

INTERNATIONAL COURT OF JUSTICE

**INTERPRETATION AND APPLICATION OF THE
INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION**

**(REPUBLIC OF ARMENIA *v.*
REPUBLIC OF AZERBAIJAN)**

**PRELIMINARY OBJECTIONS OF
THE REPUBLIC OF AZERBAIJAN**



VOLUME I

21 APRIL 2023

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I. INTRODUCTION

1. On 16 September 2021, the Republic of Armenia (“*Armenia*”) submitted to the Court its Application Instituting Proceedings Containing a Request for Provisional Measures (the “*Application*”), purporting to invoke the Court’s jurisdiction pursuant to Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (“*CERD*”). Armenia subsequently submitted its Memorial to the Court on 23 January 2023. In accordance with Article 79*bis* of the Rules of Court, the Republic of Azerbaijan (“*Azerbaijan*”) hereby submits preliminary objections to the jurisdiction of the Court. Azerbaijan requests that the Court decide these objections before any further proceedings on the merits.

2. Armenia purports to found the Court’s jurisdiction on the compromissory clause in Article 22 of CERD, which allows a party to refer to the Court any dispute “with respect to the interpretation or application of the Convention” which “is not settled by negotiation”. Armenia, however, has failed to satisfy each of the two relevant requirements of Article 22. *First*, Armenia did not make good-faith efforts to resolve the dispute through negotiation before filing its Application. *Second*, the subject matter of many of the claims raised by Armenia concerns alleged conduct in wartime governed by international humanitarian law (“*IHL*”) that fall outside the scope of CERD.

3. As to the first point, rather than seek a negotiated resolution, Armenia abruptly broke off negotiations after just two meetings on the substance of the dispute. After the parties had spent over six months negotiating only the procedural modalities and schedule between December 2020 and July 2021 to build a solid foundation for their first bilateral negotiations in nearly 30 years, Armenia presented its claims in a first meeting on 15–16 July 2021. At the second

meeting on 30–31 August 2021, Azerbaijan presented its responses and proposed 13 concrete actions that the parties could take to begin to address their dispute. Those proposed actions would have fully resolved many of the issues that Armenia later raised in its original request for provisional measures or in its Application on the merits. But rather than respond to Azerbaijan’s proposal or offer a counterproposal of its own, Armenia simply declared unilaterally at a meeting on 15 September 2021 that negotiations were at an impasse and, the very next day, filed its Application with the Court.

4. Armenia’s refusal to respond to Azerbaijan’s proposals or to continue discussions makes clear that Armenia was never serious about settling the dispute through negotiations. Armenia rushed to file its Application and then falsely depicted Azerbaijan’s own claims of racial discrimination filed a week later¹ as a “mirroring” tactic². In this way, Armenia’s stratagem sought to distract public attention from Armenia’s methodical ethnic cleansing and discrimination against Azerbaijanis during its decades-long illegal military occupation, by dismissing Azerbaijan’s claims as a litigation tactic. Since that time, Armenia has continued to eschew discussions with Azerbaijan that could achieve actual solutions to the parties’ disputes, instead preferring an aggressive political and media offensive to air its complaints before the public while leaving the parties’ disputes unresolved.

5. The Court has made clear that a mere exchange of views is not sufficient to satisfy Article 22. Rather, Article 22 requires a “genuine attempt . . . to engage

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Application Instituting Proceedings filed 23 September 2021) (hereinafter “*Azerbaijan’s Application*”).

² CR 2021/25, p. 12, para. 3 (Kirakosyan).

in discussions . . . with a view to resolving the dispute.”³ Because Armenia never made such a genuine attempt, instead cutting off discussions as soon as the parties had set out their respective positions on the substance of the claims, Armenia has not satisfied the preconditions for bringing a claim before the Court under Article 22. Accordingly, the Court lacks jurisdiction of any of Armenia’s claims.

6. Turning to the second point, the Court also lacks jurisdiction of many of Armenia’s claims on the independent basis that they do not concern CERD at all, but are instead complaints of conduct that would, if proven, constitute alleged violations of IHL. Armenia’s invasion of Azerbaijan, followed by its nearly 30-year military occupation, was undoubtedly ethnically motivated, as Armenia was carrying out a campaign to create an ethnically pure Armenian area within Azerbaijan’s internationally recognized territory. But it does not follow that all instances of misconduct in an armed conflict between Armenia and Azerbaijan fall within the subject matter of CERD. Azerbaijan has been careful to confine its complaints, in the *Azerbaijan v. Armenia* case, to those that properly engage CERD. Armenia, in this case, has not.

7. A primary object of Armenia’s Memorial is to raise claims of misconduct during armed conflict by members of Azerbaijan’s armed forces, which Armenia alleges occurred mostly during the active hostilities that took place in 2016 and over approximately six weeks in late 2020, when Azerbaijan exercised its legitimate right of self-defense under international law to oust a foreign aggressor from its sovereign territory (the “*Second Garabagh War*”). Armenia dedicates around 130 pages in Parts III and IV of its Memorial to allegations of

³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 132, para. 157.

mistreatment of soldiers and civilians, attacks on civilians, wrongful detentions, and enforced disappearances occurring during active hostilities in 2016 or during the Second Garabagh War or subsequent skirmishes, which the Court has characterized as a continuation of that conflict⁴, as well as a handful of alleged wrongful detentions during Armenia’s nearly 30-year military occupation of Azerbaijan’s territory. Armenia, however, offers no sound basis for linking these claims to discrimination “based on” ethnic origin⁵ as required by Article 1(1) of CERD.

8. Azerbaijan does not, in these Preliminary Objections, ask the Court to evaluate the strength or weakness of Armenia’s evidence on the merits. Rather, Azerbaijan objects to Armenia’s legal mischaracterization of certain of its claims as involving questions of “racial discrimination”. On their face, the allegations in question, concerning hostilities between two States engaged in armed conflict, potentially raise questions under IHL, but not under CERD. To be sure, CERD applies in armed conflict as well as in peacetime, and acts of war may implicate CERD if they impair the fundamental rights of individuals or groups of individuals based on their ethnic origin or other grounds enumerated in Article 1(1) of CERD. But the mere fact that the peoples of two States at war often are primarily of different ethnic origins does not, without more, transform every act of war into a distinction “based on” ethnic origin. Allowing Armenia to proceed

⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order on the Request for the Modification of the Order of 7 December 2021 Indicating Provisional Measures of 12 October 2022, I.C.J. Reports 2022*, p. 5, para. 18.

⁵ In its Memorial, Armenia asserts only claims of discrimination based on ethnic origin under the International Convention on the Elimination of All Forms of Racial Discrimination (“*CERD*”) and Azerbaijan accordingly addresses Armenia’s claims in those terms. See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Armenia’s Memorial filed 23 January 2023), p. 4, para 1.8; p. 9, para. 1.23; *ibid.*, pp. 750–753 (hereinafter “*Armenia’s Memorial*”).

with these claims would only encourage other States to frame all kinds of alleged unrelated grievances as claims of racial discrimination in order to bring them before the Court under Article 22 of CERD.

9. To try to force its claims into the jurisdictional framework of CERD, Armenia points to unrelated statements by Azerbaijani public officials and other individuals that it says reflect generalized “anti-Armenian” sentiment in Azerbaijan, and then refers back to such alleged hostility to try to recast its claims of misconduct during active hostilities as racial discrimination⁶. Should the case proceed to the merits, Azerbaijan will explain at that stage that these statements do not constitute promotion of ethnic hatred or discrimination implicating CERD; indeed, many of the statements, on their face, are criticism of the *Armenian government and military* in the context of war and almost 30 years of military occupation, and have nothing to do with Armenians as an ethnic group. For the purposes of these Preliminary Objections, however, the decisive point is that the alleged expressions of hostility have no connection to the alleged conduct of which Armenia complains. The presence of generalized racially prejudiced sentiment, even if Armenia could prove it, does not suffice to bring every claim of alleged wartime misconduct within the subject matter of CERD.

10. Azerbaijan wishes to emphasize that it does not excuse violations of IHL, and it remains committed to investigating—and where appropriate, prosecuting—any credible allegations of war crimes committed within its jurisdiction. But claims of misconduct in armed conflict, in the absence of grounds for claiming different treatment on the basis of ethnic origin, do not fall within the category of

⁶ See, e.g., Armenia’s Memorial, Part III.1.I; *ibid.*, p. 65, para. 3.4; *ibid.*, p. 82, para. 3.33; *ibid.*, Part III.2.I; *ibid.*, p. 210, para. 3.217; *ibid.*, pp. 215–216, para. 3.223; *ibid.*, Part III.3.II; *ibid.*, Part IV.2.II.

disputes that States parties agreed to submit to the Court under Article 22 of CERD. These claims raise no issues of interpretation and application of CERD, and Armenia's theory of unrelated general "anti-Armenian" sentiment does not transform its claims of conduct governed by IHL into CERD claims. Those claims are therefore beyond the Court's jurisdiction under CERD.

*

11. Part II of these Preliminary Objections, below, demonstrates that Armenia failed to meet the precondition of negotiations as required by Article 22 of CERD.

12. Part III of these Preliminary Objections, below, demonstrates that each of the claims within Part VI, Chapter 3, Sections I, III and IV of Armenia's Memorial falls outside the subject matter encompassed by Article 22 of CERD.

13. For each of these two independent reasons, as detailed in Azerbaijan's Submissions in Part IV below, Azerbaijan respectfully requests that the Court:

- a) dismiss Armenia's Application in its entirety for Armenia's failure to engage in genuine negotiations; or
- b) dismiss all of the claims in Part VI, Chapter 3, Sections I, III and IV, of Armenia's Memorial for lack of jurisdiction *ratione materiae*.

II.
**THE COURT LACKS JURISDICTION UNDER ARTICLE 22 OF CERD
 BECAUSE ARMENIA MADE NO GENUINE ATTEMPT TO SETTLE
 THE DISPUTE THROUGH NEGOTIATIONS**

14. Article 22 of CERD provides:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, *which is not settled by negotiation* or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”⁷

The Court has repeatedly observed that to satisfy the precondition of negotiation a party may refer a dispute under CERD to the Court only after it has made a genuine attempt to engage in discussions with the other disputing party, with a view to resolving the dispute⁸. The Court, moreover, has stated on several occasions that the negotiation precondition is not a superficial box-ticking exercise: “negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and

⁷ CERD, art. 22 (emphasis added). The two preconditions set out in Article 22—“negotiation” or “procedures expressly provided for in this Convention”—are alternative. See *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 of 8 November 2019, I.C.J. Reports 2019*, p. 600, para. 113.

⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 132, para. 157; *Application of the International Convention for the Suppression of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 602, para. 117; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, pp. 445–446, para. 57.

rebuttals, or even the exchange of claims and directly opposed counter-claims”⁹. To satisfy Article 22’s precondition, a party must make “a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute”¹⁰.

