

CASE NOTE

Cultural heritage and the International Court of Justice: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*

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Abstract

This case note discusses the role of the International Court of Justice (ICJ) in the protection of cultural heritage. Of particular relevance in this vein is the cultural heritage dimension of the International Convention on the Elimination of All Forms of Racial Discrimination and its interpretation by the ICJ in its provisional measures order of 7 December 2021 in the proceedings on the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Armenia v. Azerbaijan)*. In this order, the ICJ indicated provisional measures to protect the cultural heritage of minorities and their right to equal participation in cultural activities. Looking ahead, the case note briefly elaborates on the potential implications of this order and the proceedings for the broader debate on the human right to cultural heritage.

Introduction: The role of the International Court of Justice in protecting cultural heritage

The International Court of Justice (ICJ) is *the* court of the international community. According to Article 92 of the ICJ Statute, it is the “principal judicial organ of the United Nations.”¹ As such it fulfills an important role in the international community.² Rarely, however, has the court dealt with cultural heritage so far.³ Due to this state of affairs, it is particularly interesting to analyze why the ICJ referred to cultural heritage in the recent dispute between Armenia and Azerbaijan. Before going into the details of the case, it is fitting to take a brief look at another dispute where cultural heritage was mentioned before the court – namely, the *Temple of Preah Vihear* case between Cambodia and Thailand.

¹ Statute of the International Court of Justice 1945, 33 UNTS 993. For details, see Jennings, Higgins, and Tomka 2019, para. 3.

² See, e.g., Hernández 2014, 1, 197ff.

³ For an overview, see Chechi 2016, especially at 359ff, 371ff, with further references to Polymenopoulou 2014.

The Temple of Preah Vihear case

In the *Temple of Preah Vihear* case, the ICJ had to deal with a dispute between Cambodia and Thailand. Cambodia had asked the court to interpret a prior judgment of the ICJ on a dispute between the same parties dating from 1962.⁴ In its decision from 11 November 2013, the court clarified – in brief – that in its 1962 judgment it had stated that “Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear” and, therefore, that Thailand was under request to “withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there.”⁵ Uncertainty surrounded the precise area of this territory.

This judgment is of relevance for the case discussed in this note since the court not only dealt with a territorial dispute (which it does quite frequently) but also explicitly mentioned that the *Temple of Preah Vihear* was “a site of religious and cultural significance for the peoples of the region,” which is recognized as a world heritage site by the United Nations Educational, Scientific and Cultural Organization (UNESCO). In this vein, the court mentioned the World Heritage Convention and the obligation of the parties in Article 6 to cooperate with each other and with the international community to protect this site as world heritage.⁶ Apart from this obligation, neither party may “take any deliberate measures which might damage directly or indirectly’ such heritage.”⁷ In addition, the “Court wishe[d] to emphasize the importance of ensuring access to the Temple from the Cambodian plain.”⁸

Despite this mention, the World Heritage Convention, in general, and Article 6, in particular, are very considerate of “fully respecting the sovereignty of the States on whose territory the cultural and natural heritage” is situated. Therefore, and due to the lack of explicit sanctions provided for in the convention (except for the possibility of delisting),⁹ the (undisputed) obligations contained in the convention are somewhat lacking in (international) enforceability.¹⁰ Notwithstanding such a limitation, one of the judges at the ICJ pointed out in a separate opinion that the ICJ had “parallel[led]” the safeguarding of state sovereignty and the preservation of world cultural heritage.¹¹ Even though the *Temple of Preah Vihear* case does not provide an actual precedent for the case discussed here, the court nevertheless demonstrated its readiness to adjudicate issues involving international cultural heritage law for the first time.

⁴ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 11 November 2013, [2013] ICJ Reports 281.

⁵ Temple of Preah Vihear (Cambodia v. Thailand), para 107. The precise area remained unclear (as it only spoke of the area of the temple and its vicinity) in the 1962 judgment. Therefore, the court defined the area in para. 98 of its 2013 judgment. For a detailed analysis of the case, see Chesterman 2015; Chechi 2016.

⁶ Temple of Preah Vihear (Cambodia v. Thailand), para. 106; Convention Concerning the Protection of the World Heritage and Natural Heritage, 16 November 1972, 1037 UNTS 151.

