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INTRODUCTORY NOTE TO ARM. V. AZER., AZER. V. ARM., & UKR. V. RUSS. (ORDERS ON PROVISIONAL MEASURES) (I.C.J.)

BY EVA RIETER*

[December 7, 2021 and March 16, 2022]

Background

The provisional measures orders by the International Court of Justice (ICJ) in *Armenia v. Azerbaijan*, *Azerbaijan v. Armenia* (2021), and *Ukraine v. Russian Federation* (2022) are reproduced here to mark the start of the proceedings in these important cases. The Court issued these provisional measures orders in a setting of ongoing tensions and a pending ongoing war, respectively.

In September 2021, Armenia brought a case against Azerbaijan, and a week later Azerbaijan brought one against Armenia, with each requesting provisional measures. These cases and requests were brought in the context of the six-week war in 2020 between Armenia and Azerbaijan. Each state claimed that the other was violating the Convention on the Elimination of Racial Discrimination (CERD).

Two days after the February 24, 2022 military invasion by the Russian Federation in Ukraine, Ukraine brought a case and requested provisional measures, based on a dispute under the Genocide Convention.

In all three cases, the respondent states have not recognized the compulsory jurisdiction of the ICJ. Instead, the applications and the requests for provisional measures were based on a clause in a specific treaty conferring jurisdiction on the ICJ. The requests in the first two orders were based on Article 22 of the CERD, and the request in the third was based on Article IX of the Genocide Convention.

These cases are relevant because they deal with possibilities for states to bring cases before the ICJ when compulsory jurisdiction has not been recognized. They concern the extent of jurisdiction under compromissory clauses of specialized treaties. Moreover, they deal with war and peace, and the role of the Court. In the 2022 Order, the armed conflict also triggered general statements regarding peace and security and the Court's role in its maintenance and in the peaceful settlement of disputes. In that light, it deemed it "necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law."[1] The conflicts and the cases are ongoing, and the Orders illustrate the role the Court itself is playing when a merits judgment is pending, particularly with regard to its approach to jurisdiction on the merits at the stage of provisional measures and its continued grappling with its plausibility criterion.

The Three Provisional Measures Orders

On December 7, 2021, in two separate Orders under CERD, the Court ordered both Armenia and Azerbaijan to "prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory," targeted at persons of Armenian and Azerbaijani national and ethnic origin, and to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." These elements of the Orders were issued unanimously vis-à-vis both states. In addition, in *Armenia v. Azerbaijan* it ordered Azerbaijan to "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law" and to "[t]ake all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts."

The saga continues. In September 2022, Armenia requested a modification of the Order. Such modification would be possible under Article 76 of the Rules. On October 12, 2022, the ICJ found that the hostilities that erupted between the parties in September 2022, and the detention of Armenian military personnel, did not constitute a change in the situation justifying such modification.[2] It did observe that "the tenuous situation between the Parties confirms the need for effective implementation of the measures indicated in its Order of 7 December 2021." Therefore, it found it "necessary to reaffirm the measures indicated in its Order of 7 December 2021, in particular the requirement

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that both Parties 'shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.'"[3]

In its March 16, 2022 Order in *Ukraine v. Russia*, the ICJ granted provisional measures under the Genocide Convention in response to Ukraine's request. It ordered that the Russian Federation "shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine" and that it "shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations." It also ordered that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[4] By November 1, 2022, an unprecedented number of twenty-three states had submitted a Declaration of Intervention in the main proceedings.

Provisional Measures and Jurisdiction on the Merits

Similar to other international judicial and quasi-judicial bodies, parties before the ICJ need not show jurisdiction on the merits at the provisional measures stage. It would defeat the purpose of provisional measures to require the time-consuming full establishment of jurisdiction on the merits before granting them. Instead, at the provisional measures stage, rather than fully establishing jurisdiction on the merits, the ICJ has required the applicant state to show only a certain level of jurisdiction on the merits—for example, that there should be no *prima facie* lack of such jurisdiction or that *prima facie* jurisdiction should already be shown in the request for provisional measures. Since its 2017 Order in *Ukraine v. Russia*,[5] the ICJ has opted for the stricter requirement that *prima facie* jurisdiction on the merits should be shown before it would order provisional measures, rather than just requiring that such jurisdiction is not lacking before ordering them.

With regard to the compromissory clause, the ICJ has noted that it "must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[6] In both 2021 Orders, the Court found that "at least some of the acts and omissions alleged" were "capable of falling within the provisions of the Convention[/CERD]."[7] Therefore, it found that there was "a sufficient basis at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation or application of CERD."[8]

In the 2022 Order, the ICJ found that there was *prima facie* a dispute under Article IX of the Genocide Convention. Only Judge Gevorgian dissented on this point.[9] His argument was based on the Orders in its 1999 judgment in the *Legality and the Use of Force* cases, which denied provisional measures against several NATO states. The relation with those Orders was addressed more fully in Judge Nolte's Declaration: "in the earlier cases the applicant did not show that its request concerned acts of the respondent States that were 'capable of coming within the provisions of the Genocide Convention,' whereas in the present case, the Applicant has demonstrated that the Respondent acted in a way 'that is capable of coming within the provisions of the Genocide Convention' by making allegations that genocide is being committed by Ukraine and by undertaking a 'special military operation' with the stated purpose of preventing genocide . . . In contrast, in the present case, the subject-matter of the Application concerns the question whether the allegations of genocide and the military operations undertaken with the stated purpose of preventing and punishing genocide are in conformity with the Genocide Convention."[10]

Provisional Measures and Plausibility of the Claims

In its 2017 *Ukraine v. Russian Federation* Order, the ICJ added a stricter criterion for appropriateness of provisional measures by using the notion of plausibility in such a way that the applicant state had to bring considerable evidence on likelihood of success already at the provisional measures stage.[11] A great number of substantive dissents, and subsequent discussion in the literature, pointed at the problems with prejudgment on the merits in that Order.[12] Subsequent Orders did not always apply such a standard (e.g., *The Gambia v. Myanmar* Order of January 20, 2020, involving the Genocide Convention).[13] Yet the 2021 Orders in *Armenia v. Azerbaijan* and *Azerbaijan v. Armenia*, and the 2022 Order in *Ukraine v. Russian Federation*, illustrate that the plausibility criterion is still unclear.

In the *Azerbaijan v. Armenia* Order, the ICJ recognized

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> that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD and that such a policy can be effected through a variety of military means. However, the Court does not consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines. Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing," of rights of persons of Azerbaijani national or ethnic origin.[14]

In the *Armenia v. Azerbaijan* Order, the Court noted "that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State,"[15] implying that this is *lex specialis* not covered by CERD. It also recalled its finding in its 2021 judgment on preliminary objections in *Qatar* v. *United Arab Emirates* "that measures based on current nationality do not fall within the scope of CERD."[16] This finding has been criticized as rigid and not in conformity with international human rights law.[17] Moreover, it is based on a small majority, with strong dissents by Judges Sebutinde, Bhandari, Robinson, and Iwasawa,[18] and it only referred to the Committee's General Recommendations, not to its case law. Because the Committee is the only option for individuals with claims about CERD violations, it could be argued that the ICJ should be particularly sensitive to decisions on individual complaints by the supervisory bodies to the human rights treaties in question.[19]

In *Armenia v. Azerbaijan*, the Court did not consider that CERD "plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees." It concluded that "Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin."[20] Yet it found plausible "the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan."[21] Judge Yusuf dissented, referring to contradictions in the Court's approach.[22]

The ICJ also considered plausible "the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage."[23] President Yusuf dissented, considering that "religious heritage" is not plausibly protected under CERD, noting that Article 1, paragraph 1 of CERD "does not list religion or creed amongst the prohibited grounds for the purposes of 'racial discrimination.'" He referred to General Comment No. 21 on Article 15 of the International Covenant on Economic, Social and Cultural Rights, but not to the interpretations of the CERD Committee itself, recognizing the connections between religious and racial discrimination,[24] nor to the case law under Article 27 of the International Covenant on Civil and Political Rights.

In the 2022 *Ukraine v. Russian Federation* Order, the Court noted that at the provisional measures stage, "it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide."[25] It found that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine."[26] Judge Bennouna voted in favor of the Order, but in his Declaration he expressed doubts about this statement. He considered that this right should have been founded explicitly "on one of the provisions of the Genocide Convention."[27] Judge Nolte noted that in this case, "the Applicant has demonstrated that the Respondent acted in a way 'that is capable of coming within the provisions of the Genocide Convention' by making allegations that genocide is being committed by Ukraine and by undertaking a 'special military operation' with the stated purpose of preventing genocide."[28]

Conclusion

The Orders illustrate the Court's continued grappling with its plausibility criterion and underlying tensions within the Court about contradictory approaches in this respect. Yet they also illustrate the role the Court sees for itself in cases of urgency, where no judgment on jurisdiction can yet be made under CERD and the Genocide Convention, treaties with a compromissory clause. Moreover, they show the continued importance—especially in situations of armed conflict—of provisional measures aimed at non-aggravation, even if the Court currently only orders such measures on an ancillary basis.

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ENDNOTES

1 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order on Provisional Measures, ¶ 18 (Mar. 16, 2022), https://www.icj-cij.org/en/case/182/orders.

2 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Request for the modification of the Order of 7 December 2021 indicating provisional measures ¶ 19 (Oct. 12, 2022). Several judges attached individual opinions. Judges Sebutinde, (who proposed the following modified text: "Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict and subsequent hostilities between the Parties, including those who remain in detention, and ensure their security and equality before the law." Sep. Op. ¶ 17) Bhandari ("Fitting the September 2022 hostilities into the 2020 Conflict strikes me as a tall order." Diss. Op. ¶ 13), and Robinson (the "Court's Order misinterprets and contradicts the 2021 Order," Diss. Op. ¶ 13) dissented on this part of the Order. Judge Tomka attached a Declaration explaining that he did not vote against because of the "creative interpretation" in paragraph 18 of the Order, affirming that protection was "afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict." He stated: "This affirmation expands the scope of the applicability of the first provisional measure of protection indicated in December 2021 to any person who may be detained in the course of any further hostilities during the pendency of the proceedings in the present case." Declaration, ¶ 6. Judge ad hoc Daudet attached a Declaration stressing the principle of continuity, ¶ 11.

3 *Id.* ¶ 21.

4 *Id.* Unanimously, but see Judge ad hoc Daudet's Declaration "deeply regretting" that the non-aggravation order was directed to both states.

5 Application of the International Convention for the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order on Provisional Measures, 2017 I.C.J. Rep. 104 (Apr. 19).

6 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.) and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.) Orders on Provisional Measures ¶¶ 20 (Dec. 7, 2021), https://www.icj-cij.org/en/case/180 and https://www.icj-cij.org/en/case/181, respectively.

7 Arm. v. Azer., *id.*, ¶ 24; Azer. v. Arm., *id*, ¶ 27.

8 Arm. v. Azer., *id.*; Azer. v. Arm., *id*, ¶ 28.

9 Ukr. v. Russ., *supra* note 1, Dissenting opinion by Vice-President Gevorgian. Judge Xue also dissented, but she stressed the plausibility issue, *see* ¶ 1 of her Declaration.

10 Ukr. v. Russ., *supra* note 1, Declaration of Judge Nolte, ¶¶ 4–5.

11 Application of the International Convention for the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order on Provisional Measures (Apr. 19, 2017). The ICJ has always required some evidence that the rights invoked may indeed exist, and in 2009 it introduced the notion "plausibility," which in this 2017 Order it took as requiring evidence of likelihood of success of the claim on the merits.

12 *See, e.g.,* Eva Rieter, *The International Court of Justice and Decisions Involving the Fate of Persons*, pp. 128–170, in JUDGING INTERNATIONAL HUMAN RIGHTS 151-157 (S. Kadelbach et al. eds., 2019).

13 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order on Provisional Measures, 2020 I.C.J. Rep. 3 (Jan. 23).

14 Azer. v. Arm., *supra* note 4, ¶ 53.

15 *Id.* ¶ 60.

16 Arm. v. Azer, *supra* note 4, ¶ 60, referring to ICJ Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment on Preliminary Objections, 2021 I.C.J. Rep. 71, ¶ 105 (Feb. 4).

17 *See, e.g.,* Geir Ulfstein, *Qatar v. United Arab Emirates. Judgment, Preliminary objections*, 116 AM. J. INT'L L. 39-403 (2022) and Cathryn Costello and Michelle Foster, *Race discrimination effaced at the International Court of Justice*, 115 AJIL UNBOUND 339–343 (2021), https://doi.org/10.1017/aju.2021.51.

18 *See also* the Declaration of President Yusuf in this case.

19 International Law Association (ILA) International Human Rights Law Committee, *The International Court of Justice and Its Contribution to Human Rights Law* (Final Report Part 1), Washington Conference 2014, ¶ 41, reprinted in ILA Report 2014, at 476–501, ¶¶ 19-88, and, in slightly edited version, in Stefan Kadelbach, Thilo Rensmann, and Eva Rieter (eds.), *Judging International Human Rights, Courts of General Jurisdiction as Human Rights Courts* 27–28 (2019). *See also*, in the same volume, Stefan Kadelbach et al., *Introduction*, pp. 5–6 discussing the importance for an inter-state court to take into account the "procedural absence of the individual concerned in the proceedings" and the need therefore to take seriously the findings of the UN supervisory committees dealing with individual complaints under the specific treaty.

20 Arm. v. Azer, *supra* note 4, ¶ 60.

21 Ukr. v. Russ., *supra* note 1, ¶ 18.

22 *Id.*

23 Arm. v. Azer, *supra* note 4, ¶ 61.

24 *See, e.g.,* CERD Committee, General Recommendation 32 on the meaning and scope of special measures in the ICERD, CERD/C/GC/32 (Oct. 6, 2009) ¶ 7.

25 Ukr. v. Russ., *supra* note 1, ¶ 59.

26 *Id.* ¶ 60.

27 *Id.* Declaration of Judge Bennouna, ¶ 6.

28 *Id.* Declaration of Judge Nolte, ¶ 4.

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ARM. V. AZER. (I.C.J.)*
[December 7, 2021]

7 DÉCEMBRE 2021

ORDONNANCE

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(ARMÉNIE c. AZERBAÏDJAN)

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

(ARMENIA *v.* AZERBAIJAN)

7 DECEMBER 2021

ORDER

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

(ARMENIA *v.* AZERBAIJAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges* ad hoc KEITH, DAUDET; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 16 September 2021, the Republic of Armenia (hereinafter "Armenia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Azerbaijan (hereinafter "Azerbaijan") concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

2. At the end of its Application, Armenia

"respectfully requests the Court to adjudge and declare:

1. That Azerbaijan is responsible for violating the CERD, including Articles 2, 3, 4, 5, 6 and 7.

2. That, as a consequence of its international responsibility for these breaches of the Convention, Azerbaijan must:

A. Cease forthwith any such ongoing internationally wrongful act and fully comply with its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD, including by:

– refraining from practices of ethnic cleansing against Armenians;

– refraining from engaging in, glorifying, rewarding or condoning acts of racism against Armenians, including Armenian prisoners of war, hostages and other detained persons;

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- refraining from engaging in or tolerating hate speech against Armenians, including in educational materials;
- refraining from suppressing the Armenian language, destroying Armenian cultural heritage or otherwise eliminating the existence of the historical Armenian cultural presence or inhibiting Armenians' access and enjoyment thereof;
- punishing all acts of racial discrimination, both public and private, against Armenians, including those taken by public officials;
- ensuring that the rights of Armenians, including Armenian prisoners of war, hostages and other detained persons are upheld on an equal basis;
- adopting the laws necessary to uphold its obligations under the CERD;
- providing Armenians with equal treatment before the tribunals and all other organs administering justice, and providing effective protection and remedies against acts of racial discrimination;
- refraining from hindering the registration and operation of NGOs and arresting, detaining and sentencing human rights activists or other individuals working towards reconciliation with Armenia and Armenians; and
- taking effective measures with a view to combatting prejudices against Armenians, and special measures for the purpose of securing their adequate advancement.

B. Make reparations for the injury caused by any such internationally wrongful act, including:

- by way of restitution, allowing the safe and dignified return of displaced Armenians to their homes, and restoring or returning any Armenian cultural and religious buildings and sites, artefacts or objects;
- providing additional forms of reparation for any harm, loss or injury suffered by Armenians that is not capable of full reparation by restitution, including by providing compensation to displaced Armenians until such time as it becomes safe for them to return to their homes.

C. Acknowledge its violations of the CERD and provide an apology to Armenia and Armenian victims of Azerbaijan's racial discrimination.

D. Offer assurances and guarantees of non-repetition of violations of its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD."

3. In its Application, Armenia seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, Armenia asked the Court to indicate the following provisional measures:

- "Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
- Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;

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– Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;

– Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;

– Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;

– Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;

– Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and

– Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months."

6. The Registrar immediately communicated to the Government of Azerbaijan the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by Armenia of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 22 September 2021.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. Armenia chose Mr. Yves Daudet and Azerbaijan Mr. Kenneth Keith.

9. By letters dated 27 September 2021, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 14 and 15 October 2021 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Armenia:	H.E. Mr. Yeghishe Kirakosyan, Mr. Robert Kolb, Mr. Constantinos Salonidis, Mr. Sean Murphy, Mr. Pierre d'Argent, Mr. Lawrence H. Martin.
On behalf of Azerbaijan:	H.E. Mr. Elnur Mammadov, Mr. Vaughan Lowe, Mr. Peter Goldsmith, Ms Laurence Boisson de Chazournes, Ms Catherine Amirfar, Mr. Donald Francis Donovan.

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11. At the end of its second round of oral observations, Armenia asked the Court to indicate the following provisional measures:

- "Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
- Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;
- Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;
- Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;
- Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;
- Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;
- Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and
- Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months."

12. At the end of its second round of oral observations, Azerbaijan requested the Court "to reject the request for the indication of provisional measures submitted by the Republic of Armenia".

*

* *

I. INTRODUCTION

13. Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 21 September 1991 and 18 October 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity ("oblast") that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties' competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Armenia calls "the Second Nagorno-Karabakh War" and Azerbaijan calls "the Second Garabagh War" (hereinafter the "2020 Conflict"), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared".

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14. The differences between the Parties are longstanding and wide-ranging. The Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present case, the scope of which is therefore circumscribed by that Convention.

II. PRIMA FACIE JURISDICTION

1. General observations

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16).

16. In the present case, Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. Article 22 of CERD reads as follows:

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

18. Armenia and Azerbaijan are both parties to CERD; Armenia acceded to CERD on 23 June 1993, Azerbaijan on 16 August 1996. Neither Party made reservations to Article 22 or to any other provision of CERD.

2. Existence of a dispute relating to the interpretation or application of CERD

19. Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

20. In order to determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18). Since Armenia has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (see *ibid.*).

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21. Armenia contends that a dispute exists with Azerbaijan regarding the interpretation and application of CERD, as demonstrated by the correspondence between the Parties. According to Armenia, this dispute arose in the context of longstanding racial discrimination directed by Azerbaijan at individuals of Armenian national or

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ethnic origin. In particular, Armenia claims that a "State-sponsored policy of Armenian hatred" by the Azerbaijani authorities has led to systematic discrimination against those individuals in Azerbaijan. It submits that Azerbaijan committed grave violations of obligations arising under CERD during the 2020 Conflict, and has continued to do so following the end of hostilities, in furtherance of its policy of "ethnic cleansing" intended to rid "Azerbaijan and Nagorno-Karabakh of Armenians and Armenian influence". According to Armenia, the violations committed by Azerbaijan are directed at individuals of Armenian national or ethnic origin, regardless of their nationality.

22. Armenia alleges that Azerbaijan has acted and continues to act in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD. Armenia asserts that Azerbaijan bears responsibility, *inter alia*, for the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin held in its custody; for engaging in practices of ethnic cleansing; for glorifying, rewarding and condoning acts of racism; for inciting racial hatred, giving as an example, mannequins depicting Armenian soldiers in a degrading way at the "Military Trophies Park" which opened in Baku in the aftermath of the 2020 Conflict; for facilitating, tolerating and failing to punish and prevent hate speech; and for systematically destroying and falsifying Armenian cultural sites and heritage.

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23. Azerbaijan contends that there is no dispute between the Parties concerning the interpretation or application of CERD. It affirms that it is committed to respecting fully the values protected by CERD. The Respondent denies that its actions during and after the 2020 Conflict were motivated by an "ethnic animus" and argues instead that, through those actions, it responded to "a blatant and unlawful use of force against its people and its sovereign territory" on the part of Armenia, in the context of its "decades-long unlawful occupation of Azerbaijan's territory" dating back to the hostilities that ended in 1994. In this connection, Azerbaijan states that its conduct was solely motivated by a desire to "liberate its territories from Armenia's illegal occupation". Azerbaijan asserts, *inter alia*, that Armenia failed to comply with four United Nations Security Council resolutions requiring the immediate, complete and unconditional withdrawal of Armenian forces from occupied areas of Azerbaijan.

24. With regard to the claims put forward by Armenia in support of its allegation that the actions of Azerbaijan constitute racial discrimination under CERD, the Respondent argues that these actions "are entirely unrelated to racial discrimination". According to Azerbaijan, Armenia's case before the Court is indeed not concerned with the protection of rights under CERD but instead reflects a strategy "to use the Court as a platform to broadcast [Armenia's] grievances against Azerbaijan". Azerbaijan moreover asserts that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group; that it reaffirms its obligations to treat Armenian detainees in its custody in accordance with its obligations under CERD; and that it has commenced investigations and brought charges against Azerbaijani servicemen with respect to alleged crimes committed against Armenians during the 2020 Conflict.

25. In Azerbaijan's view, some of the measures requested by Armenia have in any event become moot. In particular, in addressing Armenia's request that the Court order Azerbaijan to close or suspend activities at the "Military Trophies Park", the Agent of Azerbaijan referred during the hearing to his "assurance [on the previous day] about the permanent removal of certain exhibits in the Trophies Park".

* *

26. The Court recalls that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*). The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (*ibid.*).

27. The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Azerbaijan gave rise to violations of its

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obligations under CERD. The Court notes that, according to Armenia, Azerbaijan has violated its obligations under the Convention in various ways (see paragraphs 21 to 22 above). Azerbaijan has denied that it has committed any of the alleged violations set out above and that the acts complained of fall within the scope of CERD (see paragraphs 23 to 24 above). The divergence of views between Armenia and Azerbaijan regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 11 November 2020 and 8 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. It is further demonstrated by subsequent exchanges between the Parties.

28. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Azerbaijan's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Armenia are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Armenia to have been committed by Azerbaijan are capable of falling within the provisions of the Convention.

29. The Court finds therefore that there is a sufficient basis at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation or application of CERD.

3. PROCEDURAL PRECONDITIONS

30. Under Article 22 of CERD, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141).

31. The Court has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative (*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. 600, para. 113). Since Armenia does not contend that its dispute with Azerbaijan was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22.

32. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

33. At this stage of the proceedings, the Court will examine whether it appears, prima facie, that Armenia genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Armenia pursued these negotiations as far as possible (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 420, para. 36).

* *

34. Regarding the procedural preconditions set out in Article 22 of CERD, Armenia states that, since the end of hostilities in autumn 2020, it has exchanged over 40 pieces of correspondence and held several rounds of meetings with Azerbaijan. Specifically, Armenia asserts that the Minister for Foreign Affairs of Armenia, in a letter dated 11 November 2020 addressed to his counterpart in Azerbaijan, expressly referred to violations of multiple provisions of CERD by Azerbaijan, and invited Azerbaijan to enter into negotiations with Armenia to remedy those violations. Armenia notes that in his letter of reply, dated 8 December 2020, the Minister for Foreign Affairs of Azerbaijan rejected Armenia's allegations. Armenia indicates that, from November 2020 to September 2021, the Parties

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engaged in further rounds of written exchanges and participated in at least seven rounds of meetings between March and September 2021, "in an effort to settle this dispute amicably".

35. Armenia claims that during these rounds of negotiations, the Parties' positions on the crucial points that divided them — namely whether Azerbaijan had violated its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD and whether it consequently owed reparation — did not change. Armenia further contends that, by 16 September 2021, the date on which it filed its Application, there was "no reasonable prospect" that the respective positions of the Parties would evolve, and that it thus considered that the negotiations had failed. In light of the impasse it describes, Armenia contends that the precondition of negotiations contained in Article 22 of CERD has thus been met.

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36. Azerbaijan, for its part, claims that Armenia did not genuinely attempt to engage in meaningful negotiations prior to the institution of proceedings before the Court against Azerbaijan. In its view, the time frame of the supposed negotiations shows that Armenia was never serious about finding a solution to the matters that divided the Parties. Specifically, Azerbaijan notes that the period from November 2020 to July 2021 was spent "talking about the procedural modalities" and that the first substantive meeting between the Parties was held in mid-July 2021. Moreover, Azerbaijan argues that, even thereafter, Armenia never attempted to engage constructively with any of the proposals put forward by the Respondent. In particular, Azerbaijan maintains that, during the bilateral meeting held on 30-31 August 2021, it presented counter-proposals that were never genuinely considered nor discussed by Armenia, which simply rejected those proposals altogether at the following meeting of 14-15 September 2021 before filing its Application and Request for the indication of provisional measures the following day.

37. Azerbaijan argues that a State is not entitled to bring a premature end to negotiations relating to alleged violations of obligations arising under CERD simply because it would rather raise these issues by means of proceedings before the Court. With regard to Armenia's position that the negotiations had reached an impasse, Azerbaijan states that it was not open to Armenia to make such a determination unilaterally, as the continuation of negotiations cannot be subject to "a right to exercise an unreasoned veto". In addition, according to Azerbaijan, Armenia's claim that the negotiations failed was based on Azerbaijan's refusal to accept that it had violated CERD, a claim which Azerbaijan considers both unreasonable and inappropriate, since "[a]cceptance of guilt as a threshold condition has no place in genuine negotiations". In sum, according to Azerbaijan, the record shows that it tried to engage in constructive negotiations whereas Armenia made no genuine attempt to do so. Azerbaijan concludes that the Court manifestly lacks jurisdiction either to determine the merits of the case or to order provisional measures because Armenia has failed to fulfil the precondition of negotiation contained in Article 22 of CERD.

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38. Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question" (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36, citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 161).

39. The Court notes that, as evidenced by the material before it, Armenia raised allegations of violations by Azerbaijan of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

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40. The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Armenia and Azerbaijan, by letters dated 11 November 2020 and 8 December 2020 respectively, and the last bilateral meeting held on 14-15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Armenia's allegations of Azerbaijan's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15-16 July 2021, 30-31 August 2021 and 14-15 September 2021 shows a lack of progress in reaching common ground on substantive issues. In particular, in the Note Verbale dated 10 September 2021 from the Permanent Mission of Armenia to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of Azerbaijan to the United Nations Office and other International Organizations in Geneva, Armenia stated that it considered Azerbaijan's "responses" (to the allegations of violations of obligations arising under CERD made against it) presented during the 15-16 July 2021 session to be "in fact categorical rejections of Armenia's claims and requested remedies". For its part, during the oral proceedings, Azerbaijan argued — with reference to the bilateral sessions held in July, August and September 2021 — that every time it put forward counter-proposals in response to Armenia's claims for remedies, Armenia failed to "put forward any proposals".

41. Despite the fact that Armenia alleged in bilateral exchanges that Azerbaijan had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on the alleged non-compliance by Azerbaijan with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

42. Recalling that, at this stage of the proceedings, the Court need only decide whether, prima facie, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

4. Conclusion as to prima facie jurisdiction

43. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the Convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

44. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 18, para. 43).

45. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

46. In the present proceedings, Armenia asserts rights under Articles 2, 3, 4, 5, 6 and 7 of CERD. In particular, Armenia asserts the right of prisoners of war and civilian detainees of Armenian national or ethnic origin to be repatriated and their right to be protected from inhuman treatment, the right of persons of Armenian national or ethnic origin not to be subject to hate speech by Azerbaijan and the right of persons of Armenian national or ethnic origin to access and enjoy their cultural heritage, as well as Azerbaijan's corresponding obligation not to destroy, erase or

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falsify such heritage. Armenia argues that these rights are plausible in so far as they are "grounded in a possible interpretation" of the Convention and that Azerbaijan's actions plausibly constitute acts of racial discrimination in violation of its obligations under CERD.

47. Armenia contends that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin following the ceasefire reached on 10 November 2020 constitutes a violation by Azerbaijan of its obligations under Articles 2 and 5 of CERD. More specifically, Armenia submits that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin is a denial of their right to equality before the law, namely "before or under international humanitarian law", and amounts to "racial discrimination" within the meaning of CERD. According to Armenia, these detainees have been subjected to "sham criminal proceedings", and it is "readily apparent" from the willingness of Azerbaijan to repatriate some prisoners of war on certain occasions, while refusing to repatriate others captured under similar circumstances, that their continued detention "has nothing to do with actual criminality". The Applicant is thus of the view that the Azerbaijani authorities are not "applying criminal law fairly and judiciously", but rather are "using criminal law arbitrarily as a subterfuge for prohibited, discriminatory conduct".

48. The Applicant further maintains that the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin by Azerbaijan violates Article 5 *(b)* of CERD, which protects the "right to security of person and protection by the State against violence or bodily harm". It asserts that evidence in the case file establishes that "atrocious acts", including torture, targeting these persons, were committed with "clear hatred being shown to persons of Armenian origin". In Armenia's view, the treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin before Azerbaijani courts "clearly implicates" Article 5 *(a)* of CERD which recognizes "[t]he right to equal treatment before the tribunals and all other organs administering justice".

49. Armenia states that the rights of persons of Armenian national or ethnic origin not to be subject to racial hatred and racial hate speech are explicitly stated in Articles 2, 4 and 7 of CERD. It asserts that Azerbaijan, instead of respecting these rights, is violating them "on a daily basis through a constant rhetoric of hate". According to Armenia, this rhetoric "escalated" before and during the 2020 Conflict, and was employed by politicians and high-ranking officials, including the President of Azerbaijan. Armenia further refers to "the racist depictions of Armenian soldiers in denigrating and dehumanizing scenes" in Azerbaijan's "Military Trophies Park". Armenia thus contends that its "rights under Article 2, 4 and 7 of the Convention meet any threshold of plausibility for purposes of this phase of the proceedings".

50. Armenia also refers to the rights of persons of Armenian national or ethnic origin under Articles 2 and 5 of CERD to access and enjoy, without discrimination, their historic, cultural and religious heritage. More specifically, Armenia invokes Article 5 *(d)* (vii) which prohibits racial discrimination in relation to the right to freedom of religion and Article 5 *(e)* (vi) which guarantees the right to equal participation in cultural activities, which, according to Armenia, entails a right to the protection and preservation of Armenian historic, cultural and religious heritage. Armenia alleges that acts of destruction and vandalism have been perpetrated by "Azerbaijani soldiers and mercenaries" against Armenian religious and cultural heritage sites, and that acts of desecration of Armenian cemeteries and religious artefacts, such as the "khachkars" (or "cross-stones") have also occurred. Armenia further alleges that Azerbaijan, by carrying out what it calls restoration works on the cathedral of Shushi, has altered features characteristic of Armenian cultural heritage. Considering the alleged general context of anti-Armenian hatred, Armenia contends that the repeated destruction, alteration and desecration of Armenian cultural heritage and religious sites in territories controlled by Azerbaijan constitutes "racial discrimination" in breach of Articles 2 and 5 of CERD and therefore that its rights under these provisions are plausible.

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51. Azerbaijan acknowledges that, as of 8 October 2021, 45 named individuals captured in relation to the 2020 Conflict remained in its custody. It asserts that these persons are not detained "on the basis of their national or ethnic origin" and maintains instead that they have been charged or convicted of serious offences including torture, murder or mercenarism. According to Azerbaijan, their detention is lawful under domestic and international law and does not

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have the "purpose or effect" of impairing their equal enjoyment of fundamental rights. It notes that "if Azerbaijan is engaged in a conflict with a wholly ethnically Armenian force, the detainees it holds are likely to be ethnically Armenian", but that this is not evidence of racial discrimination. Azerbaijan also underscores that it has "released or repatriated *the vast majority* of Armenians" (emphasis in the original) detained in relation to the 2020 hostilities, and stresses that the release of eight Armenian detainees in recent months was "not pursuant to a bargain with Armenia", confirming therefore that "Azerbaijan investigated in each case whether there is a basis for continued detention". Accordingly, Azerbaijan claims that the detention of individuals of Armenian ethnic or national origin cannot be regarded as "racial discrimination" within the meaning of Article 1 of CERD and thus cannot plausibly engage rights under the Convention.

52. Azerbaijan adds that it has initiated investigations in cases where there have been credible allegations of mistreatment of Armenian detainees, which it says demonstrates that it does not condone torture or mistreatment of any kind, regardless of a detainee's origin. It considers that Armenia therefore has no plausible rights under CERD based on allegations of the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin.

53. Azerbaijan denies that it has incited hatred of people of Armenian national or ethnic origin and argues that Armenia's allegations in this regard are not supported by specific declarations or conduct on the part of Azerbaijan. Therefore, according to the Respondent, Armenia has not established any plausible rights under CERD based on its allegations that Azerbaijan violated its obligations by inciting racial hatred against persons of Armenian national or ethnic origin. As to Armenia's references to the "Military Trophies Park", Azerbaijan considers that, in light of the fact that the mannequins and helmets of Armenian soldiers have been "permanently removed" from display, "there is nothing remaining at the Park that could possibly implicate rights under CERD".

54. Regarding Armenian religious and cultural heritage, Azerbaijan accepts that all persons who are lawfully present in Azerbaijan, including persons of Armenian national or ethnic origin, must be able to visit on an equal basis historic, cultural and religious sites that are safely open to the public in its territory. Azerbaijan claims that certain heritage sites, however, are currently not accessible due to the placement of landmines by Armenia. According to the Respondent, restriction of access to those sites is aimed at ensuring the safety and security of persons, regardless of their national or ethnic origin, and cannot, therefore, constitute an act of racial discrimination under CERD or a basis to claim "a plausible CERD right". Azerbaijan adds that its law forbids vandalism and destruction of cultural and religious heritage and asserts that it is "facilitating efforts to protect and preserve" Armenian sites and artefacts relevant to the rights under CERD. Moreover, Azerbaijan contends that it has undertaken to investigate all credible allegations of vandalism, destruction, and unauthorized alteration of historic and cultural monuments and cemeteries used by ethnic Armenians.

55. Azerbaijan concludes that in the present case the Applicant has failed to show that it seeks to protect plausible rights on the merits in so far as it has not established that the acts complained of constitute acts of "racial discrimination" within the meaning of CERD.

* *

56. The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. Article 1, paragraph 1, of CERD defines racial discrimination in the following terms:

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

Articles 2, 3, 4, 5, 6 and 7 of the Convention, invoked by Armenia in its Application and for the purposes of its Request for the indication of provisional measures, read as follows:

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Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

   (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

   (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

   (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

   (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

   (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

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(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

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(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."

57. The Court notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. It recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 426, para. 51).

58. A State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention (see *ibid.*, para. 52). In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

59. The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention.

60. In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, Armenia asserts two distinct rights: the right to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD (*Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021*, para. 105). The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan.

61. The Court also considers plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage.

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62. The Court now turns to the condition of the link between the rights claimed by Armenia and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Armenia have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Armenia.

* *

63. Armenia considers that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. According to Armenia, the measures relating to prisoners of war and other detainees of Armenian national or ethnic origin will ensure that they can enjoy their right under Article 2 of CERD to be free from racial discrimination in all of its forms and their right, under Article 5 of CERD, to be secure and protected by the State from violence or bodily harm. For Armenia, the only genuine way to protect these rights is to order that the detainees be immediately released and that they be treated humanely pending their release. Armenia further asserts that the measure requesting that Azerbaijan refrain from espousing hatred of people of Armenian national or ethnic origin and that the "Military Trophies Park" be closed, is directly linked to rights under Articles 2, 4 and 7 of CERD, which set out specific ways in which a State party must act to meet its obligations to combat racial discrimination. With regard to the measures relating to the protection and preservation of Armenian historic, cultural and religious heritage and the need to ensure a right of access, Armenia maintains that these measures are necessary in order to protect the right of persons of Armenian national or ethnic origin under Article 5 to equal participation in cultural activities, including the right of access to and enjoyment of their cultural heritage.

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64. Azerbaijan considers that there is no link between the measures requested by Armenia and the rights under CERD that it claims on the merits. In particular, with regard to the measures aimed at obtaining the release of all Armenian detainees in its custody and at ensuring their proper treatment pending that outcome, Azerbaijan argues, first, that there is no provision in CERD on the basis of which Armenia could demand the release of lawfully detained individuals. Secondly, it contends that the individuals who remain in Azerbaijan have either been lawfully tried, convicted and are serving their sentences or are awaiting trial. Azerbaijan therefore does not accept that it is under any duty to release those persons before they have been tried or, if found guilty, before they have served their sentence. Azerbaijan argues, thirdly, that all Armenian detainees in Azerbaijan's custody are treated in accordance with Azerbaijan's obligations under CERD.

65. With regard to the measure requesting Azerbaijan to refrain from espousing hatred of people of Armenian national or ethnic origin, the Respondent asserts that it has pledged its adherence to the obligations under CERD not to condone statements or actions that promote hatred or incite violence targeting a specific group on the basis of its national or ethnic origin. Azerbaijan also notes that mannequins depicting Armenian soldiers and displays of helmets of Armenian soldiers were permanently removed from the "Military Trophies Park", as confirmed by a statement from its Agent (see paragraph 25 above).

66. With regard to the measures aimed at protecting Armenian historic, cultural and religious heritage sites, as well as at ensuring the rights of Armenians to access and enjoy them, Azerbaijan states that all persons who are lawfully present in Azerbaijan, including Armenians, are able to access such sites on an equal basis; Azerbaijan also refers to an Azerbaijani law forbidding the vandalism and destruction of sites of Armenian historic, cultural and religious heritage. The Respondent further notes that it is facilitating efforts to protect and preserve sites and artefacts that are relevant under CERD.

* *

67. The Court has already found that at least some of the rights claimed by Armenia under CERD are plausible (see paragraphs 59 to 61 above). It considers that a link exists between certain measures requested by Armenia (see paragraphs 5 and 11 above) and the plausible rights it seeks to protect. This is the case for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm; to refrain from

espousing hatred against persons of Armenian national or ethnic origin; and to prevent, prohibit and punish vandalism, destruction or alteration of Armenian historic, cultural and religious heritage and to protect the right to access and enjoy that heritage. These measures, in the Court's view, are directed at safeguarding plausible rights invoked by Armenia under CERD.

68. The Court concludes, therefore, that a link exists between some of the rights claimed by Armenia and some of the requested provisional measures.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

69. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 24, para. 64, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 77).

70. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*ibid.*, p. 24, para. 65). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

71. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

72. Armenia submits that there is an urgent need to protect prisoners of war and civilian detainees of Armenian national or ethnic origin from further mistreatment, to protect persons of Armenian national or ethnic origin from continued hate speech, and to protect Armenian historic, cultural and religious heritage from erasure.

73. Armenia alleges that the evidence shows a clear record and practice of Azerbaijani authorities abusing prisoners of war and civilian detainees of Armenian national or ethnic origin. Armenia adds that these individuals continue to be at grave risk of execution, torture or other forms of mistreatment. It contends that prisoners of war and civilian detainees of Armenian national or ethnic origin have been, and continue to be, exposed to stabbings, beatings, burnings and electric shocks, and that such treatment is often accompanied by ethnic slurs and other hate speech. Armenia states that a number of military and civilian detainees of Armenian national or ethnic origin have even been executed. Armenia maintains that the fact that the detainees are subject to the arbitrariness of criminal proceedings in Azerbaijan, in which they "are charged long after they should have been repatriated, and then tried and convicted in a matter of days, often in a language they do not understand", and that they are at risk of being given lengthy prison sentences makes them extremely vulnerable to continued abuse. For all these reasons, Armenia is of the view that there is a clear and imminent threat of psychological trauma, bodily harm and even death for detainees of Armenian national or ethnic origin.

74. Armenia further speaks of obsessive and continuing expressions of hatred for persons of Armenian national or ethnic origin emanating from Azerbaijani politicians and high-ranking government officials, including the President. It alleges that this environment of hate may entail irreparable consequences, in particular by making the physical and mental abuse of all Armenians more likely, "including those living in Nagorno-Karabakh and those still held in captivity" in Azerbaijan. For example, the racist depictions at the "Military Trophies Park" of Armenian soldiers in denigrating and dehumanizing scenes "exacerbate[] the already real and present threat to the detainees".

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75. Armenia also contends that Azerbaijan has damaged, altered and destroyed Armenian churches (such as the Holy Saviour/Ghazanchetsots Cathedral in Shushi, the Armenian church of Saint John the Baptist in Shushi and the Saint Yeghishe Church in Mataghis), gravestones (in Hadrut, in north of Shushi, in Mets Tagher, in Taghavard and in Sghnakh), and other cultural and religious sites and artefacts (such as "khachkars" (or "cross-stones")). Armenia claims that Azerbaijan continues to engage in these acts of destruction and vandalism or allows these acts to occur. It adds that even before the most recent armed conflict, Azerbaijan was prolific in its efforts to erase any vestige of the Armenian presence from its territory and that the continued racist hate speech by the President of Azerbaijan and senior government officials "only exacerbates this real and present risk". Indeed, according to Armenia, by refusing even to acknowledge the existence of Armenian cultural heritage, the President of Azerbaijan "is directly promoting a climate that is even more conducive to the hate-filled destruction of that heritage".

*

76. Azerbaijan denies that there exists an imminent risk of irreparable prejudice to the rights of the Applicant under CERD because it has already reaffirmed on several occasions its obligations under the Convention and has taken concrete action to comply with those obligations.

77. In particular, Azerbaijan asserts that it has given its commitment that no detainees should be subject to mistreatment on the basis of their national or ethnic origin. It notes that the International Committee of the Red Cross visits individuals detained in relation to the 2020 Conflict on a regular basis, assesses their treatment and conditions of detention and facilitates contact with their families. In addition, Azerbaijan states that, during visits by the Azerbaijani ombudsperson, Armenian detainees confirmed that they were provided with adequate food, both in quantity and nutritional value, had access to clean drinking water and were able to speak with their relatives. Detainees were also visited by the Azerbaijani National Preventive Group's doctor and were provided medical examinations at their request. Consequently, Azerbaijan is of the view that Armenia has not demonstrated an imminent risk of irreparable prejudice to the rights of detainees presently in custody.

78. Azerbaijan further points out that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group. It claims that Armenia misinterprets the statements made by the President and senior government officials of Azerbaijan, which were directed against enemy forces in the context of an armed conflict, and not against Armenians as an ethnic group. Moreover, when certain statements were thought to have been directed against the Armenian people, as opposed to the policies and practices of Armenia, Azerbaijani officials took "immediate and positive measures designed to" combat hate speech. Azerbaijan further observes that it has taken concrete steps to address Armenia's concerns by removing mannequins and helmets from the "Military Trophies Park" and that this removal of the only specific objects complained of by Armenia eliminates any urgency to act.

79. Azerbaijan further claims to have acknowledged publicly "its international obligation to protect and uphold historical, cultural and religious heritage in the liberated territories". It observes that the protection of historic and cultural monuments is also enshrined in Azerbaijan's Constitution and in its statutory law, which criminalizes the deliberate destruction or damaging of over 6,300 sites that are listed on its State Registry, which includes sites identified by Armenia. Azerbaijan adds that it has undertaken to "provide support for investigations of all credible allegations of vandalism, destruction, and unauthorized alteration of historical and cultural monuments and cemeteries used by ethnic Armenian individuals". It further notes that it is already working to restore sites on its National Registry damaged during the conflict. Azerbaijan argues that Armenia does not identify with any specificity any sites that it asserts to be in imminent danger of destruction unless the Court issues provisional measures. According to Azerbaijan, instead of pointing to specific, ongoing conduct that could demonstrate the risk of a real and imminent irreparable prejudice as required, Armenia contents itself with alleging only past conduct, primarily during or in the aftermath of active hostilities. For example, it refers to allegations of conflict-related damage to the Gazanchi Church, damage to war memorials, a cross-stone and a monument in Shusha by Azerbaijani soldiers, and soldiers vandalizing the Yegish Arakel Temple. The Respondent further submits that Armenia's requested provisional measure preventing or prohibiting "alterations" to cultural heritage is tantamount to a prohibition on Azerbaijan from pursuing reconstruction and restoration of such heritage in its own sovereign territory without consulting

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Armenia and that this request "assumes a right to 'enjoy' monuments reconstructed to its specification" which does not plausibly exist under CERD.

* *

80. Having previously determined that some of the rights asserted by the Applicant are plausible and that there is a link between those rights and the provisional measures requested, the Court now considers whether irreparable prejudice could be caused to those rights and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

81. The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 *(a)*, *(b)*, *(c)*, *(d)* and *(e)* are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142; *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. 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 430-431, para. 67). The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD.

