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Совет Безопасности

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Генеральная Ассамблея
Семьдесят седьмая сессия
Пункты 30, 58, 66, 68, 73, 84 и 132 повестки дня

Предотвращение вооруженных конфликтов

Миростроительство и сохранение мира

Ликвидация расизма, расовой дискриминации, ксенофобии и связанной с ними нетерпимости

Поощрение и защита прав человека

Ответственность государств за международно-противоправные деяния

Верховенство права на национальном и международном уровнях

Ответственность по защите и предупреждение геноцида, военных преступлений, этнических чисток и преступлений против человечности

Совет Безопасности
Семьдесят восьмой год

Письмо Временного поверенного в делах Постоянного представительства Азербайджана при Организации Объединенных Наций от 28 августа 2023 года на имя Генерального секретаря

В ходе своей продолжающейся клеветнической кампании, направленной против Азербайджана, Армения выдвигает явно беспочвенные и безответственные обвинения в геноциде, якобы имевшем место в Карабахском регионе Азербайджана, и, пытаясь искусственно увязать свои лживые и абсурдные измышления с юридическими формулировками, опирается на мнения неких предвзятых и недобросовестных «исследователей». Так, в своем выступлении на заседании Совета Безопасности 16 августа 2023 года министр иностранных дел Армении упомянул и процитировал так называемое заключение Луиса Морено-Окампо от 7 августа 2023 года. Заседание, состоявшееся за закрытыми дверями в Центральных учреждениях Организации Объединенных Наций 23 августа 2023 года, было организованно Постоянным представительством Армении с той же целью — ввести в заблуждение международное сообщество, ссылаясь на

мнения некомпетентных лиц и избегая честных обсуждений, чтобы оградить себя от неизбежного разоблачения[1].

Очевидно, что целью этих провокационных действий Армении является подрыв процесса нормализации ситуации после конфликта и продвижение по пути к реализации своих территориальных притязаний, а также отвлечение внимания международного сообщества от собственной политики и практики, проникнутых ненавистью и носящих подстрекательский характер, от разрушительных последствий развязанной ею войны против Азербайджана и от многочисленных зверских преступлений, совершенных ею в ходе агрессии, включая акты геноцида.

Имею честь настоящим препроводить доклад и юридическое заключение королевского адвоката Родни Диксона, независимого эксперта, назначенного правительством Азербайджана для обзора заключения Луиса Морено-Окампо (см. приложение)[*]. По мнению г-на Диксона, правовое обоснование заключения Луиса Морено-Окампо имеет принципиальные изъяны, поскольку содержащиеся в нем упущения и недочеты не соответствуют методике подготовки всеобъемлющего, независимого или справедливого экспертного заключения, в нем представлено явно неполное изложение соответствующего фактологического и правового контекста, не проведен рациональный и взвешенный анализ имеющихся доказательств и неверно описано разбирательство в Международном Суде между Арменией и Азербайджаном. Г-н Диксон приходит к выводу, что содержащееся в заключении утверждение о совершающемся в настоящее время геноциде не подкреплено никакими доказательствами, что международному сообществу не следует соглашаться с заключением и содержащимися в нем надуманными выводами, что вместо этого основное внимание должно уделяться дальнейшему продвижению мирного процесса и защите прав человека в интересах всех жителей региона и что ложные обвинения в геноциде могут представлять собой международно-противоправные деяния, влекущие за собой ответственность по международному праву.

Буду признателен Вам за распространение настоящего письма и приложения к нему в качестве документа Генеральной Ассамблеи по пунктам 30, 58, 66, 68, 73, 84 и 132 повестки дня и в качестве документа Совета Безопасности.

(*Подпись*) Тофиг **Мусаев**
Временный поверенный в делах

[1] См. пресс-релиз Постоянного представительства Азербайджана при Организации Объединенных Наций (24 августа 2023 года) по адресу: un.mfa.gov.az/files/shares/Press-releases/Press%20release%2024.08.2023.pdf.

[*] Приложение распространяется только на том языке, на котором оно было представлено.

