



# INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [Twitter Account](#) [YouTube](#) [LinkedIn](#)

## Summary

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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**

The Court begins by recalling that, on 23 September 2021, Azerbaijan filed in the Registry of the Court an Application instituting proceedings against 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”). In its Application, Azerbaijan contends that Armenia has engaged and is continuing to engage “in a series of discriminatory acts against Azerbaijanis on the basis of their ‘national or ethnic’ origin within the meaning of CERD”. In particular, the Applicant claims that “Armenia’s policies and conduct of ethnic cleansing, cultural erasure and fomenting of hatred against Azerbaijanis systematically infringe the rights and freedoms of Azerbaijanis, as well as Azerbaijan’s own rights, in violation of CERD”. The Application was accompanied by a Request for the indication of provisional measures seeking to protect the rights invoked by Azerbaijan “against the harm caused by Armenia’s ongoing unlawful conduct”, pending the Court’s final decision in the case.

#### **I. INTRODUCTION (PARAS. 13–14)**

The Court sets out the general historical background to the dispute. It recalls in this regard that 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 (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”. Noting that the differences between the Parties are longstanding and wide-ranging, the Court points out however that the Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present proceedings, and that the scope of the case is therefore circumscribed by that Convention.

## II. PRIMA FACIE JURISDICTION (PARAS. 15-40)

### 1. General observations (paras. 15-18)

The Court recalls that, pursuant to its jurisprudence, it 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 that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. 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. 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.

The Court notes that Azerbaijan and Armenia are both parties to CERD and that 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 (paras. 19-28)

The Court recalls that 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. 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.

The Court observes 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. 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.

The Court notes that Azerbaijan argues that Armenia has acted and continues to act in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD and asserts that Armenia bears responsibility, *inter alia*, for engaging in practices of ethnic cleansing. Azerbaijan specifically alleges that following the 2020 Conflict Armenia prevented the return of displaced 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. Azerbaijan also asserts that Armenia is responsible 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”; 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.

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, while Armenia has denied that it has committed any of the alleged violations and that the acts complained of fall within the scope of CERD. The Court observes that 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. For the Court, the divergence of views is further demonstrated by subsequent exchanges between the Parties. For the purposes of the present proceedings, the Court recalls that it 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.

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 (paras. 29–39)**

Turning to the procedural preconditions set out in Article 22 of CERD, the Court observes that, under that Article, 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 recalls in that regard that it has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court. The Court further recalls that it has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative. 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. 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 in this respect that neither Party contends that they have agreed to another mode of settlement. Thus, 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.

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".

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.

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. In the view of the Court, 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.

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 (para. 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 (PARAS. 41–58)**

In considering the rights whose protection is sought, the Court observes that 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.

The Court adds, however, that, at this stage of the proceedings, it 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.

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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. It further notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination and 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.

The Court further recalls that 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. 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.

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. 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.

The Court then 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.

The Court is of the view that a link exists between one of the measures requested by Azerbaijan 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.

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 (PARAS. 59–67)**

The Court recalls that, pursuant to Article 41 of its Statute, it 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. 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. The Court must therefore consider whether such a risk exists at this stage of the proceedings. 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.

The Court then considers whether irreparable prejudice could be caused to those rights which it found to be plausible 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.

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. 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.

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.

In light of these considerations, the Court concludes that the alleged disregard of the rights deemed plausible by the Court 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 (PARAS. 68–75)**

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. 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.

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. The Court considers that 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.

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. In the present case, having considered all the circumstances, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute. With regard to Azerbaijan's request that the Court 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 considers that, in the particular circumstances of the case, these measures are not warranted.

**VI. OPERATIVE PARAGRAPH (PARA. 76)**

The full text of the final paragraph of the Order reads as follows:

“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.”

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

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**Declaration of Judge Iwasawa**

Judge Iwasawa observes that, in accordance with Article 4 of CERD, measures designed to eradicate incitement to racial hatred must be adopted “with due regard to the principles of the Universal Declaration of Human Rights”, including freedom of expression. The exercise of the right to freedom of expression may be subject to certain restrictions. The restrictions are, however, only permitted under specific conditions. Measures designed to eradicate incitement to racial hatred must meet those conditions.

The Parties to the present case were twice engaged in large-scale hostilities against each other in their recent history. Judge Iwasawa emphasizes that it is in these circumstances that the Court indicates that Armenia shall take all necessary measures to prevent the incitement and promotion of racial hatred targeted at people of Azerbaijani national or ethnic origin.

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