15. Armenia has failed to satisfy this precondition because it did not seriously engage with Azerbaijan with a view to resolving the dispute. In fact, Armenia broke off negotiations after just two substantive meetings: one on 15–16 July 2021 for Armenia to present its claims, and one on 30–31 August 2021 for Azerbaijan to respond. At that point, there had been effectively only an exchange of views between the parties and no real effort at negotiations on Armenia’s part.

16. Armenia will no doubt cite the large number of letters exchanged between the parties—principally in negotiating the *procedure* for their expected substantive discussions—but the quantity of communications is not an indication of good-

⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 132, para. 157; *Application of the International Convention for the Suppression of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, pp. 601–602, para. 116. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Order on Provisional Measures of 23 July 2018, I.C.J. Reports 2018*, pp. 419–420, para. 36 (“Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked.”); *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, pp. 445–446, paras. 57–59 (finding that despite “[s]everal exchanges of correspondence and various meetings” between the Parties, “[t]he fact that . . . their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute.”)

¹⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 132, para. 157.

faith engagement. Armenia first notified Azerbaijan of a potential dispute under CERD on 11 November 2020 in a two-page note that summarily listed Armenia's allegations¹¹. Azerbaijan responded promptly on 8 December 2020¹². The parties then proceeded to negotiate the procedural modalities and schedule for their upcoming substantive negotiations *for over six months*, through an extensive exchange of correspondence in the course of late December 2020 to July 2021¹³. In this specific context, agreeing on negotiation procedures was a critical confidence-building measure, as the CERD negotiations would mark the first time Azerbaijan and Armenia met bilaterally, without a mediator, in nearly 30 years.

17. After the parties had agreed on the process, substantive negotiations commenced in July 2021, but Armenia never allowed those negotiations to progress. Armenia presented its claims and requests for remedies during virtual meetings on 15–16 July 2021, and Azerbaijan presented its responses during virtual meetings on 30–31 August 2021¹⁴. Even though the parties' discussions of the substance of the claims were still at a very early stage, as part of its response Azerbaijan presented Armenia with a list of 13 concrete actions that it proposed

¹¹ **Annex 1**, Letter from Zohrab Mnatsakanyan, Minister of Foreign Affairs of the Republic of Armenia, to Jeyhun Bayramov, Minister of Foreign Affairs of the Republic of Azerbaijan dated 11 November 2020.

¹² **Annex 2**, Letter from Jeyhun Bayramov, Minister of Foreign Affairs of the Republic of Azerbaijan, to Ara Aivazian, Minister of Foreign Affairs of the Republic of Armenia, dated 8 December 2020, No. 0540/27/2022.

¹³ **Annexes 3–42**, correspondence between Armenia and Azerbaijan concerning procedures and schedule for negotiation, dated 22 December 2020 to 14 July 2021.

¹⁴ **Annex 43**, Note Verbale from the Permanent Mission of the Republic of Azerbaijan to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Republic of Armenia to the United Nations Office and other International Organizations in Geneva, dated 2 September 2021, No. 0432/27/21/25.

the parties take jointly, as a starting point for further discussions¹⁵. Armenia did not respond in writing, and instead of engaging with Azerbaijan's proposals, Armenia rejected them out of hand in a meeting on 14–15 September 2021. Armenia made no counterproposals of its own and unilaterally declared that the negotiations were at an end¹⁶. On the morning of the next day, Armenia filed with the Court its Application and first Request for Provisional Measures, prematurely claiming that the negotiations had run their course and that any further discussions would be futile¹⁷.

18. As the timeline makes clear, negotiations were not at an impasse, contrary to what Armenia has asserted. Negotiations on the substantive issues had barely begun, and Azerbaijan had just made constructive proposals that demonstrated a willingness to accommodate many of Armenia's requests, and to which Armenia never responded. Instead, Armenia rushed to the Court to file its Application and Request Provisional Measures. Significantly, Armenia's request for provisional

¹⁵ **Annex 43**, Note Verbale from the Permanent Mission of the Republic of Azerbaijan to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Republic of Armenia to the United Nations Office and other International Organizations in Geneva, dated 2 September 2021, No. 0432/27/21/25; **Annex 45**, Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elnur Mammadov, Deputy Minister of Foreign Affairs, dated 9 October 2021, No. 0612/04/21/01.

¹⁶ **Annex 43**, Note Verbale from the Permanent Mission of the Republic of Azerbaijan to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of the Republic of Armenia to the United Nations Office and other International Organizations in Geneva, dated 2 September 2021, No. 0432/27/21/25; **Annex 45**, Letter from Vaqif Sadiqov, Head of Delegation of the Republic of Azerbaijan for negotiations under CERD, to Elnur Mammadov, Deputy Minister of Foreign Affairs, dated 9 October 2021, No. 0612/04/21/01.

¹⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Application Instituting Proceedings and Request for Provisional Measures filed 16 September 2021), p. 10, para. 17 (“The Parties have been unable to settle this dispute through negotiations or by the procedures expressly provided for in the CERD.”) (hereinafter “*Armenia’s Application*”).

measures sought some of the *very same measures* that Azerbaijan had included in its proposals, as the Court will see from Azerbaijan's proposals, attached as confidential Annex 45 to these Preliminary Objections. Further, many of the proposals that Armenia rejected out of hand *mirror some of Armenia's own demands* in its case on the merits, again as shown by Annex 45. A comparison of Azerbaijan's proposals to Armenia's demands shows that agreement remained possible and could have rendered unnecessary many or all of the claims before the Court if Armenia had been willing to give negotiations a chance.

19. Given that the parties had not engaged in any direct talks for nearly 30 years, any expectation that the fundamental issues would be resolved in just two meetings would have been unrealistic. Armenia's *pro forma* attendance at those meetings fell far short of "a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute"¹⁸, as is required to satisfy the negotiation precondition in CERD Article 22. The very next morning after announcing the end of negotiations at the 15 September 2021 meeting, Armenia filed its Application and Request for Provisional Measures. Azerbaijan, by contrast, filed its Application in *Azerbaijan v. Armenia* only after Armenia had declared negotiations at an end.

20. Armenia's purpose for its precipitous termination of negotiations and filing of its Application soon became clear: during provisional measures hearings in October 2021¹⁹ and thereafter²⁰, Armenia proudly claimed to be the first

¹⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 132, para. 157.

¹⁹ CR 2021/25, p. 12, para. 2 (Kirakosyan).

²⁰ *See, e.g.*, CR 2023/4, p. 10, para. 2; p. 47, para. 2 (Kirakosyan).

through the Court's door, disparaging Azerbaijan's own claims in *Azerbaijan v. Armenia* as a "mirroring" tactic. Thus, by prematurely breaking off negotiations and rushing to file its Application, Armenia sought to use the Court as a platform for advertising its claims. At the same time, it attempted to paint Azerbaijan's claims as purely tactical, to try to distract public attention from Armenia's methodical ethnic cleansing and discrimination alongside its decades-long illegal military occupation of Azerbaijan's territory, which underlie Azerbaijan's claims. From the outset, Armenia had its sights firmly set on the Court and the opportunity to use high-profile legal proceedings to wage a public media campaign against Azerbaijan, so it had no intention of participating in good faith in negotiations that could have actually resolved the parties' disputes. Unlike Armenia, Azerbaijan remains ready to engage in a meaningful dialogue with Armenia on any issue, including with respect to any allegations of wrongful conduct under CERD²¹.

²¹ See, e.g., Azerbaijan's Application, p. 24, para. 26 ("At all times during the negotiations, Azerbaijan genuinely attempted to engage with Armenia, hoping for a constructive dialogue that could lead to a negotiated resolution of the Parties' dispute[.]"); CR 2021/21, p. 16, para. 7 (Lowe) (noting that "Azerbaijan put forward proposals for immediate steps to address the very matters that are the subject of Armenia's ... Request" during negotiations); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 6 April 2022, pp. 1–2 ("Instead of making a genuine attempt to engage with Azerbaijan to clarify the situation or resolve any questions, Armenia has continued its pattern of seeking media soundbites over substance, and asserts a patchwork of accusations that are unsupported by evidence, disregard without basis Azerbaijan's refutations provided weeks ago, or were never raised with Azerbaijan at all before being asserted to the Court[.]"); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 17 May 2022, pp. 1-2 ("Rather than continue in this course, Azerbaijan calls upon Armenia to agree to jointly establish a mechanism by which Azerbaijan and Armenia each designate an official to serve as a point of contact, so that either party can raise any issues related to the Court's Orders in *Azerbaijan v. Armenia* and *Armenia v. Azerbaijan*, in order to attempt to negotiate a resolution before coming to the Court[.]"); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 12 January 2023, p. 4 ("Since the start of the protests, Azerbaijan has continuously demonstrated its willingness to engage in dialogue with Armenia and the Russian Federation

21. Armenia’s consistent subsequent conduct only confirms that Armenia never was interested in resolving the parties’ dispute through negotiation and instead preferred to engage in political theatre. For instance, in September 2022, Armenia filed a request to modify the provisional measures ordered by the Court in December 2021 to encompass Armenian servicemen detained during hostilities in September 2022²²; but when Armenia made its request, the parties were in ongoing discussions about the detainees, Azerbaijan was already taking steps to repatriate the detainees, and the process was completed shortly thereafter²³. The Court denied Armenia’s unnecessary request in October 2022²⁴. Not long after, in December 2022, Armenia filed another provisional measures request²⁵ urging the Court to intervene in the Lachin Road protests, this time openly proclaiming its refusal to negotiate with Azerbaijan on the issue²⁶. Since the start of these

with a view to facilitating the humanitarian needs of its Armenian citizens[.]”); CR 2023/2, p. 22, para. 30 (Mammadov) (“Azerbaijan has and undertakes to continue to take all steps within its power to . . . engage with the local residents in Garabagh, and—if Armenia finally decides that it is indeed its problem and agrees to come to the negotiating table—then with Armenia as well.”).

²² Letter from Yeghishe Kirakosyan, Agent of the Republic of Armenia, to Philippe Gautier, Registrar of the International Court of Justice, dated 16 September 2022.

²³ Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 27 September 2022.

²⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order on the Request for the Modification of the Order of 7 December 2021 Indicating Provisional Measures of 12 October 2022, I.C.J. Reports 2022.*

²⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Request for Provisional Measures filed 27 December 2022).

²⁶ CR 2023/2, pp. 20–21, paras. 25–26 (Mammadov). The Court also will recall that on 26 January 2023, less than two business days before the hearing on its provisional measures request, Armenia added a request for an additional provisional measure based on public reports that it had orchestrated regarding alleged interruption of natural gas and other public utilities without raising the issue with Azerbaijan beforehand and without actual evidence in

proceedings in September 2021, Armenia has publicly broadcast numerous false allegations against Azerbaijan, and has used its public relations machinery and political allies to create a sense of urgency and push through political declarations in foreign parliaments and international bodies related to these allegations²⁷. Armenia then relies on such declarations as “evidence” before the Court even where there was no serious consideration of the underlying facts or any opportunity for Azerbaijan to present its position.

