

# LEGAL COMMENTARIES

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## The ICJ, Racial Discrimination, and the Protection of Cultural Heritage

**Abstract:** This article examines the protection of cultural heritage in the jurisprudence of the International Court of Justice (ICJ, or Court) under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It analyses all the cases before the ICJ in which the issue has arisen to date, with a particular focus on the key order on provisional measures in *Armenia v. Azerbaijan*, issued in 2021. The main argument is that this decision, although to some extent controversial, has set a precedent for other cultural heritage protection cases before the Court. However, in light of further ICJ jurisprudence, states will still have to meet a heavy burden of proof in order to make real use of this precedent, in particular to redress actual collective harm to affected communities.

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**Keywords:** cultural heritage, International Court of Justice, racial discrimination, CERD

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## Introduction

For many years, the issue of cultural heritage protection was virtually absent from the jurisprudence of the International Court of Justice (ICJ, or Court).<sup>1</sup> The main reason was the lack of a jurisdictional basis for the ICJ to hear cultural heritage cases.<sup>2</sup> The 1972 Convention for the Protection of the World Cultural and Natural Heritage (“the World Heritage Convention”),<sup>3</sup> which is crucial for the protection and preservation of cultural heritage, does not contain any provisions for the settlement of disputes in which a Party violates its obligation to “protect, conserve, present and transmit to future generations” such heritage. There is no specific jurisdiction clause in the World Heritage Convention to refer disputes arising from its application to the ICJ.<sup>4</sup> The situation becomes even more complicated in the case of armed conflict, as the World Heritage Convention only imposes obligations on the Parties with respect to cultural heritage “situated on the territory of a Party”, which may raise questions in situations of highly complex territorial disputes. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>5</sup> appears to be a solution, but it only provides for the possibility of good offices and mediation by protecting powers (i.e. states mandated by one party to protect its interests and the interests of its nationals vis-à-vis the other party during an armed conflict) and for the involvement of UNESCO in the resolution of a specific problem related to the application of the Convention. Once again, there are no provisions that would allow for its judicial enforcement.

Nevertheless, nothing in the Charter of the United Nations,<sup>6</sup> the Statute of the International Court of Justice,<sup>7</sup> and other documents governing the functioning of the Court prevents it from dealing with cultural heritage cases.<sup>8</sup> It is not surprising, therefore, that states have sought other ways to involve the Court in the protection of cultural heritage, looking elsewhere for a less obvious jurisdictional basis. In recent years, some of the most interesting attempts have been to use the International Convention on the Elimination of All Forms of Racial Discrimination

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<sup>1</sup> A. Chechi, *The 2013 Judgment of the ICJ in the Temple of Preah Vihear Case and the Protection of World Cultural Heritage Sites in Wartime*, “Asian Journal of International Law” 2016, Vol. 6(2), p. 371.

<sup>2</sup> In fact, this problem applies even more broadly to all cultural rights, see e.g. comments by E. Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, “Leiden Journal of International Law” 2014, Vol. 27(2), pp. 450 and 460.

<sup>3</sup> 16 November 1972, 1037 UNTS 151.

<sup>4</sup> L. Kirchmair, *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*, “International Journal of Cultural Property” 2022, Vol. 29(4), p. 564.

<sup>5</sup> 14 May 1954, 249 UNTS 240.

<sup>6</sup> 26 June 1945, 1 UNTS XVI.

<sup>7</sup> 26 June 1945, 59 Stat. 1055, 33 UNTS 93.

<sup>8</sup> E. Polymenopoulou, *op. cit.*, p. 450.

of 1965 (hereinafter “CERD”)<sup>9</sup> to enable the Court to rule on the matter, either through a judgment or an order for provisional measures, and thus to protect the cultural heritage of groups protected by the Convention.<sup>10</sup> This text seeks to explore this issue by analysing the cases under the CERD before the ICJ in which the issue of the protection of cultural heritage has been raised,<sup>11</sup> focusing on the most significant decision to date, the ICJ’s ruling on the provisional measures in the case of *Armenia v. Azerbaijan* of 7 December 2021 and its aftermath (hereinafter also referred to as “the 2021 Order”). The main argument of the text is that this decision, although to some extent controversial from the point of view of the interpretation of the Convention adopted therein, set a precedent for other cases related to the protection of cultural heritage before the Court, but that there will be still a heavy burden of proof for states to make use of this precedent; a burden which should not be underestimated.

## Substantive CERD Provisions Relied upon before the ICJ

It seems appropriate to precede the analysis of the ICJ’s jurisprudence with a brief description and analysis of the CERD provisions invoked by states before the Court in the cases discussed below. These are contained in the first part of the Convention (Articles 1-7), which sets out the substantive obligations of States Parties.<sup>12</sup>

The primary purpose of the CERD, as its preamble indicates, is to eliminate all forms of racial segregation and discrimination. Its Article 1 defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin” which adversely affects the enjoyment or exercise of human rights and fundamental freedoms in any field of public life. This includes – as the Convention explicitly mentions – also the cultural field. Article 2 requires CERD States Parties to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms (including taking preferential measures in favor of disadvantaged groups, where circumstances so require),

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<sup>9</sup> 7 March 1966, 660 UNTS 195.