82. As the Court has noted previously, individuals subject to inhuman and degrading treatment or torture could be exposed to a serious risk of irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142). The Court has also recognized that psychological distress, like bodily harm, can lead to irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 431, para. 69).

83. In the view of the Court, acts prohibited under Article 4 of CERD — such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin — can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the State. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress.

84. The Court has also indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage "has been the scene of armed clashes between the Parties" and when "such clashes may reoccur" (see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 552, para. 61).

85. In the present proceedings, the information placed before the Court by the Parties includes the Resolution of the Parliamentary Assembly of the Council of Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021. It observes that the Assembly indicates, *inter alia*, that

> "[a]mong allegations made by both sides, backed up by reputable international NGOs and a wealth of information available from different sources, there [is] worrying . . . evidence of . . . [a] substantial number of . . . allegations of [systematic] inhuman and degrading treatment and torture of Armenian prisoners of war by Azerbaijanis".

The Court moreover observes that the Assembly "regrets that there remain statements at the highest level which continue to portray Armenians in an intolerant fashion".

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86. The Court in addition notes that the Assembly

> "condemns the damage deliberately caused [by Azerbaijan] to [Armenian] cultural heritage during the 6-week war, and what appears to be the deliberate shelling of the Gazanchi Church/Holy Saviour, Ghazanchetsots Cathedral in Shusha/Shushi as well as the destruction or damage of other churches and cemeteries during and after the conflict; remains concerned, in the light of past destruction, about the future of the many Armenian churches, monasteries, including the monastery in Khutavank/Dadivank, cross-stones and other forms of cultural heritage which have returned under Azerbaijan control; [and] expresses concern about a developing narrative in Azerbaijan promoting a 'Caucasian Albanian' heritage to replace what is seen as an 'Armenian' cultural heritage" (*Resolution 2391 (2021), text adopted by the Assembly on 27 September 2021, 24th sitting*).

87. The Court also takes note of the joint statement issued by several United Nations human rights experts who, on 1 February 2021, addressed the situation of Armenians being held captive in Azerbaijan and expressed grave concern "at allegations that prisoners of war and other protected persons have been subjected to extrajudicial killing, enforced disappearance, torture and other ill-treatment" (United Nations Office of the High Commissioner for Human Rights, "Nagorno-Karabakh: Captives Must be Released — UN Experts" (1 February 2021).

88. In light of the considerations set out above, the Court concludes that the alleged disregard of the rights deemed plausible by the Court (see paragraphs 59 to 61 above) may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. CONCLUSION AND MEASURES TO BE ADOPTED

89. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above (see paragraphs 59 to 61).

90. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 28, para. 77).

91. In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

92. The Court considers that, with regard to the situation described above, pending the final decision in the case, Azerbaijan must, in accordance with its obligations under CERD, protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law; take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.

93. The Court takes full cognizance of the representation made by the Agent of Azerbaijan during the oral proceedings regarding certain exhibits in the "Military Trophies Park", namely that mannequins depicting Armenian soldiers and displays of helmets allegedly worn by Armenian soldiers during the 2020 Conflict have been permanently removed from the park and will not be shown in the future (see paragraphs 25 and 65 above). In this regard, the Agent of Azerbaijan also referred to two letters of 6 and 13 October 2021, whereby the Director of the "Military Trophies Park" indicated that "all mannequins displayed at the Military Trophies Park . . . were removed on October 1, 2021" and that, "on October 08, 2021 all helmets were removed from the Military Trophies

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Park". The Director of the "Military Trophies Park" further indicated that "[t]he mannequins and helmets will not be displayed at the Military Trophy Park or the Memorial Complex/Museum in the future".

94. The Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

95. The Court further recalls that Armenia requested it to indicate provisional measures directing Azerbaijan "to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD" and to provide regular reports on the implementation of provisional measures. The Court, however, considers that, in the particular circumstances of the case, these measures are not warranted.

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96. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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97. The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Armenia and Azerbaijan to submit arguments in respect of those questions.

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98. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) By fourteen votes to one,

Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judges* ad hoc Keith, Daudet;

AGAINST: *Judge* Yusuf;

(a) Unanimously,

Take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin;

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(a) By thirteen votes to two,

Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* Yusuf; *Judge* ad hoc Keith;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Armenia and the Government of the Republic of Azerbaijan, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge YUSUF appends a dissenting opinion to the Order of the Court; Judge IWASAWA appends a declaration to the Order of the Court; Judge *ad hoc* KEITH appends a declaration to the Order of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

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DECLARATION OF JUDGE TOMKA

1. The Court has been requested by Armenia to modify the Order of 7 December 2021, in particular the first measure indicated therein, according to which Azerbaijan shall "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law" (*Order of 7 December 2021*, para. 98 (1) *(a)*).

2. The reason for this request lies in the renewed hostilities between the Parties in September 2022, some 22 months after "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared" in the Trilateral Statement signed on 9 November 2020 (*ibid*., para. 13).

3. The question is how to interpret the first measure of protection indicated in paragraph 98 (1) *(a)* of the 2021 Order. The words used in that paragraph, as well as the reasoning preceding it, in particular paragraph 67, suggest that it is applicable to all prisoners of war and detained persons captured during the 2020 Conflict which lasted between September and 9 November 2020, or in its aftermath. In the authoritative French text, the word "aftermath" is rendered as "*immédiatement* après le conflit" (emphasis added).

4. It is difficult to consider that the resumption of hostilities in September 2022, some 22 months after the ceasefire and termination of the 2020 Conflict was declared on 9 November 2020, occurred "*immédiatement* après le conflit".

5. The Court, in its Order of today, considers "that the situation that existed when the Court issued the [2021 Order] is ongoing and is no different from the present situation" (para. 18). For that reason, it "*[f]inds* that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021" (*ibid*., para. 23 (1)). Although I am not fully convinced, I have not voted against this finding.

6. The main reason for me not voting against this finding is a rather "creative" interpretation by the Court of the first measure it indicated in its 2021 Order. The Court today "affirms that treatment in accordance with point 1 *(a)* of paragraph 98 of its Order of 7 December 2021 is to be afforded to any person who has been or *may come to be detained* during any hostilities that constitute a renewed flare-up of the 2020 Conflict" (Order, para. 18, emphasis added). This affirmation expands the scope of the applicability of the first provisional measure of protection indicated in December 2021 to any person who may be detained in the course of any further hostilities during the pendency of the proceedings in the present case.

(Signed) Peter TOMKA.

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SEPARATE OPINION OF JUDGE SEBUTINDE

The provisional measure contained in paragraph 98 (1) (a) *of the Court's Order of 7 December 2021 has a particular temporal scope and extends protection to particular individuals — In its current form, the said provisional measure does not extend to Armenian nationals captured and detained by Azerbaijan after the 2020 Conflict or in the future — The renewed hostilities of September 2022 resulting in the capture and detention of additional Armenian prisoners constitute a change in the situation within the meaning of Article 76 (1) of the Rules of Court, that justifies a modification of the original provisional measure, in order to extend its protection to the new detainees.*

I. INTRODUCTION

1. Although I have voted in favour of subparagraph (2) of paragraph 23 of the Order on Armenia's Request for the Modification of the Order of 7 December 2021 Indicating Provisional Measures, *(dispositif)* ("the present Order"), I respectfully disagree with the finding of the majority of the Court in subparagraph (1) that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its powers to modify the measures indicated in the Order of 7 December 2021". I accordingly voted against that subparagraph. I also disagree with the reasoning of the Court in paragraphs 12 to 19 of the present Order that led the majority to its conclusion. In my respectful opinion, the recent turn of events in September 2022 does constitute a change in the situation that warranted the indication of provisional measures in this case on 7 December 2021 and, as I shall demonstrate below, that change justifies a modification in the first provisional measure, along the lines requested by Armenia.

2. It will be recalled that Armenia has, through its various letters to the Court, requested that the first of the provisional measures indicated by the Court in its provisional measures Order of 7 December 2021 be modified to include those captured by Azerbaijan after the 2020 conflict[1]. It requests that the first provisional measure be modified by adding the following italicized words: "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict, *or any armed conflict between the Parties since that time, upon capture or thereafter, including* those who remain in detention, and ensure their security and equality before the law".

3. Armenia also requests that the Court confirm whether an *ad hoc* committee has been established for this case pursuant to Article 11 of the Resolution concerning the Internal Judicial Practice of the Court[2]. Both requests were accompanied by allegations and evidence of Azerbaijan's non-compliance with the indicated provisional measures[3].

4. Azerbaijan filed an initial response on 22 September 2022[4], *inter alia*, laying out its own allegations and evidence of Armenia's non-compliance with measures indicated for both this case and the provisional measures indicated[5] for the related case of *Azerbaijan* v. *Armenia*[6]. On 27 September 2022, Azerbaijan followed up with its written observations opposing the modification requested by Armenia on grounds that the latter had not demonstrated urgency, making additional allegations of Armenia's non-compliance, and presenting a proposal for the filing of periodic reports in order to facilitate compliance monitoring in both *Armenia* v. *Azerbaijan* and *Azerbaijan* v. *Armenia*[7].

5. In response, Armenia submitted a letter dated 29 September 2022, addressing Azerbaijan's four arguments on urgency and reiterating its request for modification. In this separate opinion, I will only address Armenia's request concerning the modification of the provisional measures indicated by the Court in its Order of 7 December 2021.

II. WHETHER THE SITUATION WARRANTING THE ORDER OF 7 DECEMBER 2021 HAS CHANGED

6. Under Article 76, paragraph 1, of the Rules of the Court, the Court may, at a party's request or *proprio motu*, "at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures *if, in its opinion, some change in the situation justifies such revocation or modification*" (emphasis added). The Court therefore needs to assess whether the situation warranting the original provisional measures order has changed and, if so, whether that change justifies the modification requested.

7. In determining whether or not there has been a change in the situation underlying the Court's Order of 7 December 2021, it is necessary to appreciate the context in which that Order was issued. It will be recalled that

the Court indicated the provisional measures contained in that Order following a particular conflict, namely, the so-called "Second Nagorno-Karabakh War" of September 2020[8] that lasted 44 days, and after the declaration of the ceasefire of 10 November 2020 pursuant to the Trilateral Statement[9]. Armenia's request for the indication of the 2021 provisional measures was intended to secure protection of the CERD rights of specifically 45 named Armenian individuals that both Parties agreed had been captured by Azerbaijan in relation to the said Second Nagorno-Karabakh War and that remained in the Respondent's custody at that time[10]. Armenia identified those individuals as "prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath"[11]. It was in respect of these 45 individuals that the Court "[found] plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan"[12]. Accordingly, the provisional measures indicated concerned those particular individuals and not any other persons detained over the course of a tenuous relationship between the Parties spanning many years, much less those who would, hypothetically, be captured during some future flare-up, as the present Order now stipulates[13]. Similarly, the Court's reasoning and analysis of the evidence in the 7 December 2021 Order specifically dealt with allegations regarding the treatment of Armenian nationals held captive during the "September-November 2020 armed hostilities or their aftermath"[14]. Moreover, the natural reading of the 2021 Order indicates that it was intended to be backward looking and specific to those who were still held in Azerbaijani custody at that time, as the text refers to "all persons *captured in relation to the 2020* Conflict *who remain* in detention"[15] (emphasis added). In my respectful opinion, the 2021 Order has both a *ratione personae* limitation as well as a *ratione temporis* limitation, which limitations are, in my view, inconsistent with the reasoning and findings of the majority in paragraphs 18 and 19 of the present Order.

8. After careful consideration and analysis of the context and situation underlying the issuance of the 2021 provisional measures Order, I shall now consider the current context and circumstances in order to determine whether there has been a change in the situation. Despite disagreements as to the details, the Parties agree that there was a resumption of hostilities from 12 to 13 September 2022. This fact is also established through independent sources including remarks by the Assistant Secretary-General of the United Nations at the Security Council meeting on 15 September, which described the fighting as "the largest in a series of incidents since 2020"[16]. The situation continues to be volatile. After agreeing to a ceasefire on the evening of 14 September, the Parties resumed clashes on 23 and 28 September, with each blaming the other for violating the ceasefire[17]. Both Parties agree that, as a result of the September 2022 hostilities, more Armenian service personnel were captured and detained by Azerbaijan. Azerbaijan makes much ado about 17 Armenian nationals that it has repatriated since the renewed hostilities. It will be recalled however, that in its 7 December 2021 Order, the Court held that it "does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees"[18]. Thus, whilst Azerbaijan may be commended for its humanitarian stance in repatriating captured Armenian service personnel, such repatriation is not a legal obligation under the 2021 provisional measures. Rather, Azerbaijan's legal obligation relates to the treatment of each of the 45 identified Armenian prisoners and those who remain in Azerbaijani custody, in particular by "[p]rotect[ing] them from violence and bodily harm . . . and ensur[ing] their security and equality before the law". Besides, Armenia, while acknowledging the repatriation of its servicemen, asserts that there is evidence that those repatriated had been subjected to torture and that Azerbaijan has other Armenians in its custody beside the 17, including at least six executed while detained and at least two who have not been returned[19]. In my view, the recent resurgence of hostilities, which broke the period of relative peace, and which led to fresh prisoners of war and probable death, constitutes a major change in the circumstances underlying the indication of the 2021 provisional measures.

III. WHETHER THE CHANGE JUSTIFIES THE MODIFICATION OF MEASURES

9. Armenia asserts that its request is a simple clarification of the Court's Order of 7 December 2021, which has become necessary "to avoid any ambiguity with respect to Azerbaijan's obligations vis-à-vis captured Armenian servicemen"[20]. According to Armenia, urgency is self-evident given the change in the situation, and the Court has already decided on the other elements required for the modification, including prima facie jurisdiction, plausibility of the asserted right, and the link between the right and the measure, all of which remain identical to those for the original provisional measure. Armenia also comments that the modification would cover conduct that already

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violates another provisional measure that requires both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"[21].

10. Azerbaijan only disputes the precondition of urgency and provides four arguments to support its position[22]. The first is that no one would be protected by the added language since it alleges that all the detainees captured during the 12-13 September 2022 hostilities have been repatriated[23]. The second and third arguments are linked; they jointly state that there is no need to merely reiterate obligations that Azerbaijan already acknowledges and has been taking active steps to comply with[24]. The fourth argument is that the change is mischaracterized since Armenia is responsible for the resumption of hostilities[25].

11. Armenia provides a response to each of Azerbaijan's arguments. In response to the first argument, it states that repatriation does not deny urgency, because there remains a real and imminent risk of repetition of Azerbaijan's conduct threatening the well-being of Armenian service members. In response to the second argument, Armenia notes that the Court did not accept the same representation as a defence in relation to detainees from the 2020 conflict who are no different from those captured recently. In response to the third argument, Armenia argues that remedial steps do not remove the urgency and that the alleged remedies are not leading to accountability. In response to the fourth argument, Armenia maintains both that the claim is false and that it would not justify abuse regardless[26].

12. For the Court to modify an existing provisional measure, the new situation must itself meet the general conditions laid down in Article 41 of the Statute of the Court. As correctly explained by Armenia and left undisputed by Azerbaijan, all elements of Article 41 (other than that of urgency which is disputed by Azerbaijan) have been considered and established in the original provisional measures Order[27]. This section thus focuses solely on the question of urgency. The Court clarified in the 7 December 2021 Order that "[t]he condition of urgency is met when the acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision on the case"[28]. Based on this standard, I find this condition satisfied.

13. In the 2021 Order, the Court specifically took note of evidence supporting allegations of inhuman and degrading treatment and torture of Armenian prisoners of war to conclude that there was urgency for the measure in question. The evidence of abuse currently in front of the Court for the modification request, consisting primarily of videos and screenshots that Armenia alleges are being circulated on social media by Azerbaijani servicemen, is arguably less verified than what the Court had at hand during the original proceedings[29]. Nevertheless, in light of the recent history of alleged abuse, the resumption of hostilities and the capture of additional Armenians provides sufficient reason to suspect that acts susceptible of causing irreparable prejudice could occur before the Court renders a final decision on the merits.

14. This conclusion would also be consistent with the Court's provisional measures Order. Two facts should be noted in this regard. First, the modification request is not Armenia's first attempt at expanding the temporal scope of the measure in question. During the proceedings on the request for provisional measures, Armenia requested that the measure cover individuals taken captive *"during the 2020 Conflict or in its aftermath"*[30]. This was also the formulation the Court used in finding a link between the plausible right asserted and the relevant provisional measure[31]. That said, the Court ultimately adopted its own formulation referring to those *"captured in relation to the 2020 Conflict"*. Clearly, the Court decided not to refer to "the aftermath" of the conflict in order to limit the scope of coverage. That said, the Order does not preclude clarification or expansion, which appears to be justified as new hostilities have begun and additional servicemen were captured. This view is further supported by the fact that conduct that would be governed by the modified language would likely also violate the provisional measure to refrain from actions that may aggravate or extend the dispute before the Court.

15. Second, Azerbaijan's four arguments either follow the same line of logic it used in the original provisional measures proceedings or are irrelevant for evaluating urgency. The first three, with minor variation in the factual details asserted, replicate Azerbaijan's previous claims, based on which the Court still concluded that the measure in question was warranted[32]. The fourth argument of fault is not relevant. Urgency is about the possibility of irreparable prejudice newly created by the changed circumstance, not the question of responsibility for this change. In my view, the Court should stand by its original decision that urgency exists despite Azerbaijan's representations.

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IV. CONCLUSION

16. In conclusion, I am of the view that there has been a change of circumstances and the change justifies the requested modification.

17. As to the language of the revised Order, I propose the following modification to subparagraph (1) *(a)* of paragraph 98 of the Order of 7 December 2021: "Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict *and subsequent hostilities between the Parties, including those* who remain in detention, and ensure their security and equality before the law."

(Signed) Julia SEBUTINDE.

ENDNOTES

1 Letter from the Agent of Armenia requesting the modification of the Court's Order indicating provisional measures (hereinafter "Armenia 16 September Letter"), p. 5; Letter from the Agent of Armenia dated 19 September 2022 reiterating Armenia's request that the Court modify its Order indicating provisional measures (hereinafter "Armenia 19 September Letter"), p. 4.

2 Armenia 16 September Letter, pp. 2 and 6; Armenia 19 September Letter, p. 4.

3 Armenia 16 September Letter pp. 5-6; Armenia 19 September Letter, p. 4.

4 Letter from the Agent of Azerbaijan dated 22 September 2022.

5 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures,* Order of 7 December 2021.

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

7 Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures (hereinafter "Azerbaijan Observations").

8 Azerbaijan referred to the 2020 conflict as the "Second Garabagh War".

9 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 13.

10 *Ibid.,* para. 51.

11 *Ibid.*, para. 60.

12 *Ibid.*

13 Present Order, para. 18.

14 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 11.

15 *Ibid.,* para. 98, subpara. (1) *(a).*

16 UN News, "UN remains deeply concerned over 'dangerous escalation' following fighting across Armenia- Azerbaijan border", 15 September 2022, https://news.un.org/en/story/2022/09/1126721/.

17 See, e.g. UN Meetings Coverage and Press Releases, "Amid Fighting between Armenia, Azerbaijan, Assistant Secretary-General Urges Both Parties Commit to Lasting Peace Treaty, in Security Council Briefing", 15 Sept. 2022, https://press.un.org/en/2022/sc15031.doc.htm; Al Jazeera, "Armenia, Azerbaijan trade blame for new ceasefire violations", 23 Sept. 2022, https://www.aljazeera.com/news/2022/9/23/armenia-azerbaijan-trade-blame-for-fresh-ceasefire-violations; and Reuters, "Armenia says three soldiers killed by Azeri shelling — Tass", 28 Sept. 2022, https://www.reuters.com/article/azerbaijan-armenia-fighting-idAFKBN2QT1SH.

18 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 60.

19 Armenia's letter dated 10 October 2022, pp. 2-3.

20 Armenia 16 September Letter, p. 5.

21 *Ibid*.

22 Azerbaijan Observations, p. 3.

23 Letter from the Agent of Azerbaijan dated 6 October 2022, p. 1.

24 Azerbaijan Observations, pp. 4-7.

25 *Ibid*., pp. 7-11.

26 Armenia 29 September Letter, pp. 2-4; Letter from the Agent of Armenia dated 6 October 2022, p. 2.

27 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, paras. 60, 67 and 81-82.

28 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 70. See also *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), Order of 16 July 2013, Provisional Measures, I.C.J. Reports 2013*, p. 238, para. 30 (stating the Court indicates provisional measures "only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision").

29 The original Order, for example, specifically referenced the Resolution of the Parliamentary Assembly of the Council of

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Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021 and the joint statement issued by several United Nations human rights experts on 1 February 2021. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, paras. 85-88.

30 *Ibid.*, para. 11.

31 *Ibid*., para. 67 ("It considers that a link exists . . . for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive *during the 2020 Conflict or in its aftermath*, in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm").

32 *Ibid*., paras. 51-52 and 76-77.

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DISSENTING OPINION OF JUDGE BHANDARI

Modification of an order indicating provisional measures — Requirement under Article 76 of the Rules of Court for "some change in the situation" — September 2022 hostilities created a "change in the situation" — Change in the situation would have justified modification of the 2021 Order — Risk of setting too high a bar for modification — Court's interpretation of paragraph 98 (1) (a) *of the 2021 Order is unfounded.*

1. I regret that I am unable to vote in favour of this Order.

2. In the first operative paragraph of this Order, the Court "[f]inds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021"[1]. I have difficulties understanding how this can be correct.

3. By letter to the Registrar dated 16 September 2022, Armenia requested the modification of paragraph 98 (1) *(a)* of the Court's 7 December 2021 Order (hereinafter the "2021 Order")[2]. That paragraph requires Azerbaijan to "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law"[3]. Referring to Article 76 of the Rules of Court, Armenia requested that the Court modify that paragraph by adding the following italicized words: "protect from violence and bodily harm all persons captured in relation to the 2020 Conflict, *or any armed conflict between the Parties since that time, upon capture or thereafter, including* those who remain in detention, and ensure their security and equality before the law"[4].

4. Armenia's request amounted, in essence, to a request that the Court extend the temporal and personal applicability of an obligation under the 2021 Order — the obligation to "protect from violence and bodily harm" — to current circumstances. It did not amount, in my view, to a request that the Court substantially modify obligations under the 2021 Order.

