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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Tuesday 19 October 2021, at 5 p.m., at the Peace Palace,

President Donoghue presiding,

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

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le mardi 19 octobre 2021, à 17 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

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

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judge *ad hoc*	Daudet
	Registrar	Gautier

Présents: Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
M. Daudet, juge *ad hoc*

M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judge Keith is unable to join us for this afternoon's sitting. The Court meets this afternoon to hear the second round of oral observations of Armenia on the Request for indication of provisional measures by Azerbaijan. I shall now give the floor to Professor Sean Murphy.

Mr. MURPHY:

AZERBAIJAN'S REQUESTS RELATING TO LANDMINES MUST BE REJECTED

1. Thank you, Madam President. Armenia does not regard the positions advanced this morning by counsel for Azerbaijan relating to landmines as successfully rebutting our arguments of yesterday, so we stand by those arguments in full. I will therefore just address six points in response that may be of assistance to the Court.

I. There is no prima facie jurisdiction over Azerbaijan's request with respect to "enabling" Azerbaijan to engage in demining

2. *First*, Ms Amirfar could not overcome a key problem in finding prima facie jurisdiction with respect to the laying of mines or any failure to provide maps relating to mines[1]. At best, such measures per se indiscriminately affect all Azerbaijani *nationals* or others in the relevant geographic area, whatever their ethnicity. Ms Amirfar herself this morning conceded that landmines do not discriminate[2], while Mr. Donovan acknowledged that the purpose for handing over of maps was to protect persons generally, not any specific ethnic group[3]. Such concessions are fatal for finding jurisdiction *ratione materiae* because an alleged measure based on nationality — based on harm to Azerbaijan citizens or even citizens of other countries — does not fall within the scope of the CERD.

3. *Second*, this morning Ms Amirfar stated that there was no problem with respect to temporal jurisdiction[4]. Yet she persisted in maintaining that the alleged discrimination at issue here is all part of a scheme of ethnic cleansing that occurred in the late 1980s and early 1990s, in which Armenia purportedly first expelled and then mined areas where a particular ethnic group lived so as to prevent

[1] CR 2021/26, p. 18, para. 22 (Amirfar).

[2] CR 2021/26, p. 12, para. 1 (Amirfar).

[3] CR 2021/26, p. 35, para. 17 (Donovan).

[4] CR 2021/26, p. 19, para. 24 (Amirfar).

their return[5]. While Ms Amirfar attempted to point to current events as still preventing a return of persons allegedly expelled three decades ago, the "crux" of Azerbaijan's claim, as stated, concerns an alleged expulsion and denial of return that clearly arose before your temporal jurisdiction under the CERD commences. If there were any unremedied effects of that pre-CERD violation that continued after CERD's entry into force, those effects do not transform the pre-CERD violation into a violation that has a continuing character[6].

II. There are no plausible CERD rights advanced by Azerbaijan with respect to "enabling" Azerbaijan to engage in demining

4. *Third*, and turning now to issues of plausibility of CERD rights, Ms Amirfar stated: "The key test is whether the acts fall within the definition of racial discrimination under Article 1 of the CERD."[7] We certainly agree that that is a threshold test. The problem at the outset for Azerbaijan, however, is that the practice of laying of a mine is not, in and of itself, a "distinction, exclusion, restriction or preference *based on . . . ethnic origin*". In other words, the mine is not laid with instructions to only explode when it comes in contact with a particular ethnicity.

5. Similarly, a decision not to release maps — including maps that are of a military significance — to another country is not a "distinction, exclusion, restriction or preference *based on . . . ethnic origin*". Releasing or not releasing maps does not inherently favour or disfavour any particular ethnicity. Hence, this measure too does not fall within the scope of CERD's Article 1 definition of racial discrimination.

6. *Fourth*, because the measures are not inherently discriminatory, Azerbaijan must pivot to making allegations about the purpose or the effects of such measures. Yet these allegations fail because there is no evidence before the Court that Armenia has laid mines or withheld maps for any purpose or effect relating to ethnic discrimination. And to be clear, it is *Azerbaijan's burden* to "put

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[5] CR 2021/26, pp. 18-19, para. 23 (Amirfar).

[6] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), pp. 57-58.

[7] CR 2021/26, p. 16, para. 14 (Amirfar).

before the Court evidence which affords a sufficient basis to find it plausible that" elements necessary to establish plausibility are present[8]; that burden is not borne by Armenia.

7. So, what is the evidence that Armenia laid mines for the purpose or effect of racial discrimination? Ms Amirfar again leaned heavily on just two annexes, which are Azerbaijan's Annexes 32 and 36[9]. The first annex — Annex 32 — contains that multi-coloured map that you saw yesterday, and which I discussed at length. I won't say more about Annex 32, except to remind the Court that it is replete with statements by Azerbaijan's Mine Action Agency that the mines at issue date back to 1991[10], that persons have been harmed by these mines since 1992[11], that the problem is not just mines but explosive remnants of war[12], that the only "confirmed" mined areas are that bright red "line of contact"[13], that mines in that "high threat area" existed to block "access to capitols"[14], as "defensive frontage around the capitol"[15], and at "strategic . . . points"[16], and finally that annex says that any suspected minefields elsewhere in the region are associated with "battlefields"[17].