Приложение к письму Временного поверенного в делах Постоянного представительства Азербайджана при Организации Объединенных Наций от 28 августа 2023 года на имя Генерального секретаря

Report and Legal Opinion of the Independent Expert Appointed by the Government of Azerbaijan to Review the Opinion dated 7 August 2023 of Luis Moreno Ocampo

Introduction

1. In an opinion dated 7 August 2023, Luis Moreno Ocampo, a former Prosecutor at the International Criminal Court ('ICC'), has claimed that a genocide is unfolding in the region of Nagorno-Karabakh within the Republic of Azerbaijan.[1] In what follows, I refer to this document as the 'Moreno Ocampo Opinion' or simply the 'Opinion'.

2. I have therefore been requested by the Government of Azerbaijan to provide a legal assessment of the Moreno Ocampo Opinion as an independent expert.

3. The accusation in the Moreno Ocampo Opinion is an extremely grave one, with potentially far-reaching consequences. Accordingly, I considered it necessary to make public certain observations on the Opinion on 14 August 2023, while this report was still in preparation.[2] Those were preliminary in nature and I have approached the finalisation of the present report with an open mind and due regard to all the material available to me.

4. Having now completed the present report, I reaffirm my conclusion that the Moreno Ocampo Opinion is a fundamentally flawed exercise in legal reasoning prepared at the behest of an unlawful and unrecognised regime installed by Armenia in the territories of Azerbaijan when they were occupied in the early 1990s.

5. There is no basis in the Moreno Ocampo Opinion for the claim that a genocide is currently being perpetrated in Nagorno-Karabakh. This is a plainly groundless allegation, which distracts from the real priorities on the ground. The Opinion should not be permitted to drive an unjustified wedge between the peace-seeking governments of Armenia and Azerbaijan or mislead the wider international community.

6. On 16 August 2023, the Foreign Minister of the Republic of Armenia invoked the Moreno Ocampo Opinion in a meeting of the Security Council of the United Nations to allege that there *'is already a genocide that is happening in Nagorno-Karabakh'* and urge the Security Council *'to act as genocide prevention body'*.[3] The Permanent Representative of Azerbaijan refuted this reliance on the Opinion, including by reference to my preliminary observations.[4]

7. It is unfortunate that Armenia has adopted and utilised the Moreno Ocampo Opinion in this way. As set out in greater detail below, the obligation to prevent

[1] This is accessible at https://luismorenoocampo.com/wp-content/uploads/2023/08/Armenia-Report-Expert-Opinion.pdf?utm_source=Web&utm_medium=Landing&utm_campign=Downloads.

[2] These preliminary observations are accessible at <https://tgchambers.com/wp-content/uploads/2023/08/Interim-Observations-by-Rodney-Dixon-KC.pdf>.

[3] The text of the Foreign Minister's comments is accessible at <https://www.mfa.am/en/speeches/2023/08/16/fm_mirzoyan_unsc/12143>.

[4] The Permanent Representative's speech is accessible as part of the recording of the 9397th meeting of the Security Council at <https://media.un.org/en/asset/kl4/kl498sf91h>.

genocide arises only when States have a proper basis on which to consider that there is a *'serious risk'* that genocide will be, or is being, committed.[5] For the reasons given in this report, the Opinion sets out no such basis. Conversely, as explained below, false accusations of genocide may constitute internationally wrongful acts. It is appropriate that the Security Council has chosen not to respond to Armenia's provocative and unsubstantiated allegation.

8. It is to be hoped that the Moreno Ocampo Opinion will not be used any further to divert attention from constructive initiatives in the region by the parties and the wider international community to tackle post-conflict challenges in order to promote and protect human rights and uphold international law.