5. It is common ground between the Parties, and the Court takes note of this fact, that a ceasefire was declared on 9 November 2020 in the form of the so-called "Trilateral Statement" between Armenia, Azerbaijan and the Russian Federation[5]. It is also common ground, and again the Court takes note of this fact, that hostilities again erupted between the Parties in the week of 12 September 2022[6].

6. Under Article 76 (1) of the Rules of Court, "[a]t the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification". In paragraph 18 of the present Order, "the Court considers that the situation that existed when it issued the Order of 7 December 2021 is ongoing and is no different from the present situation"[7]. It adds in paragraph 19 "that the hostilities which erupted between the Parties in September 2022 and the detention of Armenian military personnel do not constitute a change in the situation justifying modification of the Order of 7 December 2021 within the meaning of Article 76 of the Rules of Court"[8]. I am unable to agree with these conclusions for three reasons.

7. First, the "2020 Conflict" was a defined term in the 2021 Order. In paragraph 13 of the 2021 Order, the Court stated: "Further hostilities erupted in September 2020, in what Armenia calls 'the Second Nagorno-Karabakh War' and Azerbaijan calls 'the Second Garabagh War' (hereinafter the '2020 Conflict'), and lasted 44 days"[9]. The words "and lasted 44 days" — in particular the past tense *lasted* — indicate to me that the 2020 Conflict, at least as that term was defined and used in the 2021 Order, is over. (The present Order's definition of the "2020 Conflict" omits the words "and lasted 44 days"[10].) The 2020 Conflict as originally defined was the reference point for and had created the "situation" existing at the time the Court adopted the 2021 Order. However, the September 2022 hostilities are new events, and it is these incidents that created the relevant "situation" in existence at the adoption of the present Order.

8. Second, even in the absence of the original definition, I would find it artificial to suggest that "the situation that [was present] when [the Court] issued the Order of 7 December 2021" can be characterized as "ongoing" for the purposes of Article 76 (1) of the Rules of Court. I find it difficult to see how, in light of all intervening events,

the situation as it stood when the Court adopted the 2021 Order could be seen as unaltered by the renewed hostilities of September 2022, whether in fact or in law.

9. Third, and in any event, the Order seems to assume that only a *different* conflict could create "some change in the situation", yet there could equally be a change in the *situation* within the *same* conflict, including an ongoing conflict. Article 76 (1) of the Rules of Court in my view does not require a drastic or even substantial change in the situation. On the contrary, it textually only requires "*some* change". Interpreting these words too narrowly would, in my view, be inconsistent with Article 76 (1).

10. For these reasons, I would have concluded that "some change in the situation" within the meaning of Article 76 (1) of the Rules of Court had occurred. Any finding to the contrary strikes me as factually incorrect. Had the Court also concluded that such a change had occurred, I would have had little difficulty finding that this change in the situation justified modifying the 2021 Order in the terms Armenia requested. In particular, the totality of the evidence placed on the record before the Court suggests to me that the requirement of urgency, disputed in correspondence between the Parties[11], was satisfied. Moreover, this evidence indicates that the alleged incidents were not minor, day-to-day occurrences. Rather, differences between the Parties about specific events, numbers of detainees and evidentiary accuracy notwithstanding, the overall record to my mind demonstrates a flaring-up in brutality and violence — another circumstance indicating that these incidents should not be regarded as part of the same "situation".

11. I recognize that Azerbaijan called into question the authenticity of elements of Armenia's evidence[12]. To my mind, however, the Court is not required, at a provisional measures stage, to make a final determination on the authenticity of evidence. Rather, the evidence would in my opinion have been sufficient to satisfy the requirement of urgency for the indication of provisional measures. In any event, I note that according to a report by the Human Rights Defender of Armenia, supplied by Armenia in its letter to the Registrar dated 6 October 2022, the authenticity of videos and photographs received by that body had been verified by certain organs[13].

12. More generally, this Order risks placing the bar for modification too high. A reasonable interpretation of Article 76 of the Rules of Court should not be unduly restrictive. Again, Armenia is not requesting that the 2021 Order be modified substantially.

13. Finally, the limited scope of the 2021 Order is scarcely remedied by the statement in the present Order "that treatment in accordance with paragraph 98 (1) *(a)* of its Order of 7 December 2021 is to be afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict"[14]. Fitting the September 2022 hostilities into the 2020 Conflict strikes me as a tall order. The words "2020 Conflict" refer to precisely that: the *2020* Conflict. Reading these words to encompass hostilities that occurred in September 2022 not only places an uncomfortable strain on the ordinary meaning of those words — not to mention the Court's original definition in the 2021 Order — but arguably also discounts efforts to establish a ceasefire in the interim.

(Signed) Dalveer BHANDARI.

ENDNOTES

1 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 23 (1).

2 Letter from the Agent of Armenia requesting the modification of the Court's Order indicating provisional measures, 16 September 2022.

3 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 98 (1) *(a)*.

4 Letter from the Agent of Armenia requesting the modification of the Court's Order indicating provisional measures, dated 16 September 2022, p. 4.

5 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 12 October 2022*, paras. 17-18.

6 *Ibid.*, para. 18.

7 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 18.

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8 *Ibid.*, para. 19.

9 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 13.

10 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 17.

11 Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures, dated 27 September 2022, pp. 2-5; Letter from the Agent of Armenia, dated 29 September 2022, pp. 1- 3; Letter from the Agent of Azerbaijan, dated 4 October 2022, pp. 2- 3; Letter from the Agent of Armenia, dated 6 October 2022, p. 2; Letter from the Agent of Azerbaijan, dated 6 October 2022, pp. 1- 2; Letter from the Agent of Armenia, dated 10 October 2022, pp. 1- 2; Letter from the Agent of Azerbaijan, dated 12 October 2022, pp. 1- 2.

12 Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures, dated 27 September 2022, p. 6; Letter from the Agent of Azerbaijan, dated 4 October 2022, p. 3; Letter from the Agent of Armenia, dated 6 October 2022, Exhibit I, p. 5; Letter from the Agent of Azerbaijan, dated 7 October 2022, p. 1; Letter from the Agent of Azerbaijan, dated 12 October 2022, pp. 3- 4.

13 Letter from the Agent of Armenia dated 6 October 2022, Exhibit I, p. 5.

14 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 18.

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SEPARATE OPINION OF JUDGE ROBINSON

Scope of the Court's provisional measures Order of 7 December 2021 — Temporal limitation in the Court's Order of the 2020 Conflict — Effect of hostilities ensuing between the Parties subsequent to the 2020 Conflict — Outbreak of hostilities on 12 September 2022 qualifies as a "change in the situation".

1. In this opinion, I explain my disagreement with the finding of the majority in paragraph 23 of the Order that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021".

2. A remarkable feature of the majority's Order is that nowhere in its substantive analysis of Armenia's request for modification of the Court's provisional measures Order of 7 December 2021 (hereinafter "2021 Order") does it examine the most relevant provision of that Order, i.e. paragraph 98 (1) *(a)*. It is difficult to understand this approach because paragraph 98 (1) *(a)* is the very provision in respect of which Armenia seeks a modification.

3. Article 76 (1) of the Rules of Court reads as follows: "At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification."

4. In paragraph 98 (1) *(a)* of its 2021 Order, the Court indicated the following provisional measure:

> "(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> *(a)* [p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law".

5. Armenia requested the Court to modify that Order as follows: "to explicitly require Azerbaijan to protect from violence and bodily harm all persons captured in relation to the 2020 Conflict, *or any armed conflict between the Parties since that time, upon capture or thereafter, including* those who remain in detention, and ensure their security and equality before the law" (emphasis in the original). One immediately sees in the underlined part of the request the concern that Armenia has about the possibility of a conflict arising after the 2020 Conflict.

6. Instead of focusing on paragraph 98 (1) *(a)* of its 2021 Order, the modification of which Armenia sought, the Court concentrates on the Trilateral Statement signed on 9 November 2020 by Azerbaijan, Armenia and Russia. This statement required a "complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict" from 10 November 2020. Yet, the legal comparator for determining whether there has been "a change in the situation justifying modification" is the Court's 2021 Order, not the Trilateral Statement. The approach taken by the majority resulted in their ignoring the very consequential temporal element in the Court's 2021 Order.

7. In its Application instituting proceedings requesting provisional measures, Armenia asked the Court to indicate the following provisional measure: "Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities *or their aftermath*" (para. 131; my emphasis). By referring to the September-November 2020 armed hostilities or their aftermath, Armenia indicated that its concern was not only with the 2020 Conflict, but also with any subsequent hostilities resulting therefrom. At the end of the second round of its oral observations, Armenia in its final submission asked the Court to indicate the following provisional measure: "Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities *or their aftermath*" (hearing of 15 October 2021; my emphasis). Again, in its final submissions, Armenia, through the phrase "or their aftermath", demonstrates its concern with the possibility of hostilities after the 2020 Conflict.

8. In paragraph 13 of its 2021 Order, the Court for all practical purposes defined the temporal element relating to the conflict in 2020. It stated: "Further hostilities erupted in September 2020, in what Armenia calls 'the Second Nagorno-Karabakh War' and Azerbaijan calls 'the Second Garabagh War' (hereinafter the '2020 Conflict'), and lasted 44 days." Thus, as far as the Court was concerned, the 2020 Conflict had a duration of 44 days.

9. Notably, in its 2021 Order, the Court itself makes reference to the "2020 Conflict or its aftermath". For example, in paragraph 67, in considering the link between the measures requested by Armenia and the plausible rights it seeks to protect, the Court makes reference to "measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict *or in its aftermath*, in accordance with its obligations under CERD" (my emphasis). Similarly, in paragraph 79, in setting out the arguments of the Parties, it points to Azerbaijan's statement that Armenia "contents itself with alleging only past conduct, primarily during *or in the aftermath* of active hostilities" (my emphasis).

10. However, despite these many references to the aftermath of the hostilities in the proceedings, it is significant that the Court, in its 2021 Order, requires Azerbaijan to protect "persons captured in relation to the 2020 Conflict" (para. 98 (1) *(a)*), and not persons captured in relation to the 2020 Conflict and its aftermath. This is particularly telling with regard to Armenia's final submissions, which specifically referred to the aftermath of hostilities, because the Court would obviously have taken that submission into account in making its findings for the 2021 Order. It is therefore reasonable to conclude that the omission of any reference to hostilities subsequent to the 2020 Conflict meant that the Court confined the 2020 Conflict to the 44 days that it highlighted in paragraph 13 of the 2021 Order.

11. Therefore, any hostilities that ensued between the Parties subsequent to the 2020 Conflict are not part of the 2020 Conflict nor, as the majority maintains, are they the continuation of that conflict; such hostilities, by virtue of occurring after the 2020 Conflict, constitute a change in the situation.

12. The majority held that "Armenia's allegations about the treatment of [persons who were detained in relation to the 12 September 2022 hostilities] are of the same character as the allegations that were presented to the Court in Armenia's request for the indication of provisional measures in 2021". However, the similarity of the allegations about treatment in the hostilities of 2020 and 2022 in no way derogates from the "change in the situation", which is an inescapable conclusion of a proper reading of the Court's 2021 Order. Indeed, this similarity in the allegations about treatment is scarcely surprising, because, generally, the physical features of military conflicts are the same — injuries, deaths, capture of persons and their alleged mistreatment, etc., and it is those features, common to most conflicts, that give rise to allegations about treatment. Therefore, similarity in the allegations about treatment does not provide a basis for the conclusion that there has been no "change in the situation" justifying modification of the 2021 Order.

13. Consequently, the odd result is that the Court's Order misinterprets and contradicts the 2021 Order. This contradiction is highlighted by the last sentence in paragraph 18, in which the Court "affirms that treatment in accordance with point (1) *(a)* of paragraph 98 of its Order of 7 December 2021 is to be afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict". There is no basis for this interpretation and application of paragraph 98 (1) *(a)*, which calls for the protection of "all persons captured in relation to the 2020 Conflict who remain in detention". The phrase "who remain in detention" refers to those persons who were captured in the 2020 Conflict, which the Court defined in paragraph 13 as having a duration of 44 days. The last sentence in paragraph 18 is therefore a strained interpretation and application of paragraph 98 (1) *(a)* of the Court's 2021 Order.

14. In light of the foregoing, the outbreak of hostilities between the Parties on 12 September 2022 qualifies as a "change in the situation", within the meaning of Article 76 (1) of the Rules of Court, warranting the modification of the 2021 Order. Thus, the Court should have granted the request of Armenia for a modification of paragraph 98 (1) *(a)* of its 2021 Order. It is also possible that Armenia could have filed a fresh request for the indication of provisional measures in respect of the outbreak of hostilities in September 2022. However, such an eventuality is properly seen as unnecessary in light of the provision made in Article 76 (1) for modification of provisional measures.

(Signed) Patrick L. ROBINSON.

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DÉCLARATION DE M. LE JUGE *AD HOC* DAUDET

1. En formulant une demande de modification de l'ordonnance du 7 décembre 2021 sur la base du paragraphe 1 de l'article 76 du Règlement de la Cour, l'Arménie a pour but de protéger les personnes victimes des agissements commis par l'Azerbaïdjan et de leur assurer les garanties auxquelles elles ont droit en vertu de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (CIEDR). Plus précisément, l'Arménie voit, dans l'attaque armée de l'Azerbaïdjan et dans les autres événements survenus au cours de la semaine du 12 septembre 2022, un changement de circonstances justifiant que l'ordonnance du 7 décembre 2021 soit modifiée selon la formulation indiquée au paragraphe 9 de la présente ordonnance.

2. J'ai voté contre cette demande de l'Arménie en me joignant à la position retenue par la Cour disant que les circonstances n'étaient pas de nature à y répondre positivement car j'ai eu conscience que, pour autant, compte tenu du raisonnement de la Cour sur lequel je vais revenir, les protections recherchées par l'Arménie ne se trouvaient nullement écartées. Bien au contraire, en considérant que les dispositions de l'ordonnance du 7 décembre 2021 continuent de s'appliquer sans avoir à être modifiées, la Cour assure à l'Arménie le plein bénéfice de ses termes en l'appliquant à la situation présente. D'une certaine manière, ce raisonnement conforte même la position de l'Arménie, dont l'objectif de protection se trouve être ainsi pleinement atteint.

3. L'ordonnance rendue aujourd'hui par la Cour est à mes yeux bienvenue pour deux raisons. Je viens d'évoquer la première, qui répond à la préoccupation légitime de protection de l'Arménie et renouvelle l'appel de la Cour à l'apaisement du conflit adressé aux deux Parties, invitées à ne rien faire qui puisse l'aggraver, l'étendre ou en rendre le règlement plus difficile, selon la formulation habituelle.

4. La seconde raison pour laquelle l'ordonnance est bienvenue est d'ordre plus général. J'estime en effet qu'elle contribue fortement à encadrer le régime et les finalités des mesures conservatoires. Il me semble intéressant de m'y arrêter très brièvement.

5. Un élément majeur du régime des mesures conservatoires a été établi dans l'affaire *LaGrand*, lorsque la Cour a déclaré que les mesures conservatoires qu'elle décidait avaient un caractère obligatoire, tranchant ainsi un point délicat et essentiel de leur régime (voir *LaGrand* (*Allemagne c. Etats-Unis d'Amérique), C.I.J. Recueil 2001*, p. 506, par. 109, position rappelée ensuite à de nombreuses reprises par des renvois exprès à cette affaire). Cette jurisprudence est aujourd'hui bien fixée et le caractère obligatoire des mesures conservatoires totalement assuré.

6. La question de la modification d'une ordonnance précédemment rendue au motif du changement des circonstances n'avait jusqu'à présent été examinée qu'une seule fois par la Cour, dans l'affaire *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua); Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), ordonnance du 16 juillet 2013, mesures conservatoires, C.I.J. Recueil 2013*, p. 230.

7. Au paragraphe 17 de cette ordonnance, la Cour indique avec grande précision la démarche intellectuelle à suivre en vue de répondre à une demande de modification. Dans le cas présent, la Cour s'y réfère au paragraphe 12 de son ordonnance, dans lequel elle répète son raisonnement de 2013 pour exposer les étapes de sa réflexion de manière parfaitement claire. Il y a tout lieu de penser que, dans des hypothèses futures, la Cour conservera le même mode de raisonnement.

8. L'appréciation des éléments de fait lui permettant de décider du caractère justifié du changement de circonstances pour pouvoir accepter de modifier la décision d'indication des mesures conservatoires est laissée à la discrétion de la Cour, l'article 76 de son Règlement ne caractérisant pas le changement de circonstances comme le fait par exemple l'article 62 de la convention de Vienne sur le droit des traités exigeant que le changement soit «fondamental» (et y adjoignant une formulation négative). Néanmoins, l'exigence du caractère «justifié» du changement dans la situation dont l'appréciation est donc laissée à la sagesse de la Cour est une garantie contre tout excès dans l'utilisation par les Parties de l'article 76 du Règlement de la Cour, laquelle est attachée à la stabilité des situations juridiques.

9. Il ne serait d'ailleurs pas souhaitable du point de vue de la «politique judiciaire» que les vannes de cette procédure soient ouvertes à l'excès, au point qu'à tout instant et pour des motifs éventuellement futiles une partie tente

d'obtenir la modification d'une décision en indication de mesures conservatoires. Cette procédure doit conserver un caractère sinon exceptionnel, du moins contenu, permettant d'éviter les conséquences et dérives qu'il est aisé d'imaginer. Sans entendre évidemment par là que cette considération puisse en soi constituer un motif de rejet d'une demande.

10. Le paragraphe 18 de l'ordonnance dans lequel la Cour donne les motifs pour lesquels elle estime qu'il n'est pas justifié de modifier l'ordonnance du 7 décembre 2021 s'appuie sur une considération qui, à mon avis, exprime parfaitement la philosophie des mesures conservatoires et a, de ce fait, une portée générale. En disant que la situation à l'époque où elle a rendu l'ordonnance du 7 décembre 2021 a «perdur[é]», qu'une «résurgence du conflit de 2020» s'est produite et que «la situation entre les Parties reste précaire», la Cour met l'accent sur un phénomène de continuité de la situation qui avait justifié les mesures conservatoires de 2021.

11. Or, à la différence d'une décision au fond qui règle un différend passé et met donc un point final à une situation qui était conflictuelle, une décision indiquant des mesures conservatoires concerne un conflit en cours, qui n'est pas encore réglé mais dont des mesures conservatoires visent à éviter que ne se produisent à bref délai des dommages irréparables. S'y ajoute généralement une mesure visant à ce qu'aucune action ne soit entreprise qui serait de nature à aggraver le conflit ou à rendre son règlement plus difficile. Le jugement au fond est tourné vers le passé; la décision indiquant des mesures conservatoires est tournée vers le futur, pour cesser de produire ses effets, au plus tard à la date du jugement au fond. Si j'osais cette formule, je dirais qu'elles sont une sorte de «cessez-le-feu judiciaire». Pas plus que le cessez-le-feu n'est la paix, les mesures conservatoires ne sont le règlement du différend. Dans l'un et l'autre cas cependant — et dans les limites de la comparaison —, il s'agit de considérer qu'un conflit, comme un feu qui couve, peut se rallumer à chaque instant du futur en étant la continuation de l'événement passé. Il est donc *a priori* justiciable des mêmes mesures conservatoires précédemment indiquées qui peuvent alors se poursuivre dans la continuité, tant que des éléments nouveaux et différents ne viennent pas s'ajouter qui justifieraient une modification de l'ordonnance s'ils étaient constitutifs d'un changement de circonstances. C'est donc à la lumière de ce principe de continuité que l'appréciation doit se faire.

(Signé) Yves DAUDET.

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AZER. V. ARM. (I.C.J.)*
[December 7, 2021]

7 DÉCEMBRE 2021

ORDONNANCE

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(AZERBAÏDJAN c. ARMÉNIE)

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

(AZERBAIJAN *v.* ARMENIA)

7 DECEMBER 2021
ORDER

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

(AZERBAIJAN *v.* ARMENIA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges* ad hoc KEITH, DAUDET; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 23 September 2021, the Republic of Azerbaijan (hereinafter "Azerbaijan") filed in the Registry of the Court an Application instituting proceedings against the Republic of Armenia (hereinafter "Armenia") concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

2. At the end of its Application, Azerbaijan

> "respectfully requests the Court to adjudge and declare:
>
> A. That Armenia, through its State organs, State agents, and other persons and entities exercising governmental authority or acting on its instructions or under its direction and control, has violated articles 2, 3, 4, 5, 6, and 7 of CERD.

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B. That Armenia, by aiding, assisting, sponsoring and supporting activities inconsistent with CERD conducted by other persons, groups, and organizations has violated Article 2 (1) *(b)*, *(d)*, and *(e)* of CERD.

C. That Armenia must take all steps necessary to comply with its obligations under CERD, including to:

(a) Immediately cease and desist from any and all policies and practices of ethnic cleansing that have been directed against Azerbaijanis;

(b) Immediately cooperate with de-mining operations by Azerbaijan and international agencies in the formerly Occupied Territories, including through the provision of comprehensive and accurate maps and other information on the location of minefields, by ceasing and desisting from the laying of landmines on the territory of Azerbaijan, and by other necessary and appropriate measures;

(c) Immediately cease and desist from any acts that detrimentally impact Azerbaijanis' enjoyment of or access to their environment and natural resources;

(d) Immediately cease and desist from the destruction of Azerbaijani heritage sites and other pieces of Azerbaijani ethnic and cultural property, and from the pursuit of the policy of cultural erasure;

(e) Immediately cease and desist from disseminating, promoting, or sponsoring anti-Azerbaijani propaganda and hate speech, including via educational institutions, the media, social media disinformation campaigns, and other channels, and from glorifying individuals who have committed ethnically motivated crimes against Azerbaijanis;

(f) Immediately cease and desist from any direct or indirect sponsorship or support of persons and organizations that engage in discrimination against Azerbaijanis, including VoMA;

(g) Publicly condemn discrimination against Azerbaijanis and adopt immediate and positive measures to prevent and punish such acts of discrimination, in accordance with CERD Articles 2 (1) *(d)* and *(e)* and Article 4;

(h) Ensure the investigation and punishment of acts of discrimination, including but not limited to war crimes committed by Armenian forces, in accordance with CERD Articles 2 and 4, and provide effective protection and remedies to Azerbaijanis for harm caused by such acts;

(i) Publicly acknowledge its breaches of CERD and apologize for its conduct at the highest levels of Government;

(j) Provide assurances and guarantees of non-repetition of Armenia's illegal conduct under CERD; and

(k) Make full reparation to Azerbaijan, including compensation in an amount to be determined in a later phase in these proceedings, for the harm suffered as a result of Armenia's actions in violation of CERD."