⁷ Temple of Preah Vihear (Cambodia v. Thailand), para. 106.

⁸ Temple of Preah Vihear (Cambodia v. Thailand), para. 106.

⁹ See, e.g., Lando Kirchmair, “Turning Hagia Sophia into a Mosque (again). Has International Law Anything to Say About That?,” *Völkerrechtsblog*, 21 July 2020, <https://voelkerrechtsblog.org/turning-hagia-sophia-into-a-mosque-again/> (on the question as to whether delisting might be possible without a request for assistance by the host state).

¹⁰ See Chechi 2016, 362, with further references to Lenzerini 2008, 207. For the criticism that the court missed references to international humanitarian law and the protection of cultural property in the event of armed conflict in this instance, see Chechi 2016, especially 359ff.

¹¹ See Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade, para. 65.

Provisional measures order from 7 December 2021 in the case between Armenia and Azerbaijan

Background

Nagorno-Karabakh used to be an autonomous entity in the Soviet Union within the territory of the Azerbaijani Soviet Socialist Republic. The majority population, however, was of Armenian ethnicity.¹² With the collapse of the Soviet Union, Armenia and Azerbaijan both became independent on 21 September 1991 and 18 October 1991, respectively, and the Nagorno-Karabakh region became disputed territory. While the region was originally part of the territory of Azerbaijan, this status changed after hostilities and a ceasefire in 1994, when the region was occupied by Armenia. This status lasted for almost 30 years until 2020. In September 2020, hostilities erupted again until a ceasefire “statement” between Armenia, Azerbaijan, and Russia was signed on 10 November 2020, in which large parts of the Nagorno-Karabakh territory fell under the control of Azerbaijan again.¹³ The region has an abundance of very valuable cultural heritage, and, therefore, the identity-laden ethnic conflict and quite an unstable security situation in which the hostilities of 2020 might erupt again are a particular danger to the Armenian cultural heritage in the region.¹⁴ In brief, the provisional measures order of the ICJ was and still is necessary. However, while the order might be welcomed intuitively, it is more controversial than it might seem at first sight.

The Armenian application instituting proceedings

First, there is an issue concerning the jurisdiction of the ICJ. Neither Armenia nor Azerbaijan has accepted the compulsory jurisdiction of the ICJ according to Article 36(2) of the ICJ Statute. Despite this situation, and according to Article 36(1) of the ICJ Statute, the jurisdiction of the court can also be established if treaties ratified by both parties provide for it. Indeed, the Republic of Armenia found a treaty that fulfills these requirements. It instituted proceedings against the Republic of Azerbaijan on 16 September 2021 concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁵ which includes in its Article 22 the possibility to initiate proceedings at the ICJ.¹⁶

Thus, seemingly, the first hurdle had been overcome; to overcome the second hurdle, Armenia had to find obligations in the CERD that fitted the circumstances. This might be somewhat surprising as the CERD is not known for its cultural heritage dimension. Armenia nevertheless requested the court to adjudge and declare that Azerbaijan was violating

¹² Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures Order, 7 December 2021, para. 13, <https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf>. Cf. De Waal 2013, 2019.

¹³ Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures Order, para. 13.

¹⁴ See Thomas De Waal, “Now Comes a Karabakh War over Cultural Heritage,” *Eurasianet*, 16 November 2020, <https://eurasianet.org/perspectives-now-comes-a-karabakh-war-over-cultural-heritage>.

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195 (accession by Armenia on 23 June 1993 and Azerbaijan on 16 August 1996).

¹⁶ Note that on 23 September 2021, Azerbaijan filed a counterclaim, essentially accusing Armenia of violating the same rights of the CERD. While this included the request that the Court should adjudge and declare that Armenia should “[i]mmediately cease and desist from the destruction of Azerbaijani heritage sites and other pieces of Azerbaijani ethnic and cultural property, and from the pursuit of the policy of cultural erasure,” the ICJ did not consider any cultural heritage related rights under the CERD to have been plausibly violated by Armenia. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures Order, 7 December 2021, paras. 52–53, <https://www.icj-cij.org/public/files/case-related/181/181-20211207-ORD-01-00-EN.pdf>.