9. I set out below my assessment of the Moreno Ocampo Opinion and its multiple shortcomings.

The Moreno Ocampo Opinion in Context

10. The Moreno Ocampo Opinion presents a patently incomplete account of the relevant factual and legal context.

11. Thus, other than a coy reference to its author's *'experience in the field'*, the Opinion does not refer to Mr Moreno Ocampo's position as a former Prosecutor at the ICC, despite the reality that this is why the Opinion has attracted attention: when the Foreign Minister of Armenia cited the Opinion before the Security Council, for example, he was careful to identify Mr Moreno Ocampo by his position. The Opinion's evasiveness in this respect means that it does not grapple with the inappropriateness of an individual like Mr Moreno Ocampo very publicly asserting that an international crime is being committed by a named individual — the President of Azerbaijan. Even apart from the baselessness of this assertion, which is set out in the present report, such an assertion is itself a flagrant violation of the presumption of innocence safeguarded by, among other international legal instruments, the Rome Statute of the ICC[6] (to which neither Armenia nor Azerbaijan is presently party, despite the Opinion's repeated references to it) and the European Convention on Human Rights,[7] to which both Armenia and Azerbaijan adhere.

12. The Opinion does not disclose what is evident from posts made by Mr Moreno Ocampo on the X platform (formerly known as Twitter): it was produced at the request of an individual to whom Mr Moreno Ocampo refers as '[t]*he President of Artsakh'*.[8] That person heads what is described in the Opinion as a *'Republic* […] *with its own government'*, which rules territory *'predominantly inhabited by ethnic Armenians'*. That entity's unilateral declaration of independence from Azerbaijan; the assertion of what the Opinion describes as 'de facto *autonomy'* within Azerbaijan's former Nagorno-Karabakh Autonomous Oblast (which had been established under Soviet rule and was abolished after Azerbaijan attained its independence from the Soviet Union); and the conquest of all or large parts of the neighbouring Lachin, Kalbajar, Jabrayil, Gubadly, Zangilan, Aghdam, and Fuzuli districts of Azerbaijan were all

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 at [431], [436], [438].

[6] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('Rome Statute') at Article 66(1).

[7] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 at Article 6(2). See, for example, the judgment of the European Court of Human Rights in *Kouzmin v Russia* (app no 58939/00,18 March 2010) at[60J— [65],

[8] Mr Moreno Ocampo's posts are accessible at <https://twitter.com/MorenoOcampo1>.

made possible by the use of force on Azerbaijan's territory for which Armenia is responsible in international law.[9]

13. As a consequence of those events of the early nineties, hundreds of thousands of Azerbaijanis were displaced,[10] thereby ensuring the demographic dominance by ethnic Armenians to which the Moreno Ocampo Opinion refers. That displacement goes unmentioned in the Opinion.

14. Also unmentioned is the consistency of the universal non-recognition of the entity by the international community with past condemnations of purported declarations of independence *'connected with the unlawful use of force'*[11] and the duty not to recognise situations resulting from violations of international legal obligations *erga omnes* such as the prohibition of aggression.[12] By contrast, the references to the entity and its head in the Moreno Ocampo Opinion and on the X platform are hardly consistent with that duty.

15. Relatedly, it is odd that the Moreno Ocampo Opinion dignifies a regime whose *'so-called "presidential and parliamentary elections"* [13] 'are denounced as illegitimate[14] by the international community with the label *'Republic'*.

16. The Moreno Ocampo Opinion does recognise that Nagorno-Karabakh is Azerbaijan, expressly and also implicitly insofar as it proceeds on the basis that the ICC would not have jurisdiction over the territory in the absence of Azerbaijan's consent[15] or a referral to the ICC by the Security Council.[16] However, it does so in an unfortunately inconsistent manner. It is not correct, for example, to refer to *'disputed territorial claims'* as it is indisputable that Nagorno-Karabakh is Azerbaijan.

17. It is further apparent from Mr Moreno Ocampo's posts on the X platform, but not in the Opinion, that the Opinion was produced in just a week, from 30 July 2023. Mr Moreno Ocampo was content to pre-empt his analysis by posting on that date the following hashtags: *'#StopArmenianGenocideInArtsakh'* and *'#StopArmenianGenocide2023'*. To put it mildly, this is not how one would expect an independent and fair-minded expert to proceed.