22. Armenia’s mere pretense of participation in negotiations in July and August 2021 is the opposite of the “genuine attempt ... to engage in discussions ... with a view to resolving the dispute”²⁸ that Article 22 of CERD requires. Even if the Court has taken a somewhat permissive approach to Article 22’s negotiation requirement in the past, Armenia’s failure to make any good-faith attempt to resolve the parties’ dispute was egregious. Allowing Armenia to proceed in these circumstances would render the negotiation requirement essentially meaningless.

support, causing the Court to find that Armenia had “not placed before it sufficient evidence that Azerbaijan is disrupting the supply of natural gas and other utilities” and consequently that the measure was “not warranted.” *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order on Provisional Measures dated 22 February 2023, *I.C.J. Reports 2023*, p. 13, para. 64.

²⁷ See, e.g., Assemblée nationale, *Proposition de résolution n°388 visant à exiger la fin de l’agression de l’Azerbaïdjan à l’encontre de l’Arménie et à établir une paix durable dans le Caucase du Sud* (28 October 2022), https://www.assemblee-nationale.fr/dyn/16/textes/116b0388_proposition-resolution?fbclid=IwAR25fzm1bvHk9bujUh1idGlcP9CTKiT4z_T22TXxyUBo-Wiqi7kN6IQfnwQ; European Parliament resolution 2023/2504(RSP), The Humanitarian Consequences of the Blockade in Nagorno-Karabakh, document P9_TA(2023)0012 (19 January 2023); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 6 April 2022, pp. 1–2.

²⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, *I.C.J. Reports 2011*, p. 132, para. 157.

23. The legal consequence of Armenia's failure to comply with either of the preconditions required by Article 22 is that the Court is not properly seized of Armenia's claims. As the Court concluded in the *Georgia v. Russian Federation* case, the Court lacks jurisdiction of a CERD claim if the negotiation precondition in Article 22 is not satisfied²⁹. Accordingly, Armenia's Application should be dismissed for want of jurisdiction because Armenia has failed to satisfy the prerequisites for bringing a claim to the Court under Article 22.

III.
THE SUBJECT MATTER OF ARMENIA'S CLAIMS ALLEGING
WARTIME MISCONDUCT IS NOT WITHIN THE COURT'S
JURISDICTION UNDER ARTICLE 22 OF CERD

24. The sole basis on which Armenia invokes the Court's jurisdiction is Article 22 of CERD³⁰, which is limited to disputes "with respect to the interpretation or application of this Convention"³¹. Armenia, however, makes multiple claims that do not fall within the scope of CERD. A significant portion of the claims in Armenia's Application and Memorial allege conduct during and in the aftermath of Armenia's military occupation and the Second Garabagh War that are governed by IHL³² but have nothing to do with CERD.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 140, para. 184.

³⁰ Armenia's Application, para. 9.

³¹ CERD, art. 22.

³² *See, e.g.*, Convention (III) relative to the Treatment of Prisoners of War (12 August 1949), art. 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), arts. 1, 3.

25. As discussed in Part A below, Armenia cannot transform every grievance against Azerbaijan into a CERD claim merely because Armenia’s citizens are nearly all ethnic Armenians, or merely by citing other alleged instances of racial discrimination that have nothing to do with the acts of which Armenia is complaining. As addressed in detail in Part B below, the claims in question are outside the Court’s jurisdiction under CERD because they have no link to discrimination on the basis of ethnic origin.

A. The Court’s Jurisdiction Under Article 22 of CERD Extends Only to Claims of Racial Discrimination

26. To determine whether the Court has jurisdiction *ratione materiae* over claims raised under Article 22 of CERD, “the Court will examine whether each of [the] claims falls within the scope of CERD”³³. CERD, in relevant part, prohibits “racial discrimination”³⁴, which is defined in Article 1(1) to mean:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”³⁵

³³ *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, I.C.J. Reports 2021*, p. 94, para. 72. See also *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019*, p. 17, para. 36

³⁴ CERD, art. 2. See also CERD, arts. 3–7.

³⁵ CERD, art. 1(1).

27. CERD does *not* extend to acts *other than* distinctions, exclusions, restrictions or preferences based on the grounds enumerated in Article 1(1) and having the purpose or effect of impairing human rights or fundamental freedoms. As the Court has observed, “the scope of CERD ... *exclusively concerns* the prohibition of racial discrimination on the basis of race, colour, descent, or national or ethnic origin”³⁶. Accordingly, the Court has upheld preliminary objections to its jurisdiction under CERD where the Court concluded that the alleged discrimination was based on a characteristic other than those identified in Article 1(1)³⁷ or that the allegations did not support an inference of discrimination based on one of the characteristics identified in Article 1(1)³⁸.

1. Claims Under International Humanitarian Law Do Not Fall Within CERD in the Absence of Racial Discrimination

28. To establish the Court’s jurisdiction over its claims, Armenia must show that the acts it alleges are capable of constituting racial discrimination within the meaning of CERD³⁹. But Armenia provides no basis to conclude that its claims of wartime misconduct or of mistreatment of individuals who illegally entered Azerbaijan’s territory during the occupation period, even assuming they are true,

³⁶ *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, I.C.J. Reports 2021*, p. 105, para. 104 (emphasis added).

³⁷ *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, I.C.J. Reports 2021*, p. 106, para. 105.

³⁸ *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, I.C.J. Reports 2021*, pp. 108–109, para. 112.

³⁹ *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 of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 95.

have anything to do with racial discrimination as defined in CERD. If proven, those claims allege conduct potentially implicating questions of IHL.

29. Armed conflict frequently arises between States whose citizens are predominantly of different ethnic origins, but not every act of armed hostility against an enemy State is *ipso facto* an act of racial discrimination under CERD. To establish the Court's jurisdiction, Armenia must show that its allegations raise an issue of treating individuals differently on the basis of ethnic origin with the purpose or effect of depriving them of the exercise or enjoyment, on an equal footing, of a human right or fundamental freedom. Armenia makes no serious effort to do so.

30. On their face, Armenia's Application and Memorial set forth claims that have nothing to do with CERD but only involve allegations of misconduct in armed conflict, that are governed by IHL⁴⁰. This is not a question of evaluation of Armenia's claims on the merits. Rather, it is a question of Armenia's mislabeling of its claims as involving "racial discrimination" when on their face they involve only hostility between two States involved in an armed conflict and raise no issues of interpretation or application of CERD. Breaches of IHL can and do occur during armed conflict without regard to the ethnic origin of the victims. Because the claims in question are not capable of falling within the provisions of CERD, they should be dismissed.

31. To be clear, Azerbaijan does not condone or excuse violations of IHL regardless of whether the violations were committed by its own forces or by

⁴⁰ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order on Provisional Measures of 22 February 2023, Declaration of Judge Yusuf.

Armenia's armed forces⁴¹. Azerbaijan remains committed to investigating and responding appropriately to any credible allegations of war crimes committed within its jurisdiction and has apprised the Court of its steps in that respect⁴², even

⁴¹ The Armed Forces of Armenia include a unit established on 9 May 1992, which is based in Azerbaijan's Garabagh Region and has called itself the "Defense Army". References in this Preliminary Objection to "*Armenia's armed forces*" should be understood to include that unit as well as other parts of Armenia's armed forces.

⁴² See, e.g., Office of the Prosecutor General of the Republic of Azerbaijan, *Detained Four Servicemen Accused of Insulting Bodies of Armenian Servicemen and Tombstones Belonging to Armenians* (14 December 2020), <https://genprosecutor.gov.az/az/post/3272> ("The Prosecutor General's Office of the Republic of Azerbaijan declares that the above-mentioned criminal acts committed by the servicemen of the Republic of Azerbaijan are unacceptable and contradict the mentality of the Azerbaijani people, which is tolerant, highly appreciates multicultural values and is historically distinguished by its humanism. Persons who have committed similar violations will be brought to liability by taking measures provided by law"); CR 2021/24, pp. 55–56, para. 13 (Reid) ("In response to similar allegations involving Azerbaijani servicemen, the Azerbaijani authorities announced their intention to investigate as early as November 2020. The very same month, the Azerbaijani Prosecutor General's Office announced the detention and charging of Azerbaijani servicemen for crimes"); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 27 September 2022, p. 1 ("Azerbaijan is already actively investigating the allegations raised in Armenia's letters of 16 and 19 September and is committed to taking appropriate steps to prosecute and punish, in accordance with domestic and international law, any individuals who are found to be responsible for the alleged misconduct"); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 4 October 2022, p. 3; Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 7 October 2022, p. 1 ("Azerbaijan reiterates that it has brought 11 prosecutions against Azerbaijani soldiers, resulting in 4 convictions to date, in connection with the 2020 conflict, and it has conducted trainings for its armed forces designed to promote compliance with international humanitarian law"); Letter dated 28 November 2022 from the Permanent Mission of Azerbaijan to the United Nations addressed to the Special Procedures Mandate Holders, No. AL AZE 1/2022 (21 February 2023), <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37389> ("Azerbaijan affirms its commitment to upholding its international obligations, including under international humanitarian and human rights law. . . . Where supported by evidence, . . . Azerbaijan has initiated criminal cases against its servicemen.").

as Armenia has taken no steps to comply with its international legal obligations to investigate and prosecute war crimes against Azerbaijanis⁴³.

2. Armenia’s Attempt to Transform Claims Governed by IHL into CERD Claims by Citing “Anti-Armenian Sentiment” Has No Basis in CERD

32. Armenia’s overall approach consists of an attempt to circumvent pleading facts that show, claim by claim, that alleged actions were based on ethnic origin, as CERD requires⁴⁴, through generalized references to what it terms “anti-Armenian sentiment”⁴⁵. The very structure of its Memorial confirms this. The first section of Part III of its Memorial, which sets out the facts that Armenia believes are relevant to its Application, focuses on alleged “anti-Armenian discourse” that purportedly “encouraged” unrelated acts of murder, torture and other claimed violations of law by Azerbaijan’s forces⁴⁶, as if such a general showing would somehow suffice to show that all subsequent conduct was based

⁴³ See, e.g., CR 2021/24, pp. 51–58, paras. 3–22 (Reid); United States Department of State, *Armenia 2022 Human Rights Report*, p. 2, https://www.state.gov/wp-content/uploads/2023/03/415610_ARMENIA-2022-HUMAN-RIGHTS-REPORT.pdf (“There was no reported progress on government investigations of alleged abuses committed by Armenian armed forces or individuals during the 2020 hostilities”); European Parliament resolution 2023/2504(RSP), *The Humanitarian Consequences of the Blockade in Nagorno-Karabakh*, document P9_TA(2023)0012 (19 January 2023), para. 26 (“[C]all[ing] on Armenian investigative authorities to continue the investigation into the 2020 footage of Azerbaijani soldiers allegedly being subjected to war crimes and to identify the perpetrators and hold them accountable”).