<sup>10</sup> The hope of triggering the jurisdiction of the ICJ (allowing it to hear the case) was the main reason why these cases were brought precisely under the CERD, despite the fact that a number of underlying issues in them did not primarily concern racial discrimination and that there were other seemingly more blatant violations of international law at play, see e.g. A. Herman, *A New Take on Cultural Heritage at the ICJ – Armenia v. Azerbaijan*, 17 February 2022, <https://ial.uk.com/new-take-icj/> [accessed: 12.05.2024] or M. Lando, *The Gift that Keeps on Giving: The ICJ’s Orders on Provisional Measures in the Cases between Armenia and Azerbaijan*, <https://cil.nus.edu.sg/blogs/the-gift-that-keeps-on-giving-the-icjs-orders-on-provisional-measures-in-the-cases-between-armenia-and-azerbaijan-by-massimo-lando/> [accessed: 12.05.2024].

<sup>11</sup> The ICJ’s 2013 Temple of Preah Vihear judgment is therefore not discussed in detail in this text, as the parties did not invoke CERD provisions. For further information on the case, see A. Chechi, *op. cit.*, *passim*.

<sup>12</sup> M. Banton, *International Action Against Racial Discrimination*, Oxford University Press, New York 1996, p. 62.

to ensure that public authorities do not engage in, support, or defend such discrimination; to ensure that all laws do not create or perpetuate it; and to prohibit it.

The most important substantive provision of the Convention, and the one most frequently used as a basis for applications to the ICJ, is Article 5. It obliges states to enforce the prohibition of racial discrimination in specific areas and to ensure respect for the rights specifically mentioned therein. These are: the right to equal treatment before judicial authorities (Article 5(a)); the right to personal security and protection from violence by the state and non-state actors (Article 5(b)); political rights (Article 5(c)); civil rights, including freedom of thought, conscience, and religion (Article 5(d)(vii)); and freedom of peaceful assembly and association (Article 5(d)(ix)); as well as a broad catalogue of economic and social rights, such as the right to education (Article 5(e)(v)) and the right to equal participation in cultural activities (Article 5(e)(vi)).

Finally Article 6, although much less frequently invoked, requires States Parties to provide effective protection and remedies against racial discrimination through national courts and other state institutions, and grants individuals the right to seek just and adequate reparations for any damage suffered. Other substantive articles, such as Article 4 (prohibition of propaganda and the operation of organizations based on ideas or theories of racial superiority) or Article 7 (adoption of measures to combat prejudices leading to racial discrimination, particularly in the fields of teaching, education, culture, and information), have not yet been invoked by states before the ICJ in cultural heritage cases.

The provisions of the CERD mentioned above were not widely analyzed in the literature prior to the 2000s with regard to their impact on cultural heritage protection. Even the scope of “cultural activities” mentioned in Article 5 was not much commented upon. However, it was pointed out that the latter article was intended by the negotiators to be interpreted restrictively, and that references to the Universal Declaration of Human Rights<sup>13</sup> were deleted from it so as not to include certain rights, such as the right of access to public places.<sup>14</sup> Some found it unclear how to distinguish discrimination based on national or cultural grounds from discrimination on religious grounds, which was deliberately left out of Article 1. Examples included cases involving Catholic and Protestant residents of Northern Ireland, Orthodox Serbs and Catholic Croats, or Christian Armenians and Muslim Azeris.<sup>15</sup> One suggestion to solve this problem was that the courts would decide it based on the circumstances of the case and the evidence, analyzing the specific practice(s) complained of.<sup>16</sup>

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<sup>13</sup> 10 December 1948, UN Doc. A/RES/217 A (III).

<sup>14</sup> N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Sijthoff & Noordhoff, Alphen aan den Rijn 1980.

<sup>15</sup> M. Banton, *op. cit.*, pp. 54 and 65-66.

<sup>16</sup> *Ibidem*, p. 66.

However, in some binding and non-binding instruments unrelated to the CERD, concluded or adopted before the ICJ addressed the issue in question, there were links between the prohibition of racial discrimination under the Convention, or non-discrimination in general, and the protection or enjoyment of cultural heritage. For example, the 1981 African Charter on Human and Peoples' Rights<sup>17</sup> provided in its Article 22(1) for the right to "equal enjoyment" of the common heritage of mankind,<sup>18</sup> and the Final Report of the 1991 CSCE Meeting of Experts on National Minorities mentioned "the right to the preservation of the cultural heritage" as a consequence of the obligation not to discriminate against such minorities.<sup>19</sup> In 1993-1994, the Council of Europe documents also attempted to link the right to the protection and development of culture, especially in the case of national minorities, with the obligation of states to respect the cultural heritage of individual groups and mankind.<sup>20</sup> Also, CERD's General Recommendation 34 on racial discrimination against people of African descent, issued in 2011 by the Committee established to monitor CERD's implementation, mentioned the need to respect without discrimination, inter alia, the right of such people to "their cultural and artistic heritage".<sup>21</sup> The existence of said connections was therefore not an alien idea to scholars and practitioners.

## The ICJ's Analysis of Cultural Heritage Issues under the CERD before 2021

The first attempts in recent years to get the ICJ more involved in the protection of cultural heritage using the CERD as a jurisdictional basis were the cases of *Georgia v. Russia* and *Ukraine v. Russia*. In the first case, the issue of the protection of cultural heritage was not raised in the application initiating the proceedings in August 2008,<sup>22</sup> nor at the stage of the ICJ's order for provisional measures

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<sup>17</sup> June 1981.

