pp. 20, para. 5, pp. 22-23, para. 8, p. 27, para. 22 (Murphy); CR 2021/27, p. 14, para. 7 (Murphy); CR 2023/4, p. 29, para. 57 (Murphy).

[76] CR 2021/25, pp. 29-31, paras. 26-34 (Murphy); CR 2021/27, pp. 14-16, paras. 7-12 (Murphy); CR 2023/4, pp. 17-26, paras. 20-48 (Murphy).

[77] CR 2021/25, pp. 30-31, paras. 31-32 (Murphy); CR 2021/27, p. 14, para. 7 (Murphy); CR 2021/25, p. 28, para. 23 (Murphy); CR 2021/25, p. 31, para. 33 (Murphy); CR 2021/27, pp. 14-17, paras. 7-16 (Murphy).

[78] *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.

28. You were also shown some photos from Azerbaijan's Annex 10 and heard some references to Azerbaijan's Annex 24, this time to the second Request for provisional measures regarding booby traps. Those too were thoroughly addressed by Professor Murphy at the second hearing on provisional measures and the relevant references are included in footnote[79]. The Court has examined the evidence already when reaffirming its conclusion that Azerbaijan's allegations relating to booby traps were as implausible as those relating to landmines[80].

29. You also heard a reference to a December 2020 UN "inter-agency mine action assessment" in a letter Azerbaijan sent to the United Nations Secretary-General. It is quite telling that the best quote from that assessment Azerbaijan was able to muster in its letter refers to "indications" that "some" houses might have been booby trapped, and here is the important part, as "the Armenians *withdrew*"[81]. It is pure despair to bring this forward as "important evidence"[82], and yet this is what Azerbaijan did yesterday.

30. What remains? A report issued by an international organization of which Armenia is not a member and prepared solely on the basis of Azerbaijan's allegations and two statements by Azerbaijan's Mine Action Agency, issued after the scheduling of this hearing[83]. None of these documents add anything to the evidence that the Court has already thoroughly examined twice, nor does it detract from the reality of the situation which is that landmines and booby traps were planted for defensive purposes, including during the withdrawal of armed forces[84].

31. I now turn to Mr Aughey's second point that Armenia's "continued refusal to share complete and accurate information on the location of the minefields and booby traps, long after the

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[79] CR 2023/4, pp. 20-21, para. 28-31 (Murphy); CR 2023/4, pp. 30-31, para. 63 (Murphy).

[80] *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. 23.

[81] CR 2024/22, p. 48, footnote 126 (Aughey) (citing Letter *from* the Permanent Representative of Azerbaijan to the United Nations addressed *to* the Secretary-General (8 February 2023), p. 3, available at https://un.mfa.gov.az/files/shares/Letters/77session/Letter%20to%20UNSG%20in%20reply%20to%20Armenia's%20letter%20on%20mines%20A-77-726%20Eng.pdf) (emphasis added).

[82] CR 2024/22, p. 49, para. 7 (Aughey).

[83] CR 2024/22, pp. 48-49, para. 5 (Aughey) (citing ANAMA, Facebook post (12 February 2024) (certified translation) (emphasis added) (tab 10 of Azerbaijan's judges' folder)) and pp. 50-51, para. 10 (citing Mine Action Agency of the Republic of Azerbaijan, "Explosive materials have been discovered in Khojavand region" (19 April 2024), available at https://anama.gov.az/news/217).

[84] See e.g. ANAMA Facebook post (12 February 2024) (certified translation) (tab 10 of Azerbaijan's judges' folder).

[cessation] of hostilities, can have had no defensive purpose"[85]. For the sake of argument, I will again accept that Armenia has withheld information on the location of landmines and booby traps. For the avoidance of any doubt, however, Armenia strongly rejects any such allegation[86].

32. I will, however, venture to answer Mr Aughey's question yesterday as to "what possible justification could there be for Armenia not to hand over comprehensive and accurate information as to [the] placement [of landmines and booby traps] after November 2020?"[87] Well, there are many possible justifications and none of them is because Armenia allegedly racially discriminated against Azerbaijanis.

33. One justification may be, for example, that information was not simply at Armenia's disposal and it became available only after Armenia received the forcibly displaced from Nagorno-Karabakh. In fact, the document Mr Aughey relied yesterday shows precisely that when noting that "the transferred maps were received through [Nagorno-Karabakh] military personnel"[88].

34. Or maybe the answer to Mr Aughey's rhetorical question is even simpler than that. Tens of thousands of ethnic Armenians still lived in Nagorno-Karabakh after the conclusion of the Second Nagorno-Karabakh War. Maybe the landmines were used precisely for the reason they are intended to be used the world over: as a means to defend military positions. Maybe handing over maps would have compromised the security of the ethnic Armenian population. And the constant deadly violations of the ceasefire Azerbaijan purported to agree to under the Trilateral Statement, as well as the events of last September, prove that any such concern would have been well founded.