18. On the contrary, it seems that Mr Moreno Ocampo has allowed himself to be used as part of efforts by the unlawful entity in Nagorno-Karabakh to regain lost ground in Armenian politics. It is evident that the entity could not have been established, and would not remain in place today, without Armenia's support.[17] Yet in the wake of the 44-day armed conflict in 2020 in which Azerbaijan regained control of territory seized by Armenia and the entity, Armenia and Azerbaijan have made a *'strong commitment to the peace process'*, including by 'reconfirm[ing] *their full*

[9] See the judgment of the European Court of Human Rights in *Chiragov and Others v Armenia* (app no 13216/05,16 June 2015) at [12]-[23], [172J-J180J.

[10] *Chiragov and Others v Armenia* at [25].

[11] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 at [81].

[12] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at [155]—[159] and *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 at [33]—[34].

[13] This was the description used by the European Union in the statement of 31 March 2020 accessible at <https://www.eeas.europa.eu/eeas/nagorno-karabakh-statement-spokesperson-so-called-presidential-and-parliamentary-elections_en>.

[14] See, for example, the quotation on behalf of the Council of Europe accessible at <https://www.rferl.org/a/1097303.html>.

[15] Under Article 12 of the Rome Statute, a State can consent to the jurisdiction of the ICC by either accepting that jurisdiction by way of a declaration lodged with the Registrar of the ICC or becoming party to the Rome Statute.

[16] See Article 13(b) of the Rome Statute.

[17] See *Chiragov and Others v Armenia* at [181]—[186].

respect for the other country's territorial integrity and sovereignty'.[18] These very positive developments mean that the entity must face the prospect of losing its patron. It can readily be imagined that some might think that a document such as the Opinion could undermine this prospect, for a time at least.

19. This is particularly so given the exaggeration to which the Moreno Ocampo Opinion is prone. The Opinion cites undoubtedly well-meaning warnings for the future from unofficial observers of the region, and dramatically (and inaccurately) states that these observers have proclaimed that genocide is already underway. Equally dramatically, the Opinion suggests than a population of more than a hundred thousand people may be *'destroyed in a few 'weeks'*. That is a suggestion, implausible on its face,[19] for which the Opinion offers no substantiation.

20. The Moreno Ocampo Opinion refers to proceedings instituted by Armenia against Azerbaijan in the International Court of Justice ('ICJ') and the European Court of Human Rights without referring to proceedings in those courts instituted by Azerbaijan against Armenia.[20] The ICJ proceedings – which are not about genocide, but rather the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') [21] – are discussed in greater detail below. But it is noteworthy that, for example, the Opinion quotes one provisional measure indicated by the ICJ to Azerbaijan on 7 December 2021[22] without acknowledging that on the same date a similar provisional measure was indicated to Armenia[23] and both States were ordered to *'refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'*. [24] The obligation of non-aggravation imposed by these orders in 2021 has since been reaffirmed[25] and I return to it below in light of the Opinion.

21. Similarly, the Moreno Ocampo Opinion highlights concern expressed by the United Nations Committee on the Elimination of Racial Discrimination in its

[18] See the account given on 16 August 2023 to the Security Council of *'the last trilateral meeting hosted by President Charles Michel with President Aliyev of Azerbaijan and Prime Minister Pashinyan of Armenia on 15 July 2023'* by the Charge d'Affaires *ad interim* at the Delegation of the European Union to the United Nations, accessible at <https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-security-council-armenia-pr-letter-13-september-2022_en?s=63>.

[19] Compare Felix Light, 'Nagorno-Karabakh residents say "disastrous" blockade choking supplies', *Reuters* (16 August 2023), accessible at <https://www.reuters.com/world/asia-pacific/nagorno-karabakh-residents-say-disastrous-blockade-choking-supplies-2023-08-16/#:~:text=Nagorno%2DKarabakh%20residents%20say%20'disastrous'%20blockade%20choking%20supplies,-By%20Felix%20Light&text=TBILISI%2C%20Aug%2016%20(Reuters),drags%20into%20its%20ninth%20month.

[20] See the list of inter-State cases instituted in the European Court of Human Rights accessible at <https://www.echr.coe.int/inter-state-applications>.