8. But Ms Amirfar also emphasized this morning Azerbaijan's Annex 36, which I had less to say about yesterday, so allow me to make a few further points. Annex 36 is a letter from Azerbaijan's Mine Action Agency. Azerbaijan uses this letter to try to prove that mines were laid at a particular time — during the armed conflict that commenced in September 2020 — and in a particular location — at distances away from that bright "line of contact". According to Ms Amirfar, the report

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[8] *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*, p. 132, para. 75; see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013*, p. 239, paras. 34-35.

[9] CR 2021/26, p. 13, fns. 7 and 8, p. 14, fns. 12, 14 and 16 (Amirfar).

[10] Azerbaijan's Request for provisional measures, Ann. 32, Extract from Mine Action Agency of the Republic of Azerbaijan, Assistance Required for the Republic of Azerbaijan in Humanitarian Mine Action for Safe Reconstruction and Return of IDPs to the Conflict Affected Territories of Azerbaijan (2021), p. 5.

[11] *Ibid.*

[12] *Ibid.*

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

[14] *Ibid.*, p. 6.

[15] *Ibid.*

[16] *Ibid.*

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

proves a "salting of the earth with deadly landmines . . . designed to deter [the] return by" a civilian population that was displaced some three decades ago[18].

9. Well, when you look at the map contained in Annex 36, which is now up on your screen, it tells a somewhat different story. This map is what Ms Amirfar relies on to supposedly show mines that Azerbaijan *actually* found in the relevant area as of June 2021, as opposed to yesterday's multi-coloured map of "suspected minefields and battlefields". In other words, after searching for mines for seven months — from November 2020 to June 2021 — the Mine Action Agency apparently only found mines in the places indicated by the relatively few dots that appear on this map. If there was some deliberate plan by Armenia to "salt" mines in and around all of Nagorno-Karabakh — as part of a sinister plot to prevent the return of an ethnic group — it certainly seems like the plot was poorly executed, if these few dots are all that was accomplished.

10. But what do these dots even represent? The map says it shows "[m]ines planted during withdrawal". Well, maybe, but given that mines existed throughout this area starting from the early 1990s, that conclusion is not obvious. Indeed, places like Agdam and Fuzuli on the western side of the map in front of you were places of intense fighting by all sides in both the First and Second Nagorno-Karabakh Wars. But let us assume *arguendo* that these dots reflect mines planted in late 2020; for what purpose were they planted? Ms Amirfar confidently opines that they were not for defensive reasons[19]. But I note that her evidence does not say that; the Mine Action Agency in Annex 36 is silent as to *why* these mines were planted. Indeed, if Armenian forces were withdrawing from that area of the thick line of contact that you see on the eastern and northern part of the map, they would have retreated across the very area where these dots are located, so as to get back to Armenia, which is located on the western edge of the area shown. Planting landmines during a retreat, even in agricultural fields, is perfectly lawful, and certainly not ethnic discrimination.

11. But of equal interest is, how many mines were actually planted in the location of those dots? Here, too, the Mine Action Agency does not say. In the letter, the Agency is quite specific about the *total* number of mines and unexploded ordnance that it has cleared — it says

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[18] CR 2021/24, p. 33, para. 11 (Amirfar); CR 2021/26, p. 14, para. 9 (Amirfar).

[19] CR 2021/26, p. 14, para. 8 (Amirfar).

34,590 pieces[20] — but for all we know, those mines were cleared almost entirely in the area of the thick "line of contact", and perhaps they were even Azerbaijan's own mines.

12. But Annex 36 does contain a table that is quite specific about *some* aspects of the "[m]ines detected outside the former line of contact", which you see now on your screen. Notice how the table is specific about the city or region where the mine was found; is specific about the village where the mine was found; is specific about the precise distance from the "former line of contact". But notice too that the final column provides zero information about how *many* mines were recovered in each location. And this is the case even though such numbers *must have existed* in order for the Mine Action Agency to calculate the total number of mines and unexploded ordnance that it had cleared. Instead of finding the number of mines in this last column, instead it shows — for just a handful of rows — cross-references to a handful of photos, which in turn provide images of a handful of mines. Even on Azerbaijan's own evidence, this "salting" of the earth actually ends up looking like just a few mines perhaps left behind during a hurried retreat.

13. No doubt due to the dearth of evidence that the laying of mines was for a *purpose* of ethnic discrimination, Azerbaijan to some extent this morning abandoned that claim, so as to instead rest their request on essentially one proposition: that the failure of Armenia to hand over maps has a clear *effect* that constitutes a plausible CERD violation.

14. Well, that proposition does not seem at all clear. One might start with the observation that Armenia has no obligation under international law specifically requiring Armenia to hand over maps to Azerbaijan in the aftermath of an armed conflict. Indeed, Azerbaijan has not claimed that there is any such specific obligation, either under treaty law or under customary international law. The International Law Commission found no such obligation to hand over mine maps when completing the first reading in 2019 of its topic on "Armed Conflict and the Environment"[21].