<sup>18</sup> J. Blake, *Taking a Human Rights Approach to Cultural Heritage Protection*, "Heritage & Society" 2011, Vol. 4(2), p. 223.

<sup>19</sup> J. Symonides, *The Legal Nature of Commitments Related to the Question of Minorities*, "International Journal on Group Rights" 1995/1996, Vol. 3(4).

<sup>20</sup> J. Blake, *On Defining the Cultural Heritage*, "International & Comparative Law Quarterly" 2000, Vol. 49(1), pp. 82-83.

<sup>21</sup> P. Murillo, E. Ojulari, *General Recommendation 34: A Contribution to the Visibility and Inclusion of Afro-descendants in Latin America*, in: D. Keane, A. Waughray (eds.), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument*, Manchester University Press, Manchester 2017, pp. 162-163.

<sup>22</sup> ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Application Instituting Proceedings, 12 August 2008, <https://www.icj-cij.org/sites/default/files/case-related/140/14657.pdf> [accessed: 18.08.2024].

in October 2008,<sup>23</sup> but only later in the written proceedings on the merits, specifically in Georgia's Memorial of 2 September 2009.<sup>24</sup> The Georgian authorities requested the Court to adjudge and declare that Russia, through its organs and other dependent entities, such as the separatist authorities in Abkhazia and South Ossetia, was responsible for violations of the CERD, including the destruction of Georgian culture and identity in South Ossetia and Abkhazia. They also asked the ICJ to rule on Russia's violation of the October 2008 order on provisional measures on the same grounds, presumably believing that Russia's failure to stop the destruction of Georgian "culture and identity" in Russian-controlled territory constituted a breach of its obligation "to refrain from any act of racial discrimination against individuals, their groups or institutions within South Ossetia and Abkhazia and adjacent areas of Georgia".<sup>25</sup> Thus, in view of the specific grounds of jurisdiction of the ICJ in this case, Georgia sought to rely on a broad interpretation of racial discrimination that included the negation or obliteration of culture, religion, or language.<sup>26</sup> Ultimately, this attempt failed completely, as in the 2011 judgment on preliminary objections the ICJ upheld some of Russia's procedural objections to the further handling of the case and declared that it had no jurisdiction to hear it, thus ending the proceedings.<sup>27</sup> As a result, there was no opportunity for the ICJ to hear Georgia's application on the merits and to clarify its approach to the protection of cultural heritage under the CERD.<sup>28</sup>

In the case of *Ukraine v. Russia*, issues related to cultural heritage emerged from the very beginning, i.e. in the January 2017 application initiating the proceedings. However, Ukraine initially only demanded respect for the rights of ethnic Ukrainians and Crimean Tatars to participate in cultural gatherings, commemorate important cultural events, and freely express their cultural Crimean Tatar identity, and criticized far-reaching restrictions on teaching in the Ukrainian and Crimean Tatar languages.<sup>29</sup> Thus, its application related only to the protection of intangible

<sup>23</sup> ICJ, *Application... (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008.

<sup>24</sup> ICJ, *Application... (Georgia v. Russian Federation)*, Memorial of Georgia, 2 September 2009, particularly pp. 35 and 407, <https://www.icj-cij.org/sites/default/files/case-related/140/16097.pdf> [accessed: 18.08.2024].

<sup>25</sup> See ICJ, *Application... (Georgia v. Russian Federation)*, Provisional Measures, p. 398. Unfortunately, Georgia's memorial did not make clear why it believed there had been a breach of the order.

<sup>26</sup> E. Polymenopoulou, *op. cit.*, p. 460.

<sup>27</sup> See ICJ, *Application... (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, p. 141.

<sup>28</sup> The fact that there was no judgment in this case which would have given the Court the opportunity to discuss minority rights and the right to non-discrimination is particularly regretted by E. Polymenopoulou, *op. cit.*, p. 461.

<sup>29</sup> ICJ, *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)*, Application Instituting Proceedings, 16 January 2017, pp. 94-96, <https://www.icj-cij.org/sites/default/files/case-related/166/166-20170116-APP-01-00-EN.pdf> [accessed: 18.08.2024].

cultural heritage as defined in Article 2 of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.<sup>30</sup> There was no mention of tangible cultural heritage, i.e. movable or immovable property, including monuments, groups of buildings, and sites, as enumerated in Article 1 of both the 1954 and 1972 Conventions. Ukraine also repeatedly accused Russia of cultural erasure through discrimination against non-Russian ethnic communities in Crimea.<sup>31</sup> Similar themes were included in its request for an order on provisional measures, filed in parallel with the complaint.<sup>32</sup>

In the end, the ICJ's order on interim measures was limited in its consideration of Ukrainian expectations, requiring Russia only to ensure the availability of education in the Ukrainian language.<sup>33</sup> It is likely that this narrow scope was due to the Court's lack of conviction that there was a real and imminent risk that the rights in dispute would suffer irreparable harm before the final judgment. As an aside, it should be noted that in its memorial submitted in the case in June 2018, Ukraine accused Russia of directly attacking its cultural heritage through the destruction of the Palace of the Crimean Khans in Bakhchysarai and the harassment and gradual closure of virtually all institutions focused on cultural expression in the Ukrainian language, explicitly invoking a violation of Article 5(e)(vi) of the CERD.<sup>34</sup> By 2021, the case had not reached a verdict on the merits, only a ruling on preliminary objections, which included only a single mention of Ukraine's claims related to cultural heritage protection.<sup>35</sup>

## The 2021 Order on Provisional Measures in *Armenia v. Azerbaijan*

The ICJ's subsequent rulings in the *Armenia v. Azerbaijan* case were much more far-reaching than those analysed so far. The case arose from a request by Armenia to the ICJ to open proceedings in September 2021 and indicate provisional measures to counter the adverse effects caused by Azerbaijan's military actions in re-

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<sup>30</sup> 17 October 2003, 2368 UNTS 3.