3. In its Application, Azerbaijan seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. Together with the Application, Azerbaijan submitted a Request for the indication of provisional measures with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, Azerbaijan asked the Court to indicate the following provisional measures:

(a) Armenia shall take all necessary steps to enable Azerbaijan to undertake the prompt, safe and effective demining of the landmines laid in Azerbaijan's territory by the Armenian military and/or other

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groups under the direction, control, or sponsorship of Armenia, including by immediately providing comprehensive and accurate information about the location and characteristics of landmines in Azerbaijan's territory;

(b) Armenia shall immediately cease and desist from endangering the lives of Azerbaijanis by planting or promoting or facilitating the planting of landmines in Azerbaijan's territory;

(c) Armenia shall take all necessary steps effectively to prevent organizations operating in Armenian territory, including the VoMA organization, from engaging in the incitement of racial hatred and racially-motivated violence targeted at Azerbaijanis, and immediately shall 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;

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

(e) Armenia shall refrain from any measure that might aggravate, extend, or make more difficult the resolution of this dispute; and

(f) Armenia shall submit a report to the Court on all measures taken to give effect to its Order indicating provisional measures within three months, as from the date of the Order, and thereafter every six months, until a final decision on the case is rendered by the Court."

6. The Registrar immediately communicated to the Government of Armenia the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by Azerbaijan of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 27 September 2021.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. Azerbaijan chose Mr. Kenneth Keith and Armenia Mr. Yves Daudet.

9. By letters dated 27 September 2021, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 18 and 19 October 2021 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Azerbaijan:	H.E. Mr. Elnur Mammadov, Mr. Vaughan Lowe, Ms Catherine Amirfar, Ms Laurence Boisson de Chazournes, Ms Natalie Reid, Mr. Donald Francis Donovan.
On behalf of Armenia:	H.E. Mr. Yeghishe Kirakosyan, Mr. Robert Kolb, Mr. Sean Murphy, Mr. Constantinos Salonidis, Mr. Pierre d'Argent, Mr. Lawrence H. Martin.

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11. At the end of its second round of oral observations, Azerbaijan asked the Court to indicate the following provisional measures:

> *(a)* Armenia shall take all necessary steps to enable Azerbaijan to undertake the prompt, safe and effective demining of the landmines laid in Azerbaijan's territory by the Armenian military and/or other groups under the direction, control, or sponsorship of Armenia, including by immediately providing comprehensive and accurate information about the location and characteristics of landmines in Azerbaijan's territory;
>
> *(b)* Armenia shall immediately cease and desist from endangering the lives of Azerbaijanis by planting or promoting or facilitating the planting of landmines in Azerbaijan's territory;
>
> *(c)* Armenia shall take all necessary steps effectively to prevent organizations operating in Armenian territory, including the VoMA organization, from engaging in the incitement of racial hatred and racially-motivated violence targeted at Azerbaijanis, and immediately shall 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;
>
> *(d)* Armenia shall take effective measures to collect, and to prevent the destruction and ensure the preservation of, evidence related to allegations of ethnically-motivated crimes against Azerbaijanis of which it is aware, including those identified in communications from the Republic of Azerbaijan;
>
> *(e)* Armenia shall refrain from any measure that might aggravate, extend, or make more difficult the resolution of this dispute; and
>
> *(f)* Armenia shall submit a report to the Court on all measures taken to give effect to its Order indicating provisional measures within three months, as from the date of the Order, and thereafter every six months, until a final decision on the case is rendered by the Court."

12. At the end of its second round of oral observations, Armenia requested the Court "to reject Azerbaijan's requests for the indication of provisional measures in full".

*

* *

I. INTRODUCTION

13. Azerbaijan and Armenia, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 18 October 1991 and 21 September 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity ("oblast") that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties' competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Azerbaijan calls "the Second Garabagh War" and Armenia calls "the Second Nagorno- Karabakh War" (hereinafter the "2020 Conflict"), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared".

14. The differences between the Parties are longstanding and wide-ranging. The Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present case, the scope of which is therefore circumscribed by that Convention.

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II. PRIMA FACIE JURISDICTION

1. General observations

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16).

16. In the present case, Azerbaijan seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. Article 22 of CERD reads as follows:

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

18. Azerbaijan and Armenia are both parties to CERD; Azerbaijan acceded to CERD on 16 August 1996, Armenia on 23 June 1993. Neither Party made reservations to Article 22 or to any other provision of CERD.

2. Existence of a dispute relating to the interpretation or application of CERD

19. Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

20. In order to determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18). Since Azerbaijan has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (see *ibid.*).

* *

21. Azerbaijan contends that a dispute has arisen between Azerbaijan and Armenia concerning the interpretation and application of CERD. According to Azerbaijan, Armenia has engaged and continues to engage in discriminatory acts against persons of Azerbaijani national or ethnic origin. Azerbaijan claims that, taken individually and collectively, Armenia's policies and conduct of ethnic cleansing, cultural erasure and fomenting of hatred against ethnic Azerbaijanis systematically infringe their rights and freedoms in violation of CERD. Azerbaijan specifically alleges that, following the end of the 2020 Conflict, Armenia "actively continues to prevent" the return of displaced

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ethnic Azerbaijanis to the areas formerly under Armenian control by refusing to share information about the minefields in the area where their former homes were located so as to allow for mine clearance operations, and by "continu[ing] to plant *new* mines on Azerbaijan's territory" (emphasis in the original). Azerbaijan considers that the Applicant's conduct in this regard is "a continuation of Armenia's decades-long ethnic cleansing campaign" against persons of Azerbaijani national or ethnic origin. The Applicant adds that, at present, the Court need only make a prima facie finding of jurisdiction and that its Application is premised on a claim of discrimination against "Azerbaijanis as an ethnic origin or national origin group and not in relation to nationality or citizenship".

22. Azerbaijan alleges, in particular, that Armenia has acted in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD. Azerbaijan asserts that Armenia bears responsibility, *inter alia*, for engaging in practices of ethnic cleansing and other acts of racial segregation; for inciting hatred and violence against persons of Azerbaijani national or ethnic origin through hate speech and the dissemination of racist propaganda, including at the highest level of its Government; for harbouring "armed ethno-nationalist hate groups", including Voxj Mnalu Arvest, which stands for "Art of Survival" (hereinafter "VoMA"); for engaging in, sponsoring or supporting disinformation operations across social media; and for failing to investigate and preserve evidence related to violations of obligations arising under CERD with regard to ethnic Azerbaijanis. Azerbaijan adds that, in its understanding, both Parties accept "that a dispute under CERD exists".

*

23. Armenia does not address specifically the existence of a dispute concerning alleged violations of its obligations under CERD. However, Armenia denies that it has violated its obligations and responsibilities under CERD and stresses that it does not endorse or condone racism aimed at ethnic Azerbaijanis. Armenia contends that Azerbaijan's claims have no substance. For example, it disputes the Applicant's allegation that hate speech against ethnic Azerbaijanis has emanated from the highest level of the Government of Armenia, pointing out that Azerbaijan has only adduced the "statements of a few individuals or non-governmental organizations engaged in emergency and self-defence trainings". As to Azerbaijan's allegation that the Respondent refuses to co-operate in demining, Armenia states that it has already provided minefield maps to Azerbaijan on two separate occasions and that it is willing to provide further information in the context of resolving all outstanding humanitarian issues. Armenia moreover asserts that it is not planting landmines in the territory of Azerbaijan.

24. Armenia contends that the claims of Azerbaijan fall outside the scope of the Court's jurisdiction *ratione materiae*, because the measures complained of affect all citizens of the Republic of Azerbaijan as opposed to persons of Azerbaijani ethnicity. The Respondent states that, in any event, Azerbaijan's claims related to the planting of landmines and the alleged refusal by Armenia to provide minefield maps lie outside the parameters of CERD. Armenia argues that the Court lacks prima facie jurisdiction over these claims because demining has no connection to CERD. Armenia also questions whether the Court has jurisdiction *ratione temporis* because the mining of the relevant areas allegedly took place during and in the immediate aftermath of the hostilities that ended in 1994, and hence before CERD entered into force as between the Parties.

* *

25. The Court recalls that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" *(ibid.)*. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure *(ibid.)*.

26. The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Armenia gave rise to violations of its obligations under CERD. The Court notes that, according to Azerbaijan, Armenia has violated its obligations under the Convention in various ways (see paragraphs 21 to 22 above). Armenia has denied that it has committed any of the alleged violations set out above and that the acts complained of fall within the scope of CERD (see paragraphs 23 to

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24 above). The divergence of views between Azerbaijan and Armenia regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 8 December 2020 and 22 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. It is further demonstrated by subsequent exchanges between the Parties.

27. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Armenia's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Azerbaijan are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Azerbaijan to have been committed by Armenia are capable of falling within the provisions of the Convention.

28. The Court finds therefore that there is a sufficient basis at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation or application of CERD.

3. PROCEDURAL PRECONDITIONS

29. Under Article 22 of CERD, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141).

30. The Court has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative (*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. 600, para. 113). Since Azerbaijan does not contend that its dispute with Armenia was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22.

31. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

32. At this stage of the proceedings, the Court will examine whether it appears, prima facie, that Azerbaijan genuinely attempted to engage in negotiations with Armenia, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Azerbaijan pursued these negotiations as far as possible (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 420, para. 36).

* *

33. Regarding the procedural preconditions set out in Article 22 of CERD, Azerbaijan states that between December 2020 and September 2021, the Parties have exchanged over 40 pieces of correspondence and held several rounds of meetings in an attempt to settle Azerbaijan's claims concerning Armenia's violations of obligations arising under CERD. In particular, Azerbaijan asserts that the Minister for Foreign Affairs of Azerbaijan, in a letter dated 8 December 2020 addressed to his counterpart in Armenia, specified the actions by which Armenia had violated its obligations under CERD. According to Azerbaijan, further correspondence between the Parties set out the modalities that were to govern their negotiations, and several bilateral meetings took place between March and September 2021. Azerbaijan further asserts that Armenia did not engage in good faith in the negotiations, refusing either to consider properly the requested remedies or to make any proposals or counterproposals to resolve the issues in dispute. In support of its contention that Azerbaijan genuinely sought to find a solution to the matters in dispute, counsel for the Applicant refers, in particular, to three letters, namely, a letter from the Minister for Foreign

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Affairs of Armenia, dated 11 November 2020, the above-mentioned letter from the Minister for Foreign Affairs of Azerbaijan, dated 8 December 2020, and a letter, dated 9 October 2021, outlining the proposals made by Azerbaijan to Armenia in the course of negotiations held on 30 and 31 August 2021. According to Azerbaijan, these documents show that Azerbaijan made genuine attempts to find a negotiated solution with Armenia to the dispute, whereas Armenia failed to do so. It contends that to continue negotiations or to resort to the procedures expressly provided for in CERD would be futile in light of Armenia's intransigence. Azerbaijan thus considers that it has pursued the negotiation of its claims "as far as possible" and that the procedural precondition of negotiation under Article 22 CERD is therefore satisfied.

*

34. Armenia, for its part, states that it recognizes that the requirement for the failure of negotiations is met in the present case, although it argues that this is through no fault of its own. According to Armenia, Azerbaijan did not genuinely attempt to engage in meaningful negotiations before instituting proceedings alleging violations by Armenia of its obligations under CERD. In its view, throughout the whole negotiating process, Azerbaijan showed no intention of negotiating and used delaying tactics to postpone the negotiations, for example by repeatedly requesting the Parties to clarify the modalities, topics and selection of representatives for the purposes of the negotiations. Armenia observes in this regard that "[i]t took nearly a year, dozens of exchanges of Notes and numerous encounters before it was finally possible to address the substance of the dispute". Therefore, Armenia claims that it had a "good reason to think that there was no longer any point in continuing a negotiation that had become futile". In this context, Armenia submits, "the requirements in terms of negotiation were met".

* *

35. Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question" (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36, citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 161).

36. The Court notes that, as evidenced by the material before it, Azerbaijan raised allegations of violations by Armenia of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

37. The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Azerbaijan and Armenia, by letters dated 8 December 2020 and 22 December 2020 respectively, and the last bilateral meeting held on 14-15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Azerbaijan's allegations of Armenia's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15-16 July 2021, 30-31 August 2021 and on 14-15 September 2021 shows a lack of progress in reaching common ground on substantive issues. The Court observes moreover that both Parties appear to accept that negotiations between them with a view to addressing the CERD-related complaints levelled by Azerbaijan against Armenia had reached an impasse.

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38. Despite the fact that Azerbaijan alleged in bilateral exchanges that Armenia had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on the alleged non-compliance by Armenia with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

39. Recalling that, at this stage of the proceedings, the Court need only decide whether, prima facie, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

4. CONCLUSION AS TO PRIMA FACIE JURISDICTION

40. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the Convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

41. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 18, para. 43).

42. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Azerbaijan wishes to see protected exist; it need only decide whether the rights claimed by Azerbaijan on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

43. In the present proceedings, Azerbaijan asserts rights under Articles 2, 3, 4, 5, 6 and 7 of CERD. In particular, Azerbaijan argues that "Armenia's policies and practices target Azerbaijanis for discriminatory treatment falling within the scope of Article 1 (1) and in violation of Articles 2, 3, 4, 5, 6, and 7 of CERD". Azerbaijan thus considers that its rights under these provisions of CERD are plausible and that Armenia's acts plausibly constitute racial discrimination in violation of its obligations under CERD.

44. Azerbaijan contends more specifically that by laying mines, including in the course of the 2020 Conflict, in civilian areas previously inhabited by ethnic Azerbaijanis, Armenia has deliberately made it impossible for them to return to their homes. Azerbaijan further contends that Armenia continues to plant landmines and intentionally withholds comprehensive and accurate information about mine placement. Azerbaijan asserts that the laying of landmines and the alleged refusal to share information about their location are part of a longstanding campaign of "ethnic cleansing" by Armenia which constitutes "racial discrimination" under the definition set out in Article 1, paragraph 1, of CERD, and violates the rights of ethnic Azerbaijanis under this Convention in so far as it has both the purpose and effect of nullifying or impairing, for example, the right not to be arbitrarily deprived of life, the right to liberty and security of person and the right to liberty of movement and freedom to choose one's residence. Azerbaijan thus submits that the rights it asserts under CERD with regard to the laying of landmines by Armenia are plausible.

45. Azerbaijan notes that Armenia has neither condemned the activities within its territory of armed ethnonationalist hate groups, such as VoMA, that are said to incite violence against ethnic Azerbaijanis, including through social media, nor punished those involved in such activities. Azerbaijan cites, for example, anti-Azerbaijani propaganda disseminated by VoMA on social media, referring to persons of Azerbaijani national or

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ethnic origin pejoratively as "Turks" or "Caspian Turks", and referring to Azerbaijan as the "Caspian Threat", which should be "liquidat[ed]". According to Azerbaijan, VoMA claims that its personnel has "work[ed] in close cooperation with [Armenia's] Armed Forces and received a commendation by the command". Moreover, Azerbaijan considers that, by failing to condemn or prohibit anti-Azerbaijani paramilitary groups, Armenia has allowed those groups to proliferate. In this regard, it also refers to the group "Statehood as National Value" (hereinafter "POGA") which apparently began organizing military training programmes in March 2021. In addition, Azerbaijan asserts that the Government of Armenia is responsible for an "ongoing anti-Azerbaijani cyber disinformation campaign". According to Azerbaijan, by not condemning or prohibiting the operations of VoMA, POGA and similar groups, by glorifying the racist ideology used to target persons of Azerbaijani national or ethnic origin and by engaging, at a governmental level, in a cyber disinformation campaign in an attempt "to stoke ethnic tensions between Azerbaijanis and Armenians", Armenia is infringing the rights guaranteed by Articles 2, 4, 5 and 7 of CERD.

*

46. With respect to Azerbaijan's claim relating to Armenia's supposed "policy and practice" of laying landmines, Armenia contends that Azerbaijan has no plausible rights under CERD because "landmines, by their nature, do not engage in ethnic discrimination". Moreover, according to Armenia, there is no evidence that it ever used mines to target persons of Azerbaijani ethnic origin. It asserts that the laying of mines in areas in and around Nagorno-Karabakh was not for the purpose of racial discrimination but for the purpose of military defence. Armenia states that it has already provided maps to Azerbaijan and its Agent announced that it "stand[s] ready to provide any more maps in [its] possession regarding minefields located behind the lines currently held by Azerbaijani armed forces, which now present solely humanitarian concerns".

47. Regarding Azerbaijan's allegations that the Respondent has neither condemned nor punished the activities within its territory of armed ethnonationalist hate groups, Armenia observes that the groups in question are not State entities and that it has not endorsed, nor does it endorse or condone, the rhetoric of these organizations. Armenia asserts that Azerbaijan's alleged rights in this regard are not plausible in so far as the private speech that Azerbaijan has cited does not constitute speech against which CERD provides protection. Moreover, Armenia refers to the wording of Article 4 of CERD, which requires States parties to take measures to eradicate acts of discrimination "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of [the] Convention". Armenia notes that these rights include the right to freedom of expression and freedom of association contained in Article 5 *(d)* of CERD. According to Armenia, the evidence before the Court does not establish that the organizations in question seek to incite racial hatred in such a way that the Government of Armenia would be required to prevent their speech and, thus, Armenia considers that the rights that Azerbaijan seeks to protect are not plausible.

48. Armenia adds that Azerbaijan has not demonstrated that Armenia is engaging in cyber disinformation operations to incite anti-Azerbaijani hate and concludes that the "rights for which Azerbaijan seeks protection through the second part of its third request are therefore not plausible".

* *

49. The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. Article 1, paragraph 1, of CERD defines racial discrimination in the following terms:

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

Articles 2, 3, 4, 5, 6 and 7 of the Convention, invoked by Azerbaijan in its Application and for the purposes of its Request for the indication of provisional measures, read as follows:

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"*Article 2*

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

   (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

   (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

   (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

   (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

   (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

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(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

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Article 6

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."

50. The Court notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. It recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 426, para. 51).

51. A State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention (see *ibid.*, para. 52). In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

52. The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Azerbaijan are plausible rights under the Convention. This is the case, with respect to rights allegedly violated through Armenia's failure to condemn the activities within its territory of groups that, according to Azerbaijan, are armed ethnonationalist hate groups that incite violence against ethnic Azerbaijanis, and to punish those responsible for such activities.

53. With regard to rights under CERD asserted by Azerbaijan with respect to Armenia's alleged conduct in relation to landmines, the Court recalls that Azerbaijan claims that this conduct is part of a longstanding campaign of ethnic cleansing. The Court recognizes that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD and that such a policy can be effected through a variety of military means. However, the Court does not consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines. Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing", of rights of persons of Azerbaijani national or ethnic origin.

* *

54. The Court now turns to the condition of the link between the rights claimed by Azerbaijan and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Azerbaijan have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Azerbaijan.

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55. Azerbaijan considers that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. In particular, with regard to the measure requesting that Armenia be ordered to prevent certain groups from engaging in hate speech, and to cease and desist from its alleged ongoing cyber disinformation campaign, Azerbaijan asserts that this is aimed at protecting ethnic Azerbaijanis from racist hate speech and the risk of ethnic violence and therefore are directly linked to the rights asserted by Azerbaijan under CERD.

*

56. Armenia maintains, in general, that the measures requested by Azerbaijan have no link to rights of Azerbaijan arising under CERD.

* *

57. The Court has already found that at least some of the rights claimed by Azerbaijan under CERD are plausible (see paragraph 52 above). It considers that a link exists between one of the measures requested by Azerbaijan (see paragraphs 5 and 11 above) and the plausible rights it seeks to protect. This is the case for the measure aimed at ensuring that any organizations and private persons in the territory of Armenia do not engage in the incitement and promotion of racial hatred and racially motivated violence targeted at people of Azerbaijani national or ethnic origin. This measure, in the view of the Court, is directed at safeguarding plausible rights invoked by Azerbaijan under CERD.

58. The Court concludes, therefore, that a link exists between some of the rights claimed by Azerbaijan and one of the requested provisional measures.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

59. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 24, para. 64, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 77).

60. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*ibid.*, p. 24, para. 65). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

61. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

62. Azerbaijan submits that Armenia has incited and continues to incite hatred and violence against persons of Azerbaijani national or ethnic origin by permitting armed hate groups to recruit members, raise funds, and operate training centres. It claims in particular that VoMA, whose stated aim is "to create an entirely ethnic Armenian 'Nation Army' and to ready the mono-ethnic Armenian State against the perceived 'threat' of Azerbaijanis", uses fear and hatred of persons of Azerbaijani national or ethnic origin as a recruiting tool, regularly disseminates messages of racial superiority, and arms and trains Armenians for an ethnic war against persons of Azerbaijani national or ethnic origin. Azerbaijan adds that the threat of violence is exacerbated by "growing calls to arms" by VoMA, which, in its most recent activity report for September 2021, stated that it had trained dozens of people and instructors across Armenia and had solicited donations for vehicles and "arms for weapons practice and protection in the

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populated areas along the borders". Azerbaijan adds that, by not condemning or prohibiting anti-Azerbaijani paramilitary groups, Armenia has allowed groups, such as VoMA and POGA, which apparently began organizing military training programmes in March 2021 to prepare Armenians for war, to proliferate within its territory. Azerbaijan considers that there is an urgent need to protect Azerbaijanis from continued hate speech and violence on account of their national or ethnic origin and that the emotional effects of this constant threat of violence can cause an irreparable prejudice to their rights.

*

63. Armenia denies that there exists an imminent risk of irreparable prejudice to the rights of Azerbaijan with respect to its "allegations of incitement of ethnic hatred and violence through an alleged failure to sanction or punish so-called armed hate groups". Armenia contends that the objectives of these organizations have nothing to do with incitement of racial hatred and racially motivated violence targeted at persons of Azerbaijani national or ethnic origin. In particular, Armenia states that VoMA is a non-governmental organization engaged in emergency and civil-military defence preparedness, education and training, which aims to "raise the spirits of the Armenian people". Armenia further references the obligation to respect the right of freedom of opinion and expression when considering the reach of Article 4 of CERD, and observes that statements must be of an "*exceptionally/manifestly* offensive character" (emphasis in the original) to fall outside the protection of the "due regard" clause in Article 4. With respect to the statements made by VoMA, Armenia acknowledges that they could be considered as nationalistic, patriotic, and sometimes offensive and even controversial, but it denies that these statements could be viewed as an incitement to ethnic hatred and violence against an ethnic group. Therefore, the Respondent asserts that Azerbaijan has neither demonstrated that Armenia has allowed militant hate groups — such as, according to Azerbaijan, VoMA and POGA — to proliferate, nor provided evidence of incitement of racial hatred imputable to these or similar organizations. Consequently, Azerbaijan has failed to establish an imminent risk of irreparable prejudice.