35. In short, Mr President and Members of the Court, the evidence before the Court, on its face, does not show that Armenia has laid mines and booby traps or withheld maps for any purpose or effect relating to racial discrimination, let alone as a part of a "30-year campaign of ethnic cleansing"[89]. As such, Azerbaijan has not shown good reason why the Court should treat its claims any different than it did in its two Requests for provisional measures. The Court does not have

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[85] CR 2024/22, p. 54, para. 25 (Aughey).

[86] See CR 2021/25, p. 13, para. 9 (Kirakosyan); CR 2021/25, pp. 24-25, paras. 12-14 (Murphy); CR 2021/27, pp. 16-18, paras. 13-18 (Murphy).

[87] CR 2024/22, p. 51, para. 11 (Aughey).

[88] National Security Service of the Republic of Armenia, *Report* (25 January 2024), available at https://www.sns.am/en/news/view/920 (tab 9 of Azerbaijan's judges' folder).

[89] CR 2024/22, p. 10, para. 3 (Mammadov).

jurisdiction *ratione materiae* with respect to those claims and Armenia respectfully asks you that you reject them *in limine* at this phase of the proceedings. This brings my presentation to an end, Mr President, and I would kindly ask you to call upon Ms Macdonald to continue Armenia's submissions.

The PRESIDENT: I thank Mr Salonidis for his statement. I now invite Ms Alison Macdonald to take the floor. You have the floor, Madam.

Ms MACDONALD:

THE COURT LACKS JURISDICTION *RATIONE MATERIAE* OVER AZERBAIJAN'S CLAIMS CONCERNING ALLEGED ENVIRONMENTAL HARM

I. Introduction

1. Mr President, Madam Vice-President, Members of the Court, I will respond to Azerbaijan's oral submissions on its claims of environmental harm.

II. The legal framework

2. Starting with the legal framework, Professor Boisson de Chazournes cited[90] the two-fold test applied by the Court in the first *Ukraine* v. *Russia* case[91]. The Court will recall that Armenia also cited this passage on Monday[92], along with the paragraph which followed it, which I showed you on screen[93] and which we have here. So it is not quite clear to us why Professor Boisson de Chazournes said yesterday that Armenia has sought to argue something else[94].

3. Be that as it may, remaining with the legal framework a moment longer, on Monday I set out three propositions, derived from the Court's case law[95]:

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[90] CR 2024/22, p. 55, para. 4 (Boisson de Chazournes).

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

[92] CR 2024/21, p. 52, para. 10, fn. 140 (Macdonald).

[93] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024*, para. 196, referring to *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. 112.

[94] CR 2024/22, p. 56, para. 5 (Boisson de Chazournes).

[95] CR 2024/21, pp. 55-56, para. 22 (Macdonald).

(a) the showing of "disparate effects" must still be directed at establishing that the conduct complained of was "based on" a prohibited ground;

(b) the showing of a disparate effect will not suffice if there is an objective and reasonable explanation for the disparity that does not relate to the prohibited grounds;

(c) mere collateral or secondary effects on a particular group are not enough. And I showed you on Monday that this was expressly accepted by Azerbaijan in its submissions last week[96].

4. These propositions were not mentioned, let alone disputed, by Professor Boisson de Chazournes. And yet in light of the submissions she *did* make, they take on some significance. It is not enough, even at jurisdiction stage, just to point to an alleged differential effect and then ask the Court to indulge in speculation to fill the — as Azerbaijan likes to call it — "something more".

5. Now Professor Boisson de Chazournes made a point on permissible inferences, based on the Court's recent Judgment on the merits in the first *Ukraine* v. *Russia* case[97]. There, citing the *Corfu Channel* case, the Court stated that "a State that is not in a position to provide direct proof of certain facts 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence'"[98]. In that case, the "more liberal recourse" was because of Ukraine's lack of access to evidence in Crimea.

6. Counsel for Azerbaijan sought to draw an analogy between that situation and what she said was Azerbaijan's lack of access, at the time of filing its Memorial, to the so-called "occupied territories"[99]. But there is no analogy, for two reasons:

(a) The *Ukraine* case was dealing with the proof of facts at the merits stage. Azerbaijan does not need to prove facts at jurisdiction stage because Armenia must — and does — accept its factual allegations as true. So the issue of proof, and consequently of inferences, liberal or otherwise, does not arise.

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[96] CR 2024/21, p. 56, para. 22 *(c)* (Macdonald).

[97] CR 2024/22, pp. 60-61, para. 29 (Boisson de Chazournes).

[98] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024*, para. 169, citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

[99] CR 2024/22, pp. 60-61, para. 29 (Boisson de Chazournes).