[21] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS195.

[22] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures) [2021] ICJ Rep 361 (*'Armenia v Azerbaijan* Provisional Measures of 7 December 2021') at [92], [98(1)].

[23] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures) [2021] ICJ Rep 405 (*'Azerbaijan v Armenia Provisional Measures of 7 December 2021'*) at [71], [76(1)].

[24] *Azerbaijan v Armenia* Provisional Measures of 7 December 2021 at [72], [76(2)]; *Armenia v Azerbaijan* Provisional Measures of 7 December 2021 at [94], [98(2)].

[25] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)*, as yet unreported order of 6 July 2023 ('ICJ Order of 6 July 2023'), at [30]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)*, as yet unreported order of 12 October 2022, at [21], [23(2)].

concluding observations on periodic reports by Azerbaijan. The Opinion omits to mention that similar concern was expressed by the Committee in its concluding observations on Armenian periodic reports.[26]

22. The omission of such context in the Moreno Ocampo Opinion is evidently distorting.

23. More broadly, the Moreno Ocampo Opinion asserts that, following the 44-day armed conflict, ethnic Armenians in Azerbaijan are at risk of discrimination. The Opinion fails to address Azerbaijan's policy in this regard. By way of illustration, following the Security Council meeting at which the Opinion was invoked by the Armenian Foreign Minister, the Government of Azerbaijan reiterated its *'policy of reintegration of ethnic Armenian residents of the Garabagh region of Azerbaijan as equal citizens guaranteeing all the rights and freedoms envisaged in the Constitution of Azerbaijan, and all relevant international human rights mechanisms that Azerbaijan is a signatory to'*.[27]

The Moreno Ocampo Opinion's Mischaracterisation of the ICJ Proceedings

24. As defined in the Genocide Convention,[28] to which both Armenia and Azerbaijan are party,[29] *'genocide contains two constituent elements: the physical element, namely the act perpetrated or* actus reus, *and the mental element, or* mens rea'.[30] One of the acts capable of amounting to the *actus reus of* genocide is '[d]*eliberately inflicting on* [a] *group conditions of life calculated to bring about its physical destruction in whole or in part'*.[31]

25. Despite its loose discussion of alleged discrimination by Azerbaijan against ethnic Armenians, the Moreno Ocampo Opinion does not allege that any other act capable of amounting to the *actus reus* of genocide is taking place in Nagorno-Karabakh. Its limited assertion is that this particular act is being committed by Azerbaijan against the group of ethnic Armenians in Nagorno-Karabakh by way of '[t]*he blockade of the Lachin Corridor by the Azerbaijani security forces'*.

26. In order to make this argument, the Moreno Ocampo Opinion mischaracterises the ICJ proceedings between Armenia and Azerbaijan – which, again, are not about genocide, but rather the CERD.

27. Armenia first requested that the ICJ indicate provisional measures in respect of the Lachin Corridor on 28 December 2022.[32] Ultimately, Armenia sought an order that –

[26] 'Concluding Observations on the Combined Seventh to Eleventh Periodic Reports of Armenia' (31 May 2017) UN Doc CERD/C/ARM/CO/7-11 at [11].

[27] Statement No 440/23 by the Ministry of Foreign Affairs of the Republic of Azerbaijan, accessible at <https://www.mfa.gov.az/en/news/no44023>.

[28] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ('Genocide Convention') at Article II.

[29] Armenia acceded to the Genocide Convention on 23 June 1993; Azerbaijan acceded to the Genocide Convention on 16 August 1996. Note, however, that the provisions of the Genocide Convention had already become part of customary international law by that stage: see *Belgium v Spain* at [34], See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 at 23.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Judgment) [2015] ICJ Rep 3 at [130].

[31] Article 11(c) of the Genocide Convention.

[32] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)*, as yet unreported order of 22 February 2023 ('ICJ Order of 22 February 2023'), at [8]–[10], [24]–[25].