<sup>31</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Application Instituting Proceedings, particularly p. 56 et seq.

<sup>32</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, 16 January 2017, pp. 3-7, <https://www.icj-cij.org/sites/default/files/case-related/166/19316.pdf> [accessed: 18.08.2024].

<sup>33</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, ICJ Reports 2017, p. 40.

<sup>34</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Memorial of Ukraine, 12 June 2018, pp. 302-308, <https://www.icj-cij.org/sites/default/files/case-related/166/166-20180612-WRI-01-00-EN.pdf> [accessed: 18.08.2024].

<sup>35</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 8 November 2019, ICJ Reports 2019, p. 593.

lation to Nagorno-Karabakh from September to November 2020. The claims concerning the protection of cultural heritage were raised at the very beginning of the case and were one of the core elements of the application and the request. Among the provisional measures Armenia requested the ICJ to indicate, pending a decision on the merits of the case, were the demands that Azerbaijan observe “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”, as well as facilitate and refrain from placing any impediment on, efforts to protect and preserve this heritage, relevant to the exercise of its rights under the CERD.<sup>36</sup> Interestingly, in September 2021, Azerbaijan also filed an application with the ICJ, initiating a parallel case, *Azerbaijan v. Armenia*. It argued, among other things, that Armenia had destroyed Azerbaijani cultural heritage sites between 1994 and 2020, and expected the Court to order Armenia to “immediately cease and desist from the destruction of Azerbaijani heritage sites and other pieces of Azerbaijani ethnic and cultural property and from pursuing the policy of cultural eradication”.<sup>37</sup> However, unlike Armenia, Azerbaijan did not even ask the ICJ to address the protection of Azerbaijani heritage in its simultaneous request for provisional measures.<sup>38</sup> This was probably due to its conviction that virtually all the damage to its cultural heritage had already been done in the past 30 years,<sup>39</sup> so there was no real risk of the immediate and irreparable harm necessary for the ICJ to order provisional measures.

<sup>36</sup> ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 16 September 2021, p. 86, but see also pp. 20-24 and particularly 44-50 and 72-78, <https://www.icj-cij.org/sites/default/files/case-related/180/180-20210916-APP-01-00-EN.pdf> [accessed: 18.08.2024].

<sup>37</sup> ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application Instituting Proceedings, 23 September 2021, p. 86, see also pp. 14-18, 50-56, 70-74, <https://www.icj-cij.org/sites/default/files/case-related/181/181-20210923-APP-01-00-EN.pdf> [accessed: 18.08.2024].

<sup>38</sup> ICJ, *Application... (Azerbaijan v. Armenia)*, Request for the Indication of Provisional Measures, 23 September 2021, <https://www.icj-cij.org/sites/default/files/case-related/181/181-20210923-REQ-01-00-EN.pdf> [accessed: 18.08.2024]. This important difference was also noted by A. Herman, *op. cit.* The scale of destruction of Azerbaijan's cultural heritage has also been very serious, see N. Mustafayev, ‘*Small Hiroshima: Addressing Systemic Cultural Heritage Erasure in Formerly Armenia-Occupied Territories*’, 4 August 2022, <https://opiniojuris.org/2022/08/04/small-hiroshima-addressing-systemic-cultural-heritage-erasure-in-formerly-armenia-occupied-territories/> [accessed: 12.05.2024] and the sources cited there.

<sup>39</sup> As Mustafayev (*op. cit.*) points out, the allegations made by the parties in the two cases differed greatly in quality and quantity, with Armenia's claims being “forward-looking” (referring specifically to a perceived risk in the future), and Azerbaijan's claims referring to past violations from 1992 to 2020. Thus, the view that the ICJ has rejected Azerbaijan's “twin” application, as claimed by S. Maghakyan, *Cultural Desecration Is Racial Discrimination*, “Foreign Policy”, 13 January 2022, is not correct.

In light of the above, it should come as no surprise that the ICJ has so far (mid-2024) only ruled on the protection of Armenia's cultural heritage. It did so in the order on provisional measures of 7 December 2021, and in a way that gives new impetus to the argument that the protection of cultural heritage by the ICJ is a viable option. It should be stressed that Armenia's argument for the protection of its cultural heritage was based primarily on Azerbaijan's violation of Article 2, which requires states to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms, as well as Articles 5(d)(vii) and 5(e)(vi), which impose an obligation to guarantee to everyone, without racial discrimination, the enjoyment of freedom of religion and the right to equal participation in cultural activities. In Armenia's view, these provisions entail, *inter alia*, the protection and preservation of the Armenian historical, cultural, and religious heritage by Azerbaijan.<sup>40</sup> According to Armenia, the Azerbaijani authorities violated the right of persons of Armenian ethnic or national origin to enjoy their cultural heritage, including by "systematically destroying and falsifying Armenian cultural sites and heritage".<sup>41</sup> Among the facts it raised were instances of destruction and vandalism of various religious and cultural sites, desecration of Armenian cemeteries, tombstones, and religious artefacts (the so-called khachkars), as well as the carrying out of renovation works at the Shushi Cathedral that altered its Armenian cultural heritage features.<sup>42</sup> Azerbaijan, for its part, claimed that it had made efforts to protect and preserve Armenian sites and artefacts and had conducted investigations into cases of vandalism, destruction, and unauthorized alteration of historical and cultural monuments and cemeteries used by Armenians.<sup>43</sup> It also claimed that Armenia was actually referring to cases of destruction that had taken place during the hostilities themselves, not afterwards.<sup>44</sup>