(b) In any event, on Azerbaijan's case most of the environmental harm occurred in the seven districts over which it has had control since the conclusion of the Second Nagorno-Karabakh War in late 2020. And indeed it commissioned its own experts, Industrial Economics, who went to the "Formerly Occupied Area" in 2021[100], although as Armenia sets out in its Preliminary Objections, the resulting report takes Azerbaijan's discrimination case no further forward, and in fact undermines it in a number of respects[101].

III. The factual context in which the alleged harms occurred

7. Moving on, then, to the facts, you will recall that Armenia took some time on Monday to work through the structure of Azerbaijan's case[102]. Having heard Azerbaijan yesterday, it does not seem to be in dispute that, *on Azerbaijan's case*:

(a) all the harm allegedly occurred in the three decades in which it describes Armenia as having "occupied" the territory[103];

(b) Armenia controlled the relevant area[104];

(c) ethnic Armenians lived in that area[105];

(d) ethnic Azerbaijanis did *not* live in that area[106].

8. One thing that Azerbaijan seems to have become confused about, however, is its own factual case about Armenia's intentions. You will recall that on Monday I referred you to passages of Azerbaijan's Memorial, where its case is set out very clearly. It speaks of Armenia "violat[ing] CERD by preventing Azerbaijanis from accessing those territories throughout the entire course of its almost thirty-year occupation"[107]. How was this done? Well, Azerbaijan goes on to allege that

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[100] 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)* (Memorial of Azerbaijan, Annex 65), p. ES-3, p. 3.

[101] Preliminary Objections of Armenia, paras. 107, 115.

[102] CR 2024/21, pp. 50-52, paras. 2-8 (Macdonald).

[103] See CR 2024/22, p. 57, para. 11 (Boisson de Chazournes).

[104] See *ibid.*, pp. 59-60, para. 25 (Boisson de Chazournes).

[105] See *ibid.*, pp. 56-57, para. 10 (Boisson de Chazournes).

[106] See *ibid.*, p. 57, para. 15 (Boisson de Chazournes).

[107] Memorial of Azerbaijan, para. 446.

> "the Armed Forces of Armenia, including its Installed Regime, sealed off the then-occupied territories from the rest of Azerbaijan, using physical barriers, military fortifications, landmines, and snipers, and deploying threats and intimidation along the Line of Contact and beyond to reinforce the message that *Azerbaijanis could never return to those territories*"[108].

9. Azerbaijan's Agent yesterday said that "Armenia's counsel made the extraordinary and extremely misleading submission that Azerbaijanis had no intention of returning to those territories"[109]. He then gave a one-sided description of the process of negotiations as to a potential resolution of the situation[110].

10. But it is abundantly clear that the submissions to which he took exception, including the passage he footnotes[111], were summarizing *Azerbaijan's own case* as to Armenia's intentions, namely that — again according to Azerbaijan — *Armenia* did not intend the Azerbaijanis to return to the area. You have just seen that case set out clearly on the screen: Armenia, *says Azerbaijan*, was determined to use military means "to reinforce the message that Azerbaijanis could never return to those territories".

11. So when Azerbaijan's Agent finds it "puzzling that Armenia did not expect Azerbaijanis to return to the areas Armenia intentionally pillaged"[112], unfortunately that puzzlement arises from Azerbaijan's own pleadings, on which its case on jurisdiction *ratione materiae* must stand or fall.

12. To be sure, the case pleaded by Azerbaijan on this issue is not a remotely fair or accurate characterization of Armenia's *actual* intentions towards the many persons — Armenian and Azerbaijani — who had been displaced by the First Nagorno-Karabakh War. If this part of the case went to the merits, Armenia would have abundant evidence to show you about its good-faith engagement in the Minsk process, through which Armenia strongly hoped to reach a resolution allowing return of *all* those who were displaced by the conflict. But at jurisdiction stage, Armenia has scrupulously taken Azerbaijan's factual allegations as true, and Azerbaijan must of course do the same.

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[108] *Ibid.*, para. 449.

[109] CR 2024/22, p. 13, para. 16 (Mammadov).

[110] See *ibid.*, pp. 13-14, paras. 17-18 (Mammadov).

[111] See CR 2024/21, p. 61, para. 44 (Macdonald).

[112] CR 2024/22, pp. 13-14, para. 18 (Mammadov).

IV. The alleged harm, even if true, does not fulfil any of the criteria for racial discrimination

13. Turning to the legal requirements that Azerbaijan has to meet, counsel yesterday did not address the first argument put forward by Armenia, namely that the acts and omissions it complains of were not capable of amounting to "a differentiation of treatment" of human beings[113].

14. Moving on to the requirement that the conduct in question be "based on" a prohibited ground, which Azerbaijan *did* address, its submissions focused on what it says to have been different treatment of the seven so-called "occupied" districts which had previously been populated by Azerbaijanis, when compared with the territory which was occupied by ethnic Armenians. This alleged difference, or, as Azerbaijan put it in the Memorial, the "purposeful concentration" of environmental harm[114], is central to Azerbaijan's case at every stage of the discrimination analysis.