⁴⁴ See *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, I.C.J. Reports 2021*, p. 94, para. 72; *M.M. v. Russian Federation*, Communication No. 55/2014, Decision dated 7 August 2015 (“In order to consider the petitioner’s claims admissible, the Committee has to determine whether the petitioner has alleged facts that constitute discrimination on the basis of race, colour, descent or national or ethnic origin.”).

⁴⁵ Armenia’s Memorial, p. 65, para. 3.4. See generally *ibid.*, Part III, Chapters 1–2.

⁴⁶ See Armenia’s Memorial, p. 65, para. 3.4; *ibid.*, p. 82, para. 3.33.

on ethnic origin⁴⁷. Many of the claims that follow notably contain no specific allegations or citations to evidence that the actions alleged by Armenia were taken on the basis of ethnic origin.

33. As Azerbaijan will address in its Counter-Memorial on the merits, Armenia’s allegations of “anti-Armenian sentiment”, even if proven on the facts, do not themselves give rise to valid claims under CERD. Criticism of a foreign State or its government and its policies—which accounts for the great majority of the instances of “anti-Armenian” sentiment in the excerpts selectively quoted by Armenia—is not racial discrimination⁴⁸. Nor does every expression of ethnic prejudice by private individuals rise to the level of discrimination under CERD, particularly in view of Azerbaijan’s repeated and public statements that ethnic Armenians in Azerbaijan will be guaranteed the same rights as ethnic Azerbaijanis⁴⁹. But for the purpose of these Preliminary Objections, the relevant point is that Armenia’s allegations of generalized antipathy—whether or not they support independent claim(s) under CERD—do not transform each of Armenia’s unrelated claims into claims that fall within CERD.

⁴⁷ See Armenia’s Memorial, Part III.1.I.

⁴⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108–109, para. 112 (“[D]eclarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD[.]”).

⁴⁹ See, e.g., President of the Republic of Azerbaijan, *Ilham Aliyev attended the international conference themed “South Caucasus: Development and Cooperation” at ADA University* (29 April 2022), available at <https://president.az/en/articles/view/55909> (“I already said that Armenians who live in Karabakh – we consider them our citizens. . . . [A]s citizens of Azerbaijan, they will have all rights, and their security will be ensured. Azerbaijan, unlike Armenia, is a multi-ethnic country and all ethnic groups who live here live in peace and dignity, including Armenians.”); President of the Republic of Azerbaijan, *Ilham Aliyev was interviewed by local TV channels* (10 January 2023), available at <https://president.az/en/articles/view/58555> (“[N]ecessary conditions will be created for those who want to live there under the flag of Azerbaijan. Just like all the other citizens of Azerbaijan, their rights and security will be provided.”).

34. In considering Armenia's theory of "anti-Armenian sentiment", it is important to recall that this dispute arises in the context of Armenia's brutal invasion, ethnic cleansing campaign, and nearly 30-year-long occupation of Azerbaijan's sovereign territory from the late 1980s to late 2020, in the course of which more than 700,000 Azerbaijanis were murdered or forcefully expelled from their homes in the occupied territories by reason of their ethnic and national origin⁵⁰, in addition to more than 100,000 Azerbaijanis displaced from other areas of Azerbaijan near the occupied territories and more than 200,000 refugees expelled from Armenia. Unsurprisingly, these events—including Armenia's brutal massacre of 613 Azerbaijanis in the town of Khojaly over the course of one night on 25 to 26 February 1992—shocked the national conscience and remain a source of pain and outrage in the collective memory of Azerbaijanis, who commemorate the victims of Armenia's atrocities each year⁵¹. The subsequent almost three decades of Armenia's military occupation of Azerbaijan's sovereign territory, accompanied by intermittent active hostilities between the two States, have understandably resulted in animosity between the parties and between members of their populations. These deeply negative feelings are regrettable, but they are hardly surprising when two States have experienced the tragedy of war, particularly in a conflict that involves the invasion and 30-year occupation of one State's sovereign territory accompanied by the forceful expulsion of thousands of

⁵⁰ CR 2021/21, p. 11, para. 4 (Mammadov) ("This dispute with Armenia under CERD arises in the context of two wars of Armenian aggression and Armenia's almost thirty-year occupation of territory internationally recognized as Azerbaijan's sovereign territory.").

⁵¹ See, e.g., President of the Republic of Azerbaijan, *Blood Memory*, <https://president.az/en/pages/view/azerbaijan/memories>; "How Azerbaijan kept the memory of Khojaly alive", *Daily Sabah* (14 October 2020), <https://www.dailysabah.com/opinion/oped/how-azerbaijan-kept-the-memory-of-khojaly-alive> ("Khojaly, which emerged as the site of Azerbaijani suffering during the war in the early 1990s, has been annually commemorated since. . . . These atrocities have been a sorrowful wound in the Azerbaijani collective memory").

Azerbaijanis. As Judge Iwasawa has pointed out in regard to the conflict between Armenia and Azerbaijan, “animosity appears to persist between the two States and among some segments of their populations” as a result of “large-scale hostilities between the parties”, and “[s]tatements made by organizations and private persons need to be understood in this context.”⁵²

35. In this regard, Armenia’s reference to certain allegedly wrongful acts as committed during “peacetime” is willfully misleading⁵³. For almost 30 years, as a result of Armenia’s unlawful invasion of Azerbaijan’s internationally recognized territory, a significant part of Azerbaijan’s territory was under continuing military occupation by Armenia. It is in this context that President Aliyev and other Azerbaijani officials made the statements that Armenia now seeks to classify as hate speech—statements that, on their face, are clearly directed towards Armenia as an occupying power, Armenian forces as a wartime enemy and the destruction they wreaked upon Azerbaijani lands, and Armenia’s supporters around the world endorsing the invasion and occupation—and not against Armenians as an ethnic group⁵⁴. Antipathy to a hostile State, which is experienced in any armed conflict,

⁵² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order on Provisional Measures of 7 December 2021, I.C.J. Reports 2021, Declaration of Judge Iwasawa, p. 401, para. 2.*

⁵³ *See, e.g., Armenia’s Memorial, p. 83.*

⁵⁴ *Compare, e.g., Armenia’s Memorial, p. 66, para. 3.7 (“He has long disparaged Armenians as ‘bandits’, ‘vandals’, ‘fascists’, and ‘barbarians’, and as having a ‘cowardly nature’”) with President of the Republic of Azerbaijan Ilham Aliyev, Speech by Ilham Aliyev at the opening of a new block for 1440 IDP families in Mushfigabad (27 December 2012) (cited at Armenia’s Memorial, p. 66, para. 3.7, n.204) (“As you know, everything on the occupied lands is destroyed. All our historical monuments have been destroyed by Armenian bandits and vandals. . . . [M]ost of our material heritage items kept in museums there have been looted, destroyed and burnt by the Armenians. Our mosques and cemeteries are in ruins. This was done by the Armenians, Armenian fascists.”) (emphasis added) and President of the Republic of Azerbaijan, Speech by Ilham Aliyev at the opening of Balakan regional ‘ASAN xidmət’ center (29 July 2020) (cited at Armenia’s Memorial, p. 66, para. 3.7, n.206) (“You know these events have once again exposed the fascist essence of Armenia, their cowardly*

is not the same as racial discrimination. And as the Court has held, “declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD”⁵⁵, whether in time of war or time of peace.

36. Armenia also cites other statements by public officials, some of which are over a decade old⁵⁶, as well as statements made by anonymous individuals on

nature, because it wasn’t the first time when an *aggressor*, after being defeated on the battlefield, proceeds to take action against the civilian population”) (emphasis added); Armenia’s Memorial, p. 210, para. 3217 (“He also promised that the Azerbaijani army would chase Armenians out of Nagorno-Karabakh like ‘dogs’”) with “President Ilham Aliyev was interviewed by BBC News”, *AZERTAC English* (9 November 2020), at 3:58, <https://youtu.be/eP98bXyWBdc> (clarifying that he was referring to “the Armenian military-political leadership. I meant so-called ‘authorities of Nagorno-Karabakh.’ . . . I meant them, I didn’t mean Armenian people”); Armenia’s Memorial, p. 209, para. 3.215 (“[President Aliyev] often contrasted the alleged moral superiority of Azerbaijanis with the cruelty and savagery of ethnic Armenians”) with President of the Republic of Azerbaijan, *Speech by Ilham Aliyev at the Security Council meeting* (27 September 2020), <https://president.az/en/articles/view/42459> (cited at Armenia’s Memorial, p. 209, para. 3.215, n.735) (“Because such atrocities against the civilian population can only be attributed to fascist states, and this is not the first time . . . People who were forcibly driven out of their ancestral lands by Armenians – by *Armenia’s leadership* want to return to their native lands even though savages have already destroyed their homes.”) and “Chronicles of Victory: President Ilham Aliyev addresses the nation, *AzerNews* (17 October 2021), <https://www.azernews.az/nation/184462.html> (cited at Armenia’s Memorial, p. 209, para. 3.215, n.735) (“I am confident that the Armenian people will also bring the *leaders of their criminal junta* to justice.”) and President of the Republic of Azerbaijan, *Speech by Commander-in-Chief Ilham Aliyev at the operational meeting of the Central Command Post of Ministry of Defense* (25 October 2020) (cited at Armenia’s Memorial, p. 209, para. 3.215, n.735) (“The Armenian state is responsible for these crimes and will be held accountable for them.”).

⁵⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 109, para. 112. Indeed, President Ilham Aliyev and Foreign Minister Jeyhun Bayramov have both gone out of their way to publicly clarify that any remarks about getting “the Armenians” out of Garabagh refer only to “those who continue to occupy our territories”, including the Armenian political leadership, not to “Armenian people”. CR 2021/21, p. 14, para. 13 (Boisson de Chazournes).

⁵⁶ See, e.g., Armenia’s Memorial, p. 66, para. 3.7, n.207; *ibid.*, pp. 68–69 paras. 3.11–3.12.

social media⁵⁷. Azerbaijan’s policy, however, is that for ethnic Armenian citizens of Azerbaijan, “just like all the other citizens of Azerbaijan, their rights and security will be provided”⁵⁸. Even to the extent that Armenia has alleged some examples of actual racially discriminatory language, either by government officials or private parties, Armenia does not explain how the mere existence of statements made independently of the wartime misconduct Armenia alleges in its Memorial allows Armenia to characterize each of those completely unrelated incidents as CERD claims. Armenia does not contend that the alleged perpetrators of the putative misconduct during armed conflict were even aware of the alleged discriminatory comments, much less influenced by them.