Articles 2, 3, 4, 5, 6, and 7 of the CERD and should therefore cease any such ongoing internationally wrongful act and fully comply with its obligations under the CERD, including – and this is of interest here – refraining from “destroying Armenian cultural heritage or otherwise eliminating the existence of the historical Armenian cultural presence or inhibiting Armenians’ access and enjoyment thereof.”¹⁷ Armenia alleged that Azerbaijan was “systematically destroying and falsifying Armenian cultural sites and heritage” and submitted to the court that this would constitute a violation of Azerbaijan’s obligations under Article 5 of the CERD.¹⁸

The request for provisional measures

Due to the unstable situation and the alleged ongoing violations, Armenia furthermore asked the court, in order to prevent the risk of irreparable prejudice, to indicate provisional measures, among which the following points are related to the protection of cultural heritage:

- Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;
- Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD.¹⁹

Jurisdiction of the ICJ to adjudge on the protection of cultural heritage

In order to adjudicate this case, the court had to find that there was a dispute between both parties according to Article 22 of the CERD and that previous negotiations to settle the dispute were not successful. At the stage of provisional measures, the court must not yet come to final conclusions. It is sufficient if the court finds that, *prima facie*, a dispute between the parties exists and whether it appears that Armenia genuinely attempted to engage in negotiations as far as possible. While a previous opportunity to adjudicate upon the cultural heritage dimension of the CERD was missed by the ICJ when it dismissed a case between Georgia and Russia on jurisdictional grounds,²⁰ this changed with the provisional measures order under discussion here. In this order, the ICJ considered that negotiations had not been successful and that a dispute did exist between Armenia and Azerbaijan. The court thus

¹⁷ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, paras. 1, 2.

¹⁸ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 22.

¹⁹ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, paras. 5, 11.

²⁰ The issue had been raised in the written statement by Georgia at para 2.115, <https://www.icj-cij.org/public/files/case-related/140/16101.pdf>. Cultural heritage, however, was not dealt with in the provisional measures order of the ICJ. Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, [2008] ICJ Reports 353. In the merits phase, the court found that it had no jurisdiction as, according to the ICJ, no negotiations in relation to the obligations of both parties under the CERD to settle the dispute could be identified. Application of the CERD (Georgia v. Russian Federation), Preliminary Objections, 70, paras. 167ff.

answered both questions in the affirmative²¹ and concluded that “*prima facie*, it has jurisdiction pursuant to Article 22 of CERD.”²²

Armenian assertions and Azerbaijan’s defense concerning the link between allegedly violated rights of the CERD and the necessity to request provisional measures

For the indication of provisional measures, it is necessary that there is a link between the rights whose protection is sought and the provisional measures requested. This link must be made plausible. To this end, Armenia asserted, among other rights and obligations, “the right of persons of Armenian national or ethnic origin to access and enjoy their cultural heritage, as well as Azerbaijan’s corresponding obligation not to destroy, erase or falsify such heritage.”²³ Moreover, Armenia referred to the rights of persons of Armenian national or ethnic origin (Articles 2 and 5 of CERD) to access and enjoy their historic, cultural, and religious heritage without being discriminated against. Armenia pointed to Article 5(d) (vii) prohibiting racial discrimination in relation to the right to freedom of religion and Article 5(e)(vi) guaranteeing the right to equal participation in cultural activities. Armenia held that this right also entails a right to the protection and preservation of Armenian historic, cultural, and religious heritage.

Armenia alleged that soldiers from Azerbaijan committed acts of destruction and vandalism against Armenian religious and cultural heritage sites as well as acts of desecration of Armenian cemeteries and religious artifacts, such as the “khachkars.” In addition, Armenia claimed that Azerbaijan had changed features that were characteristic of Armenian cultural heritage by engaging in “restoration” works on the cathedral of Shushi. The repeated destruction, alteration, and desecration of Armenian cultural heritage and religious sites in the territories controlled by Azerbaijan constituted – according to Armenia – plausible “racial discrimination” in potential breach of Articles 2 and 5 of the CERD.²⁴

Azerbaijan accepted that all persons lawfully present in Azerbaijan – and this would include persons of Armenian national or ethnic origin – “must be able to visit on an equal basis historic, cultural and religious sites that are safely open to the public in its territory.”²⁵ However, specific heritage sites could not be accessed at that point due to landmines allegedly placed by Armenia. Thus, if access to such sites was restricted due to safety concerns, it affected everybody regardless of their origin and, thus, was not a plausible violation of rights leading to racial discrimination. Moreover, the law of Azerbaijan would forbid the vandalism and destruction of cultural and religious heritage, and efforts to protect and preserve Armenian sites would be facilitated. Credible allegations of vandalism, destruction, and unauthorized alteration would be investigated.²⁶

Article 5 of the CERD

To elaborate whether the alleged violations of Article 5 of the CERD are given, it is important to look at the text of the norm, which provides:

[i]n compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination

²¹ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, paras. 29, 42.

²² Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 43.

²³ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 46.

²⁴ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 50.

²⁵ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 54.

²⁶ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 54.

in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

(d) Other civil rights, in particular: ...

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

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

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

The findings of the ICJ

In the court's analysis, it was considered that the alleged violations of rights by Azerbaijan are plausible regarding the "discrimination against persons of Armenian national or ethnic origin ... through vandalism and desecration affecting Armenian cultural heritage."²⁷ In addition, the ICJ found that a link between the plausible violation of these rights and the provisional measures requested exists in relation "to prevent, prohibit and punish vandalism, destruction or alteration of Armenian historic, cultural and religious heritage and to protect the right to access and enjoy that heritage. These measures, in the Court's view, are directed at safeguarding plausible rights invoked by Armenia under the CERD."²⁸

After these findings, the court also had to find that irreparable prejudice could be caused to those rights and that urgency was given – that is, that there was a real and imminent risk that such irreparable prejudice could take place before the final judgment of the court was delivered. To this end, the court consulted its previous case law stating that Article 5(a), (b), (c), (d), and (e) "are of such a nature that prejudice to them is capable of causing irreparable harm."²⁹ Subsequently, the court referred to its provisional measures order in the *Temple of Preah Vihear* case, stating that the court "indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage 'has been the scene of armed clashes between the Parties' and when 'such clashes may reoccur'."³⁰

The court referred to a resolution by the Parliamentary Assembly of the Council of Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021 that condemned damage caused deliberately to cultural heritage by Azerbaijan during the six-week war in 2020.³¹ Hence, the court concluded that conditions to indicate provisional measures had been met.³² Therefore, by 13 votes to two,

²⁷ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 61.

²⁸ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, paras. 67, 68.

²⁹ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 81 (with further references to Application of the CERD (Georgia v. Russian Federation), Provisional Measures, para. 142); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, [2017] ICJ Reports 104, 138, para. 96; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, [2018] ICJ Reports 406, 430–31, para. 67.

³⁰ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 84, with reference to *Temple of Preah Vihear* (Cambodia v. Thailand), Provisional Measures Order, para. 61.

³¹ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, paras. 85, 86, with reference to Resolution 2391, 27 September 2021 (twenty-fourth sitting).

³² Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 89.

the court indicated, among others, the following provisional measures. Azerbaijan must “[t]ake all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.”³³

Dissenting opinion and declaration of judge Yusuf and judge *ad hoc* Keith

The indication of provisional measures by the ICJ concerning cultural heritage maybe did not come as a surprise, but, nevertheless, it had little precedent. Commentators spoke of a “new take on cultural heritage at the ICJ.”³⁴ Indeed, subsuming the protection of cultural heritage under the CERD is not obvious, and a prominent voice of criticism was Judge Abdulqawi Ahmed Yusuf, who began his dissenting opinion with the claim that “[t]he Court has thrown wide open the gates of the ... CERD ... to all kinds of claims that have nothing to do with its provisions or with its object and purpose.”³⁵ Apart from other points raised in the proceedings, he also directed this criticism toward the law on the safeguarding of cultural heritage that had been brought within the scope of the CERD. In his eyes, “[t]his unprecedented approach risks transforming the Convention into a ‘fourre-tout’.”³⁶

The words of Judge Yusuf deserve particular attention as he was, among many other things, legal adviser and director at the Office of International Standards and Legal Affairs at UNESCO for nearly a decade from March 2001 to January 2009 before becoming a judge at the ICJ. The reason for his dissent was not the question as to whether cultural heritage is “worthy of protection”³⁷ but, rather, whether his doubt that the jurisdiction of the court in the given case was sufficient. To him, it was implausible to claim that acts allegedly committed and those that might be committed in the near future before the court gives its final judgment “constitute acts of racial discrimination within the meaning of Article 1, paragraph 1” of the CERD.³⁸ Cultural heritage is protected by other international legal instruments (on which the court, in this case, has no power to adjudicate as neither of the parties had accepted the compulsory jurisdiction of the court according to Article 36(2) of the ICJ Statute).³⁹