15. And you will recall that, to make its case on this point, counsel for Azerbaijan showed you a map.

16. Counsel then noted that the yellow areas were formerly Azerbaijani, while the areas outlined in purple were those inhabited by people of Armenian origin, and she boldly claimed that there were *no acts of environmental destruction* in these purple areas[115]. We can see, though, that this is contradicted by the map itself, which plainly shows alleged environmental harms in the purple areas too.

17. Then when it comes to *Armenia's* case, counsel for Azerbaijan claimed that Armenia's position is that the environmental harm was evenly distributed throughout the occupied territories[116]. One searches in vain, though, for a footnote to point us to such a submission, written or oral, by Armenia. On the contrary, as you have seen, Armenia has been scrupulous to accept, at jurisdiction stage, Azerbaijan's factual case about — as I put it on Monday — what was done and where.

18. So let us look at the map. As you can see, it claims to depict four types of environmental harm: construction of hydropower, mining activities, forest harm and agricultural abandonment.

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[113] CR 2024/21, pp. 52-53, paras. 9-11 (Macdonald).

[114] Observations of Azerbaijan, para. 77.

[115] CR 2024/22, p. 58, para. 17 (Boisson de Chazournes).

[116] *Ibid.*, para. 19 (Boisson de Chazournes).

19. To take the example of hydropower, as you see to the left, the hydroelectric stations are built in Kalbajar and Lachin districts, which are also, according to Azerbaijan's own experts, the districts with the highest levels of precipitation[117]. As you see to the right, the Tartar, Hakari and Aghavno Rivers also run through these districts. And as you can see when we overlay the two maps, the hydropower plants allegedly constructed closely follow the flow of these rivers. Is Azerbaijan's case that these rivers flow in a discriminatory manner? Or that the rain in Nagorno-Karabakh falls in a discriminatory way?

20. Turning to mining activities, on Azerbaijan's map, these took place throughout what it calls the "Liberated Territories", including in areas that were allegedly populated by ethnic Armenians, ringed here in dark blue[118]. Unsurprisingly, areas where Azerbaijan alleges that there were mining activities are also the areas with large mineral reserves. In particular, Zangilan, ringed in red at the bottom, has gold, copper, faced stone, limestone and building stone, while Lachin, ringed to the left, and Kalbajar, ringed in green at the top left, have large chromite and mercury deposits[119]. And so to state the obvious, mines can only be built where the deposits are. Again, the argument cannot surely be that the mineral resources were distributed in a discriminatory fashion.

21. Azerbaijan's claim that the "abandonment of agricultural land" constitutes differential treatment is similarly illogical. We can see this from the report that Azerbaijan cited yesterday, which it calls a report of the UN Environment Programme[120]. At the outset we note that the report explicitly states that it "does not constitute an official publication" and that the views expressed in it "do not necessarily reflect the view of the United Nations Environment Programme"[121]. Elsewhere, the report notes that its findings were restricted not only by the objectives pursued by the Government of

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[117] 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)* (Memorial of Azerbaijan, Annex 65), p. 25.

[118] Memorial of Azerbaijan, p. 245, footnote 717.

[119] "The potential of natural resources in the occupied territories", Karabakh.org, available at https://karabakh.org/conflict/occupied-territories/the-potential-of-natural-resources-in-the-occupied-territories/.

[120] See CR 2024/22, p. 58, para. 19 (Boisson de Chazournes).

[121] *Report of the UNEP Environmental Scoping Mission to the Conflict-Affected Territories of Azerbaijan* (April 2022), available at http://eco.gov.az/frq-content/plugins/pages_v1/entry/20221223145000_59496900.pdf, p. I.

Azerbaijan[122], but also by the fact that the sites visited were specifically selected by the Government[123].

22. In any event, on the farming issue the report does not help Azerbaijan at all, since it makes clear that under-farming is due to depopulation because of the conflict[124]. Interestingly, the report even notes that "[t]he resulting decline in agricultural activity may have inadvertently supported some ecological benefits in terms of ecosystem services and biodiversity"[125]. And again we ask, is not farming agricultural land in a depopulated war zone really capable of being racial discrimination?

23. Interestingly, also, the same report makes clear that Azerbaijan has itself caused significant damage to forests, so we see: "New road construction — launched as part of the reconstruction drive in January 2021 — is also having a significant impact on forest cover; particularly the approximately ~80-kilometer highway segment between Fuzuli and Shusha."[126]

24. Counsel for Azerbaijan also relied on the 2016 Resolution of the Parliamentary Assembly of the Council of Europe[127], but did not address the key points I made about this on Monday, including:

(a) Firstly, the fact that the reservoir — which is located in Nagorno-Karabakh and which was damaged in the First Nagorno-Karabakh War[128], supplied water to the ethnic Armenian population of Nagorno-Karabakh, as well as people downstream in Azerbaijan[129].