> *'Azerbaijan shall cease its orchestration and support of the alleged "protests" blocking uninterrupted free movement along the Lachin Corridor in both directions [;]*
>
> *Azerbaijan shall ensure uninterrupted free movement of all persons, vehicles, and cargo along the Lachin Corridor in both directions[;]* [and]
>
> *Azerbaijan shall immediately fully restore and refrain from disrupting or impeding the provision of natural gas and other public utilities to Nagorno-Karabakh.'*[33]

28. In response, the ICJ did not find that Azerbaijan had orchestrated or supported any protests in the Lachin Corridor or was otherwise responsible for what it described as a disruption to *'the connection between Nagorno-Karabakh and Armenia via the Lachin Corridor'*.[34]

29. On the contrary, the ICJ refused to *'make definitive findings of fact'*.[35] It rejected the first Armenian request as *'not warranted'*.[36] It also rejected the Armenian case as to the third request reasoning *'that Armenia ha*[d] *not placed before it sufficient evidence that Azerbaijan is disrupting the supply of natural gas and other utilities to the residents of Nagorno-Karabakh'*.[37]

30. However, after noting Azerbaijan's existing obligation under the Trilateral Statement that ended the 44-day armed conflict[38] and its affirmation that *it 'has and undertakes to continue to take all steps within its power to guarantee the safety of movement of persons, vehicles and cargo along the Lachin* Corridor,[39] the ICJ ordered that —

> *'Azerbaijan shall, pending the final decision in the case and in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions.'* [40]

31. Obviously, nothing in this order by the ICJ is capable of founding the conclusion in the Moreno Ocampo Opinion that Azerbaijan is responsible for anything that could constitute the *actus reus* of genocide.

32. The ICJ considered the Lachin Corridor again recently. In the interim, according to Armenia, any protests had stopped.[41]

33. It is not disputed between Armenia and Azerbaijan that the latter has established a checkpoint at the beginning of the Lachin Corridor.[42] Azerbaijan's position is that the checkpoint's purpose is *'to stop the illegal flow of weapons, military equipment, and soldiers into* [its] *sovereign territory'*[43] and *'that the checkpoint is not a military checkpoint, that it is staffed with members of Azerbaijan's State Border Service, that*

[33] ICJ Order of 22 February 2023 at [19].
[34] ICJ Order of 22 February 2023 at [54].
[35] ICJ Order of 22 February 2023 at [47].
[36] ICJ Order of 22 February 2023 at [63].
[37] ICJ Order of 22 February 2023 at [64].
[38] ICJ Order of 22 February 2023 at [60].
[39] ICJ Order of 22 February 2023 at [56].
[40] ICJ Order of 22 February 2023 at [62], [67].
[41] ICJ Order of 6 July 2023 at [19].
[42] ICJ Order of 6 July 2023 at [18], [22].
[43] ICJ Order of 6 July 2023 at [22].

it operates under Azerbaijan's Law on the State Border and that it performs routine checks of identity documents and cargo'.[44]

34. In this connection, it is clear that smuggling has taken place along the Lachin Corridor. The International Committee of the Red Cross ('ICRC') expressly confirmed on 11 July 2023 that such activity has indeed taken place in vehicles bearing the ICRC emblem.[45]

35. Armenia requested that the ICJ modify its earlier order concerning the Lachin Corridor.[46] The ICJ rejected this request by its Order of 6 July 2023.[47] In doing so, the ICJ noted the factual inconsistencies in Armenia's case.[48] It made no finding as to Azerbaijan's compliance with the earlier order.[49]

36. Again, there is nothing in this order by the ICJ capable of founding the conclusion in the Moreno Ocampo Opinion that Azerbaijan is responsible for anything that could constitute the *actus reus* of genocide. The order does not support the Opinion's assertion that Azerbaijan is not complying with the provisional measures indicated to it by the ICJ. That the Opinion makes this assertion without careful analysis, and in the express absence of a finding by the ICJ, is a signal weakness of the Opinion.[50]

37. Given the references to plausibility in the Moreno Ocampo Opinion, it is important to emphasise that what the ICJ regarded as plausible in February 2023 were *'at least some of the rights'* asserted by Armenia, rather than any factual or legal allegations about the conduct of Azerbaijan.[51] The Opinion does not reflect an understanding of this very basic point. Moreover, the ICJ was at pains to make clear that its conclusion did not *'prejudg*[e]*'* such questions as whether these rights truly exist or whether they have been violated by Azerbaijan.[52]

38. It follows from the foregoing that there is no basis at all in the Moreno Ocampo Opinion for its assertion that the *actus reus* of genocide is being committed in Nagorno-Karabakh.