The ICJ pointed out that the CERD protects against racial discrimination – understood as discrimination based not only on race, but also on color, descent, and national or ethnic origin – in all its forms and manifestations, and that it requires that respect for human rights and fundamental freedoms be ensured in, *inter alia*, the cultural sphere.<sup>45</sup> It found the alleged Azerbaijani violations of the rights of the Armenian population by vandalism and desecration of Armenian cultural heritage to be plausible,<sup>46</sup> relying mainly on one of the Council of Europe's Parliamentary

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<sup>40</sup> ICJ, *Application... (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, ICJ Reports 2021, p. 377.

<sup>41</sup> *Ibidem*, pp. 369 and 375-376.

<sup>42</sup> *Ibidem*, pp. 377 and 386-387.

<sup>43</sup> *Ibidem*, pp. 378 and 384.

<sup>44</sup> *Ibidem*, p. 388.

<sup>45</sup> *Ibidem*, pp. 379-382.

<sup>46</sup> *Ibidem*, p. 383.

Assembly resolutions.<sup>47</sup> It also stressed 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’”, and referred to its observation in the earlier 2011 order on provisional measures in the *Temple of Preah Vihear* case (*Cambodia v. Thailand*).<sup>48</sup> In the end, by a vote of 13 to 2 it ordered Azerbaijan “to take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts”.<sup>49</sup> In doing so, it largely acceded to Armenia’s request.

### Assessment of the 2021 ICJ’s Order

The ICJ’s 2021 ruling is undoubtedly important for a number of reasons. It is the first ICJ order on provisional measures directly concerning the protection of tangible cultural heritage,<sup>50</sup> and in addition one in which the Court has imposed an obligation on a party to preserve such heritage. As such, it is evidence that the ICJ does not shy away from “lending a protective hand to endangered cultural heritage” and is an element that contributes to the strengthening of international heritage law.<sup>51</sup> The 2021 Order is thus a landmark, as the CERD had not previously been considered as an instrument to protect the cultural heritage dimension.<sup>52</sup> As will be shown below, the reasoning set out therein has already shaped the ICJ’s line of jurisprudence and will remain a reference point for it. This is because in its light it can no longer be disputed that, at least in some cases and under some circumstances, the obligation of non-discrimination with regard to economic, social, and cultural rights contained in the CERD – and in particular the right to equal participation in cultural activities – can provide a legal basis for the obligation to protect the heritage of a given community from a risk of irreparable damage or desecration.<sup>53</sup> In a sense, it creates a tool that can be used by states supporting communities displaced by conflict to prevent other states that took over control of an area from

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<sup>47</sup> *Ibidem*, p. 390.

<sup>48</sup> *Ibidem*, p. 389. As noted above, this case was not brought under the CERD. According to A. Chechi, *op. cit.*, p. 377, and L. Kirchmair, *op. cit.*, p. 564, the importance of this case lies mainly in the fact that it was the first case in which a judgment was delivered directly concerning cultural heritage and in which the willingness of the Court to protect it was demonstrated.

<sup>49</sup> ICJ, *Application... (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, pp. 392-393.

<sup>50</sup> A. Herman, *op. cit.*

<sup>51</sup> Quote by L. Kirchmair, *op. cit.*, pp. 571 and 574.

<sup>52</sup> *Ibidem*, p. 565.

<sup>53</sup> This is the conclusion that A. Herman, *op. cit.*, draws, although he later criticizes the Court’s approach in this respect.

changing its cultural identity by destroying or altering the cultural heritage there.<sup>54</sup> The possibility of obtaining an order under the CERD thus becomes one of the potential options for preventing collective cultural harm to vulnerable communities, as aspect in which the means of redress are not numerous and are not particularly effective.<sup>55</sup> This is all the more important in particular with regard to the actions by a state that may amount to a violation of international cultural heritage obligations undertaken on its own territory,<sup>56</sup> and beyond the context of an armed conflict.<sup>57</sup> Recourse to the ICJ thus becomes an instrument that can be used in such cases, in place of the rather ineffective appeals to UNESCO. On the other hand however, the order has little relevance to the probably more frequent cases of destruction of cultural heritage by non-state groups, such as the Islamic fundamentalists who destroyed the cultural heritage in Mali, Iraq, or Syria.<sup>58</sup>

The ICJ's order is also undoubtedly a confirmation of the trend observed by researchers among some international organizations and bodies (especially in recent years) to view the protection of cultural heritage in the context of states' human rights obligations. Such a right to access and enjoy cultural heritage has been derived from various sources, e.g. the right to take part in cultural life contained in the Universal Declaration of Human Rights,<sup>59</sup> a combination of the ICCPR's/ICESCR's individual right to participate in cultural life with a people's right to self-determination including cultural development;<sup>60</sup> ICESCR's rights to education or ICCPR's freedom of conscience and religion;<sup>61</sup> documents such as the 1976 Declaration of Algiers stating the right of a people to its own artistic, historical, and cultural heritage; or the 1981 African Charter on Human and Peoples' Rights providing for the right to equal enjoyment of the common heritage of mankind.<sup>62</sup> It has also been

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<sup>54</sup> This is noted by F. Chishty, *Is Cultural Desecration Racial Discrimination in International Law? Implications of the Order Indicating Provisional Measures in Armenia v Azerbaijan* [2021], 24 March 2022, <https://cilj.co.uk/2022/03/24/is-cultural-desecration-racial-discrimination-in-international-law-implications-of-the-order-indicating-provisional-measures-in-armenia-v-azerbaijan-2021/> [accessed: 12.05.2024], although he takes a critical approach to this view.