(b) Secondly, that the war damage meant that "water from the Sarsang reservoir cannot be used for irrigation *by anyone* until the canal has been repaired"[130].

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[122] See *ibid.*, p. 3.

[123] *Ibid.*, p. 5.

[124] *Ibid.*, p. 10.

[125] *Ibid.*

[126] *Ibid.*, p. 14.

[127] Parliamentary Assembly of the Council of Europe, Resolution 2085, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (26 January 2016).

[128] CR 2024/21, pp. 56-57, paras. 25-26 (Macdonald); Council of Europe, Parliamentary Assembly, Committee on Social Affairs, Health and Sustainable Development, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water*, Doc.13931 (12 December 2015), available at https://pace.coe.int/en/files/22290, para. 19.

[129] CR 2024/21, pp. 56-57, paras. 25-26 (Macdonald); Council of Europe, Parliamentary Assembly, Committee on Social Affairs, Health and Sustainable Development, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water*, Doc.13931 (12 December 2015), available at https://pace.coe.int/en/files/22290, para. 9.

[130] CR 2024/21, p. 56, para. 25 (Macdonald); Council of Europe, Parliamentary Assembly, Committee on Social Affairs, Health and Sustainable Development, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water*, Doc.13931 (12 December 2015), available at https://pace.coe.int/en/files/22290, para. 19 (emphasis added).

(c) Thirdly, that the Resolution characterizes the alleged mismanagement of the reservoir as a "tool[] of *political* influence"[131].

25. So we are no further forward in understanding how Armenia is said to have discriminated against Azerbaijanis in this regard when ethnic Armenians needed the water just as much.

26. As I discussed on Monday, the overall case that Azerbaijan makes here is the "purposeful concentration" argument, or as counsel put it yesterday, the idea that environmental harm was "deliberately concentrated" in areas formerly populated by Azerbaijanis[132]. But after yesterday's submissions the Court still has no sense of why this is more than just secondary or collateral effects — if even that, given that, on Azerbaijan's case, nobody lived in those areas. Azerbaijan has offered you no basis at all to conclude that there was any racial discrimination involved in, for example, situating hydroelectric power activity in areas where there was water, or mining in areas where there were the resources to mine.

27. And as to how the Azerbaijani population could be discriminated against when they were not there to experience any of the impacts of this alleged activity, Azerbaijan falls back on the argument that the alleged environmental harm was all part of a campaign of ethnic cleansing[133].

28. The ethnic cleansing allegation is doing a lot of work here. Counsel argued that Armenia's alleged ethnic cleansing was intended to ensure that Azerbaijanis would be deprived, upon their return, of their right to enjoy their homeland, including the environment and natural resources that form part of it[134]. The problem with that is that the whole point of ethnic cleansing is that the perpetrator does not intend the displaced population to return. And as you have seen, that is exactly Azerbaijan's pleaded case on the facts and the law[135].

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[131] CR 2024/21, pp. 54-55, para. 19 (Macdonald); Council of Europe, Parliamentary Assembly, *Resolution 2085(2016), Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (26 January 2016) (emphasis added).

[132] CR 2024/22, p. 61, para. 30 (Boisson de Chazournes).

[133] *Ibid.*, pp. 59-60, paras. 22-25 (Boisson de Chazournes).

[134] *Ibid.*, p. 59, para. 23 (Boisson de Chazournes).

[135] See *ibid.*, p. 27, para. 32 (Lowe).

V. Azerbaijan does not establish the applicability of the rights it relies on

29. Turning briefly to the various specific rights which Azerbaijan invokes in support of its claims, Professor Boisson de Chazournes stated yesterday that Armenia argues that the rights of health and property do not fall within the scope of the CERD[136]. That is, of course, not Armenia's position — its position is, rather, that Azerbaijan's case does not fall within the scope of those rights.

30. And we saw yesterday how loosely they are being invoked. This includes the assertion that the destruction of the environment, *whether intentional or not*, has repercussions on the health and well-being of individuals and their fundamental rights[137]. Now that may be unobjectionable as an abstract statement, but the idea of unintentional harm being the basis for a CERD claim is rather difficult to understand, given among other things the requirement that the relevant acts be "based on" a protected characteristic.

31. In this regard, counsel for Azerbaijan did not engage with the points I made on Monday about:

(a) Azerbaijan's inaccurate presentation of the *Western Shoshone* case[138];

(b) the complete absence of any reference in the work of the CERD Committee to the alleged right to "return to a healthy environment"[139];

(c) the fact that the legal sources on property rights cited by Azerbaijan relate to the collective land rights of indigenous, tribal or minority communities, and one recommendation of the CERD Committee on racial discrimination against people of African descent[140]. And Azerbaijan still, rightly, stops short of claiming that the former Azerbaijani population of the so-called "occupied territories" falls into any of these categories, despite gesturing in this general direction by referring to what it describes as the cultural importance of the territories in question[141].