37. Allowing Armenia’s claims of wartime misconduct to stand would invite parties to other armed conflicts to bring their claims before the Court under CERD despite the lack of any real connection to racial discrimination, contrary to the intent of CERD Article 22. Given that armed conflicts frequently arise between States whose populations are predominantly of different ethnic origins, Armenia’s approach, if accepted, would allow nearly all parties to armed conflict to recharacterize alleged violations of wartime misconduct governed by IHL as CERD claims within the Court’s jurisdiction. But conduct during the course of armed conflict, even if motivated by animus or hostility towards the enemy State, the enemy armed forces, or citizens of the enemy State, will not constitute racial discrimination under CERD unless it has the purpose or effect of impairing the

⁵⁷ See, e.g., Armenia’s Memorial, pp. 227–229, paras. 3.234–3.236.

⁵⁸ President of the Republic of Azerbaijan, *Ilham Aliyev was interviewed by local TV channels* (10 January 2023), <https://president.az/en/articles/view/58555>. See also, e.g., “President of the Republic of Azerbaijan, *Speech by Ilham Aliyev at the Extraordinary Summit of Heads of State of Organization of Turkic States* (16 March 2023), <https://president.az/en/articles/view/59195> (“[W]e, the state of Azerbaijan, will guarantee the individual rights and security of the Armenian residents living in Karabakh.”).

equal exercise of human rights and fundamental freedoms based on ethnic origin or one of the other protected grounds identified in Article 1(1) of CERD⁵⁹. As discussed in Part B below, Armenia has failed to identify any grounds on which it could claim that each of the alleged acts was “based on” ethnic origin. Accordingly, the Court need not evaluate any evidence or any part of the merits to conclude that these claims do not raise any issue of the interpretation or application of CERD. Those claims are therefore beyond the Court’s jurisdiction under Article 22.

B. On the Face of Armenia’s Memorial, Armenia’s Claims of Misconduct During Armed Conflict Raise No Issues of Racial Discrimination Under CERD

38. As detailed below, a significant portion of the claims in Armenia’s Memorial, on their face, allege discrimination not on the basis of ethnic origin but of an individual’s actual or perceived status as a member of Armenia’s armed forces or involvement in illegal activity. Neither of these is a protected category under Article 1(1) of CERD.

39. Of course, most if not all members of Armenia’s armed forces will be ethnic Armenians because Armenia’s population is almost exclusively of Armenian ethnic origin—due in large part to Armenia’s ethnic cleansing of Azerbaijanis from Armenia and its deliberate policies to exclude other ethnicities⁶⁰. But this does not transform every act taken in a war with Armenia into a CERD violation or every claim of such an act into a question of interpretation or application of CERD. The Court held in its judgment on

⁵⁹ CERD, art. 1(1).

⁶⁰ See Azerbaijan’s Application, paras. 6, 10; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Azerbaijan’s Memorial filed 23 January 2023), paras. 82–92 (hereinafter “*Azerbaijan’s Memorial*”).

preliminary objections in *Qatar v. United Arab Emirates* that “collateral or secondary effects” on persons of a particular national or ethnic origin, arising in the context of measures against a foreign State, do “not constitute racial discrimination within the meaning of the Convention.”⁶¹ The Committee established by CERD to monitor its implementation and application⁶² has similarly found that a complaint “is not compatible with the provisions of the Convention” and is therefore inadmissible where the alleged acts of discrimination can be explained on grounds other than one of the categories protected under Article 1(1) of CERD⁶³.

40. Although Armenia has not taken care to particularize its claims and supporting evidence, Armenia asserts in its Memorial that Azerbaijan “engag[ed] in and fail[ed] to prevent the murder, torture, inhuman and degrading treatment and other abuse of ethnic Armenians as well as the mutilation of their dead bodies”, in violation of Articles 2(1), 4(a) and 5(b); that Azerbaijan “discriminatorily . . . detain[ed] ethnic Armenians” in breach of Articles 2 and 5(a); and that Azerbaijan “discriminatorily subject[ed] ethnic Armenians to

⁶¹ *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, I.C.J. Reports 2021*, p. 109, para. 112.

⁶² CERD art. 8(1).

⁶³ *See, e.g., M.M. v. Russian Federation*, Communication No. 55/2014, Opinion, document CERD/C/87/D/55/2014 (2015), p. 5, para. 6.3 (“In order to consider the petitioner’s claims admissible, the Committee has to determine whether the petitioner has alleged facts that constitute discrimination on the basis of race, colour, descent or national or ethnic origin. . . . [A]ccording to the petitioner, the acts of discrimination against him were manifested in the extension of the duration of the preliminary investigation. . . . [T]he State party has claimed in response that the extension of the preliminary investigation was necessitated by the complexity of the case . . . in the view of the Committee, [these claims] amount to a reasonable explanation of the duration of the preliminary investigation and . . . rebuts the petitioner’s claims of intentional discrimination.”).

enforced disappearances” in breach of Articles 2 and 5⁶⁴. But nothing in Armenia’s Application or Memorial, other than bare assertion, connects these allegations to racial discrimination. As addressed in detail below in Sections 1, 2, and 3, which address Armenia’s allegations relating to unlawful violence, arbitrary detention, and enforced disappearances, respectively, Armenia’s allegations in support of these claims under Articles 2, 4, and/or 5 of CERD do not “allege[] facts that constitute discrimination on the basis of . . . ethnic origin” or any other protected ground and so are outside the Court’s jurisdiction *ratione materiae*.

41. The Court’s lack of jurisdiction over Armenia’s claimed violations based on these three categories of allegations is particularly suitable for resolution on preliminary objections because the inapplicability of CERD is apparent on the face of Armenia’s Memorial. The Court therefore need not weigh evidence or otherwise consider the merits to dismiss this set of Armenia’s claims. As Annex 46 to these Preliminary Objections, Azerbaijan submits a table that sets out Armenia’s claims with references to the legal, factual, and evidentiary portions of Armenia’s Memorial that are subject to dismissal on this basis⁶⁵.

1. Armenia’s Allegations of Unlawful Violence by Members of Azerbaijan’s Armed Forces Do Not Fall Within CERD

42. Although Armenia purports to assert CERD claims of unlawful violence against “ethnic Armenians”, its own allegations show that these acts, if they occurred, were not based on ethnic origin. Armenia’s claims fall into three categories: (i) alleged mistreatment and violence against members of Armenia’s

⁶⁴ Armenia’s Memorial, p. 586, para. 6.81; *ibid.*, p. 595, para. 6.104; *ibid.*, pp. 611–612, para. 6.138.

⁶⁵ See **Annex 46** (detailing claims subject to the Preliminary Objections).

armed forces in the context of active hostilities taking place in early April 2016 and during or after the Second Garabagh War in late 2020 and thereafter; (ii) alleged mistreatment and violence against individuals who crossed the international boundary or the line of contact during Armenia's occupation that Azerbaijan determined were members of Armenia's armed forces; and (iii) alleged attacks on and mistreatment of civilians in the context of active hostilities. Armenia asserts that those claims implicate CERD Articles 2(1) and 4(a) as well as the "right to security of person" under Article 5(b), but in the absence of discrimination based on ethnic origin, Armenia's alleged violations are beyond the scope of CERD. Armenia's claims⁶⁶ therefore should be dismissed.

(a) Alleged mistreatment of members of Armenia's armed forces

43. Armenia's allegations of brutality towards members of Armenia's armed forces may be evidence of hostility and tension between the armies of Azerbaijan and Armenia during armed conflict, but they have nothing to do with discrimination based on ethnic origin. Armenia's Memorial alleges misconduct against members of Armenia's armed forces in the context of active hostilities from 2–5 April 2016, during the Second Garabagh War in late 2020, and in hostilities occurring after the Second Garabagh War.

44. With respect to the April 2016 hostilities, Armenia explicitly refers to its claims as asserting violations of IHL, alleging that Azerbaijan did not act "in accordance with the laws of armed conflict", that Azerbaijan's alleged "acts of aggression" killed 76 combatants and 4 civilians, and that 28 servicemen and 3

⁶⁶ See **Annex 46**, nn.1, 3, 6 (citing Armenia's Memorial, p. 586, para. 681; *ibid.*, p. 595, para. 6.104; *ibid.*, p. 611, para. 6.138).

civilians were mistreated while in Azerbaijan’s custody⁶⁷. Armenia also alleges misconduct during and after the Second Garabagh War against Armenian servicemen and “fallen Armenian soldiers and medical personnel”, but does not allege any basis for its bare assertion that such conduct was directed against “Armenians” on the basis of their ethnic origin, rather than as members of opposition armed forces⁶⁸. Whether those alleged acts would constitute a violation of IHL is irrelevant to whether they were based on ethnic origin.

45. Armenia’s limited evidence shows that the acts it complains of, to the extent they occurred, were not based on an individual’s ethnic origin but rather on the individual’s status as an enemy combatant⁶⁹. In many cases, Armenia posits no connection to discrimination on the basis of ethnic origin at all other than by making general references to a supposed climate of ethnic prejudice. In other instances, Armenia argues that there were “explicit expressions of hatred of ethnic Armenians”⁷⁰ in connection with alleged abuse of bodies of Armenian servicemembers or other alleged war crimes, but in nearly all of these cases, Armenia misrepresents the statements in question. Almost invariably, the

⁶⁷ Armenia’s Memorial, p. 101, para. 3.66. *See also* Armenia’s Memorial, pp. 299–300, para. 3.326 (citing Annexes 127, 161–165); Annex 45 to Armenia’s Memorial (noting allegations of violations of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), the 1977 Protocol Additional to the Geneva Conventions, and the Laws of War on Land Manual).

⁶⁸ *See* Armenia’s Memorial, pp. 93, 95–96, 99–101, 235–245, 251–255, 285–286, 291, 296–298, 300–304, 428–429, 434–438, 440–443, 446–447, 494, 497–501, 512–518.

⁶⁹ *See* Armenia’s Memorial, pp. 515–517, para. 4.132; Annex 118 to Armenia’s Memorial (allegedly showing Azerbaijani soldiers filming fallen servicemen and calling a fallen servicewoman a “whore”); Annex 119 to Armenia’s Memorial (allegedly showing Azerbaijani soldiers filming fallen servicemen and referring to them as “the immoral”); Annex 155 to Armenia’s Memorial (allegedly showing Azerbaijani soldiers filming and stepping on fallen servicemen); Annex 203 to Armenia’s Memorial (same).