<sup>55</sup> See more about the concept in A. Jakubowski, *Heritage Destruction as a Collective Harm*, in: A. Strecker, J. Powderly (eds.), *Heritage Destruction, Human Rights and International Law*, Brill, Leiden 2023, pp. 87-90.

<sup>56</sup> This aspect of the order in question is emphasized by A. Jakubowski et al., in the *International Law Association Committee on Participation in Global Cultural Heritage Governance - Final Report* (2022), 7 November 2022, p. 10, [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID4220401\\_code2548995.pdf?abstractid=4220401&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4220401_code2548995.pdf?abstractid=4220401&mirid=1) [accessed: 12.05.2024].

<sup>57</sup> A. Jakubowski, op. cit., p. 94.

<sup>58</sup> S. Maghakyan, op. cit.

<sup>59</sup> A. Jakubowski et al., op. cit., p. 18.

<sup>60</sup> Rights contained, respectively, in the International Covenant on Economic, Social and Cultural Rights (16 December 1966, 993 UNTS 3) and the International Covenant on Civil and Political Rights (16 December 1966, 999 UNTS 171), J. Blake, *Taking a Human Rights Approach...*, pp. 216-217.

<sup>61</sup> L. Kirchmair, op. cit., p. 572.

<sup>62</sup> J. Blake, *Taking a Human Rights Approach...*, p. 223.

sought for by the experts in non-binding documents such as the 1968 UNESCO Recommendation on Public and Private Works<sup>63</sup> or the Council of Europe's 1994 Fribourg Draft Protocol on cultural rights.<sup>64</sup> However, the CERD as a source in its own right has long been overlooked.<sup>65</sup> The ICJ's decision has thus removed any doubt that the Convention could be a source of such a right, with quite far-reaching consequences.

Nonetheless, while it can be agreed that cultural heritage is an integral part of cultural identity and that the need to protect such identity may justify an obligation to preserve it, the question still arises whether the consequences drawn by the ICJ from the CERD itself were not too remote from the wording and the purpose of the Convention. On this point, the ICJ's order was explicitly criticized by two of its judges, Yusuf and Keith (the latter in his capacity as an *ad hoc* judge), on the grounds that the Court was attempting to "fit" the destruction of tangible cultural heritage into Article 5(e)(vi) of the CERD, which deals only with "equal participation in cultural activities", and that various meanings could be given to the provisions of the Convention in a similar way.<sup>66</sup> Both argued that the provisions of the CERD are intended to protect fundamental human rights and freedoms, and not the cultural heritage of mankind, the protection of which is provided for in other international instruments.<sup>67</sup> Yusuf also referred to decisions of the European Court of Human Rights, which failed to find a link between the provisions of the European Convention on Human Rights and claims concerning cultural heritage sites or artefacts, such as the 2016 decision in *Sylogos Ton Athinaion v. the United Kingdom*<sup>68</sup> or the 2019 decision in *Ahunbay and Others v. Turkey*.<sup>69</sup> In turn, Keith pointed out that freedom of religion or the right to equal participation in cultural activities could often be realized without access to specific venues.<sup>70</sup> Their view was echoed by some

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<sup>63</sup> UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, 19 November 1968, <https://www.unesco.org/en/legal-affairs/recommendation-concerning-preservation-cultural-property-endangered-public-or-private-works> [accessed: 18.08.2024]; J. Blake, *Taking a Human Rights Approach...*, p. 224.

<sup>64</sup> J. Blake, *On Defining...*, p. 81.

<sup>65</sup> It is mentioned in e.g. A. Jakubowski et al., *op. cit.*, p. 18, footnote 82 – but the report was published after the 2021 Order was delivered. See also comment by L. Kirchmair (*op. cit.*, p. 573) that the CERD "is not the first legal instrument that comes to mind when considering the international protection of cultural heritage".

<sup>66</sup> A. Herman, *op. cit.*

<sup>67</sup> ICJ, *Application...* (*Armenia v. Azerbaijan*), Provisional Measures, Declaration of Judge Ad Hoc Keith, ICJ Reports 2021, p. 402 and ICJ, *Application...* (*Armenia v. Azerbaijan*), Provisional Measures, Dissenting Opinion of Judge Yusuf, ICJ Reports 2021, p. 398.

<sup>68</sup> Application No. 48259/15, Decision of 31 May 2016.

<sup>69</sup> Application No. 6080/06, Decision of 29 January 2019.