32. Instead of responding to these points, Azerbaijan made a series of scattershot references to general principles contained in instruments such as the Rio Declaration on Environment and

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[136] *Ibid.*, p. 63, para. 40 (Boisson de Chazournes).

[137] *Ibid.*

[138] CR 2024/21, p. 59, para. 38 (Macdonald).

[139] *Ibid.*, p. 60, para. 40 (Macdonald); Memorial of Azerbaijan, para. 473.

[140] Committee on the Elimination of Racial Discrimination, *General recommendation No. 34: Racial discrimination against people of African descent*, UN doc. CERD/C/GC/34 (3 October 2011).

[141] CR 2024/22, p. 61, para. 32 (Boisson de Chazournes); *ibid.*, p. 66, para. 49.

Development and General Comment No. 14 of the Committee on Economic, Social and Cultural Rights[142]. But again, none of these general statements of principle gives Azerbaijan the slightest assistance in establishing the complex blend of rights that it now seeks to rely on. And so its case also fails, we say, for lack of the engagement of any specific rights in the contorted factual situation which forms the basis of its discrimination claim.

VI. Conclusion

33. In conclusion, Mr President, Members of the Court, Armenia submits that nothing you heard yesterday helps Azerbaijan to establish its claim of racial discrimination. So Armenia respectfully asks you to uphold its jurisdictional objection in this regard.

34. Mr President, that concludes my submissions. I thank you for your attention, and I ask you to call upon the Agent of Armenia, His Excellency Mr Kirakosyan, to present Armenia's final submissions.

The PRESIDENT: I thank Ms Macdonald for her statement. I now invite the Agent of Armenia, His Excellency Mr Kirakosyan, to take the floor. You have the floor, Excellency.

Mr KIRAKOSYAN:

CONCLUDING REMARKS AND FINAL SUBMISSIONS

1. Mr President, Madam Vice-President, distinguished Members of the Court, thank you, once again, for your kind attention throughout the course of Armenia's submissions. Counsel showed that Armenia's preliminary objections are all properly before you and we look forward to the Court's judgment. Before reading Armenia's final submissions, I would like, however, to make four brief points responding to some of the allegations made against Armenia in the course of Azerbaijan's opening submissions yesterday. These allegations are not the proper province of this phase. The same holds true for our responses but with the Court's indulgence I will raise them now for the record.

2. First, Azerbaijan's Agent referred yesterday to nearly 100-year-old statements, claiming that Armenia has "endorsed racist ideologies"[143]. Let me be clear: the author of those statements,

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[142] *Ibid.*, p. 65, para. 46 (Boisson de Chazournes).

[143] CR 2024/22, pp. 11-12, paras. 7-9 (Mammadov).

Garegin Nzhdeh, is a prominent figure in Armenian history. He is known for his role as a military leader and statesman, and is widely credited, among other things, for playing a key role in preventing the severing of the Syunik region of Armenia during 1920-1921[144], as well as for defending Armenian people following the Armenian genocide which the world commemorates today and Azerbaijan denies. He is *not*, however, venerated for the statements Azerbaijan placed on the screen yesterday.

3. Azerbaijan's Agent also showed images of what he called a "parade" which allegedly "ended in a collective Nazi salute" in front of the statue of Garegin Nzhdeh. But as is clear from Azerbaijan's own slides, the so-called "parade" was attended by fewer than 15 individuals[145]. It should not be surprising that fringe groups occasionally abuse freedom of expression in a democratic society. Armenia is no different from any other democratic society in that regard. It is not long ago that Azerbaijan sought to convince you that freedom of expression in Azerbaijan could only be exercised in the Lachin Corridor, and my hope is that the irony is lost on the Court.

4. Azerbaijan's Agent further referred to a statement by Twitter asserting that it had "removed 35 accounts that had ties to the Government of Armenia"[146]. The Members of the Court will recall that, in its first Request for provisional measures, Azerbaijan relied on the same statement to request the Court to order Armenia to "cease and desist incitement based on the fabrication of public and private hate speech attributed to Azerbaijanis on Twitter and other social media and traditional media channels"[147]. But the Court declined to make such an order. And while Azerbaijan is free to seek to revive that unfounded argument on the merits, Armenia will — once again[148] — address it at that stage.