The Moreno Ocampo Opinion's Failure to Address the Aghdam-Khankendi Road

39. The shortcomings of the Moreno Ocampo Opinion as to the discussion of the alleged *actus reus* of genocide are not limited to its mischaracterisation of the ICJ proceedings.

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[44] ICJ Order of 6 July 2023 at [22].

[45] See the 'ICRC statement on transport of unauthorised goods across the Lachin corridor', accessible at <https://www.icrc.org/en/document/icrc-statement-transport-unauthorised-goods-across-lachin-corridor>.

[46] ICJ Order of 6 July 2023 at [11].

[47] ICJ Order of 6 July 2023 at [29], [33].

[48] ICJ Order of 6 July 2023 at [26].

[49] ICJ Order of 6 July 2023 at [32].

[50] There would seem to be nothing necessarily inconsistent between a legal obligation like that imposed by the provisional measure in respect of the Lachin Corridor and the exercise of what was called the *'power of regulation and control'* in *Right of Passage over Indian Territory (Portugal v India)* (Judgment) [1960] ICJ Rep 6: see, for example, *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, [87]; *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, [103]; and *Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* [1932] PCIJ Series A/B No 46 at 166 (*'[T]here is no doubt that the Court is unable to restrain France from establishing at her political frontier a police cordon for the control of traffic'*).

[51] ICJ Order of 22 February 2023 at [38]–[39].

[52] ICJ Order of 22 February 2023 at [28], [66].

40. It is remarkable that the Moreno Ocampo Opinion does not test its conclusion that Azerbaijan is in Nagorno-Karabakh '*[d]eliberately inflicting on* [a] *group conditions of life calculated to bring about its physical destruction in whole or in part'* against Azerbaijan's offer of alternatives to the Lachin Corridor for the supply of necessities to the population – most notably the Aghdam-Khankendi road – noted by, among others, the President of the Security Council on 16 August 2023.[53]

41. The availability of this route was highlighted as *'important'* by the European Union, through the President of the European Council, on 15 July 2023.[54] The ICRC has also noted this additional route for the supply of goods and has called on *'decision-makers to find a compromise'*.[55] Azerbaijan has underscored the importance of the Aghdam-Khankendi road as part of a transport and logistics hub to meet the economic and social needs of the ethnic Armenians in Nagorno-Karabakh.[56] It is the unlawful and unrecognised entity in Nagorno-Karabakh that has refused to make use of this route.[57]

42. The offer and availability of such alternatives are clearly both relevant and not consistent with the notion that Azerbaijan is inflicting the conditions alleged by the Moreno Ocampo Opinion on the ethnic Armenians of Nagorno-Karabakh or doing so deliberately. Yet the Opinion does not grapple with this in any way.

The Moreno Ocampo Opinion's Failure to Address Facilitation of the ICRC

43. Also relevant, not consistent with the notion that *'conditions of life calculated to bring about […] physical destruction* are being inflicted by Azerbaijan on the ethnic Armenians of Nagorno-Karabakh deliberately or at all, and unaddressed in the Moreno Ocampo Opinion is Azerbaijan's facilitation of the achievements of the ICRC since December 2022, when the Opinion suggests that the '[b]*lockade of the Lachin Corridor'* began.