<sup>70</sup> ICJ, *Application...* (*Armenia v. Azerbaijan*), Provisional Measures, Declaration..., p. 402.

experts, who pointed out that, among other things, the 2021 Order “effectively contrived a plausible right which has no grounding in the CERD”.<sup>71</sup>

This disagreement is hard to resolve. On the one hand, the elements of tangible cultural heritage are “the vehicles through which cultural heritage (in its intangible sense) is mediated to us”.<sup>72</sup> It may therefore be reasonable to consider that depriving a protected group of certain places of worship that are important to their culture may be directed against persons belonging to that group and motivated by discrimination on grounds of national or ethnic origin. On the other hand, it does not always seem to be the case that the right to participate in cultural activities is at risk of being violated when elements of tangible cultural heritage are damaged, desecrated, or disturbed,<sup>73</sup> as the role of these elements (e.g. buildings, temples, cemeteries) in cultural life may differ from one community to another. Ultimately, it all boils down to different assessments of how direct an act of discrimination needs to be in order to fall under Article 5 of the CERD.<sup>74</sup> The Convention’s provisions on participation in cultural events indeed appear to have been designed primarily to respond to cases where the authorities of a state deny a protected group the opportunity to organize certain events while allowing other groups to do so, or where they deny a group, or fail to create the conditions for a group, to have the opportunity to participate in events that are available to other groups. The preparatory work for the Convention may also suggest that this right was originally interpreted more along these lines of the right of individuals and their groups to participate in and organize cultural events and, plausibly, to associate for the purpose of carrying out cultural activities.<sup>75</sup> At the end of the day however, it is also largely the practice of courts, including the ICJ, that influences the interpretation of instruments such as the Convention, and ICJ’s approach appears to have led to a more liberal interpretation of said provisions, whose material scope originally seemed much narrower.

Meanwhile, the 2021 Order also demonstrates that in order to obtain protection for an element of cultural heritage, the state must prove not only the “plausibility” of the existence of certain rights, but also that they are at risk of being infringed.<sup>76</sup> However, it should be borne in mind that in accordance with the ICJ’s established jurisprudence on provisional measures, the standard of proof

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<sup>71</sup> F. Chishty, *op. cit.*

<sup>72</sup> J. Blake, *On Defining...*, p. 74.

<sup>73</sup> Cf. the skepticism of A. Herman, *op. cit.*, or F. Chishty, *op. cit.*

<sup>74</sup> L. Kirchmair, *op. cit.*, p. 571.

<sup>75</sup> P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford University Press, Oxford 2016, p. 313.

<sup>76</sup> As M. Lando (*op. cit.*) points out, this is a more demanding standard than that applied in the classic 2009 decision in *Belgium v. Senegal*, but it has already been applied in other cases before the ICJ so it is not entirely new.

required for a definitive finding of a violation of such rights in a judgment on the merits is usually much higher – and, as will be shown below, this is indeed the case in practice.

## The Aftermath: Was the 2021 ICJ’s Order Really So Groundbreaking?

Three years on, the practical impact of the 2021 Order is less spectacular than it first appeared. Regarding the protection of cultural heritage in the *Armenia v. Azerbaijan* case itself, the ICJ issued a new order in November 2023 that partially touches on the issue under consideration. At the time, following Azerbaijan’s offensive on Nagorno-Karabakh in September 2023 and its complete recapture by Azerbaijani forces, Armenia expected the Court to confirm the obligations imposed on Azerbaijan in December 2021 and also to mandate the Azerbaijani authorities “not to alter or destroy any monument commemorating the Armenian Genocide of 1915 or any other monument or Armenian cultural artefact or site in Nagorno-Karabakh”.<sup>77</sup> It maintained that there were further concerns about the destruction or desecration of cultural sites and monuments, particularly because more of them came under Azerbaijani control as a result of the offensive.<sup>78</sup> Interestingly, this time the ICJ was satisfied with Azerbaijan’s unilateral undertaking, given at the public hearing before it, that the Azeri side would “protect and not damage or destroy cultural monuments, artefacts and sites in Garabagh”.<sup>79</sup> It merely requested Azerbaijan to include the measures taken to implement this commitment in the report on implementation of provisional measures it was to submit.<sup>80</sup> The case still awaits a final judgement on the merits.

Another interesting development was the ICJ’s final judgment in the *Ukraine v. Russia* case in January 2024. It should be noted that in its reply of 29 April 2022 to Russia’s memorial, Ukraine had expanded its claims relating to the protection of cultural heritage. It can be assumed that this was a direct consequence of the 2021 Order in *Armenia v. Azerbaijan*, as Ukrainian pleadings explicitly referred to it and used it to argue that the vandalism and destruction of Ukrainian cultural heritage complained of was incompatible with the CERD. This time, Ukraine alleged that Russia had violated Articles 2(1), 5(e)(vi), and 6 of the CERD through what it called

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<sup>77</sup> ICJ, *Application... (Armenia v. Azerbaijan)*, Provisional Measures, Order of 17 November 2023, pp. 3-5, <https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf> [accessed: 18.08.2024].

<sup>78</sup> *Ibidem*, pp. 9 and 13-14.

<sup>79</sup> *Ibidem*, p. 16.

<sup>80</sup> *Ibidem*, pp. 19-20.