5. The second point I wish to address concerns Azerbaijan's criticism of my statement on Monday denying that Armenia ever "illegally occupied Azerbaijan's territory, or controlled the

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[144] See e.g. Richard G. Hovannisian, The Republic of Armenia: Between Crescent and Sickle: Partition and Sovietization, Vol. 4., Berkeley, *University of California Press* (1996), p. 239; "Armenian Embassy Condemns Attack On Nzhdeh Memorial In Russia", *Azatutyun* (13 November 2019), available at https://www.azatutyun.am/a/30269739.html.

[145] "The Response To The 'Neo-Fascist' March In Yerevan", *Media.am* (11 January 2024), available at https://media.am/en/verified/2024/01/11/37437.

[146] *Ibid.*

[147] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia*), Request for provisional measures of Azerbaijan (23 September 2021), para. 39 *(c)*.

[148] CR 2021/25, pp. 33-36, paras. 2-14 (Kirakosyan).

authorities in Nagorno-Karabakh"[149]. According to Azerbaijan's Agent, Armenia "ignores the overwhelming response of the international community to Armenia's invasion and occupation . . ., which rejected Armenia's conveniently created self-determination narrative"[150].

6. Azerbaijan places much emphasis on the European Court of Human Rights' judgment in the *Chiragov* case, which determined that Armenia had *jurisdiction* under Article 1 of the European Convention over Nagorno-Karabakh[151]. Azerbaijan, however, glosses over the fact that the Court's jurisdictional determination, in the Court's own words, "has never been equated with the test for establishing a State's responsibility for an internationally wrongful act"[152]. To be clear, the European Court has never found Armenia to have occupied Nagorno-Karabakh.

7. Nor did any of the UN Security Council resolutions relating to the Nagorno-Karabakh conflict the Agent and counsel for Azerbaijan misrepresented yesterday. The Security Council has called on Armenia to "continue to exert its *influence* to achieve compliance by the Armenians of Nagorno-Karabakh"[153], but has never referred to Armenia as an occupying Power, let alone an aggressor. It instead referred to the "local Armenian forces" of Nagorno-Karabakh as the "occupying forces" and urged the parties "immediately to resume negotiations for the resolution of the conflict within the framework of the peace process of the Minsk Group"[154]. That is exactly what Armenia and the authorities of Nagorno-Karabakh did. Azerbaijan, in contrast, unilaterally decided — in President Aliyev's own words — that "war was inevitable" and that the "Minsk Group was dead"[155].

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[149] CR 2024/21, p. 13, para. 6 (Kirakosyan).

[150] CR 2024/22, p. 11, para. 5 (Mammadov).

[151] *Chiragov* v. *Armenia [GC]*, European Court of Human Rights, Application no. 13216/05, Judgment (16 June 2015), paras. 169-187.

[152] *Christian Religious Organization of Jehovah's Witnesses in the NKR* v. *Armenia*, European Court of Human Rights, Application no. 41817/10, Judgment (22 March 2022), paras. 47-48. See also *Georgia* v. *Russia (II) [GC]*, European Court of Human Rights, Application no. 38263/08, Judgment (21 January 2021), para. 162; *Loizidou* v. *Turkey*, European Court of Human Rights, Application no. 15318/89, Judgment (Preliminary Objections) (23 March 1995), para. 64; *Catan and Others* v. *Moldova and Russia*, European Court of Human Rights, Application nos. 43370/04, 8252/05 and18454/06, Judgment (19 October 2012), para. 115.

[153] UN Security Council, resolution no. 853 (29 July 1993), available at http://unscr.com/files/1993/00853.pdf.

[154] *Ibid.*

[155] "Ilham Aliyev attended the opening of the IX Global Baku Forum", President of the Republic of Azerbaijan Ilham Aliyev (16 June 2022), available at https://president.az/en/articles/view/56442; Ilham Aliyev @presidentaz, X (1 July 2022), available at https://twitter.com/presidentaz/status/1542805435845066752.

And it was Azerbaijan that — again in President Aliyev's words — then "started" the Second Nagorno-Karabakh War[156], which Azerbaijan's Agent did not dare to deny yesterday.

8. This brings me to the third point I wish to make. Azerbaijan's Agent accused Armenia's counsel yesterday of having misleadingly submitted that Azerbaijanis "never intended to return" to the so-called formerly occupied territories[157]. As Ms Macdonald has explained, that is decidedly *not* what Armenia's counsel said. In any event, like the Minsk Group Co-Chairs, Armenia has *always* been committed to the reciprocal return of refugees, and Armenia agrees with Azerbaijan's Agent that their return was a "critical component of any negotiations"[158]. But as I have already noted, it was *Azerbaijan* that abandoned the Minsk Group Co-Chairs negotiation format.