Pointedly, Judge Yusuf stated that “[c]onsiderations of race and racial discrimination cannot and do not apply to monuments, groups of buildings, sites and artifacts.”⁴⁰ In particular, he pointed out that Article 5(e)vi of the CERD – the right to equal participation in cultural activities – is not a self-standing provision disconnected from the aim to eliminate all racial discrimination. The order lacks, according to his criticism, an analysis demonstrating that distinctions were made on the basis of race, color, or national or ethnic origin.⁴¹ He concluded this from the fact that neither the United Nations (UN) Committee on Economic, Social and Cultural Rights – in Comment no. 21 on Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights – nor the European Court of Human Rights could find a link between the respective conventions and claims relating to cultural heritage sites.⁴² From this conclusion, he followed that “an obligation for States to

³³ Application of the CERD (Armenia v. Azerbaijan), Provisional Measures Order, para. 98.

³⁴ See, e.g., Alexander Herman, “A New Take on Cultural Heritage at the ICJ – Armenia v. Azerbaijan,” *Blog of the Institute of Art & Law*, 17 February 2022, <https://ial.uk.com/new-take-icj/>.

³⁵ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 1.

³⁶ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 1.

³⁷ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 4.

³⁸ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 2.

³⁹ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 4.

⁴⁰ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 13.

⁴¹ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 15.

⁴² International Covenant on Economic, Social and Cultural Rights (ICESCR) 16 December 1966, 993 UNTS 3.

prevent and punish acts of vandalism and desecration of cultural heritage and religious sites does not arise from the requirement, in Article 5, paragraph (e)(vi), of CERD.”⁴³

Furthermore, the assertion that “religious heritage” is plausibly protected under the CERD was “erroneous” to him as it “is well known that the drafters of the CERD decided not to address religious discrimination or religious intolerance in this Convention.”⁴⁴ Judge Yusuf was seconded in his dissent by Judge ad hoc Sir Kenneth Keith, nominated by Azerbaijan, who also explained in a declaration his “negative vote relating to cultural property,” with the supposedly limited protection provided by the CERD to this end. In particular, Article 5(d)(vii) of the CERD on the rights of persons to freedom of thought, conscience, and religion could “in many cases ... be enjoyed without access to physical places,” and he saw no real evidence for a denial of the right to equal participation in cultural activities (Article 5(e)(vi) CERD) in the record.⁴⁵ In addition, he voiced doubt through the prism of his “understanding of the evidence” that even to “the extent that CERD does provide for access to sites that include Armenian cultural property, that access is ... made difficult by the existence of landmines and the lack of knowledge of their spread, rather than because of the national or ethnic origin of those seeking access.”⁴⁶

For both judges, the *Temple of Preah Vihear* case was of no relevance here. While Judge Yusuf stated that the present case was distinguishable “in so far as the Court’s prima facie jurisdiction there was premised on a much wider jurisdictional basis,”⁴⁷ Judge ad hoc Keith held that the jurisdiction “at the merits stage of that case [*Temple of Preah Vihear*] arose under unilateral acceptances of the jurisdiction of the Court.”⁴⁸ However, in both the provisional measures order of 2011 and the judgment on the merits in 2013, the court based its jurisdiction in the *Temple of Preah Vihear* case on Article 60 of the ICJ Statute and Article 98(1) of the Rules of Court relating to the “event of dispute as to the meaning or scope of the judgment,” which – according to long-standing case law of the court – “does not require the same criteria to be fulfilled as those determining the existence of a dispute under Article 36, paragraph 2, of the Statute.”⁴⁹

While Judge ad hoc Keith was “unable to find evidence of a real and imminent risk that irreparable prejudice will be caused to the right in respect of cultural property” as the “material before the Court at present is too scant to meet that exacting standard,”⁵⁰ Judge Yusuf also stated that, in his opinion, “CERD does not provide legal grounds for the indication of provisional measures ... with respect to the protection of cultural and religious sites.”⁵¹