Russia's "erasure of the cultural heritage" of Crimea.<sup>81</sup> It pointed out that Russia was carrying out the destruction of cultural artefacts and the closure of cultural sites and programmes, thereby affecting the cultural rights of the Crimean Tatar and Ukrainian communities. This included not only the degradation of the cultural integrity of the Palace of the Crimean Khans mentioned earlier, but also, *inter alia*, the demolition of Muslim burial grounds to build the Tavrida highway and the deliberate destruction of archaeological sites in the old part of Akmeyit-Simferopol.<sup>82</sup> Ukraine also complained about the large number and culturally significant nature of ethnic Ukrainian and Crimean Tatar cultural gatherings blocked by the Russian Federation.<sup>83</sup>

In response to Ukraine's allegations regarding the destruction of the Khan's Palace, the ICJ accepted Russia's counter-arguments that the renovation works there were necessary. While noting the CERD Committee's comments of June 2023 on "reports of destruction of and damage to Crimean Tatar cultural heritage" and "the lack of information on investigations into such allegations",<sup>84</sup> it stressed that the CERD Committee had not taken a position on the veracity of these reports and had no access to first-hand evidence. It stated that even if the renovation of the Khan's Palace had been negligently carried out, this did not necessarily imply discrimination on the basis of the ethnicity of the Crimean Tatars, and that the other Ukrainian allegations of destruction of cultural heritage were, in its view, insufficiently substantiated.<sup>85</sup> The Court also accepted Russia's explanation as to why a complaint about ongoing renovation work was dismissed by the Russian courts, while a complaint by Russians against the same contractors concerning sites of importance to the Russian community was upheld, finding that the difference in treatment was unrelated to the discrimination prohibited by the CERD.<sup>86</sup>

The ICJ generally reached a similar conclusion with regard to the intangible cultural heritage claims. Regarding the treatment of persons associated with Ukrainian cultural institutions in Crimea, it accepted Russia's argument that their treatment was unrelated to any discrimination prohibited by the CERD, and stated that Ukraine failed to demonstrate how the closure of some Ukrainian cultural institutions in Crimea involved discrimination on the basis of ethnicity.<sup>87</sup> The ICJ also

<sup>81</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Reply of Ukraine, 29 April 2022, p. 12, <https://www.icj-cij.org/sites/default/files/case-related/166/166-20220429-WRI-01-00-EN.pdf> [accessed: 18.08.2024].

<sup>82</sup> *Ibidem*, pp. 333-343.

<sup>83</sup> *Ibidem*, pp. 316-317 but see more in ICJ, *Application... (Ukraine v. Russian Federation)*, Judgment of 31 January 2024, p. 90, <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> [accessed: 18.08.2024].

<sup>84</sup> ICJ, *Application... (Ukraine v. Russian Federation)*, Judgment..., p. 98.

<sup>85</sup> *Ibidem*.

<sup>86</sup> *Ibidem*.

<sup>87</sup> *Ibidem*, pp. 98-99.

accepted Russia's point of view that the restrictions on celebrating events such as the Ukrainian Flag Day or Taras Shevchenko's birthday were not motivated by racial discrimination because some Ukrainian and Crimean Tatar organizations had managed to successfully organize other cultural events, while some ethnic Russians had been banned from organizing them. In this regard it noted that Russia's approach to public assembly was generally restrictive and, for these reasons, found that Russia had not violated its obligations by imposing restrictions on culturally significant assemblies.<sup>88</sup> It concluded that, in its view, Russia had not violated its obligations under the CERD with respect to the cultural heritage of the Crimean Tatars and Ukrainians.<sup>89</sup>

### Conclusions

The analysis conducted in this text confirms that the ICJ's 2021 Order in *Armenia v. Azerbaijan* is a breakthrough and an important precedent in the field of international law on the protection of cultural heritage, particularly tangible heritage. It demonstrates that the CERD Convention can be the basis for a state to successfully claim, on behalf of a group it seeks to protect, that such a group is discriminated against within the meaning of the Convention as a result of the destruction or desecration of its heritage. At the very least, this reasoning applies in situations where there is an imminent and real risk of such occurrences, and can thus serve as a tool in cases where a group's Convention rights may be *prima facie* violated.

Some scholars have expressed doubts as to whether the ICJ will continue along this path or abandon the interpretation adopted in the 2021 Order in its rulings ending the proceedings.<sup>90</sup> The judgment on the merits in *Ukraine v. Russia*, discussed above, suggests that the Court does not seem to be willing to depart from its view that a state's vandalism of cultural heritage sites can constitute a violation of the CERD. At the same time however, it shows that the success of cultural heritage claims before the ICJ may be limited due to serious evidentiary difficulties. As a consequence, the aforementioned 2021 breakthrough may in practice be less significant than originally thought, particularly as a means of redressing collective cultural harm. On the other hand, contrary to the cautious predictions of some, states may not yet feel under pressure to withdraw from the Convention because other states are framing claims as racial discrimination in order to bring before the ICJ "cases that in reality have nothing to do with racial discrimination".<sup>91</sup>

Nevertheless, it remains to be seen how the ICJ will proceed in further cases of this kind. It can be expected that the issue of cultural heritage will also be

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<sup>88</sup> Ibidem, pp. 92-93.

<sup>89</sup> Ibidem, p. 99.

<sup>90</sup> L. Kirchmair, *op. cit.*, p. 574.

<sup>91</sup> M. Lando, *op. cit.*

raised by the ICJ in its judgment on the merits in *Armenia v. Azerbaijan*, and it is highly likely that the Court will also raise it in a final judgment in *Azerbaijan v. Armenia*. This would be interesting in that it could shed light not only on future risks, but also on whether and to what extent any specific obligations for compensation or restitution of damage to cultural heritage arise from the provisions of the CERD.

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