⁷⁰ Armenia’s Memorial, pp. 238–245, paras. 3.247–3.260.

statements Armenia labels as “racist” involve references to Armenian servicemembers⁷¹, and while in many instances the language is undoubtedly offensive, they do not refer to Armenians as an ethnic group—instead, statements focus upon and decry past war crimes committed by Armenia’s armed forces, such as the massacre of hundreds of Azerbaijani civilians in the town of Khojaly or Armenia’s unlawful occupation of Garabagh⁷². Even in the limited instances

⁷¹ See Annex 168 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 244, nn.825–826) (including the following statements by alleged Azerbaijani soldiers: “This is how we are, this is how we destroy Armenians. Look here, these are their barracks”; “This is an Armenia nurse. He is an Armenian major”; “[T]his is the UAZ of Armenians. Look, look, it is the barracks of Armenians”); Annex 133 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 243, n.823) (“He looks like he is from the land infantry, right? . . . Five people attacked us, five people. Fuck them . . .”); Annex 117 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 240, n.810) (including the following statements by purported Azerbaijani soldiers: “Give me the weapon . . . How many of you are here? . . . Did your [people] make a spy of you? . . . The ones that made you spies, where are your [people], where are your [people], answer quickly! . . . Tell me straight, scumbag, and you’ll survive as a POW. . .”); Annex 128 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 241, n.816) (including the following statements by purported Azerbaijani soldiers: “Ask him: ‘Is he an army conscript?’ Yes, this one, hit him . . . Fuck you!”); Annex 167 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 241, nn.818, 819) (including the following statements by purported Azerbaijani soldiers: “Tell me, where is your group? . . . If he does not speak, you will see what will happen”); Annex 169 to Armenia’s Memorial (cited at Armenia’s Memorial p. 237, n.803, p. 243, n.822) (including the following statements by purported Azerbaijani soldiers referring to members of Armenia’s armed forces: “These are not human; these should be shot from behind.”).

⁷² Compare Armenia’s Memorial, p. 244, n.829 (“Throughout the video, he insults the dead Armenian servicemen, adding: If there is need, I am ready to kill [Armenians] like animals”) with Annex 173 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 244, n.289) (“We took revenge for our dead martyrs . . . We treated them the same way they treated us in Khojaly . . . We have taken control of the servicemen of the internal forces. If there is a need, I am ready to kill them like animals”). See also Annex 134 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 244, n.824) (including the following statements by alleged Azerbaijani soldiers: “Did you choke us in blood in Khojaly? . . . You choked us in blood in Khojaly, pimp!.. [W]e will avenge the blood of our martyrs”); Annex 124 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 244, n. 827) (including the following statements by purported Azerbaijani soldiers: “[Y]ou are now answering with your ears for the immorality you did yesterday . . . I came here for one purpose, for cutting off the seeds of these immoral people to taking revenge.”); Annex 132 to Armenia’s Memorial (cited at Armenia’s Memorial p. 242, n. 820) (including the following statements by three alleged Azerbaijani soldiers: “Say Karabakh is Azerbaijan . . . Nation of Bitches” . . . Wait! We cannot force him speak that way.”); Annex 131 to Armenia’s Memorial (cited at Armenia’s

where alleged Azerbaijani servicemembers used derogatory language with a possible ethnic dimension—for example, a reference to “Armenian dogs”⁷³—alongside other insulting language, this evidences hostility between opposing soldiers at war, not discrimination on the basis of ethnic origin. In the absence of any facts pled showing that individuals were singled out for different treatment on the basis of ethnic origin, the use of insults between soldiers during armed conflict does not transform abusive acts against the enemy into racial discrimination under CERD. In a similar vein, the Amnesty International and Human Rights Watch reports relied upon by Armenia also consider allegations of misconduct by Azerbaijani servicemen solely in the context of IHL, but none of them refers to CERD or contains any indication that racial discrimination played any role⁷⁴.

46. In three instances, Armenia relies only on after-the fact allegedly racist statements made by unknown persons, and it otherwise has nothing to connect its claims to CERD. With respect to one of the most heinous acts alleged in its Memorial—the alleged execution of three of Armenia’s servicemen during the

Memorial, p. 239, n.806) (including the following statements by alleged Azerbaijani soldiers: “nation of bitches”; “fuck your people”); Armenia’s Memorial, paras. 3.307, 3.309 (describing how detained Armenian servicemen were forced to say “Karabakh is Azerbaijan”); Armenia’s Annex 126 (cited at Armenia’s Memorial, p. 291, n.984) (same); Armenia’s Annex 129 (cited at Armenia’s Memorial, p. 295, n.1004) (including the following statements by alleged Azerbaijani soldiers: “Do you know who Lachin belongs to?”).

⁷³ Annex 137 to Armenia’s Memorial (cited at Armenia’s Memorial, p. 245, n.830) (including the following statements by purported Azerbaijani soldiers: “these are Armenian dogs”; “Karabakh is Azerbaijan and will stay Azerbaijani. Immorals! Die!”).

⁷⁴ See, e.g., Human Rights Watch, *Azerbaijan: Armenian POWs Abused in Custody*, (19 March 2021), <https://www.hrw.org/news/2021/03/19/azerbaijan-armenian-pows-abused-custody> (cited at Armenia’s Memorial, p. 247, nn. 854-856); Human Rights Watch, *Azerbaijan: Armenian Prisoners of War Badly Mistreated* (2 December 2020), <https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated> (cited at Armenia’s Memorial, p. 247, n.838). See also Armenia’s Memorial, nn.790, 792, 831, 832, 838, 854–856.

2016 hostilities⁷⁵—the only purported connection to racial hatred that Armenia cites is a statement posted to Facebook by unknown individuals after the fact⁷⁶. In another instance, Armenia alleges that a video depicting dead Armenian soldiers was accompanied by a text description using a specific derogatory slur⁷⁷; but the video itself, submitted as Annex 203, does not contain the cited slur. The alleged text description is not before the Court⁷⁸, and Armenia makes no effort to identify who added the alleged text description after the fact⁷⁹. In the third instance, Armenia refers in its Memorial to a photo purporting to depict an Azerbaijani soldier resting his foot atop a dead Armenian soldier and states that a “caption” accompanying the photo uses a derogatory slur⁸⁰. But again, Armenia does not submit the alleged caption to the Court, does not attempt to identify who added the caption, and does not attempt to connect the alleged slurs to the misconduct of the soldiers depicted⁸¹. These after-the-fact allegedly ethnically biased comments,

⁷⁵ See Armenia’s Memorial, p. 101, para. 3.63.

⁷⁶ See Armenia’s Memorial, p. 101, para. 3.67 (stating that “comments inciting hatred and violence against Armenians” were made on social media after the alleged misconduct occurred).

⁷⁷ Armenia’s Memorial, pp. 516–517, para. 4.132; *ibid.*, n.1718.

⁷⁸ Letter from Philippe Gautier, Registrar of the International Court of Justice, to Elnur Mammadov, Agent of the Republic of Azerbaijan, dated 9 February 2023 (“[T]he Court has decided that these documents [described as “Other Sources”] do not form part of the case file”).

⁷⁹ Armenia purported to attach a screenshot showing the text containing the slur as “Other Source” No. 1037, which does not identify who added the text and in any event is not before the Court. The only translation of the video provided by Armenia is an excerpt in Annex 290 that says: “A video showing at least 3-4 corpses of Armenian soldiers. The individual filming steps on the back of one of the dead Armenian soldiers, saying ‘These are the boys of the Armenians’ and ‘immorals’”.

⁸⁰ Armenia’s Memorial, pp. 516–517, para. 4.132; *ibid.*, n.1720.

⁸¹ Armenia purported to attach the “caption” as “Other Source” No. 1039, which does not identify the author of the supposed caption and is not properly before the Court in any event.

which could have originated from anyone and anywhere, have no relevance to whether the underlying alleged conduct was racially discriminatory.

47. The few instances where Armenia has even purported to cite allegedly discriminatory language, moreover, are the exception rather than the rule. In most instances, Armenia does not allege that the putative misconduct was accompanied by anti-Armenian statements or other evidence of discrimination. Instead, Armenia simply makes allegations of mistreatment of detainees and other misconduct during armed conflict⁸². While the alleged misconduct, if it occurred, may be contrary to IHL, it has nothing to do with the subject matter of CERD.

48. Azerbaijan again wishes to make clear that it in no way condones or excuses conduct that violates IHL and has taken steps to punish those responsible⁸³. It is an unfortunate reality that in any armed conflict, some soldiers may ignore their training and react inhumanely and vengefully against members of the opposing army or even civilians of the enemy State. That is true whether the enemy is of the same or a different ethnicity. Rather than condone or endorse such conduct, Azerbaijan is actively investigating allegations of such violations raised by third parties and previously raised by Armenia, and has already initiated 11 criminal cases⁸⁴ and convicted four servicemen⁸⁵. Azerbaijan is committed to

⁸² See Armenia's Memorial, pp. 251–255, paras. 3.270–3.275 (alleging that detainees were forced to sleep standing, kept in isolation, deprived of food, and subject to beatings); *ibid.*, pp. 297–298, para. 3.326 (alleging interrogations and beatings of detained servicemen); *ibid.*, pp. 302–306, paras. 3.332–3.339 (alleging that detainees were beaten, electrocuted, deprived of food and water, and spat on); *ibid.*, pp. 428–429, para. 4.6 (alleging abuse of detained servicemen); *ibid.*, pp. 434–439, paras. 4.15–4.20; *ibid.* pp. 446–447, paras. 4.29–4.31.

⁸³ See *supra*, n.42.

⁸⁴ See, e.g., CERD Committee, 2904th Meeting, 107th Session (16 August 2022) at 1:44:20, <https://media.un.org/en/asset/klz/klzdlzmmn8>.

upholding its obligations under the Geneva Conventions to prosecute and punish such conduct, which is also contrary to Azerbaijan’s domestic law and military policies, without distinction based on the ethnic origin of the alleged victim⁸⁶. But claims arising from conduct during armed conflict governed by IHL do not, on their own, implicate questions of interpretation and application of CERD, no matter how strong the hostility between the two States or between parts of their populations.

49. To be clear, conduct that violates IHL *can* also implicate CERD if it involves a “distinction ... based on ... 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”⁸⁷. Azerbaijan itself makes claims based on this kind of discrimination in *Azerbaijan v. Armenia*, where it explains that during the First Garabagh War, Armenia singled out ethnic Azerbaijanis in the formerly occupied territories of Azerbaijan for murder, torture and other abuse, while ethnic Armenian populations in Azerbaijan were left undisturbed (indeed, were protected) by Armenia’s forces⁸⁸. That kind of *discrimination*—that is, distinction or differentiation—between individuals based on their ethnic or national origin, and affecting their human rights or fundamental

⁸⁵ Permanent Mission of the Republic of Azerbaijan to the UN Office and other International Organizations, Letter no. AL AZE 1/2022 (21 February 2023), <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37389>.

⁸⁶ See, e.g., Azerbaijan’s Letter to Court dated 27 September 2022. See also Human Rights Watch, *Azerbaijan: Armenian POWs Abused in Custody* (19 March 2021), <https://www.hrw.org/news/2021/03/19/azerbaijan-armenian-pows-abused-custody> (cited at Armenia’s Memorial, nn.854–856) (“One [Armenian] former POW said the [Azerbaijani] commanding officer told his subordinates not to hit the POWs”).