* *

64. Having previously determined that some of the rights asserted by the Applicant are plausible and that there is a link between those rights and the provisional measures requested, the Court now considers whether irreparable prejudice could be caused to those rights and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

65. The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 *(a)*, *(b)*, *(c)*, *(d)* and *(e)* are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142; *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. 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 430-431, para. 67). The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD.

66. In the view of the Court, acts prohibited under Article 4 of CERD — such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin — can generate a pervasive racially charged environment within society. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress.

67. In light of the considerations set out above, the Court concludes that the alleged disregard of the rights deemed plausible by the Court (see paragraph 52 above) may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

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V. CONCLUSION AND MEASURES TO BE ADOPTED

68. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Azerbaijan, as identified above (see paragraph 52).

69. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 28, para. 77).

70. In the present case, having considered the terms of the provisional measures requested by Azerbaijan and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

71. The Court considers that, with regard to the situation described above, Armenia must, pending the final decision in the case and in accordance with its obligations under CERD, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin.

72. The Court recalls that Azerbaijan has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Armenia. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of*
23 July 2018, I.C.J. Reports 2018 (II), pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measure it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

73. The Court further recalls that Azerbaijan requested it to indicate provisional measures directing Armenia to "take effective measures to collect, to prevent the destruction and ensure the preservation of, evidence related to allegations of ethnically-motivated crimes against Azerbaijanis" and to provide regular reports on the implementation of provisional measures. The Court, however, considers that, in the particular circumstances of the case, these measures are not warranted.

*

* *

74. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

*

* *

75. The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Azerbaijan and Armenia to submit arguments in respect of those questions.

*

* *

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76. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

The Republic of Armenia shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Azerbaijan and the Government of the Republic of Armenia, respectively.

(Signed) Joan E. DONOGHUE, President.

(Signed) Philippe GAUTIER, Registrar.

Judge IWASAWA appends a declaration to the Order of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

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DECLARATION OF JUDGE IWASAWA

Article 4 of CERD requires that measures to eradicate incitement to racial hatred and discrimination must be adopted "with due regard to the principles of the Universal Declaration of Human Rights", including freedom of expression — The Parties were engaged in large-scale hostilities in their recent history — Statements made by organizations and private persons need to be understood in this context.

1. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") requires that measures designed to eradicate incitement to racial hatred and discrimination must be adopted "with due regard to the principles of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of th[e] Convention". This includes, most notably, freedom of expression. Freedom of expression is an indispensable condition for the full development of the person and the foundation stone for a free and democratic society. The exercise of the right to freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, which are, however, only permitted under specific conditions (see Article 19, paragraph 3, of the International Covenant on Civil and Political Rights). Measures designed to eradicate incitement to racial hatred and discrimination are compatible with the protection of freedom of expression, provided that they meet those conditions.

2. The Parties to the present case were twice engaged in large-scale hostilities against each other in their recent history, between 1991 and 1994 and again in 2020. As a result, animosity appears to persist between the two States and among some segments of their populations. Statements made by organizations and private persons need to be understood in this context.

3. In the present Order, the Court indicates that Armenia shall, in accordance with its obligations under CERD, take all necessary measures to prevent the incitement and promotion of racial hatred targeted at people of Azerbaijani national or ethnic origin (paragraph 76 (1) of the Order). The Court indicates this measure in the circumstances described in paragraph 2 above.

(Signed) IWASAWA Yuji.

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DECLARATION OF VICE-PRESIDENT GEVORGIAN

Disagreement with the Court's finding on prima facie jurisdiction — Consent as a fundamental principle underlying the Court's jurisdiction — The acts invoked by Ukraine do not fall under the scope of the Genocide Convention — The actual dispute relates to the use of force which is not covered by the Genocide Convention — Importance for the Court to maintain its settled jurisprudence — Support for adoption of the non-aggravation clause.

1. I could not join the majority on the first and second provisional measure indicated by the Court in this Order, purely on a substantial legal ground — I do not believe that the Court has jurisdiction to entertain this case. Ultimately, the jurisdiction of every international court emanates from the consent of States to subject a dispute between them to the binding settlement by a judicial body. This is a well-established principle of general international law and also firmly embodied in the Court's Statute[1]. Accordingly, no State can, without its consent, be compelled to submit its disputes to the Court[2].

2. States can express this consent in several ways, for example by recognizing the Court's jurisdiction as compulsory under Article 36 (2) of its Statute, or by expressing a narrower form of consent via a compromissory clause, which allows the Court to adjudicate disputes relating to a specific treaty. Since neither the Russian Federation nor Ukraine have lodged a declaration under Article 36 (2) of the Statute to accept the Court's jurisdiction as compulsory, Ukraine based its claim exclusively on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention"). Article IX of said Convention states that:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

3. In a letter to the Court, the Russian Federation indicated its opposition to the Court's jurisdiction and noted that Article IX does not apply to the situation at hand[3]. In particular, the Russian Federation considers that Ukraine seeks to bring before the Court issues relating to the use of force, which are not governed by the Genocide Convention and, therefore, do not come within the jurisdiction of the Court[4].

4. As the Court has stated multiple times, in order to establish jurisdiction under Article IX of the 1948 Genocide Convention, the subject-matter of the dispute must relate to the interpretation, application or fulfilment of the Convention[5]. While it must not decide in a definitive manner that it has jurisdiction over the merits of the case at this stage of the proceedings, the Court must nevertheless ascertain whether the provisions relied on by Ukraine appear, prima facie, to afford a basis on which its jurisdiction could be founded[6]. Accordingly, the Court must analyse whether the acts complained of by Ukraine are capable of falling within the provisions of the Genocide Convention and, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain[7].

5. It is evident that the dispute that Ukraine seeks to bring before the Court, in reality, relates to the use of force by the Russian Federation on Ukrainian territory. However, neither is the use of force regulated by the Genocide Convention nor does the use of force in itself constitute an act of genocide. The Court has been very clear in this regard in the 1999 *Legality of the Use of Force* cases, where it held that

> "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above'"[8].

6. Accordingly, the Court found that it had no prima facie jurisdiction under the Convention to adjudicate upon the bombardment of Serbia by NATO member States[9]. As the Court has noted in *Croatia* v. *Serbia,* it will not depart from its settled jurisprudence *(jurisprudence constante)* unless it finds "very particular reasons to do so"[10]. Yet, the situation in the precent case is similar as it concerns the use of force without a legal link to genocide. Nothing in Ukraine's Application for provisional measures indicates that the military operations launched by the Russian

Federation demonstrate the element of intent necessary for acts of genocide. Therefore, the dispute Ukraine aims to have adjudicated upon by the Court does not fall within the scope of the Convention. As a result, the Court manifestly lacks jurisdiction *ratione materiae* to entertain this Application, and, consequently, to indicate provisional measures.

7. To circumvent this problem, Ukraine claims that the Convention embodies a right "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention"[11]. This argument is unconvincing and undermines the fundamental requirement that jurisdiction emanates from consent. Under the interpretation advanced by Ukraine, *any* purportedly illegal act, including the unauthorized use of force, could be shoehorned into a random treaty as long as the subject-matter regulated by this treaty had some role in the political considerations preceding the respective act.

8. With regard to Ukraine's claim that the Russian Federation is falsely invoking Ukraine's responsibility for acts of genocide, an additional problem arises. I remain unconvinced that Ukraine can invoke the compromissory clause under Article IX of the Convention only to have the Court confirm its own compliance. Such "non-violation complaints" cannot be brought before the Court in absence of a *compromis* or specific treaty-based authorization. Applications of this type have only been entertained by the Court when they were brought under the much broader jurisdictional basis of Article 36 (2) of the Statute[12], or in combination with an actual violation complaint of the treaty in question[13].

9. Taking into account all the legal considerations explained above, I come to the conclusion that the Court lacks prima facie jurisdiction to entertain this case. Accordingly, the Court should have dismissed Ukraine's request for provisional measures.

10. Despite my position on the absence of prima facie jurisdiction in this case, I have voted in favour of the third provisional measure indicated in the Court's Order, namely that both Parties shall refrain from any action which might aggravate or extend the dispute or make it more difficult to resolve. The power to indicate such measure is a power inherent to the Court, and not necessarily linked to the Court's prima facie jurisdiction over the parties' substantive rights or obligations on the merits of a case.

(Signed) Kirill GEVORGIAN.

ENDNOTES

1 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 101, para. 26; *Case of the Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32.

2 *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16.

3 Letter by H.E. Mr. Alexander V. Shulgin, Ambassador of the Russian Federation to the Kingdom of the Netherlands, dated 7 March 2022.

4 *Ibid.*, paras. 4 and 13.

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 16, para. 26; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, 1.C.J. Reports 1999 (I),* p. 137, para. 37.

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16.

7 *Ibid.*, p. 10, para. 20; *Legality* of *Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, 1. C.J. Reports 1999,* p. 138, para. 38.

8 *Legality* of *Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, 1.C.J. Reports 1999,* p. 138, para. 40.

9 *Ibid.*, para. 41.

10 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28.

11 Ukraine's Request for the indication of provisional measures, para. 12.

12 *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I. C.J. Reports 1952*, p. 176.

13 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9.

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16 MARCH 2022
ORDER

ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(UKRAINE *v.* RUSSIAN FEDERATION)

ALLÉGATIONS DE GÉNOCIDE AU TITRE DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(UKRAINE c. FÉDÉRATION DE RUSSIE)

16 MARS 2022
ORDONNANCE

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ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(UKRAINE *v.* RUSSIAN FEDERATION)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH; *Judge* ad hoc DAUDET; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 26 February 2022, at 9.30 p.m., Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation concerning "a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter the "Genocide Convention" or the "Convention").

2. At the end of its Application, Ukraine

> "respectfully requests the Court to:
>
> *(a)* Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.
>
> *(b)* Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.

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(c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(e) Require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.

(f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide."

3. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

4. Together with the Application, Ukraine submitted a Request for the indication of provisional measures with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, Ukraine asked the Court to indicate the following provisional measures:

(a) The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine.

(b) The Russian Federation shall immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

(c) The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.

(d) The Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court.

6. Ukraine also requested the President of the Court

> "pursuant to Article 74 (4) of the Rules of Court . . . to call upon the Russian Federation to immediately halt all military actions in Ukraine pending the holding of a hearing, to enable any order the Court may make on the request for provisional measures to have its appropriate effects".

7. In the morning of 27 February 2022, the Registrar communicated by email to the Russian Federation an advance copy of the Application and Request for the indication of provisional measures. These documents were formally communicated to the Russian Federation on 28 February 2022, pursuant to Article 40, paragraph 2, of the Statute of the Court in respect of the Application, and pursuant to Article 73, paragraph 2, of the Rules of Court in respect of the Request for the indication of provisional measures. The Registrar also notified the Secretary-General of the United Nations of the filing of the Application and the Request by Ukraine.

8. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 2 March 2022.

9. Since the Court included upon the Bench no judge of Ukrainian nationality, Ukraine proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Yves Daudet.

10. By a letter dated 1 March 2022, the President of the Court, exercising the powers conferred upon her under Article 74, paragraph 4, of the Rules of Court, called the attention of the Russian Federation to the need to act in such a way as would enable any order the Court may make on the request for provisional measures to have its appropriate effects.

11. By letters dated 1 March 2022, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 7 and 8 March 2022 as the dates for the oral proceedings on the Request for the indication of provisional measures. The Registrar indicated that the hearings would be held in a hybrid format, pursuant to which each Party could choose to have a certain number of representatives present in the Great Hall of Justice, with other members of the delegation participating by video-link.

12. By a letter dated 5 March 2022, the Ambassador of the Russian Federation to the Kingdom of the Netherlands indicated that his Government had decided not to participate in the oral proceedings due to open on 7 March 2022.

13. At the public hearing held in a hybrid format on 7 March 2022, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Ukraine: Mr. Anton Korynevych,
Mr. Jean-Marc Thouvenin,
Mr. David M. Zionts,
Ms Marney L. Cheek,
Mr. Jonathan Gimblett,
Mr. Harold Hongju Koh,
Ms Oksana Zolotaryova.

14. At the end of its oral observations, Ukraine asked the Court to indicate the following provisional measures:

(a) The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine.

(b) The Russian Federation shall immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

(c) The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.

(d) The Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such order and then on a regular basis to be fixed by the Court.

15. Under cover of a letter dated 7 March 2022 received in the Registry shortly after the closure of the hearing, the Ambassador of the Russian Federation to the Kingdom of the Netherlands communicated to the Court a document setting out "the position of the Russian Federation regarding the lack of jurisdiction of the Court in t[he] case".

16. Since the Government of the Russian Federation did not appear at the oral proceedings, no formal request was presented by that Government. However, in the document communicated to the Court on 7 March 2022, the

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Russian Federation contends that the Court lacks jurisdiction to entertain the case and "requests the Court to refrain from indicating provisional measures and to remove the case from its list".

*

* *

I. INTRODUCTION

17. The context in which the present case comes before the Court is well-known. On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he had decided to conduct a "special military operation" against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering.

18. The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. The Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.

19. The ongoing conflict between the Parties has been addressed in the framework of several international institutions. The General Assembly of the United Nations adopted a resolution referring to many aspects of the conflict on 2 March 2022 (doc. A/RES/ES-11/1). The present case before the Court, however, is limited in scope, as Ukraine has instituted these proceedings only under the Genocide Convention.

*

20. The Court regrets the decision taken by the Russian Federation not to participate in the oral proceedings on the request for the indication of provisional measures, as set out in the above-mentioned letter of 5 March 2022 (see paragraph 12 above).

21. The non-appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party could have provided to it. Nevertheless, the Court must proceed in the discharge of its judicial function at any phase of the case (*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 464, para. 25; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 23, para. 27).

22. Though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 25, para. 31). It is valuable for the Court to know the views of both parties in whatever form those views may have been expressed *(ibid.)*. The Court will therefore take account of the document communicated by the Russian Federation on 7 March 2022 to the extent that it finds this appropriate in discharging its duties.

23. The Court recalls that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 13, para. 13). It emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its decision (cf. *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 464, para. 26; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 23, para. 27). Should the present case extend beyond the current phase, the Russian Federation, which remains a Party to the case, will be able, if it so wishes, to appear before the Court to present its arguments (*Military and Paramilitary*

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Activities in and against Nicaragua (Nicaragua v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 142-143, para. 284).

II. PRIMA FACIE JURISDICTION

1. General observations

24. The Court may indicate provisional measures only if the provisions relied on by the applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16).

25. In the present case, Ukraine seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

26. Article IX of the Genocide Convention reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

27. Ukraine and the Russian Federation are both parties to the Genocide Convention. Ukraine deposited its instrument of ratification on 15 November 1954 with a reservation to Article IX of the Convention; on 20 April 1989, the depositary received notification that this reservation had been withdrawn. The Russian Federation is a party to the Genocide Convention as the State continuing the legal personality of the Union of Soviet Socialist Republics, which deposited its instrument of ratification on 3 May 1954 with a reservation to Article IX of the Convention; on 8 March 1989, the depositary received notification that this reservation had been withdrawn.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention

28. Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). To determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18).

29. Since Ukraine has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain, at the present stage of the proceedings, whether it appears that the acts complained of by the Applicant are capable of falling within the scope of that convention *ratione materiae* (cf. *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 239, para. 30).

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30. Ukraine contends that a dispute exists between it and the Russian Federation relating to the interpretation, application or fulfilment of the Genocide Convention. It maintains that the Parties disagree on whether genocide, as defined in Article II of the Convention, has occurred or is occurring in the Luhansk and Donetsk oblasts of Ukraine and whether Ukraine has committed genocide. In this regard, the Applicant submits that it profoundly disagrees with the unsubstantiated allegation of the Russian Federation that genocide has taken place in Ukraine and that it has made this known to the Russian Federation on multiple occasions since September 2014, including through a statement by the Minister for Foreign Affairs of Ukraine before the General Assembly of the United Nations on 23 February 2022.

31. Ukraine further argues that the dispute between the Parties concerns the question whether, as a consequence of the Russian Federation's unilateral assertion that genocide is occurring, the Russian Federation has a lawful basis to take military action in and against Ukraine to prevent and punish genocide pursuant to Article I of the Genocide Convention. Ukraine considers that the Russian Federation "has turned the Genocide Convention on its head", making a false claim of genocide as a basis for actions on its part that constitute grave violations of the human rights of millions of people across Ukraine. It asserts that, rather than taking military action to prevent and punish genocide, the Russian Federation should have seised the organs of the United Nations under Article VIII of the Convention or seised the Court under Article IX thereof. Ukraine states that it vehemently disagrees with the Russian Federation's interpretation, application and fulfilment of the Convention. Referring, *inter alia*, to a statement by the Ukrainian Ministry of Foreign Affairs of 26 February 2022, Ukraine asserts that the Russian Federation "could not have been unaware, that its views were 'positively opposed'" by Ukraine.

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32. In the document communicated to the Court on 7 March 2022, the Russian Federation states that the only basis for jurisdiction referred to by Ukraine is the dispute resolution clause contained in Article IX of the Genocide Convention. However, according to the Respondent, it is clear from the plain language of the Convention that it does not regulate the use of force between States. The Respondent submits that, in order to "glue" the Convention to the use of force for the purposes of invoking its dispute resolution clause, Ukraine has claimed that the Russian Federation commenced its "special military operation" on the basis of allegations of genocide committed by Ukraine. The Russian Federation asserts that, in reality, its "special military operation" on the territory of Ukraine is based on Article 51 of the United Nations Charter and customary international law and that the Convention cannot provide a legal basis for a military operation, which is beyond the scope of the Convention.

33. The Respondent further states that the legal basis for the "special military operation" was communicated on 24 February 2022 to the Secretary-General of the United Nations and the United Nations Security Council by the Permanent Representative of the Russian Federation to the United Nations in the form of a notification under Article 51 of the United Nations Charter (circulated as document S/2022/154 of the Security Council). The Russian Federation contends that, while the address of President Putin "to the citizens of Russia" that was appended to the notification may in certain contexts have referred to genocide, this reference is not the same as the invocation of the Convention as a legal justification for its operation, nor does it indicate that the Russian Federation recognizes the existence of a dispute under the Convention. The Russian Federation emphasizes that there are no references to the Genocide Convention in the address made by its President on 24 February 2022.

34. The Russian Federation therefore concludes that Ukraine's "Application and Request manifestly fall beyond the scope of the Convention and thus the jurisdiction of the Court"; it asks the Court to remove the case from its List.

* *

35. The Court recalls that, for the purposes of deciding whether there was a dispute between the Parties at the time of the filing of the Application, it takes into account in particular any statements or documents exchanged between the Parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26).

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36. The Court notes that the Applicant disputes the Russian Federation's allegation that Ukraine has committed or is committing genocide in the Luhansk and Donetsk regions of Ukraine. Ukraine also asserts that nothing in the Convention authorizes the Russian Federation to use force against Ukraine as a means to fulfil its obligation under Article I thereof to prevent and punish genocide.

37. In this regard the Court observes that, since 2014, various State organs and senior representatives of the Russian Federation have referred, in official statements, to the commission of acts of genocide by Ukraine in the Luhansk and Donetsk regions. The Court observes, in particular, that the Investigative Committee of the Russian Federation — an official State organ — has, since 2014, instituted criminal proceedings against high-ranking Ukrainian officials regarding the alleged commission of acts of genocide against the Russian-speaking population living in the above-mentioned regions "in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide".

38. The Court recalls that, in an address made on 21 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, described the situation in Donbass as a "horror and genocide, which almost 4 million people are facing".

39. By a letter dated 24 February 2022 (see paragraph 33 above), the Permanent Representative of the Russian Federation to the United Nations requested the Secretary-General to circulate, as a document of the Security Council, the "text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence". In his address, pronounced on 24 February 2022, the President of the Russian Federation explained that he had decided, "in accordance with Article 51 (chapter VII) of the Charter of the United Nations . . . to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic". He specified that the "purpose" of the special operation was "to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years". He stated that the Russian Federation had to stop "a genocide" against millions of people and that it would seek the prosecution of those who had committed numerous bloody crimes against civilians, including citizens of the Russian Federation.

40. The Permanent Representative of the Russian Federation to the United Nations, referring to the address by the President of the Russian Federation of 24 February 2022, explained at a meeting of the Security Council on Ukraine that "the purpose of the special operation [was] to protect people who ha[d] been subjected to abuse and genocide by the Kyiv regime for eight years".

41. Two days later, the Permanent Representative of the Russian Federation to the European Union stated in an interview that the operation was a "peace enforcement special military operation" carried out in an "effort aimed at de-Nazification", adding that people had been actually "exterminated" and that "the official term of genocide as coined in international law[, if one] read[s] the definition, . . . fits pretty well".

42. In response to the Russian Federation's allegations and its military actions, the Ministry of Foreign Affairs of Ukraine issued a statement on 26 February 2022, saying that Ukraine "strongly denies Russia's allegations of genocide" and disputes "any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression".

43. At the present stage of these proceedings, the Court is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. At the stage of making an order on a request for the indication of provisional measures, the Court's task is to establish whether the acts complained of by Ukraine appear to be capable of falling within the provisions of the Genocide Convention.

44. The Court recalls that, while it is not necessary for a State to refer expressly to a specific treaty in its exchanges with the other State to enable it later to invoke the compromissory clause of that instrument to institute proceedings before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a

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claim is made to ascertain that there is, or may be, a dispute with regard to that subject-matter (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). The Court considers that, in the present proceedings, the evidence in the case file demonstrates prima facie that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke the compromissory clause in this instrument as a basis for the Court's jurisdiction.

45. The statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention. In the Court's view, the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention.

46. The Court recalls the Russian Federation's assertion that its "special military operation" is based on Article 51 of the United Nations Charter and customary international law (see paragraphs 32-33). The Court observes in this respect that certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty (cf. *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 of 3 February 2021*, para. 56). The above-referenced assertion of the Russian Federation does not therefore preclude a prima facie finding by the Court that the dispute presented in the Application relates to the interpretation, application or fulfilment of the Genocide Convention.

47. The Court finds therefore that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

3. Conclusion as to prima facie jurisdiction

48. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case.

49. Given the above conclusion, the Court considers that it cannot accede to the Russian Federation's request that the case be removed from the General List for manifest lack of jurisdiction.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

50. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 18, para. 43).

51. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Ukraine wishes to see protected exist; it need only decide whether the rights claimed by Ukraine on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

52. In the present proceedings, Ukraine argues that it seeks provisional measures to protect its rights "not to be subject to a false claim of genocide", and "not to be subjected to another State's military operations on its territory

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based on a brazen abuse of Article I of the Genocide Convention". It states that the Russian Federation has acted inconsistently with its obligations and duties, as set out in Articles I and IV of the Convention.

53. Ukraine contends that it has a right to demand good faith performance of obligations under the Genocide Convention by the Russian Federation, in accordance with the object and purpose of the Convention. It states that the Russian Federation has abused and misused the rights and duties stipulated in the Convention and that the "special military operation" of the Respondent is an aggression undertaken "under the guise" of the duty to prevent and punish genocide, enshrined in Articles I and IV of the Convention, and that it frustrates the object and purpose of the Convention.

54. The Applicant further submits that it has a right under the Convention not to be harmed by the Russian Federation's misuse and abuse of the Convention. It considers in particular that it has a right not to suffer grave harm as a result of a military action falsely cloaked as one undertaken to prevent and punish genocide.

55. Ukraine asserts that the above-mentioned rights are grounded in a possible interpretation of the Genocide Convention and are therefore plausible.

* *

56. The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken "to prevent and to punish" the crime of genocide. Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble. Pursuant to Article VIII of the Convention, a Contracting Party that considers that genocide is taking place in the territory of another Contracting Party "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". In addition, pursuant to Article IX, such a Contracting Party may submit to the Court a dispute relating to the interpretation, application or fulfilment of the Convention.

57. A Contracting Party may resort to other means of fulfilling its obligation to prevent and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization. However, the Court emphasizes that, in discharging its duty to prevent genocide, "every State may only act within the limits permitted by international law", as was stated in a previous case brought under the Convention (*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. 221, para. 430).

58. The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter. In this regard, the Court recalls that, under Article 1 of the United Nations Charter, the purposes of the United Nations are, *inter alia*,

> "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

59. The Court can only take a decision on the Applicant's claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.

60. Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.

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61. The Court now turns to the condition of the link between the rights claimed by Ukraine and the provisional measures requested.

* *

62. Ukraine claims that there is a clear link between the plausible rights that it seeks to preserve and the first two provisional measures that it requests. In particular, the first two provisional measures share a direct link to Ukraine's right under Article I to good faith performance of the Convention by any State party.

* *

63. The Court has already found that Ukraine is asserting a right that is plausible under the Genocide Convention (see paragraphs 50-60 above). The Court considers that, by their very nature, the first two provisional measures sought by Ukraine (see paragraph 14 above) are aimed at preserving the right of Ukraine that the Court has found to be plausible. As to the third and fourth provisional measures requested by Ukraine, the question of their link with that plausible right does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance with any specific provisional measure indicated by the Court (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 24, para. 61).

64. The Court concludes, therefore, that a link exists between the right of Ukraine that the Court has found to be plausible and the requested provisional measures.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

65. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *ibid.*, p. 24, para. 64, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 77).

66. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*ibid.*, para. 65). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

67. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of obligations under the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of the right found to be plausible. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

68. Ukraine submits that there is an urgent need to protect its people from the irreparable harm caused by the Russian Federation's military measures that have been launched on a pretext of genocide. It emphasizes that the invasion by the Russian Federation has resulted in numerous casualties among Ukrainian civilians and military personnel, the bombing of numerous cities across Ukraine, and the displacement of over one and a half million Ukrainian civilians both within Ukraine and across its international borders.

69. Ukraine asserts that, in assessing whether the condition of urgency is satisfied in cases involving ongoing conflict, the Court typically considers whether the population at risk is particularly vulnerable, the fragility of the overall situation, including the likelihood of aggravation of the dispute, and the risk of reoccurrence of harm. Ukraine submits that the Court has frequently stated that loss of life constitutes an irreparable harm.

70. In this regard, Ukraine contends that thousands of people have already been killed in the conflict and that, with every day that passes, more lives will be lost and probably at an accelerating rate. It argues that the refugee crisis is another example of irreparable harm, pointing to the uncertainty that these displaced individuals will ever be able to return to their homes and the lasting psychological trauma the conflict will cause them even if they are resettled. It emphasizes that the population is extremely vulnerable, with many lacking food, electricity and water; that the overall situation is extremely fragile; and that the risk of aggravation of the crisis is acute. Ukraine further asserts that the Russian Federation's military action poses grave environmental risks, not only to Ukraine but also for the wider region, referring in particular to the dangers posed to Ukraine's civil nuclear industry and toxic smoke released by attacks on fuel depots.

71. Ukraine submits that the seriousness of the situation unambiguously satisfies the conditions of irreparable harm and urgency necessary for the imposition of provisional measures.

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72. The Russian Federation, for its part, submits that, contrary to what Ukraine asserts, the urgency must pertain not to the situation in general but to the protection of rights provided for by the Convention.

* *

73. Having previously determined that Ukraine can plausibly assert a right under the Genocide Convention and that there is a link between this right and the provisional measures requested, the Court now considers whether irreparable prejudice could be caused to this right and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to this right before the Court gives its final decision.

74. The Court considers that the right of Ukraine that it has found to be plausible (see paragraph 60 above) is of such a nature that prejudice to it is capable of causing irreparable harm. Indeed, any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment.

75. The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The "special military operation" being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

76. In this regard, the Court takes note of resolution A/RES/ES-11/1 of 2 March 2022, of the General Assembly of the United Nations, which, *inter alia*, "*[e]xpress[es] grave concern* at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children", "*[r]ecogniz[es]* that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war", "*[c]ondemn[s]* the decision of the Russian Federation to increase the readiness of its nuclear forces" and "*[e]xpress[es] grave concern* at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance".

77. In light of these circumstances, the Court concludes that disregard of the right deemed plausible by the Court (see paragraph 60 above) could cause irreparable prejudice to this right and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. CONCLUSION AND MEASURES TO BE ADOPTED

78. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the right of Ukraine that the Court has found to be plausible (see paragraph 60 above).

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79. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 28, para. 77).

80. In the present case, having considered the terms of the provisional measures requested by Ukraine and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

81. The Court considers that, with regard to the situation described above, the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the "Donetsk People's Republic" and the "Lugansk People's Republic" had turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.

82. The Court recalls that Ukraine also requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the Russian Federation. When it indicates provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of the dispute if it considers that the circumstances so require (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 94; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021*, para. 72). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute.

83. The Court further recalls that Ukraine requested it to indicate a provisional measure directing the Russian Federation to "provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court". In the circumstances of the present case, however, the Court declines to indicate this measure.

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84. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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85. The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Ukraine and of the Russian Federation to submit arguments in respect of those questions.

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86. For these reasons,

THE COURT,

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Indicates the following provisional measures:

(1) By thirteen votes to two,

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(2) By thirteen votes to two,

The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixteenth day of March, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Ukraine and the Government of the Russian Federation, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President GEVORGIAN appends a declaration to the Order of the Court; Judges BENNOUNA and XUE append declarations to the Order of the Court; Judge ROBINSON appends a separate opinion to the Order of the Court; Judge NOLTE appends a declaration to the Order of the Court; Judge *ad hoc* DAUDET appends a declaration to the Order of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

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DECLARATION OF JUDGE BENNOUNA

1. I voted in favour of the Order indicating provisional measures in this case because I felt compelled by this tragic situation, in which terrible suffering is being inflicted on the Ukrainian people, to join the call by the World Court to bring an end to the war.

2. However, I am not convinced that the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "1948 Convention") was conceived, and subsequently adopted, in 1948, to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force. We know, since the adoption of the Charter of the United Nations, that the only exceptions to the prohibition of the use of force in international relations are individual or collective self-defence, under Article 51 of the Charter (which has also been invoked by the Russian Federation), and authorization by the Security Council, in accordance with Chapter VII of that text.

3. The Genocide Convention is one of the major conventions of the United Nations, a monument of human civilization, which aims to prevent and punish genocide, defined as one of the acts set out in Article II "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

4. I am aware that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions. This is neither in the interest of the human groups under serious threat of destruction, nor in the interest of the credibility and efficiency of the 1948 Convention, which has enjoyed massive support from States and their consent to the jurisdiction of the International Court of Justice for the settlement of disputes relating to the Convention.

5. The Convention obliges the States parties to adopt the legislation required for its proper application and to enable those accused of genocide to be brought to justice, or before the competent international criminal court. These States may, if they deem it necessary, seise the competent organs of the United Nations (Article VIII) and submit to the International Court of Justice any dispute relating to the responsibility of another State for genocide (Article IX). The Convention does not cover, in any of its provisions, either allegations of genocide or the use of force allegedly based on such allegations.

6. It is not sufficient for the Court to state that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" (Order, paragraph 60). The Court must also be able to found this alleged plausible right on one of the provisions of the Genocide Convention which the Russian Federation is said to have breached. The Court clearly failed in this task; it did not identify the rights of Ukraine under the Convention which must be preserved by provisional measures pending the judgment on the merits (Statute of the Court, Article 41).

7. Following the military intervention of the countries of the North Atlantic Treaty Organization (NATO), from 24 March to 10 June 1999, in the Federal Republic of Yugoslavia (now Serbia), without the authorization of the Security Council, which was aimed at preventing a "serious humanitarian disaster in Kosovo", the matter was debated at the international level. The then Secretary-General of the United Nations, Mr. Kofi Annan, underlined the tension that existed within the international community between the need to prevent massive human rights violations and the limits imposed on humanitarian intervention in the context of respect for State sovereignty (*We the peoples: the role of the United Nations in the twenty-first century,* report of the Secretary-General to the Millennium Assembly of the United Nations, doc. A/54/2000, 27 March 2000, para. 218). This was followed, after long discussions, by the adoption at the 2005 United Nations Summit of the concept of "responsibility to protect", according to which it falls to each State to protect its population from massive human rights violations, in particular genocide, and, if necessary, other States may intervene to this end with the authorization of the Security Council (*2005 World Summit Outcome*, resolution adopted by the General Assembly on 16 September 2005, doc. A/RES/60/1, paras. 138-139).

8. Sadly, in practice, the concept of responsibility to protect has been diverted from its purpose. When, on 17 March 2011, the Security Council authorized Member States to take action through air strikes to protect civilian populations in Libya (resolution 1973, doc. S/RES/1973 (2011)), NATO forces deviated from their initial mandate, by favouring régime change in that country. This saw the end of the concept of responsibility to protect.

9. In fact, it is difficult to link the question of the legality of the use of force in international relations, as such, to the Genocide Convention. When, in 1999, Yugoslavia instituted proceedings before the Court, on the basis of the Convention, against a number of NATO countries, which had launched air strikes against Belgrade, the Court adopted orders indicating provisional measures, considering, in particular, that it

> "must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of [the Genocide Convention] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX" (*Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 372, para. 25).

The Court concluded that this was not so.

10. From a legal standpoint, that case is similar to the present proceedings, in so far as, in both instances, the applicant invoked the Genocide Convention in the context of an unlawful use of force by the respondent. Although the Court rejected the Request for the indication of provisional measures submitted to it by Yugoslavia, it underlined that

> "[w]hereas, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties" (*Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 374, para. 36).

11. The Court thus recalled that respect for international legality is binding on all States and in all circumstances, whether or not they have consented to a particular method for the peaceful settlement of the disputes between them. The fact remains that artificially linking a dispute concerning the unlawful use of force to the Genocide Convention does nothing to strengthen that instrument, in particular its Article IX on the peaceful settlement of disputes by the International Court of Justice, which is an essential provision in the prevention and punishment of the crime of genocide.

(Signed) Mohamed BENNOUNA.

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DECLARATION OF JUDGE XUE

1. While I fully endorse the call that the military operations in Ukraine should immediately be brought to an end so as to restore peace in the country as well as in the region, I reserve my position on the first two provisional measures indicated in this Order. Contrary to the established practice of the Court, these measures are, in fact, not linked with the rights that Ukraine may plausibly claim under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention"); the right identified by the Court as plausible cannot be established under the Genocide Convention (see paragraph 60 of the Order). More importantly, given the complicated circumstances that give rise to the conflict between Ukraine and the Russian Federation, the measures that the Russian Federation is solely required to take will not contribute to the resolution of the crisis in Ukraine. The Court, in my view, should be cautious in entertaining the request submitted by Ukraine and avoid prejudgment on the merits of the case.

2. Although Ukraine bases its claim on the Genocide Convention, the purpose of its Application is apparently to seek a determination from the Court that the Russian Federation's recognition of the Luhansk and Donetsk oblasts of Ukraine as independent republics and its military operations in Ukraine are unlawful. Ukraine's contention that the Russian Federation's allegation of genocide against Ukraine is just "an excuse for Russia's unlawful aggression" raises doubt that this is a genuine case about genocide. It appears that the acts complained of by Ukraine — namely Russia's recognition of the independence of the Luhansk and Donetsk regions of Ukraine and Russia's military operations in Ukraine — cannot be directly addressed by the interpretation and application of the provisions of the Genocide Convention, as the issues they have raised are concerned with the questions of recognition and use of force in international law. They do not appear to be capable of falling within the scope of the Genocide Convention (*Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 239, para. 30).

3. Referring to the statements of the President of the Russian Federation dated 21 February and 24 February 2022, Ukraine argues that the only possible reason for the justifications put forward by the Russian Federation for the launch of the military operations in Ukraine is that, in the Russian Federation's view, the Genocide Convention gives it "the right, perhaps even the duty or the responsibility" to prevent and punish the alleged genocide perpetrated in Ukraine, by means of a "special military operation". Ukraine's contention, however, is based on a mischaracterization of the Russian Federation's position on its military operations. The document communicated by the Russian Federation to the Court shows that the legal grounds that the Russian Federation invokes for its military operations are Article 51 of the United Nations Charter on self-defence and customary international law. Nowhere has the Russian Federation claimed that the Genocide Convention authorizes it to use force against Ukraine as a means of fulfilling its obligation under Article I thereof to prevent and punish genocide. Whether the Russian Federation may exercise self-defence, as it claims, under the circumstances is apparently not governed by the Genocide Convention.

4. Although the Russian Federation did refer to the alleged genocidal acts committed in the Luhansk and Donetsk regions of Ukraine in its official statements, it appears that the issue of the alleged genocide is not just one aspect of a broader political problem between the two States which may be separately examined, or the very reason for the Russian Federation to launch military operations against Ukraine, as claimed by Ukraine; it is an integral part of the dispute between the Russian Federation and Ukraine over the security issue in the region. Ukraine's claim ultimately boils down to the very question whether recourse to use of force is permitted under international law in case of genocide. Ukraine's grievances against the Russian Federation, therefore, directly bear on the legality of use of force by Russia under general international law, rather than the Genocide Convention. Therefore, I am of the view that the rights and obligations which Ukraine claims are not plausible under the Genocide Convention.

5. This is not the first time that the Court is confronted with a tragic situation caused by the use of force. In the *Legality of Use of Force* cases, even without indicating provisional measures, the Court reminded the States before it that

> "they remain in any event responsible for acts attributed to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required

> to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 140, para. 48; see also *Legality of Use of Force (Yugoslavia* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 273, para. 44; *Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 374, para. 36; *Legality of Use of Force (Yugoslavia* v. *Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 433, para. 35; *Legality of Use of Force (Yugoslavia* v. *Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 492, para. 36; *Legality of Use of Force (Yugoslavia* v. *Netherlands), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 557, para. 48; *Legality of Use of Force (Yugoslavia* v. *Portugal), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 671, para. 47; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 773, para. 37; *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 839, para. 40; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 925, para. 31).

This also applies to the present case.

6. The present situation in Ukraine demands all efforts that will contribute to a peaceful resolution of the dispute between Ukraine and the Russian Federation. The present Order, to my regret, prejudges the merits of the case (see paragraphs 56-59 of the Order). Moreover, in the context of an armed conflict, one may wonder how those provisional measures can be meaningfully and effectively implemented by only one Party to the conflict. When the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen.

(Signed) XUE Hanqin.

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SEPARATE OPINION OF JUDGE ROBINSON

1. I voted in favour of the provisional measures ordered by the Court. In this opinion, I explain why I have supported the orders granted by the Court, and in particular the order requiring Russia to suspend its military operation in Ukraine.

2. The purpose of an indication of provisional measures is to preserve the respective rights claimed by the parties, pending the Court's decision on the merits of the claim. The Court's Order is wholly consistent with the law relating to the indication of such measures. In view of the fundamental importance attached to the purpose served by the indication of provisional measures, the law has developed so as not to impose high evidentiary requirements for the indication of such measures. To begin with, it is settled that the provisions relied upon by the applicant must appear, prima facie, to afford a basis on which the Court's jurisdiction may be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. It is also established that the Court's prima facie jurisdiction depends on a determination that the claims appear to be capable of falling within the provisions of the respective treaty[1]. In relation to the plausibility of rights, the Court's case law is that, at this stage of the proceedings, it need not determine definitively whether the rights for which protection is sought exist; it need only decide whether the rights claimed on the merits are plausible. Plausibility of a right depends on whether it is grounded in a possible interpretation of the convention[2]. Moreover, the more relaxed approach to the evidentiary requirements in the indication of provisional measures is evident from the frequent use of the word "appear" in provisional measures orders made by the Court, including the Court's Order in this case.

3. The central issues in this case are whether the Court has prima facie jurisdiction over the dispute brought by Ukraine and whether the rights for which Ukraine seeks protection are plausible.

THE COURT'S PRIMA FACIE JURISDICTION

4. The identification and characterization of the dispute is of cardinal importance in responding to Ukraine's request for the identification of provisional measures.

5. Case law of the International Court of Justice establishes three features in the process of identifying and characterizing a dispute. First, the Court examines how the parties themselves have identified and characterized the dispute, but in doing so it has particular regard to the applicant's characterization of the dispute[3]. However, and second, it is ultimately the responsibility of the Court to determine on an objective basis the dispute between the parties[4]. Third, it does that by "isolat[ing] the real issue in the case and . . . identify[ing] the object of the claim"[5]. A party's characterization of the dispute is therefore only a starting-point, and a dispute, properly characterized, may have more than one element, and indeed, a case may have more than one dispute.

6. Ukraine sees the dispute as having two elements. In its first element, Ukraine argues that a dispute exists as to whether, on the basis of Russia's allegations, Ukraine has breached its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter the "Genocide Convention" or the "1948 Convention"). In its second element, Ukraine sees the dispute as the question whether Russia has the right under the Genocide Convention to engage in the military action initiated against Ukraine on 24 February 2022. Russia, on the other hand, argues that the dispute has nothing to do with the Genocide Convention; rather, it maintains that the dispute relates to the use of force under customary international law. More specifically, Russia maintains that in carrying out a "special military operation" in Ukraine it is exercising its right of self-defence under Article 51 of the Charter of the United Nations.

The first element of the dispute

7. There is an abundance of evidence showing that Russia alleged breaches of the Genocide Convention by Ukraine and denials by Ukraine of those allegations. These allegations were either made expressly or arose by implication from the context in which they were made. Indeed, it is settled that there is no need for parties to refer to a particular treaty in order for a dispute to exist between them under that treaty, although it must be clear to the respondent that there is a dispute relating to the subject-matter of the treaty[6].

8. The Investigative Committee of the Russian Federation is an official Russian agency in charge of federal criminal prosecutions and reports directly to the President of the Russian Federation. The Investigative Committee opened an inquiry into "the genocide of the Russian-speaking population" living in the Luhansk and Donetsk oblasts. In September 2014, the Committee found that

> "during the period from 12 April 2014 to the present, in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, . . . the top political and military leadership of Ukraine, the Armed Forces of Ukraine, the National Guard of Ukraine and the 'Right Sector' gave orders to completely destroy specifically Russian-speaking population living on the territory of the Donetsk and Luhansk republics".

It may be observed that this finding has implications for the specific requirement in the Genocide Convention of an intent "to destroy, in whole . . ., a national, ethnic, racial or religious group" and obviously indicates that Russia's attention was focused on whether the purported acts of Ukraine fell under the Genocide Convention. In January 2015, the Committee found that acts carried out by the Ukrainian military constituted crimes under the 1948 Convention. In September 2017, the Committee announced criminal proceedings against 20 senior officials in Ukraine's Ministry of Defence in respect of orders that they issued to soldiers in violation of the Genocide Convention.

9. In November 2021, President Putin adopted a decree in respect of the territory in eastern Ukraine, which, according to the Russian Ambassador to the Contact Group for the settlement of the situation in eastern Ukraine, was a response to actions in Kyiv that "actually fall under the United Nations Convention on the Prevention of Genocide". On 18 February 2021, the Chairman of the Russian Parliament accused Ukraine of committing in eastern Ukraine "acts prohibited based on international accords", observing: "[I]f this is not genocide, then what is?" On 21 February 2022, President Putin, in relation to his decision to recognize the republics of Donetsk and Luhansk, referred to this "horror and genocide, which almost 4 million people are facing". In an address on 24 February 2022, President Putin stated: "the purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime". President Putin further stated that Russia intends to "de-Nazify Ukraine" and "bring to trial those who perpetrated numerous bloody crimes against civilians". On 25 February 2022, the Russian Foreign Minister stated that Russia's military actions "prevent[ed] the neo-Nazis and those who promote methods of genocide from ruling this country". Also on 25 February 2022, the Russian Ambassador to the European Union remarked that "[w]e can turn to the official term of genocide as coined in international law. If you read the definition, it fits pretty well." The three explicit statements by Russian officials concerning the Genocide Convention in 2014 and 2015, the beginning of the dispute between the two States, provide a basis for the inference that, by the subsequent references in 2021 and 2022 to "genocide", Russian officials meant genocide under the Genocide Convention.

10. On 23 February 2022, the Russian Ambassador to the United Nations, addressing Russia's recognition of the republics of Donetsk and Luhansk, pointed to "the flagrant genocide . . . of the 4 million people in the Donbass". In response, the Ukrainian Minister of Foreign Affairs stated, "Russia's accusations of Ukraine are absurd. Ukraine has never threatened or attacked anyone. Ukraine has never planned and does not plan any such action."

11. On 26 February 2022, the Minister for Foreign Affairs of Ukraine stated:

> "Ukraine strongly denies Russia's allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for unlawful aggression. The crime of genocide is defined in the Genocide Convention, and under that Convention Russia's claims are baseless and absurd. Russia's claims of genocide as justification for its lawless conduct are an insult to the Genocide Convention, and to the work of the international community in preventing and punishing the world's most serious crime."