15. Azerbaijan appears to be arguing that a State's decision not to engage in a discretionary act vis-à-vis another State, such as, for example, not providing emergency medical equipment or not

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[20] Letter from Vugar Suleymanov, Chairman of the Board of the Mine Action Agency of the Republic of Azerbaijan, to Fuad Alasgarov, Head of the Department for Work with Law Enforcement Bodies of the Presidential Administration of the Republic of Azerbaijan, No. 414/M, 11 June 2021 (certified translation) (with enclosure), Azerbaijan Ann. 36, para. 2.

[21] ILC, *Yearbook of the International Law Commission* (2019), pp. 214-215, principles 24 (18) and 27 (16).

providing vaccines, automatically violates the CERD if that second State contains a particular ethnicity that would be *affected* by the first State's decision. We submit that such an argument simply cannot be correct and embracing such a breathtakingly broad "effects" doctrine would radically distort the meaning of the CERD.

16. Moreover, there simply is no evidence before you that the Armenian Government in not releasing maps seeks to have such an effect. Azerbaijan has pointed to no Armenian laws, no Armenian regulations, no directives, no statements by Armenian Government officials indicating such a desired effect. Azerbaijan has pointed to no reports by NGOs or by the media identifying such a desired effect. By contrast, there is ample evidence before you that the military situation in the geographic area at issue remains active[22], such therefore that Armenia's reason for not releasing certain maps concerns the effect it would have on military defence. Moreover, Armenia has already handed over maps to Azerbaijan, the accuracy of which has been attested to by the US Government[23], and Armenia is fully prepared to meet with Azerbaijan to hand over additional maps unrelated to military affairs[24].

17. My *fifth* point is on whether, in the past, Azerbaijan has viewed the failure to co-operate on demining as causing racially discriminatory effects, and as raising an issue of urgency. As I noted yesterday, Armenia worked closely with the Organization for Security and Co-operation in Europe (OSCE) on demining-related activities, and this was done through an OSCE office that was set up in the capital of Armenia, Yerevan. Yet Azerbaijan complained to the OSCE[25] and then forced the OSCE in 2016 to terminate those demining-related efforts, saying that such efforts were occurring in the geographic area that we have been discussing in this case[26]. Moreover, Azerbaijan refused to

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

[23] "Ilham Aliyev: We've received maps of minefields of Agdam district", abc.az (16 June 2021), available at http://abc.az/mobile/view.php?id=74781&lng=en.

[24] CR 2021/25, p. 25, para. 13 (Murphy).

[25] Statement of the Chairperson, OSCE Permanent Council, 1126th Plenary Meeting, PC.JOUR/1126 (31 Dec. 2016), available at https://www.osce.org/files/f/documents/5/e/292951.pdf.

[26] Statement by the Delegation of Azerbaijan, PC.JOUR/1126 (31 Dec. 2016), at p. 1 (p. 4 of the PDF), available at https://www.osce.org/files/f/documents/5/e/292951.pdf.

even agree to extend the mandate of the OSCE office in Yerevan, such that that office — which was the last OSCE field office operation in the South Caucasus — had to close in 2017.[27]

18. And yet now, suddenly, in 2021, it is urgent that demining activities take place in and around Nagorno-Karabakh, and that a failure to co-operate has discriminatory effects cognizable under the CERD? We submit that such a change in attitude by Azerbaijan is not in good faith, that Azerbaijan is not capable of claiming that our conduct today has prohibited effects, whereas their non-co-operation for years did not, and we submit that the Court should not issue the requested measure on the basis of Azerbaijan's newly-discovered sense of urgency.

III. There are no plausible CERD rights advanced by Azerbaijan with respect to alleged planting of landmines in Azerbaijan's territory

19. My sixth, and final point, is on Azerbaijan's second request that this Court order Armenia not to plant mines in Azerbaijan. Counsel for Azerbaijan were very brief on this point this morning, likely because it is unsustainable, for the reasons I gave yesterday. Their only point this morning seemed to be to complain that yesterday's statement by our Agent — that Armenia is not planting any such mines and that Armenia fully respects Article 2 (4) of the United Nations Charter — that that statement was not good enough for Azerbaijan[28]. In our view, Armenia's full adherence to Article 2 (4) of the United Nations Charter is quite enough to address Azerbaijan's request for this provisional measure, especially given Azerbaijan's self-serving and inaccurate "evidence" of a single incident, and given that it is actually Azerbaijan's troops that have crossed into Armenia, as has been recognized by third-party governments[29].

20. Madam President, Members of the Court, for the foregoing reasons, and the reasons set forth in our opening presentations, Armenia submits that Azerbaijan's first and second requests do not satisfy the conditions for the exercise of your jurisdiction to indicate provisional measures.

This concludes my presentation. If it pleases the Court, I now ask you to call on Dr. Salonidis.