⁸⁷ CERD, art. 1(1).

⁸⁸ Azerbaijan’s Memorial, Parts II.C, pp. 199–237; *ibid.*, IV.C.2.a, pp. 336–339.

freedoms, directly implicates CERD. But in the absence of differentiation based on ethnic origin, allegations of misconduct during armed conflict—even if the perpetrator and victim are from different ethnic groups—do not constitute “racial discrimination” as defined in CERD.

(b) Alleged mistreatment of individuals who illegally crossed borders or the line of contact

50. Armenia also provides no evidence or argument in support of its assertion that racial discrimination was involved in the alleged violations of the rights of seven residents of Armenia who were detained between 2009 and 2014 after illegally crossing the border from Armenia into Azerbaijan or after crossing the line of contact between then-occupied parts of Azerbaijan’s territory and areas controlled by Azerbaijan. Armenia admits that these individuals “crossed the border” into Azerbaijan during this period of unlawful military occupation of Azerbaijan’s territory and that at least two of them were members of Armenia’s armed forces⁸⁹. As Azerbaijan has explained elsewhere, Azerbaijan believed all of these individuals to be “member[s] of the Armenian armed forces”⁹⁰ who were suspected of entering Azerbaijan to engage in espionage or other unlawful activities. The judgments of the European Court of Human Rights on which Armenia relies with respect to four of the detained Armenian individuals did not find a violation of ECHR Article 14, which prohibits discrimination⁹¹.

⁸⁹ Armenia’s Memorial, p. 93, para. 3.55 (“[O]n 26 December 2014, Azerbaijani forces captured . . . a serviceman of the NKR Defense Army”), p. 95, para. 3.58 (“[I]n August 2020 . . . an Armenian soldier who . . . crossed . . . into Azerbaijan’s Goranboy district, was detained by Azerbaijani authorities”).

⁹⁰ See, e.g., *Badalyan v. Azerbaijan*, ECHR Application No. 51295/11, Judgment dated 22 July 2021, p. 4, para. 15.

⁹¹ The ECHR found violations of Articles 2, 3 and 5 of the European Convention on Human Rights, relating to the right to life; the right to freedom from torture or cruel, inhuman and

51. Azerbaijan disputes that these individuals were subjected to improper treatment in violation of their human rights, but in any event, Armenia has presented no basis for its assertion that the alleged mistreatment was based on ethnic origin rather than, for example, their perceived status as members of an enemy State’s armed forces, their undisputed status as nationals of an enemy State, and their violation of the laws against illegal entry. Again, none of those is a protected classification under Article 1(1) of CERD. Indeed, Article 1(2) of CERD makes explicit that “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” And the Court has held that differential treatment based on current nationality, as opposed to national origin or ethnic origin, is not capable of falling within the scope of CERD⁹².

(c) Alleged targeting or mistreatment of civilians

52. The Court also lacks jurisdiction over Armenia’s claims of unlawful violence against civilians during active hostilities, mistreatment of civilian detainees, and “intentional and indiscriminate attacks” on civilians and civilian infrastructure. Although these acts, if they occurred, would implicate IHL, unlawful attacks on civilians are not *ipso facto* a violation of CERD.

degrading treatment; and the right to liberty and security of the person. *See Petrosyan v. Azerbaijan*, ECHR Application No. 32427/16, Judgment dated 4 November 2021, p. 22, para. 84 (not considering case under Article 14 of the European Convention on Human Rights); *Saribekyan and Balyan v. Azerbaijan*, ECHR Application No. 35746/11, Judgment dated 30 January 2020, p. 26, paras. 102–103; *Khojuyan and Vardazaryan v. Azerbaijan*, ECtHR Application No. 62161/14, Judgment (4 November 2021), p. 22, para 85. *See also Badalyan v. Azerbaijan*, ECHR Application No. 51295/11, Judgment dated 22 July 2021, p. 1, para. 1 (not raising an Article 14 claim).

⁹² *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, I.C.J. Reports 2021*, p. 106, para. 105.

53. In many of the cases that Armenia identifies, civilians located in areas previously occupied by Armenia were allegedly killed or injured as Azerbaijan liberated these territories⁹³. For example, Armenia claims that three Armenian civilians were killed as “Azerbaijani troops [] entered and took control of the Talish village in Nagorno-Karabakh”⁹⁴. Armenia also claims that four Armenian civilians were killed as Azerbaijani servicemen liberated Hadrut and Shusha⁹⁵. Armenia, however, offers no evidence that its allegations of unlawful violence towards these civilians constitute racial discrimination within the scope of CERD. Instead, Armenia describes in gruesome detail factual allegations that, if true, would be governed by IHL⁹⁶. To the extent Armenia’s evidence suggests a motive for alleged unlawful acts, it shows that those acts, if they occurred, were based on individuals’ perceived association with those who had occupied Azerbaijan’s territory and who had committed atrocities against Azerbaijanis—not the individuals’ ethnic origin⁹⁷. The same is true of Armenia’s evidence of

⁹³ See, e.g., Armenia’s Memorial, pp. 98–99, para. 3.62; *ibid.*, p. 101, para. 3.66; *ibid.*, pp. 248–250, paras. 3.265–3.267; *ibid.*, pp. 282–283, para. 3.305; *ibid.*, pp. 292–294, paras. 3.318–3.320; *ibid.*, pp. 304–305, para. 3.337; *ibid.*, pp. 429–432, para. 4.7; Annex 204 to Armenia’s Memorial; Annex 123 to Armenia’s Memorial; Annex 130 to Armenia’s Memorial; Annex 170 to Armenia’s Memorial; Annex 95 to Armenia’s Memorial (reporting the death of a civilian in Hadrut).

⁹⁴ Armenia’s Memorial, pp. 98–99, para. 3.62.

⁹⁵ Armenia’s Memorial, pp. 248–250, paras. 3.265–3.268.

⁹⁶ See, e.g., Armenia’s Memorial, pp. 98–99, para. 3.62 (describing murder by beheading, dismemberment and mutilation (cutting of ears and arms), and “other acts of brutality”, and citing in support Annex 45 to Armenia’s Memorial, which describes how acts of brutality against civilians violate States’ obligations under the Fourth Geneva Convention).

⁹⁷ See Armenia’s Memorial, pp. 238–239, para. 3.247 (alleging that Azerbaijani soldiers killed an Armenian civilian and “proclaim[ed] ‘[t]his is how we took revenge for the blood of our martyrs’”) (citing Annex 123); *ibid.*, pp. 292–293, para. 3.318 (alleging a civilian in Garabagh was forced to say “Karabakh is Azerbaijan” and later killed); *ibid.*, p. 293, para. 3.319 (alleging that an Azerbaijani soldier punched and kicked a civilian while “yelling that he must have taken part in the war 30 years ago and that ‘this was punishment for killing Azerbaijani people back then’”).

alleged violence against and mistreatment of civilian detainees⁹⁸. Armenia itself relies heavily on sources such as an April 2016 Interim Report of the so-called “Human Rights Ombudsman of the Republic of Artsakh” that consider allegations of brutality towards Armenian civilians as possible violations of the Fourth Geneva Convention, not racial discrimination potentially violating CERD⁹⁹.

54. Armenia’s remaining claims concern the alleged “deliberate[] target[ing of] the ethnic Armenian population and infrastructure of the NKR”¹⁰⁰ during active hostilities and the alleged firing by Azerbaijan’s forces in the direction of civilian areas after the Second Garabagh War¹⁰¹.

55. With respect to the alleged targeting of civilians during active hostilities in 2016, as noted above, Armenia frames its allegations explicitly in terms of IHL¹⁰². It also alleges that Azerbaijan conducted “indiscriminate” attacks on ethnic Armenian civilians and civilian infrastructure during the Second Garabagh War¹⁰³. By definition, “indiscriminate” attacks do not discriminate on the basis of ethnic

⁹⁸ See Armenia’s Memorial, p. 255, para. 3.274 (alleging that a civilian detainee was “forced to sing the national anthem of Azerbaijan” and told “[h]is village” belongs to Azerbaijan); *ibid.*, pp. 304–306, paras. 3.336–3.339 (alleging that civilian detainees were abused in detention, and another was forced to say “Karabakh is Azerbaijan”).

⁹⁹ Annex 45 to Armenia’s Memorial, pp. 20–21, paras. 59–62; Armenia’s Memorial, p. 231, n.790 (citing a Human Rights Watch report that references “[i]nternational humanitarian law” as “applicable to the international armed conflict between Azerbaijan and Armenia”).

¹⁰⁰ See, e.g., Armenia’s Memorial, p. 98, para. 361; *ibid.*, p. 231, para. 3.240.

¹⁰¹ Armenia’s Memorial, pp. 96–97, para. 3.59; *ibid.*, pp. 493–503, paras. 4.100–4.112; *ibid.*, pp. 512–514, paras. 4.129–4.131.

¹⁰² Armenia’s Memorial, p. 98, para. 3.61 (“Azerbaijan’s attack was not conducted in accordance with the laws of armed conflict; rather, it deliberately targeted the ethnic Armenian civilian population and infrastructure of the NKR, including schools and homes.”).

¹⁰³ Armenia’s Memorial, p. 231, para. 3.240.

origin or anything else¹⁰⁴. Armenia offers no allegations of fact, much less evidence, suggesting that the targets of these attacks were selected on the basis of ethnic origin, rather than (for example) on the basis of their proximity to Armenian military units. And once again, the sources Armenia cites in support of its claims describe the conduct at issue as conduct governed by IHL, not by CERD¹⁰⁵.

56. With respect to the alleged firing towards civilians after the Second Garabagh War, Armenia offers no basis for any allegation that any civilians were deliberately targeted rather than being collateral victims of ongoing military skirmishes. As Azerbaijan has already explained, Azerbaijan's forces were responding to repeated attacks on Azerbaijan's positions by Armenia's armed forces, which Armenia had placed in civilian settlements in Garabagh, and the continued activities of Armenia's illegal armed detachments in Azerbaijan's territory¹⁰⁶. But even if Armenia could show intentional targeting of civilians, its

¹⁰⁴ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 22 February 2023*, Declaration of Judge *ad hoc* Keith, para. 2 (“By their very nature, landmines are indiscriminate in their effects.”). See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 420, para. 46 (noting Armenia's argument that “landmines, by their nature, do not engage in ethnic discrimination”). Although Azerbaijan continues to believe that Armenia's laying of landmines specifically in the vicinity of ethnic Azerbaijani settlements constitutes racial discrimination under CERD, it agrees with the point that truly indiscriminate attacks do not implicate CERD. See CR 2021/26, pp. 12–13, paras. 3–4.