⁴³ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 16, with further reference to ECtHR, *Ahunbay et autres c. Turquie*, Application no. 6080/06, 21 February 2019, paras. 23–25 (where the European Court of Human Rights explicitly stated in para. 25: “Par contre, elle n’observe, à ce jour, aucun ‘consensus européen’ ni même une tendance parmi les États membres du Conseil de l’Europe qui aurait pu nécessiter une remise en cause de l’étendue des droits en question ou qui aurait autorisé que l’on inférât des dispositions de la Convention un droit individuel universel à la protection de tel ou de tel héritage culturel, comme il est revendiqué dans la présente requête.”)

⁴⁴ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 17.

⁴⁵ Application of the CERD (Armenia v. Azerbaijan), Declaration of Judge ad hoc Keith, para. 4.

⁴⁶ Application of the CERD (Armenia v. Azerbaijan), Declaration of Judge ad hoc Keith, para. 5.

⁴⁷ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 18.

⁴⁸ Application of the CERD (Armenia v. Azerbaijan), Declaration of Judge ad hoc Keith, para. 4. Similarly, in this vein, see Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, paras. 18–19.

⁴⁹ *Temple of Preah Vihear* (Cambodia v. Thailand), Provisional Measures Order, paras. 19–22; Judgment, paras. 31–33, with further reference to Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), 1927, PCIJ, Series A, No. 13, 10–12.

⁵⁰ Application of the CERD (Armenia v. Azerbaijan), Declaration of Judge ad hoc Keith, para. 6.

⁵¹ Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 20.

Discussion

The provisional measures indicated in the order of 7 December 2021 in relation to the protection of cultural heritage in Nagorno-Karabakh stand out in the case law of the ICJ. While, so far, cultural heritage law has not been at the center of the issues dealt with, the proceedings instituted by Armenia, and the successful request for provisional measures, demonstrate that the ICJ is willing to lend a protective hand to cultural heritage in danger. Such efforts, arguably, significantly strengthen international heritage law. The provisional measures indicated are binding for Azerbaijan.

In this controversial order, the ICJ found it plausible that Azerbaijan had violated, and would continue to do so, Article 5 of the CERD. Article 5(d)(vii) of the CERD does not exclude “religious heritage” as such.⁵² It has been pointed out that “[r]eligion, like culture, takes many forms.”⁵³ Thus, it is difficult to draw clear lines: “For many communities, including but not confined to indigenous peoples, clear lines between culture or tradition and ‘religion’ may not exist, and defining such lines may amount to an attempt to graft exogamous concepts and structures on to such communities and their life projects.”⁵⁴ This also seems to apply to the actors and communities discussed here as, according to one commentator, it is too simplistic “to define the conflict in terms of ethnicity and religion.”⁵⁵ Therefore, it is not amiss to consider it plausible that Article 5(d)(vii) of the CERD might have been violated.

Article 5(e)(vi) of the CERD “links with an undefined prospectus of ‘cultural activities,’” which arguably is broad enough to include the protection of cultural heritage as potentially envisaged by the court.⁵⁶ Article 5(e)(vi) of the CERD is furthermore closely connected with Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.⁵⁷ By subsuming the acts committed by Azerbaijan under Article 5(e)(vi) of the CERD – the right to equal participation in cultural activities – the ICJ paved the way for a human right to cultural heritage, which has been maintained by the UN special rapporteurs for cultural rights for years. The dissenting opinion by Judge Yusuf and the declaration by Judge ad hoc Keith, however, show that this interpretation of Article 5 of the CERD is not without its critics.

While the court considered it plausible that the alleged vandalism and desecration of Armenian cultural heritage is an act of discrimination against persons of Armenian national or ethnic origin and, thus, a violation of rights laid down by the CERD, Judge Yusuf questioned this finding in this dissent. To him, racial discrimination cannot apply to monuments. To Judge ad hoc Keith, arguing in a similar fashion, it is doubtful that the rights of persons to freedom of thought, conscience, and religion could not be enjoyed without access granted to physical places such as places of worship. In addition, he claimed that access is made difficult by landmines and not because of the national or ethnic origin of persons seeking access. The decisive element that separates the positions of these two judges from the majority at the court seems to be the question as to how direct a discriminatory act or a violation of the freedom of religion must be in order to fall under Article 5 of the CERD. For the purpose of provisional measures, the court seems to be perfectly right to consider it plausible that the hindrance to enter particular places of worship, or, rather, the destruction thereof, might be directed against persons of Armenian national or ethnic origin and thus could constitute a violation of Article 5 of the CERD. To put

⁵² See Application of the CERD (Armenia v. Azerbaijan), Dissenting Opinion Judge Yusuf, para. 17.