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[27] See Statement of the Chairperson, OSCE Permanent Council, 1144th Plenary Meeting, PC.JOUR/1144, Ann. 1 (4 May 2017), available at https://www.osce.org/files/f/documents/8/1/317111.pdf; see also Statement by the Representative of the European Union, OSCE Permanent Council, 1144th Plenary Meeting, PC.JOUR/1144, Ann. 2 (4 May 2017), available at https://www.osce.org/files/f/documents/8/1/317111.pdf; Statement by the United States Mission to the OSCE on Closure of the OSCE Office in Yerevan, PC.DEL/579/17 (4 May 2017), available at https://www.osce.org/files/f/documents/7/a/320881.pdf.

[28] CR 2021/26, p. 35, para. 20 (Donovan).

[29] CR 2021/25, pp. 30-31, paras. 32-36 (Murphy).

The PRESIDENT: I thank Professor Murphy. I now invite the next speaker, Mr. Constantinos Salonidis, to take the floor.

Mr. SALONIDIS:

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

1. Madam President, distinguished Members of the Court, good afternoon. I will briefly address certain points made this morning by counsel with respect to Azerbaijan's third request.

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

2. Yesterday, I explained why Armenia's alleged Twitter campaign does not meet the requirements for the indication of provisional measures. Ms Amirfar's remarks this morning confirm this conclusion, for the following three reasons.

3. First, Azerbaijan argues that "[t]here is no . . . doubt" that Armenia has "direct[ed] . . . these accounts" and that when Twitter "identifies a network as State-linked, it is, in fact, sure that is the case"[30]. With all due respect, this is simply not true. On the contrary, the document referred to in tab 16 of Azerbaijan's judges' folder *explicitly* states that "mistakes can happen". You can see that language on the screen. And while Azerbaijan suggests that Armenia refrained from denying any involvement[31], let me be clear: Armenia categorically denies that it has *ever* used Twitter or any other social media platform to incite racial hate.

4. I move next to the three tweets that Azerbaijan presented to the Court. Ms Amirfar argued that we "focuse[d] exclusively on three sample tweets Azerbaijan provided from the dataset"[32]. But if we did so, it is because this is the evidence that Azerbaijan chose to present to the Court. Azerbaijan was able to identify *three five-year old* tweets out of 70,000, per Ms Amirfar's representation[33]. And one struggles to see how even those three tweets can qualify as racist hate speech.

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[30] CR 2021/26, pp. 23-24, para. 35 (Amirfar).

[31] CR 2021/26, p. 25, para. 38 (Amirfar).

[32] CR 2021/26, p. 24, para. 36 (Amirfar).

[33] CR 2021/26, p. 24, para. 36 (Amirfar).

5. Third, Ms Amirfar represented that "[t]his one network of 35 accounts must be understood as the tip of a very deep iceberg"[34]. What is the evidence that Azerbaijan relies on for such a far-reaching accusation? There is none. I am not exaggerating: Azerbaijan has failed to put before the Court a *single* piece of evidence that sustains this accusation, let alone the existence of an imminent risk of irreparable harm. Plainly, had it found any ice under the water, it would have presented it to the Court.

6. But I will not waste any more of the Court's time with this. The request is plainly unfounded.

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

7. I now turn to Azerbaijan's claim that VoMA and POGA are inciting racial hatred and violence. I have five points in response to Ms Amirfar's remarks this morning.

8. First, I recall for the Court that it is not sufficient for Azerbaijan to cite to a few instances of alleged racially discriminatory speech by private actors in Armenia. Azerbaijan must instead establish a plausible violation of the CERD *by the Armenian Government itself*, which we submit it has not done. Armenia has instructed its organs and agents to engage in no such speech. Armenia has laws and regulations that seek to prevent racial discrimination in all its forms by either the Government or others. Due diligence in implementing such laws and regulations cannot be found as lacking based on just a few instances of private speech, extracted randomly from one or two private actors[35].

9. Second, the evidence Azerbaijan presented to the Court for the proposition that Armenia "is not just turning a blind eye to these groups"[36], but is in fact "glorify[ing]"[37] them is entirely unfounded. As far as VoMA is concerned, Azerbaijan's allegation rests on a single alleged commendation letter by the armed forces and an alleged joint "fire preparation exercise" with local authorities, both referenced only in VoMA's promotional materials[38]. There is nothing vis-à-vis

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[34] CR 2021/26, pp. 24-25, para. 37 (Amirfar).

[35] CERD Committee, General Recommendation No. 35: Combating racist hate speech, UN doc. CERD/C/GC/35 (26 Sept. 2013), para. 17. See also e.g. *Zentralrat Deutscher Sinti und Roma* v. *Germany*, comm. 38/2006, UN doc. A/63/18 (2008) (p. 121), para. 7.7.

[36] CR 2021/26, p. 21, para. 29 (Amirfar).

[37] CR 2021/24, p. 46, para. 17 (Boisson de Chazournes).

[38] Azerbaijan's Ann. 35, p. 18; Azerbaijan's Ann. 61, p. 19.

POGA. I therefore stand by my conclusion yesterday: there is no evidence that Armenia supports these groups, let alone that it glorifies them[39].