9. Moreover, the Basic Principles proposed by the Minsk Group's Co-Chairs did not *just* call for the reciprocal return of refugees and the "return of the territories surrounding Nagorno-Karabakh to Azerbaijani control" — the two bullets from the Basic Principles that Azerbaijan selectively highlighted on your screens[159]. They *also* called for "an interim status for Nagorno-Karabakh providing guarantees for security and self-governance"; "a corridor linking Armenia to Nagorno-Karabakh"; the "future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will"; and "international security guarantees that would include a peacekeeping operation"[160]. In addition, the Co-Chairs explicitly based their Basic Principles on, among others, the principle of "Equal Rights and Self-Determination of Peoples"[161]. In such circumstances, it is difficult to see how Azerbaijan's Agent could bring himself to claim before this Court that the international community "rejected Armenia's conveniently created self-determination narrative"[162].

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[156] "Ilham Aliyev attended an event organized on the occasion of Victory Day in Shusha", President of the Republic of Azerbaijan Ilham Aliyev (8 November 2022), available at https://president.az/en/articles/view/57801, "The CNN Turk TV channel has interviewed Ilham Aliyev", President of the Republic of Azerbaijan Ilham Aliyev (14 August 2021), available at https://president.az/en/articles/view/52736.

[157] CR 2024/21, p. 61, para. 44 (Macdonald).

[158] CR 2024/22, p. 13, para. 18 (Mammadov).

[159] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, hearing on preliminary objections, presentation of Azerbaijan (23 April 2024), slide 11.

[160] *Ibid.*

[161] "Statement by the OSCE Minsk Group Co-Chair countries", OSCE Minsk Group (10 July 2009), available at https://www.osce.org/mg/51152.

[162] CR 2024/22, p. 11, para. 5 (Mammadov).

10. My fourth and final point relates to Azerbaijan's Agent's assertion that, during the course of the so-called "occupation", Armenia "prevented access by Azerbaijan, by the UN agencies and other international organizations, as a means of precluding Azerbaijan from complaining about Armenia's racist occupation campaign following liberation of its territories"[163]. As Azerbaijan knows, however, neither Armenia *nor* the local representatives in Nagorno-Karabakh ever prevented the United Nations from accessing Nagorno-Karabakh, and Azerbaijan's Agent conspicuously cited nothing in support of his statement asserting that they did. In reality, it was Azerbaijan that impeded UN access, and it is Azerbaijan that continues to do so today[164]. It was also Azerbaijan that repeatedly refused to co-operate with the ethnic Armenians of Nagorno-Karabakh, including with respect to issues of environmental protection and the Sarsang Reservoir[165].

11. I will now read Armenia's final submissions.

"On the basis of its written and oral submissions, the Republic of Armenia respectfully requests that the Court:

a. Uphold the preliminary objection raised by the Republic of Armenia concerning the jurisdiction *ratione temporis* of the Court, and adjudge and declare that it lacks jurisdiction 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;

b. In the alternative, uphold the preliminary objection raised by the Republic of Armenia concerning the admissibility of the claims, and adjudge and declare that 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 are inadmissible;

c. Uphold the preliminary objection raised by the Republic of Armenia concerning the jurisdiction *ratione materiae* of the Court, and adjudge and declare that it lacks jurisdiction with respect to Azerbaijan's claims and contentions concerning the alleged placement of landmines and booby traps; and

d. Uphold the preliminary objection raised by the Republic of Armenia concerning the jurisdiction *ratione materiae* of the Court, and adjudge and declare that it lacks

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[163] CR 2024/22, p. 15, para. 27 (Mammadov).

[164] "UNESCO is awaiting Azerbaijan's Response regarding Nagorno-Karabakh mission", UNESCO (21 December 2020), available at https://www.unesco.org/en/articles/unesco-awaiting-azerbaijans-response-regarding-nagorno-karabakh-mission; "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", United Nations (12 May 2021), available at https://press.un.org/en/2021/db210512.doc.htm. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*, Memorial of Armenia (23 January 2023), paras. 3.458-3.467.

[165] See e.g. "Azerbaijan rejects Karabakh's call for joint use of river resources - spokesman", Tert.am (16 August 2013), available at https://www.tert.am/en/news/2013/08/16/davit-babayan1/841598; Karabakh, "Azerbaijan can jointly use Sarsang Reservoir resources", News.am (10 April 2019), available at https://news.am/eng/news/506318.html.

jurisdiction with respect to Azerbaijan's claims and contentions concerning alleged environmental harm."

12. Mr President, Members of the Court, this concludes Armenia's submissions on its preliminary objections. With your kind indulgence, I wish only to thank the interpreters and the Registry for their professional assistance throughout these proceedings and, of course, thank you, Members of the Court, for your kind attention.

The PRESIDENT: I thank His Excellency Mr Kirakosyan. La Cour prend note des conclusions finales dont vous venez de donner lecture au nom de votre gouvernement. La Cour se réunira de nouveau le vendredi 26 avril, à 10 heures, pour entendre l'Azerbaïdjan en son second tour de plaidoiries.

L'audience est levée.

L'audience est levée à 18 h 5.

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