⁵³ Thornberry 2016, 355.

⁵⁴ Thornberry 2016, 355.

⁵⁵ De Waal 2013, 9.

⁵⁶ Thornberry 2016, 384.

⁵⁷ Thornberry 2016, 383; Universal Declaration of Human Rights, UN Doc. A/810, 10 December 1948; ICESCR.

it bluntly, it seems rather artificial to argue that landmines hinder anybody from equally entering a particular place of worship.

Is the ICJ's finding, beyond its impact on international heritage law, also of relevance for the discourse on a (potential) human right to the protection of cultural heritage?⁵⁸ Several international human rights treaties include provisions closely related to, or indirectly promoting, cultural heritage.⁵⁹ Farida Shaheed, the first UN special rapporteur in the field of cultural rights appointed by the UN Human Rights Council, concretized the relation between cultural heritage and cultural rights when locating the legal basis of the right of access to, and enjoyment of, cultural heritage "in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage."⁶⁰

Cultural heritage also has links to further human rights such as human dignity as well as identity if one accepts UNESCO's premise holding that "culture is central to man and that without it no rights are possible since it is the matrix from which all else must spring."⁶¹ In this stance, cultural heritage is also important for the right of peoples to self-determination. The right to education also "is crucial in fostering respect for the diversity of cultural heritages and expressions" and since "much of cultural heritage has religious connotations, the right to freedom of thought and religion is of great relevance for the right of access to and enjoyment of cultural heritage."⁶² Shaheed advocated for perceiving cultural heritage "from a human rights perspective."⁶³ Even though there is no specific universal right to cultural heritage enshrined in a binding agreement, there is, nevertheless, a dynamic development to be noticed. Shaheed observed this development, acknowledged its general value in relation to cultural identity, and, therefore, underscored the need to preserve cultural heritage as a "human rights issue."⁶⁴

Karima Bennouna, the second UN special rapporteur in the field of cultural rights, followed the position of her predecessor in her first thematic report on 27 October 2016 and also highlighted the "[i]mportance of cultural heritage from a human rights perspective."⁶⁵ In subsequent reports, she has raised awareness for the work of what she coins "cultural rights defenders" – that is, "human rights defenders who defend cultural rights in accordance with international standards." To her, the rights that such human rights defenders advocate are "a core part of international human rights law."⁶⁶ This ties back to the 1993 summit meeting of the Council of Europe in which heads of state generally made a direct link between cultural heritage and human rights.⁶⁷ And, indeed, it seems that the international community is increasingly considering the relevance of cultural heritage as a significant pillar of a flourishing cultural diversity, which is important for human rights, in particular, and for peace and stability, in a broader perspective.⁶⁸ In this sense, the

⁵⁸ Cf. Kirchmair 2022.

⁵⁹ Providing an overview Human Rights Council (HRC), *Report of the Independent Expert*, 2011, paras. 33–48; Blake 2011, 215–18, especially 223–30; 2015, 288–96.

⁶⁰ HRC, *Report of the Independent Expert*, para. 78.

⁶¹ United Nations Educational, Scientific and Cultural Organization, *Cultural Rights as Human Rights*, 1970.

⁶² HRC, *Report of the Independent Expert*, paras. 2, 45, 46, 47, 48; cf. Vrdoljak 2012, 139 (speaking of a "cross-fertilization between human rights and cultural heritage law in the field of movable heritage").

⁶³ HRC, *Report of the Independent Expert*, paras. 4–8.

⁶⁴ HRC, *Report of the Independent Expert*, paras. 20, 77.

⁶⁵ HRC, *Report of the Independent Expert*, 2016, paras. 34, 50–51, 47–51.

⁶⁶ HRC, *Report of the Special Rapporteur*, 2020, para. 2.