10. Third, notwithstanding Ms Amirfar's characterizations and references to ideologies and past statements by historical figures, the basis for this claim remains a small number of questionable statements. And make no mistake, distinguished Members of the Court, Azerbaijan must have found them by scouring every corner of the internet to find *anything* that might paint either organization in a negative light. In fact, many of the statements Azerbaijan now suggests represent an urgent risk of irreparable harm were so obscure that it apparently was not even aware of them at the time it made its request. Indeed, POGA was not even mentioned in the Request *at all*; it appeared only in the new documents that Azerbaijan submitted to the Court last week.

11. To reiterate: the statements are distasteful or expressed in controversial and unproductive terms. But freedom of expression is a fundamental tenet of any democratic society, and the due regard clause in Article 4 of the Convention exists precisely to protect expression of this kind.

12. Fourth, Ms Amirfar had precious little to say about the urgency of the request. Her entire argument appears to rest on the allegation that these groups are "actively fundraising and training recruits in pursuit of their violent and racist goals"[40]. With all due respect, I fail to understand how this allegation comports with the record. Is the suggestion that the "volunteers"[41] of an obscure non-profit organization focused on self-defence training may invade Azerbaijan's territory and carry out racially motivated attacks? If so, how will they do it? Through their training on how to dig defensive trenches[42]? Or their "medical training courses"[43]? Or will it be with their "electric guns for plastic-pellet shooting" they use in training[44]?

13. Let us be serious. Even if there were any evidence VoMA or POGA or any other group intended to incite racially motivated violence against Azerbaijan — and as I have explained

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[39] CR 2021/25, p. 37, para. 17 (Salonidis).

[40] CR 2021/26, p. 23, para. 33 (Amirfar).

[41] See e.g. Azerbaijan's Ann. 35, pp. 17-18.

[42] Azerbaijan's Ann. 35, p. 19.

[43] Azerbaijan's Ann. 35, p. 22.

[44] Azerbaijan's Ann. 35, p. 20.

yesterday and today, there is not — there could not possibly be an *urgent* risk of irreparable harm in this case.

14. Finally, it is no exaggeration to assert that, if the Court were to order provisional measures in relation to either of these organizations, it would set a precedent that is virtually limitless. Indeed, speech like that espoused by VoMA and its founder is widespread in almost every country in the world. Azerbaijan asks the Court to open Pandora's box, allowing one State to charge another State with a violation of the CERD, warranting provisional measures no less, every time a hurtful Tweet or Facebook posting is made by some misguided person. And here, Azerbaijan advances its claim not out of any actual fear of imminent and irreparable harm from such speech, but rather in order to deflect attention from its own leaders' racist rhetoric and actions.

15. For all these reasons, and the reasons set forth in our opening submissions yesterday, Azerbaijan's third request must be rejected in its entirety. Madam President, distinguished Members of the Court, I thank you for your attention and consideration, and I kindly request that you now invite Professor d'Argent to address the Court.

The PRESIDENT: I thank Mr. Salonidis and I now invite the next speaker, Professor Pierre d'Argent to take the floor.

M. D'ARGENT : Merci, Madame la présidente.

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

1. Madame la présidente, Mesdames et Messieurs les juges, qu'avons-nous appris du débat contradictoire d'aujourd'hui au sujet de la quatrième mesure conservatoire sollicitée par l'Azerbaïdjan ?

2. Eh bien, tout d'abord, que l'Azerbaïdjan ne demande pas une mesure conservatoire en matière de preuves au soutien de ses autres mesures. C'est toujours bien la même demande autonome et il n'y a pas d'autre demande, plus réduite, sollicitée de manière alternative.

3. L'Azerbaïdjan vous demande donc d'ordonner à l'Arménie de rechercher, de prévenir la destruction et d'assurer la préservation des éléments de preuve de crimes haineux dont l'Arménie a connaissance, y compris parce que l'Azerbaïdjan les lui dénoncerait.

4. Selon l'Azerbaïdjan, cette mesure viserait à protéger son droit au titre de l'article 6 de la convention. M^e^ Reid a été assez rapide sur ce point comme s'il s'agissait d'une évidence, aussi je me permets de vous rappeler que cet article dispose que, en cas de violation des dispositions substantielles de la convention, chaque Etat partie doit assurer aux individus qui en sont victimes «une protection et une voie de recours effectives, devant les tribunaux nationaux» afin notamment de «demander à ces tribunaux satisfaction ou réparation juste et adéquate pour tout dommage». Comme M^e^ Reid l'a dit, l'Arménie ne conteste pas l'existence de cette obligation.

5. En revanche, ce que l'Arménie soutient, c'est qu'il n'est pas plausible que cette obligation au bénéfice des particuliers soit interprétée comme signifiant que sa protection au provisoire puisse passer par la mesure sollicitée. Au-delà de ce que M^e^ Reid a appelé the «squabble over jurisdiction»[45] au sujet de laquelle elle n'a pas voulu vous éclairer, la mesure sollicitée vise à tout le moins à permettre à l'Azerbaïdjan d'actionner l'enquête pénale en Arménie en exigeant de l'Arménie qu'elle recueille des preuves et les préserve sur dénonciation de l'Azerbaïdjan. C'est bien ça, la demande qui vous est soumise.