12. The above-mentioned statements clearly reference a claim by Russia that Ukraine has committed acts that constitute genocide under the 1948 Genocide Convention and a denial by Ukraine of that claim. In its Application, Ukraine maintains that "[t]here is no factual basis for the existence of genocide in the Luhansk and Donetsk oblasts" and asks the Court to find that no acts of genocide as alleged by Russia were committed by Ukraine.

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Isolation of the real issue

13. In the circumstances of this case, it falls to the Court to determine on an objective basis the dispute between the Parties by "isolat[ing] the real issue in the case and . . . identify[ing] the object of the claim"[7]. The dispute between the Parties did not commence on 24 February 2022 when Russia sent its forces into Ukraine. Although the dispute may be traced to events before 2014 (including those following the break-up of the former Union of Soviet Socialist Republics ("USSR") and the emergence into independence of several States that were formerly part of the USSR), for the purposes of this case that date may serve as its origin. An objective examination of the statements of the Parties and their diplomatic exchanges from that date show that the real issue in the case is not the use of force, as argued by Russia. Rather, it is the allegation by Russia that Ukraine was carrying out acts that constituted genocide under the Genocide Convention and Ukraine's denial of that allegation. This conclusion is supported by the several investigations carried out by the Russian Investigative Committee in the period from 2014 to 2017 into alleged acts of genocide committed by Ukrainian officials against the Russian-speaking population in the Donetsk and Luhansk oblasts in breach of the Genocide Convention. A very significant investigation is that of September 2014 which found that Ukraine gave orders to "completely destroy" specifically Russian-speaking populations, a finding that directly relates to the intent requirement to establish genocide under Article II of the Genocide Convention. In light of Russia's assertion that it has the right to exercise universal jurisdiction on the basis of the Genocide Convention, the investigations carried out by the Investigative Committee led to the institution of criminal proceedings by Russia against Ukrainian officials for breaches of the Genocide Convention. It would be hard to have more conclusive evidence of a dispute between Russia and Ukraine than criminal proceedings initiated by Russia against Ukrainian officials for a breach of the Genocide Convention.

14. Russia's stated reliance on the right of self-defence under the Charter by the President on 24 February 2022 does not serve to define the dispute between the Parties as one relating to the use of force. The dispute between the Parties was defined eight years before by the several investigations carried out by Russia into alleged acts of genocide by Ukraine under the 1948 Convention. That the dispute relates to Russia's allegation of genocide is confirmed by the Russian President's statement that the purpose of the special military operation is to "protect people who have been subjected to abuse and genocide by the Kiev regime for eight years". Against the background of the criminal investigations, it is entirely reasonable to understand President Putin's reference to genocide as meaning genocide under the Genocide Convention, to which both States are parties. There is therefore evidence of a line of discourse between the Parties, over a period of eight years, in which Russia alleges Ukraine's breach of the Genocide Convention and Ukraine denies that allegation. This shows an opposition of views sufficient to constitute a dispute between Ukraine and Russia as to whether Ukraine has committed acts of genocide within the meaning of the Convention. In short, the dispute before the Court does not, as alleged by Russia, relate to the question of the use of force under customary international law.

15. The acts that Russia alleges to have been carried out by Ukraine include the killing of persons from the Russian-speaking population in the Donetsk and Luhansk oblasts, members of an ethnic group in Ukraine. These acts appear to be capable of falling within the provisions of Article II of the Genocide Convention, because that provision lists, as one of the acts constituting genocide, killing members of an ethnic group with intent to destroy in whole or in part that group.

16. In light of Russia's allegation that Ukraine has committed genocide against the Russian-speaking population in the Donetsk and Luhansk oblasts, in its Application, Ukraine requests the Court to find that it has not committed genocide. More usually, in its practice, the Court is called upon to exercise its jurisdiction in cases where the applicant maintains that the respondent has committed a breach under the relevant treaty. However, there is nothing in doctrine or practice that precludes the Court from having jurisdiction to find that an applicant has not committed a breach of a treaty, where that applicant has requested the Court to make such a finding.

17. In light of the foregoing, the Court has prima facie jurisdiction to entertain the dispute brought by Ukraine.

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The second element of the dispute

18. Ukraine argues that there is another aspect of the dispute that it has brought before the Court. Ukraine submits that there is a legal dispute between the Parties as to whether Russia may take military action in and against Ukraine to punish and prevent alleged acts of genocide within the meaning of Article I of the Convention. Russia maintains that the "special military operation" it is carrying out in Ukraine has nothing to do with the Genocide Convention; rather, it constitutes the exercise by a State of its right of self-defence under Article 51 of the Charter of the United Nations.

19. Although President Putin stated that the military operation was initiated "in accordance with Article 51 . . . of the Charter of the United Nations", he expressly noted that "[i]ts purpose is to protect people who have been subjected to . . . genocide by the Kiev regime for eight years". This makes clear that, notwithstanding the possible defensive aims of the special military operation, the operation has a clear protective aim; more specifically, it aims to protect against alleged acts of genocide committed by Ukraine which, as has already been shown, Russia considered to be contrary to Ukraine's obligations under Genocide Convention. In response to Russia's claim, the Ukrainian Ministry of Foreign Affairs issued a statement that Ukraine "strongly denies Russia's allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression". There is undoubtedly a question of the lawfulness of Russia's use of force within the framework of the United Nations Charter which arises in the context of a broader dispute between the Parties, but this does not preclude the Court from assuming jurisdiction with respect to the aspect of the dispute which properly falls within its jurisdiction under the Genocide Convention.

20. In its 2021 Judgement in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States)*, the Court ruled that the fact that certain acts committed by the United States may fall within the ambit of more than one instrument, or may relate to the interpretation or application of more than one treaty, did not preclude the Court from finding that those acts related to the interpretation or application of the Treaty of Amity to the extent that the measures adopted by the United States might constitute breaches of that Treaty[8]. In the circumstances of the present case, although Russia's "special military operation" may relate to the prohibition of the use of force and the right of self-defence provided for in Articles 2 (4) and 51 of the United Nations Charter respectively, that fact does not preclude the Court from finding that a dispute also arises from the initiation of the "special military operation" with respect to the Genocide Convention.

21. The difficulties attendant on situating cases involving the use of force by a State on the territory of another State within the framework of the Genocide Convention have previously arisen in the Court's jurisprudence. In the *Legality of Use of Force* cases, as in the present case, Yugoslavia sought to found the jurisdiction of the Court on Article IX of the 1948 Genocide Convention. In the cases brought against Spain and the United States, the Court concluded, with respect to its jurisdiction under Article IX of the Genocide Convention, that

> "Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and [the respondent] alleged to fall within its provisions . . . that Article manifestly does not constitute a basis of jurisdiction in the present case, even prima facie"[9].

The Court further observed that

"the Court manifestly lacks jurisdiction to entertain Yugoslavia's Application . . . it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein;

. . . . . there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties"[10].

22. For the purposes of the present case, it is critical to understand that the Court's finding that it manifestly lacked jurisdiction under Article IX of the Genocide Convention was not at all related to the action that formed the basis of the claims, that is, the use of force by the respondent States. Having found that its Statute and Rules could not afford a basis for jurisdiction, the Court examined Article IX of the Genocide Convention as a basis for resolving the dispute

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between the States. It found, however, that both Spain and the United States had made reservations to Article IX, which had the effect of excluding the jurisdiction of the Court in the cases before it[11]. These cases are, therefore, distinguishable from the present case because the Court does not manifestly lack jurisdiction over Ukraine's claims. Both Ukraine and Russia are parties to the Genocide Convention and neither State has entered a reservation to Article IX of the Convention. Thus, the Court is not facing a situation of manifest lack of jurisdiction; rather, in determining its prima facie jurisdiction, the question before the Court is whether Ukraine's claims are capable of falling within the provisions of the Genocide Convention.

23. In the cases brought against the other eight States, there being no basis for a manifest lack of jurisdiction under Article IX of the Genocide Convention, the Court went on to consider whether it had prima facie jurisdiction under that provision to grant the measures requested by Yugoslavia against each of those States.

24. In its Application, Yugoslavia defined the subject-matter of the dispute as "acts of [the respondent] by which it has violated its international obligation banning the use of force against another State", as well as other norms of international humanitarian and international human rights law, and "the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group"[12]. Yugoslavia requested that the Court adjudge and declare that each respondent State "has acted . . . in breach of its obligation not to use force against another State", in breach of various standards of international humanitarian and international human rights law, and "in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part"[13]. In its Request for the indication of provisional measures, Yugoslavia asked the Court to order that each State "shall cease immediately the acts of use of force and shall refrain from any act or threat or use of force against the Federal Republic of Yugoslavia"[14]. With respect to its jurisdiction under Article IX of the Genocide Convention, the Court concluded that it was not in a position to find, in the absence of evidence as to an intention to destroy a national group, "that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention"[15]. The Court found that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention"[16]. In the present case, however, Ukraine has not put before the Court a general question of the legality of Russia's use of force. Instead, it has asked the Court to "[a]djudge and declare that the 'special military operation' declared and carried out by the Russian Federation . . . is based on a false claim of genocide and therefore has no basis in the Genocide Convention".

25. In justifying its "special military operation" in Ukraine, Russia expressly stated that the purpose of the operation is "to stop . . . [the] genocide of the millions of people" in the Donetsk and Luhansk oblasts, and "to protect people who have been subjected to abuse and genocide by the Kiev regime". It is this express purpose which brings the dispute within the terms of the Genocide Convention, and specifically Article I, which imposes on States parties an obligation "to prevent and to punish" genocide. There is, therefore, a live issue in the present case as to whether Russia can use of force to prevent and to punish alleged genocide. As such, in describing the subject-matter of the dispute, Ukraine submits that the parties hold opposing views on "whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to 'prevent and to punish'. . . alleged genocide". The fact that the acts of which Ukraine complains constitute a use of force by the Russian Federation does not mean that those acts are incapable of amounting to breaches of the Genocide Convention.

26. In using force, Russia has purported to act to prevent alleged genocide by Ukraine. Ukraine, on the other hand, asserts that Russia "had no right under the Convention to engage in the military action initiated on 24 February 2022". In doing so, Ukraine argues, Russia has acted contrary to Article I of the Genocide Convention. There is, therefore, a dispute between the States as to whether Russia could employ the use of force in and against Ukraine to protect persons from alleged genocide. However, while the breach of the Convention alleged by Ukraine need not be established at this stage, it must be demonstrated that the acts complained of appear to be "capable of falling with the provisions of that instrument"[17].

27. Ukraine submits that the duty to prevent genocide provided for in Article I of the Genocide Convention is limited in scope. More specifically, it submits that Article VIII of the Convention "anchors the duty to prevent and punish genocide in the principles of international law reflected in the Charter of the United Nations". In its merits Judgment in the *Bosnia Genocide* case, the Court found that Article I of the Genocide Convention imposes an obligation on

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States parties to "employ all means reasonably available to them, so as to prevent genocide so far as possible"[18]. It is reasonable to conclude that it was in the exercise of this duty that the Russian Federation acted in initiating a military campaign in Ukraine. The Court further noted that, in carrying out the duty to prevent, a State party "may only act within the limits permitted by international law"[19]. Therefore, Article I of the Genocide Convention imposes an obligation on Russia not only to act to prevent genocide, but to act *within the limits permitted by international law* to prevent genocide.

28. The preamble to the Genocide Convention states that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world". In that regard, it is noted that Article 1 of the United Nations Charter describes the purposes of the United Nations as including "bring[ing] about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". Reliance on the preamble to the Genocide Convention is in order because, in terms of Article 31 of the Vienna Convention on the Law of Treaties, the preamble is a part of the context in which a treaty must be interpreted. The Genocide Convention also provides, by its Article VIII, that it is open to States parties to call upon the competent organs of the United Nations to take appropriate action to prevent and suppress genocide. Equally significant is Article IX which provides that disputes relating to the interpretation, application or fulfilment of the Convention are to be brought before the Court. These are therefore means for the resolution of disputes that the Convention provides. These means would of course have been open to Russia as alternatives to the military action that it commenced in Ukraine on 24 February 2022.

29. The Court, in its *Nicaragua* v. *United States* Judgment, noted that the protection of human rights under international conventions "takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves"[20]. Article VIII therefore may be seen as an indication of the kind of action that a Contracting Party may take for monitoring or ensuring respect for the human rights provided for in the Genocide Convention. The Court also expressed the view that "while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect"[21]. By the same token, while Russia may form its own appraisal as to the situation relating to the respect of the human rights of persons of Russian ethnicity in the Donetsk and Luhansk oblasts, in light of the object and purpose of the Genocide Convention and the circumstances of its conclusion, the use of force would not appear to be the appropriate method to monitor or ensure such respect. It is therefore possible to interpret the duty under Article I to prevent and punish genocide as precluding the force used by Russia in its "special military operation" in Ukraine.

30. In view of the relatively low evidentiary threshold applicable at this stage of the proceedings, it can be concluded that the breach of the Genocide Convention alleged by Ukraine, that is, that Russia has acted contrary to Article I of the Convention in initiating a military campaign with the aim of preventing genocide, appears to be capable of falling within the provisions of that instrument. As such, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX of the Convention.

APPROPRIATENESS OF THE MEASURES REQUESTED

31. Since Ukraine's right not to have force used against it by Russia as a means of preventing the alleged genocide in Ukraine is grounded in a possible interpretation of the Convention, that right is plausible. The evidence before the Court shows that there have been numerous casualties resulting from the military intervention as well as bombing of numerous cities across Ukraine, and that over one and a half million persons have fled Ukraine to escape the atrocities. Consequently, given the patent irreparable harm caused by the "special military operation" and the urgent need for the measures, it is appropriate for the Court to grant Ukraine's request for an order requiring Russia to suspend its special military operation in Ukraine until such time as the Court has determined the merits of the case.

32. It is critical to note that the fact that the military operation by Russia appears to be capable of falling within the Convention as being in breach of Article I, has no implication for Russia's claimed right of self-defence. The right of self-defence recognized in Article 51 is inherent in every State and cannot be overridden by any pronouncement the Court may make as to the consistency of Russia's military operation with the Genocide Convention.

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33. Special comments are warranted in relation to the third and fourth provisional measures requested by Ukraine. The third measure ordered by the Court calls on both Parties to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. In my view, there is no justification for directing this measure to Ukraine. It should have been directed solely to the Russian Federation. Nonetheless, the formulation of the measure called for an affirmative vote in order to ensure that there would be a non-aggravation measure that would be applicable to the Russian Federation. Ukraine also requested as a fourth provisional measure that the Court should order the Russian Federation to "provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such order and then on a regular basis to be fixed by the Court". The Court did not grant this request. In my view, this decision is regrettable, since in light of the very grave situation in Ukraine caused by the "special military operation", it would have been advantageous for the Court to examine periodic reports by Russia on its implementation of the provisional measures and to make appropriate orders.

(Signed) Patrick L. ROBINSON.

ENDNOTES

1 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1159, para. 47.

2 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, ICJ Reports 2009*, p. 152, para. 60.

3 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30.

4 *Ibid.,* para. 30.

5 *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30.

6 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30.

7 *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30.

8 *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. 27, para. 56.

9 *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 772, para. 33.

10 *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 773, paras. 35-36.

11 *Ibid.*, p. 772, paras. 29, 32-33.

12 *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 125, para. 1.

13 *Ibid.*, pp. 126-127, para. 4.

14 *Ibid.*, p. 131, para. 15.

15 *Ibid.*, p. 138, para. 41.

16 *Ibid.*, para. 40.

17 *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 38.

18 *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. 221, para. 430.

19 *Ibid.*

20 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 134, para. 267.

21 *Ibid.*, p. 134, para. 268.

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DECLARATION OF JUDGE NOLTE

Jurisdiction prima facie under Article IX of the Genocide Convention — Difference between the present case and the Legality of Use of Force *cases — Subject-matter of the Application of Ukraine does not pertain to the question whether the military operation by Russia amounts to genocide — Subject-matter of the Application concerns the question whether a military operation undertaken to prevent and punish an alleged genocide is in conformity with the Genocide Convention.*

1. I agree with this Order. I write separately to underline one particular point. In the present case the Court has found that it has prima facie jurisdiction under Article IX of the Genocide Convention to order the suspension of military operations by way of a provisional measure. This decision is consistent with earlier decisions in which the Court found that it lacked such prima facie jurisdiction.

2. In 1999, the Federal Republic of Yugoslavia requested that the Court order the cessation of acts of use of force by certain member States of NATO (see e.g. *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp. 128-129, para. 7 and p. 131, para. 15). In those cases, however, neither the applicant State nor the respondent States stated before the Court that the use of force by the respondent States had the purpose of preventing an alleged genocide. In the present case, in contrast, the Russian Federation has made allegations that Ukraine is committing genocide and has affirmed that its "special military operation" serves the purpose of preventing genocide.

3. The earlier cases concerned an allegation by the requesting State that the States conducting the military operations were committing genocide by their use of force (*ibid*., pp. 136-137, para. 35). The Court held that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention" (*ibid*., p. 138, para. 40). Since it appeared, at that stage of the proceedings, that the military operations concerned did not entail genocidal intent, the Court was "not in a position to find . . . that the acts imputed . . . to the Respondent are capable of coming within the provisions of the Genocide Convention" (*ibid*., p. 138, para. 41). Accordingly, the Court found that Article IX cannot "constitute a basis on which the jurisdiction of the Court could prima facie be founded" *(ibid.)*.

4. Thus, in the earlier cases the applicant did not show that its request concerned acts of the respondent States that were "capable of coming within the provisions of the Genocide Convention", whereas in the present case, the Applicant has demonstrated that the Respondent acted in a way "that is capable of coming within the provisions of the Genocide Convention" by making allegations that genocide is being committed by Ukraine and by undertaking a "special military operation" with the stated purpose of preventing genocide.

5. The subject-matter of the Application by the Federal Republic of Yugoslavia in 1999 was whether the use of force by the intervening States amounted to "genocide". In contrast, in the present case, the subject-matter of the Application concerns the question whether the allegations of genocide and the military operations undertaken with the stated purpose of preventing and punishing genocide are in conformity with the Genocide Convention.

6. It is true that, in 1999, certain respondent States came close to justifying their use of force by stating that their actions were taken with the intent to prevent genocide (see *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, dissenting opinion of Vice-President Weeramantry, p. 184) and that certain of their officials made allegations of genocide in that context. However, such justifications were not the stated purpose of the military operations by the respondent States, nor was that purpose so perceived by the applicant State. That aspect was therefore not the subject-matter of the earlier cases before the Court.

7. In my view, the differences between the present case and the earlier cases are clear and sufficiently significant to justify that the Court has, in the present case, found prima facie jurisdiction based on Article IX of the Genocide Convention, which it did not in the earlier cases.

(Signed) Georg NOLTE.

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DECLARATION OF JUDGE *AD HOC* DAUDET

1. I deeply regret that operative paragraph 3 of the Order, concerning the obligation to refrain from any act that might aggravate or extend the dispute, is addressed to Ukraine as well as to the Russian Federation. In my view, this measure of non-aggravation of the dispute should have been directed solely at the Russian Federation, which I recall was designated by the United Nations General Assembly[1] as the perpetrator of aggression against Ukraine.

2. *Volens nolens,* however, I found myself obliged to vote in favour of this measure addressed to both Parties. Indeed, to vote in the negative in order to spare Ukraine would at the same time have exonerated the Russian Federation, which would have been the worst solution. But I would like to make it clear here that this vote, as far as Ukraine is concerned, is in my view meaningless.

3. Indeed, it is going against the evidence to think that Ukraine is likely to "aggravate" the conflict, when the reality shows that the Russian Federation alone is constantly amplifying military operations and making them more painful and tragic every day for a growing number of Ukrainians. The heroic defence of Ukrainians, both military and civilian, is taking place in a totally unbalanced way, in an unequal conflict marked by numerous and profound violations of international law and humanitarian law attributable to one side — the Russian Federation — which has military means of which the other side — Ukraine — is deprived, so that the possibilities of aggravation can only come from the former. In the current conflict, it is clear that the obvious escalation of the conflict, as it is developing day by day, is largely (but not only) due to the control of the skies by the Russian air force, which can bomb any target it decides to attack in more and more parts of Ukraine.

4. Ukraine is under bombardment and can only fight a defensive war and resist as best it can against an attack by the world's second largest army. If the Russian military operation is not going as smoothly as President Putin had hoped, it is certainly not because the Ukrainians are escalating the conflict, nor because they are in danger of doing so, but simply because they are showing a courage and determination that is admired the world over. I hope that they will not regard the Court's position as a form of insult to their courage, which it clearly does not intend to be.

5. Finally, it should be recalled that more and more victims are to be deplored among the civilian population, among women and children, victims of the unspeakable cruelty of a Head of State whose designs violate the most elementary principles of humanity and civilization.

6. It therefore goes against all logic to enjoin the Ukrainians not to aggravate the dispute, since their dearest wish is that it should cease, that the women and children who have had to flee should be able to return to a country at peace and be reunited with their husbands and fathers who have gone to war. They also want to live in a régime of freedom and democracy, which the perpetrator of the aggression would deprive them of. They want peace and their State has turned to the Court to obtain it through international law.

7. If there is therefore one Party to the dispute, and only one, towards which non-aggravation measures make sense, it is the Russian Federation and only it. The Court was perfectly entitled to decide in this sense, since there is no rule that requires this kind of balance between the parties, which would make it necessary to address both of them at the same time in order to enjoin them to respect the same measure, even if it is its usual practice to do so.

8. Having made this reservation with regard to one element of this third provisional measure decided by the Court, I wish to emphasize that I have agreed in full with the reasons for the Order. Indeed, I considered that the Court, at the stage of provisional measures and under the legal basis — the Convention on the Prevention and Punishment of the Crime of Genocide — chosen by the Applicant, had succeeded in the difficult exercise of fully respecting the limits and requirements of the provisional measures procedure, while at the same time satisfying to the best of its ability Ukraine's requests for the suspension of military operations and for the other guarantees it sought.

9. Public opinion was informed by the media of Ukraine's referral to the Court and many people placed their hopes in the voice of international law that the World Court would carry. I believe that this Order will meet their legitimate expectations.

10. To this hope, I would add a wish: President Putin cannot be reproached for willingly referring to Russian history and sometimes to the period of the Empire. I hope that he will remember the initiative of Tsar Nicholas II in convening the first Peace Conference in The Hague in 1899, which was the cornerstone of the construction of a world order for peace and the peaceful settlement of disputes.

(Signed) Yves DAUDET.

ENDNOTES

1 United Nations, General Assembly, resolution A/RES/ES-11/1, 2 March 2022.

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