⁶⁷ See Blake 2000, 73.

⁶⁸ See, e.g., Francioni 2012, 25; Vrdoljak 2014.

cultural heritage concept also influences and promotes cultural rights, and the ICJ has arguably contributed toward this end with its provisional measures order.

Apart from the human rights dimension of the order, it must be said that the criticism voiced in relation to the jurisdiction of the court, holding that there was no legal basis for it, hinges upon the qualification as to whether Article 5 of the CERD is pertinent or not. If this question is answered in the affirmative, it seems hard to uphold the argument that the court overstretched its jurisdiction based upon Article 22 of the CERD. Despite this qualification, this case might also be an important example of strategic, if not to say creative, litigation since the CERD, as was pointed out by the dissenting opinion, is not the first legal instrument that comes to mind when considering the international protection of cultural heritage. The readiness of the ICJ to, nevertheless, consider this case and to adopt provisional measures might open avenues for future cases before this court and also before other courts.⁶⁹ The verdict on whether this case will, indeed, become an example of strategic litigation will have to wait until the final judgment has been delivered.

Finally, in relation to matters of urgency, which justify the indication of provisional measures, it is rather a judgment upon the situation at hand than a merely legal interpretation. The way in which the armed conflict played out in 2020, building on a conflict that has been burning for decades, if not more,⁷⁰ and the most recent rekindling of the situation in the wake of Russia's war of aggression against Ukraine, show the necessity of the provisional measures indicated by the court.

Concluding by looking ahead

Orders on provisional measures indicated by the court are binding.⁷¹ If the provisional measures are not complied with, Azerbaijan would be in violation of international law and could be held accountable for such a violation. First, if Armenia considered that Azerbaijan had failed to perform its obligations resulting from the provisional measures order, it could bring the matter before the UN Security Council. According to Article 94(2) of the UN Charter, the Security Council is empowered to recommend or decide upon measures to be taken to give effect to the judgment.⁷² Second, the law of state responsibility is pertinent as, for instance, the ILC Articles on State Responsibility hold that any internationally wrongful act of a state entails its international responsibility.⁷³

In order to see whether Azerbaijan is complying with international law on the protection of cultural heritage, it seems vital that the region remains under surveillance by the international community. As the war of aggression of Russia against Ukraine understandably consumes much of the international attention, it is nevertheless important not to lose sight of the Nagorno-Karabakh region and the compliance with international law of the actors present in this region. While it should be possible to assume that a UN member state complies with the orders of its principal judicial organ, being particularly vigilant might even raise Azerbaijan's motivation to comply. However, the blatant violation of

⁶⁹ For an analysis of strategic litigation at the ICJ, see Ramsden 2022, 472 (pointing, for instance, to "the indivisibility of many human rights standards' which enable "broad claims of abuse to be bundled into claims under a specific treaty"). For another recent example of a successful creative litigation strategy, see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

⁷⁰ See only De Waal 2013.

⁷¹ *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, [2001] ICJ Reports 466, 506, para. 109.

⁷² Cf. Llamzon 2007; Charter of the United Nations, 26 June 1945, 1 UNTS 16.

⁷³ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/83, 3 August 2001, Art. 1.

international law by Russia shows us that compliance with international law ultimately hinges – at least to a certain extent – on the question as to how important it is to states – in our case, Azerbaijan – to be regarded as respectful members of the international community that are concerned about their legal obligations toward other treaty parties and the international community as a whole.

Be that as it may, the ICJ has demonstrated its readiness to fulfill its role as the principal judicial organ of the UN and the international community, also in relation to the protection of cultural heritage. In this vein, the provisional measures order breaks new ground. Whether the ICJ will continue along this path in the final judgment remains to be seen. Whether Azerbaijan complies with the provisional measures indicated by the court will certainly be decisive to this end until the final judgment is rendered.⁷⁴ Until then, it is of great importance for the protection of cultural heritage that the international community pays close attention to the region.

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⁷⁴ In an order from 21 January 2022, the ICJ declared that the written pleadings of Armenia are due on 23 January 2023 and those of Azerbaijan on 23 January 2024. Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Armenia v. Azerbaijan), Order of 21 January 2022, <https://www.icj-cij.org/public/files/case-related/180/180-20220121-ORD-01-00-EN.pdf>.

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