6. Une telle mesure est tout à fait extraordinaire. Elle est, comme telle, sans aucun précédent dans votre jurisprudence. Elle est, surtout, sans aucun lien avec l'article 6.

7. Tout d'abord parce que l'article 6 vise avant tout à assurer un recours civil indemnitaire aux victimes de discrimination raciale, mais aussi parce que la convention elle-même n'est pas un instrument de coopération pénale entre Etats et que la mesure sollicitée immanquablement la transforme en un tel instrument.

8. M^e^ Reid n'a rien dit de la question du lien entre la mesure sollicitée et la convention. Elle a simplement affirmé que cette mesure visait à protéger la jouissance de l'article 6. Regardez bien toutefois ce que l'Azerbaïdjan vous demande d'ordonner : l'Azerbaïdjan vous demande qu'il puisse être en mesure d'exiger de l'Arménie qu'elle récolte des preuves pénales sur dénonciation de l'Azerbaïdjan en attendant que vous statuiez dans cette affaire. C'est proprement extraordinaire et sans aucun lien avec l'article 6.

[45] CR 2021/26, p. 26, par. 6 (Reid).

9. Pour essayer de vous convaincre de la nécessité d'indiquer une telle mesure, M[e] Reid a, à nouveau, procédé à des comparaisons.

10. D'une part, elle a comparé la prétendue diligence des autorités répressives de son client avec celles de l'Arménie. Le rapport arménien adressé aux rapporteurs spéciaux onusiens, repris à l'onglet n[o] 4 de votre dossier d'audience d'hier après-midi, serait menu et insuffisamment descriptif des tâches d'enquête et des étapes procédurales entreprises par l'Arménie. Par comparaison, bien sûr, le rapport du procureur azerbaïdjanais, lui, serait bien fourni.

11. Deux petits rappels à ce sujet.

12. Premièrement, le rapport de l'Arménie a été déposé *in tempore non suspecto* en avril 2021. L'Azerbaïdjan aurait pu en faire de même s'il avait répondu à l'invitation des rapporteurs spéciaux onusiens. Il ne l'a pas fait. L'Azerbaïdjan a préféré, pour les besoins de sa cause et deux semaines après qu'elle fut introduite, faire écrire à son procureur un rapport daté du 6 octobre et transmis six jours plus tard. La Cour a toujours, et avec raison, considéré avec la plus grande suspicion les documents spécialement établis par une partie au soutien d'une affaire[46].

13. Deuxièmement, et contrairement à ce que M[e] Reid a soutenu en faisant un exercice d'exégèse du droit pénal arménien, la nature haineuse des crimes relatés dans les vidéos faisant l'objet de l'enquête pénale arménienne est bien notée et soulignée dans le rapport arménien d'avril adressé aux rapporteurs spéciaux onusiens :

> «During the preliminary investigation of the same video materials it was found out that an unidentified person, speaking Armenian, committed serious violations of international humanitarian law in connection with the person's race, nationality, ethnicity and religion.»

Voilà ce qui est écrit dans le rapport arménien soumis aux rapporteurs spéciaux des Nations Unies.

14. Je vous invite à scruter le rapport du 6 octobre du procureur général azerbaïdjanais ; vous ne trouverez aucun langage comparable par lequel le caractère haineux et discriminatoire des crimes est reconnu. Les bases pénales azerbaïdjanaises sur lesquelles le procureur agirait — les articles 115.2, 115.4 et 245 du code pénal — ne vous seront pas plus utiles car elles ne sont pas relatives à des crimes racialement motivés.

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[46] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 201, par. 61.

15. M^e^ Reid a également comparé le volume d'information disponible dans le rapport arménien d'avril avec celui qui ressortirait du communiqué de presse du procureur arménien en date du 28 septembre et déposé dans votre dossier d'audience de ce matin. Très franchement, et en toute collégialité, je n'ai pas très bien compris à quoi ma collègue voulait en venir. Au fait que le bureau du procureur ne pourrait pas établir une telle communication ? Au fait que si une telle communication est faite en rapport avec certains faits pénaux, il faudrait que l'Arménie en fasse à tous égards ? Par ailleurs, ma collègue semble oublier qu'en Arménie les autorités judiciaires sont un pouvoir indépendant de l'exécutif. L'article 201 du code arménien de procédure pénale qu'elle a cité ne permet pas au gouvernement d'enjoindre les autorités chargées des poursuites de faire état publiquement des éléments et des étapes d'une enquête pénale en cours. C'est à ces autorités d'en décider. Cela n'a rien d'extraordinaire dans un Etat de droit.

16. En toute hypothèse, et comme je vous l'indiquais hier, Mesdames et Messieurs les juges, ces comparaisons n'ont guère de sens et vous ne devez pas vous y aventurer pour statuer sur la quatrième demande conservatoire. La seule comparaison dans les efforts répressifs que vous devrez faire concerne l'affaire dont vous avez eu à connaître la semaine dernière : dans cette première affaire, il vous faudra comparer le zèle mis par l'Azerbaïdjan à condamner les prisonniers de guerre et les détenus civils arméniens avec ce que le rapport du procureur général dit dans sa lettre du 6 octobre quand il s'agit de poursuivre des soldats azerbaïdjanais. A cet égard, assurément, la comparaison s'impose.