¹⁰⁵ See, e.g., Human Rights Watch, *Azerbaijan: Unlawful Strikes in Nagorno-Karabakh* (11 December 2020) (cited at Armenia's Memorial, p. 231, n.790); Annex 71 to Armenia's Memorial (cited at Armenia's Memorial, p. 231, n.790) (describing alleged “war crimes” committed during the Second Garabagh War as violations of the Geneva Conventions, Rome Statute, and Mercenaries Convention).

¹⁰⁶ See, e.g., Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 27 September 2022, pp. 7–11.

claims are governed by IHL and not CERD in the absence of a showing of discrimination on the basis of ethnic origin.

57. Again, if Armenia could manufacture CERD jurisdiction simply by asserting that some or all of the victims of armed hostilities were of Armenian ethnicity, then nearly every claim arising out of armed conflict between two States could be transformed into a CERD claim through a similar stratagem. That approach is not consistent with CERD.

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58. For these reasons, all of the claims in Part VI, Chapter 3, Section I, of Armenia's Memorial and as set out in Annex 46 do not fall within CERD and should be dismissed as beyond the Court's jurisdiction in this case.

2. Armenia's Allegations of Wrongful Detention Do Not Fall Within CERD

59. Although Armenia complains about detention of Armenian prisoners in Azerbaijan, Armenia puts forward no evidence that any Armenian was detained on the basis of ethnic origin. Accordingly, Armenia's argument in Part VI, Chapter 3, Section III of its Memorial, where it invokes CERD Articles 2 and 5(a) to assert that Azerbaijan has "discriminatorily and arbitrarily" detained ethnic Armenians, does not implicate the subject matter of CERD because Armenia provides no grounds to conclude that the complained-of detentions were "based on" ethnic origin.

60. The detainees that Armenia complains of fall into two categories: Armenian nationals who illegally crossed the border into Azerbaijan and prisoners of war captured during the Second Garabagh War. As to the individuals who crossed the border, Armenia's own allegations make clear that these individuals

were taken into custody by Azerbaijan because they were nationals of a hostile occupying State who illegally crossed into territory controlled by Azerbaijan, not because they were ethnically Armenian¹⁰⁷. Armenia’s references to “false accusations” and “spurious charges”¹⁰⁸ are completely unsubstantiated by any facts pled in Armenia’s Memorial, no matter how many times those words are repeated. Indeed, Armenia has admitted that these individuals crossed either the border from Armenia into Azerbaijan or the military line of contact from then-occupied Garabagh into territory controlled by Azerbaijan¹⁰⁹. This occurred at a time when borders were closed and when a significant portion of Azerbaijan’s territory was under military occupation by Armenia. Even if the detention of any of these individuals had been unlawful under IHL—which Azerbaijan disputes—it did not, on Armenia’s own case, involve differences in treatment based on ethnic origin. Accordingly, it does not implicate rights under CERD¹¹⁰.

61. Armenia’s claim that Azerbaijan detained prisoners during the Second Garabagh War also has nothing to do with the subject matter of CERD. Armenia alleges that 280 individuals were arbitrarily detained during and after the Second Garabagh War, at least 276 of whom are members of Armenia’s armed forces¹¹¹.

62. In rejecting Armenia’s September 2021 request for provisional measures that would have required release of these detainees, the Court found that “*international humanitarian law* governs the release of persons fighting on behalf

¹⁰⁷ See *supra*, Part III.B.I.b.

¹⁰⁸ See Armenia’s Memorial, p. 604, p. 6.123.

¹⁰⁹ See Armenia’s Memorial, p. 83, para. 3.35.

¹¹⁰ See *supra*, Part III.B.I.a–b.

¹¹¹ Armenia’s Memorial, p. 606, para. 6.127.

of one State who were detained during hostilities with another State” and, with respect to certain of these detainees, that Armenia has not produced “evidence indicating that these persons continue to be detained by reason of their national or ethnic origin”¹¹². Armenia has not put before the Court any grounds to reach a different conclusion today.

63. Instead, Armenia simply asserts without any coherent explanation that “Azerbaijan’s detention of these ethnic Armenians is patently discriminatory”¹¹³. It argues that its allegations of unlawful violence by Azerbaijani forces—which themselves have nothing to do with CERD as discussed above—as well as completely unrelated allegations of hate speech leave “no room for doubt in this regard”¹¹⁴. Armenia’s need to resort to bare assertions that racial discrimination is “patent” or beyond “doubt”, without even explaining the supposed connection between the detentions and the other allegations that it cites, shows that Armenia’s claims do not fall within CERD.

64. In fact, as Azerbaijan has previously explained, all of the detainees were either captured during active hostilities or were detained as a result of their suspected illegal activity. Twenty-eight of the detainees were repatriated to Armenia after a judicial determination that they had not committed a crime or

¹¹² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order on Provisional Measures of 7 December 2021, I.C.J. Reports 2021*, pp. 383–383, para. 60. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order on the Request for the Modification of the Order of 7 December 2021 Indicating Provisional Measures of 12 October 2022, I.C.J. Reports 2022* (denying Armenia’s request for modification of the 7 December 2021 order).

¹¹³ Armenia’s Memorial, p. 607, para. 6.129.

¹¹⁴ Armenia’s Memorial, p. 607, para. 6.129.

after their sentences were commuted¹¹⁵. The 33 detainees remaining in Azerbaijan's custody have been convicted of crimes including torture and murder¹¹⁶. The mere fact that these wartime detainees are primarily ethnic Armenians does not automatically transform claims about their detention into claims under CERD. It is simply the predictable reality of armed conflict against a monoethnic State whose population is almost entirely ethnic Armenian.

65. Again, Azerbaijan is not asking the Court to consider, on the merits, the strength or weakness of Armenia's case that the detentions were wrongful. Rather, the question is whether Armenia's claims—namely, that Azerbaijan is continuing to detain prisoners of war and other detainees captured in conflict with Armenia—are shown to be capable of falling within the provisions of CERD. In this case, on the face of Armenia's Memorial, the detentions have no discernible connection to ethnic origin and every connection to the fact that the detainees were, or were perceived to be, fighting for Armenia or engaged in violations of law. Armenia's unsupported assertions that criminal charges were not prosecuted fairly¹¹⁷ are irrelevant to CERD in the absence of any basis for claiming that there was a difference in treatment "based on" Armenian ethnic origin—as opposed to, for example, based on status as a member of Armenia's military or status as a citizen of Armenia or resident of Garabagh who was believed to have crossed illegally into Azerbaijan-controlled territory. Accordingly, the detentions do not implicate any rights protected under CERD.

¹¹⁵ CR 2021/21, p. 26, para. 8 (Goldsmith); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 4 October 2022.

¹¹⁶ CR 2021/21, p. 26, para. 8 (Goldsmith); Letter from Elnur Mammadov, Agent of the Republic of Azerbaijan, to Philippe Gautier, Registrar of the International Court of Justice, dated 4 October 2022.

¹¹⁷ See Armenia's Memorial, Part III.3.I.B.

66. For this reason, all of the allegations in Part VI, Chapter 3, Section III of Armenia's Memorial are beyond the Court's jurisdiction under Article 22 of CERD and should be dismissed.

3. Armenia's Allegations of Enforced Disappearances Do Not Fall Within CERD

67. Armenia's allegations of enforced disappearances, if they were true, also would be governed by IHL and do not fall within CERD. Armenia alleges in Part VI, Chapter 3, Section IV of its Memorial that Azerbaijan subjected ethnic Armenians to enforced disappearances during the Second Garabagh War and subsequent outbreaks of armed hostilities, and that the alleged disappearances violated CERD Articles 2 and 5. Armenia's allegations, however, do not implicate CERD in the absence of different treatment on the basis of ethnic origin.

68. Armenia does not provide any basis for any allegation that any Armenian was killed, detained, or otherwise subjected to enforced disappearance based on the individual's ethnic origin. Indeed, the only attempt Armenia makes to even argue that the allegations of disappearances fall within the scope of CERD is to assert that all of Armenia's claims must be "[v]iewed in the context of Azerbaijan's incessant hateful rhetoric against ethnic Armenians"¹¹⁸. As already explained, however, these claims of "rhetoric" cannot be used to transform every one of Armenia's other, unrelated claims into CERD violations. Again, in the context of an almost 30-year occupation and outbreaks of active hostilities between Azerbaijan and Armenia, Armenia has no justification for simply assuming that every alleged wrong against any national of Armenia or inhabitant of Azerbaijan's territories under Armenia's control necessarily has the purpose or effect of depriving individuals of rights on the basis of their ethnic origin.

¹¹⁸ Armenia's Memorial, p. 620, para. 6.156.

69. As previously stated, Azerbaijan does not contend that CERD cannot apply in wartime. For example, Azerbaijan itself has asserted a CERD claim in *Azerbaijan v. Armenia* based on Armenia's refusal to disclose the location of mass gravesites of ethnic Azerbaijanis in the aftermath of Armenia's campaign of singling out ethnic Azerbaijani communities for extermination on the basis of the ethnic origin and national origin of their inhabitants¹¹⁹. Armenia's allegations against Azerbaijan do not involve similar circumstances. Instead, Armenia's allegations arise in the context of the Second Garabagh War, when Azerbaijan exercised its inherent right of self-defense as recognized under international law and liberated territory internationally recognized as Azerbaijan's own and unlawfully occupied by Armenia. While enforced disappearances, if they occurred, would be a deplorable human rights violation regardless of their circumstances, they do not implicate CERD in the absence of discrimination based on ethnic origin or other characteristics enumerated in Article 1(1) of CERD.

70. For this reason, all of the allegations in Part VI, Chapter 3, Section IV of Armenia's Memorial are beyond the Court's jurisdiction under Article 22 of CERD and should be dismissed.

IV. SUBMISSIONS

71. For these reasons, Azerbaijan respectfully requests that the Court issue a judgment:

- a) Dismissing Armenia's Application in its entirety on the ground that none of Armenia's claims is properly before the Court because Armenia has

¹¹⁹ Azerbaijan's Memorial, p. 420, para. 581; *ibid.*, at 429.

failed to comply with the negotiation precondition required by Article 22 of CERD; and

- b) In addition or in the alternative, dismissing the claims as follows and as set forth in Annex 46 on the ground that the Court lacks jurisdiction *ratione materiae* because those claims fall outside the scope of CERD:
 - i) Each of the claims asserted in Part VI, Chapter 3, Section I, of Armenia's Memorial;
 - ii) Each of the claims asserted in Part VI, Chapter 3, Section III of Armenia's Memorial; and
 - iii) Each of the claims asserted in Part VI, Chapter 3, Section IV of Armenia's Memorial.

72. Azerbaijan reserves all its rights under the Court's Statute and Rules, including the right to amend and supplement these Submissions and right to contest jurisdiction and admissibility on the above and other grounds should the case proceed to the merits.

Respectfully submitted,

Elnur Mammadov
Agent of the Republic of Azerbaijan
21 April 2023