17. Mais dans la présente instance, il y a seulement lieu de déterminer s'il existe entre vos mains des éléments de preuve crédibles permettant de soutenir qu'il existe un risque réel et imminent que l'Arménie ne préservera pas, voire détruira, les preuves relatives aux abus commis par ses soldats. L'Azerbaïdjan prête cette intention à l'Arménie ; l'Azerbaïdjan affirme que, à moins que vous n'ordonniez la mesure sollicitée, les poursuites pénales arméniennes ne seront pas diligentées — et qu'elles ne le seront pas pour un motif prohibé par la convention. Ce sont de pures spéculations car tout le dossier qui vous est soumis établit le contraire. Il n'y aucun risque, encore moins de risque imminent, de disparition ou de destruction de preuves.

18. En réalité, par sa quatrième mesure, l'Azerbaïdjan entend vous transformer en surveillant de procédures pénales arméniennes dont vous aurez peut-être à connaître sur le fond, tout en

s'arrogeant un pouvoir d'initiative répressive à charge de l'Arménie, puisque l'Arménie devrait agir à la suite de communications que lui adresserait l'Azerbaïdjan. Cela ne permet de protéger aucun droit plausible contenu dans la convention et cela n'a aucun lien avec l'un de ces droits.

19. La quatrième mesure conservatoire sollicitée par l'Azerbaïdjan doit être rejetée, faute de lien avec des droits plausibles au titre de la convention et en l'absence de risque avéré et imminent de préjudice irréparable.

20. Mesdames et Messieurs les juges, je vous remercie pour votre attention et puis-je vous demander, Madame la présidente, de bien vouloir appeler à la barre M[e] Larry Martin ?

The PRESIDENT: I thank Professor d'Argent and I invite the next speaker, Mr. Lawrence Martin, to take the floor.

Mr. MARTIN: Madam President, distinguished Members of the Court, good evening.

CONCLUDING OBSERVATIONS

1. After all that you have heard, I stand before you now for one purpose. I ask that you see Azerbaijan's request for provisional measures for what it is: a transparent ploy to distract the Court from Azerbaijan's own ongoing egregious and racist behaviour. Azerbaijan plainly hopes that by bringing its own request for provisional measures, the Court will be tempted to treat the two requests as somehow equivalent and accord both sides similar treatment. As our distinguished Agent said yesterday, however, there is no equivalence between the two — not legally, not factually.

2. The point is not to relitigate measures that Armenia committed to your wise judgment last week. The point is only to underscore that the deep deficiencies in Azerbaijan's request expose it as an obvious example of the misinformation technique sometimes called "whataboutism"[47]. That is, in response to our well-founded request, Azerbaijan tries to muddy the waters by asking "what about you?"

3. Well, what about us? The answer is simple. There is nothing about Armenia's current conduct that comes even remotely close to warranting the indication of provisional measures against Armenia.

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[47] See "Whataboutism", *Wikipedia*, available at https://en.wikipedia.org/wiki/Whataboutism.

4. We were gratified last week, and again yesterday, to hear Mr. Donovan "embrace"[48] the high threshold for the indication of provisional measures. But does Azerbaijan's request really respect what Mr. Donovan described yesterday as "the rigorous and disciplined approach this Court has customarily taken to exercising its Article 41 authority"[49]? Not even close.

5. Professor Murphy has laid bare the inadequacies of what might be seen as Azerbaijan's most "serious" request: those relating to land mines. Among the many flaws in those requests is that they have nothing to do with the CERD; there is no plausible link to any right under the Convention on the Elimination of *Racial* Discrimination. To be sure, Azerbaijan has *asserted* that Armenia deliberately laid mines for the purpose of racially targeting ethnic Azerbaijani civilians and is withholding maps for the same purposes. But Azerbaijan's assertions are just that: naked assertions bereft of evidence. Ms Amirfar used the words "deliberate" or "deliberately" to describe Armenia's conduct nine times on Monday[50], but where is the evidence? She did not cite *any* that actually supports that allegation. In fact, the only evidence she did cite, from Azerbaijan's own Mine Action Agency, proves exactly the opposite: the mines are there for military purposes[51]. What plausible right under CERD is at imminent risk of irreparable prejudice[52]? None.

6. In this respect, Azerbaijan is in even greater difficulty than Ukraine was in its case against the Russian Federation. There, the Court rejected Ukraine's request for provisional measures under the Terrorist Financing Convention, finding: "At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present."[53] "These elements" are the elements of intent, knowledge or purpose *that* convention requires. In contrast to Azerbaijan in this case, Ukraine in that case did at least try to point to evidence that Russia had the requisite knowledge[54]. Even so, the Court found Ukraine's request implausible. In the absence of even a hint of evidence of discriminatory intent or knowledge in this case, not to

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[48] CR 2021/24, para. 4 (Donovan).

[49] CR 2021/24, para. 4 (Donovan).

[50] CR 2021/24, pp. 29-35, paras. 4, 5, 7, 9, 11, 16, 18 and 19 (Amirfar).

[51] CR 2021/25, p. 30, paras. 31-32 (Murphy).

[52] CR 2021/24, p. 65, para. 23 (Donovan).

[53] *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*, p. 132, para. 75.

[54] CR 2017/1, pp. 47-48, para. 49 (Cheek).

mention all the other reasons Professor Murphy so amply developed, Azerbaijan's request fails on this basis alone.

7. Azerbaijan's request relating to Armenia's putative "ongoing campaign to incite ethnic violence"[55] is equally lacking and obviously so, to say the least. The evidence of what Azerbaijan outlandishly labels Armenia's racist "cyber disinformation operation"[56] at root consists of *three* — yes, three — inoffensive five-year-old tweets that may well have been sent by private individuals[57]. This could not possibly trigger any plausible rights under CERD. Nor could there be any risk of irreparable prejudice[58] from such *de minimis*, dated, conduct.

8. And with respect to what Azerbaijan calls "Armenia's support of anti-Azerbaijani hate groups"[59], the evidence — even taken at face value — stands for nothing more than one or two private groups, dedicated to the defence of Armenia, that have made a few comments that might — and even then only with effort — be portrayed as racist hate speech[60]. How can this be part of an ongoing "campaign" to "incite ethnic violence" by private actors is profoundly unclear. Equally unclear is how these few statements by private actors constitute a basis for finding that *Armenia* "intends to act in a specific manner that will cause irreparable injury", which Mr. Donovan said last week is the required standard[61].

9. Azerbaijan's request relating to the collection and preservation of evidence is similarly ill-conceived. Professor d'Argent just explained that, as phrased by Azerbaijan, it is a truly extraordinary measure that does not relate to the protection of any plausible right under CERD. And here again, I ask, using Mr. Donovan's own words, where is the evidence that Armenia "intends to act in a specific manner that will cause irreparable injury"[62]? In other words, where is the evidence that Armenia is destroying or failing to preserve evidence? There is none. There is thus no basis on which to order this provisional measure either.

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[55] Azerbaijan's Request for provisional measures, Sect. II.B, heading.

[56] Azerbaijan's Request for provisional measures, Section II.B.1, heading.

[57] CR 2021/25, pp. 35-36, paras. 7-14 (Salonidis).

[58] CR 2021/21, p. 57, para. 23 (Donovan).

[59] Azerbaijan's Request for provisional measures, Sect. II.B.2, heading.

[60] CR 2021/25, pp. 36-42, paras. 15-32 (Salonidis).

[61] CR 2021/21, p. 55, para. 12 (Donovan).

[62] CR 2021/21, p. 55, para. 12 (Donovan).

10. For the sake of completeness, I should note finally that the last two measures Azerbaijan seeks, those relating to non-aggravation and regular reporting, fall like dominos with the others. Since none of the first four measures has any basis in fact or law, these last two measures are moot.

11. For all these reasons, Madam President, distinguished Members of the Court, we respectfully submit that the Court should not fall for Azerbaijan's ruse. The two requests before you are not equivalent. Azerbaijan has not proved that Armenia is doing *anything* that poses an urgent risk of irreparable harm to any rights under CERD that are in dispute in this case. There is thus no reason, still less a need, for the Court to order provisional measures of any kind against Armenia.

12. Thank you, Madam President, for your courteous attention. May I kindly ask that you invite our distinguished Agent to conclude our submissions today.

The PRESIDENT: I thank Mr. Martin for his statement and I shall now invite the Agent of Armenia, H.E. Mr. Yeghishe Kirakosyan, to take the floor. You have the floor, Your Excellency.

Mr. KIRAKOSYAN:

AGENT'S CLOSING

1. Madam President, distinguished Members of the Court, it is an honour and privilege to appear before you again, this time, to close the responding submissions of the Republic of Armenia.

2. As our learned counsel have demonstrated, Azerbaijan's requests do not meet the conditions for the exercise of your power to indicate provisional measures. We trust firmly in the Court to see this for itself.

3. Madam President, I thank the Court once more for hosting our delegation here at the Peace Palace for the proceedings in both cases. We genuinely appreciate the Court's willingness and availability to hold two successive provisional measures hearings over the course of the past seven days.

4. I would also like to express my gratitude to the Registry for its meticulousness and expediency, as well as the interpreters and other Court personnel whose efforts contributed to the seamlessness of these proceedings.

5. In accordance with Article 60 (2) of the Rules of Court, I shall now read out the Republic of Armenia's final submissions.

6. On the basis of its oral pleadings, Armenia respectfully requests the Court to reject Azerbaijan's requests for the indication of provisional measures in full.

7. Madam President, distinguished Members of the Court, on behalf of the Republic of Armenia, I thank you for your kind attention. This closes our responding submissions.

The PRESIDENT: I thank the Agent of Armenia, whose statement brings to an end the second round of oral argument of Armenia, as well as the present series of sittings.

I would like to thank the Agents, counsel and advocates of the two Parties for their statements. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Order at a public sitting. Since the Court has no other business before it today, the sitting is declared closed.

The Court rose at 6.05 p.m.

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