44. The ICRC – which describes itself as *'the only humanitarian organization operating across the Lachin* [C]*orridor'* – has confirmed that in the period from December 2022 until August 2023 it has been able to medically evacuate '[m]*ore than 700 people'*, including 41 people so far this month; assist in the safe passage *'of 600 people, including 230 minors'*, along the Lachin Corridor; deliver *'900 metric tons of medical supplies'* (with the latest delivery of medical supplies on 7 July); distribute *'around 10,000 food and hygiene parcels'* (with the latest delivery of food supplies on 14 June); provide '[m]*ore than 3,000 liters of diesel fuel in support of ambulance services'*; and furnish *'over 1,500 tons of wheat flour'*, *'20,000 liters of sunflower oil', 'more than 40 tons of sugar and buckwheat', '154 tons of potato seeds', '21 tons*

[53] See the remarks by the Permanent Representative of the United States, accessible at <https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-briefing-on-armenia-and-azerbaijan/>.

[54] The 'Press remarks by President Charles Michel following trilateral meeting with President Aliyev of Azerbaijan and Prime Minister Pashinyan of Armenia' are accessible at <https://www.consilium.europa.eu/en/press/press-releases/2023/07/15/press-remarks-by-president-charles-michel-following-trilateral-meeting-with-president-aliyev-of-azerbaijan-and-prime-minister-pashinyan-of-armenia//>.

[55] See the 'Operational update on ICRC's work across the Lachin Corridor' of 18 August 2023, accessible at <https://www.icrc.org/en/document/operational-update-icrcs-work-across-lachin-corridor>.

[56] See, for example, the discussion of the 'Prospects of communication between Agdham and Khankendi' accessible at <https://azertag.az/en/xeber/Prospects_of_communications_between_Aghdam_and_Khankendi-2727820?s=08>.

[57] See, for example, Ani Avetisyan, 'Backlash in Armenia as EU backs Nagorno-Karabakh aid via Azerbaijan', OC *Media* (20 July 2023), accessible at <https://oc-media.org/backlash-in-armenia-as-eu-backs-nagorno-karabakh-aid-via-azerbaijan/>.

of corn and onion seeds', and *'10,000 kits of vegetables and green seeds'* as well as '2 *water pumps'*, *'cleaning chemicals for safe distribution of drinking water'*, and *'laboratory equipment for drinking water analysis'*.[58]

45. The Moreno Ocampo Opinion's oversights or omissions do not reflect the methodology of a comprehensive, independent, or fair-minded expert report.

46. I therefore do not consider that the Moreno Ocampo Opinion has substantiated its assertion that the *actus reus* of genocide is being committed in Nagorno-Karabakh.

The Moreno Ocampo Opinion's Flawed Approach as to Mens Rea

47. The *mens rea* of genocide is '[t]he *"intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such'* and *'is the essential characteristic of genocide, which distinguishes it from other serious crimes'*.[59] According to the ICJ, '[i]*t is regarded as a* dolus specialis, *that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved'*.[60]

48. The presence of this cornerstone requirement may have to be inferred, since it *'will seldom be expressly stated'*,[61] but it is necessary to do so with very considerable caution. In the context of individual criminal responsibility (as to which, see further below), the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') held that '[g]*enocide is one of the worst crimes known to humankind', 'its gravity is reflected in the stringent requirement of specific intent',* and so '[c]*onvictions for genocide can be entered only where that intent has been unequivocally established'*.[62] It is reckless for an individual of Mr Moreno Ocampo's standing to draw inferences as to genocidal intent publicly without a proper basis.

49. According to the jurisprudence of the ICJ, an inference of genocidal intent can be drawn when *'this is the only inference that could reasonably be drawn'*.[63]

50. The Moreno Ocampo Opinion purports to deduce – that is, infer – genocidal intent on the part of Azerbaijan. But its reasoning is incoherent. It starts from flawed premises such as facts that simply have not been found by the ICJ and conclusions of law to which the ICJ has not come.

51. It leaves out of account facts such as the alternative routes to Nagorno-Karabakh offered by Azerbaijan and Azerbaijan's facilitation of the ICRC. And it does not demonstrate that its conclusion is the only inference reasonably to be drawn even from the purported conduct on which it selectively focuses.

52. There is thus no basis at all in the Moreno Ocampo Opinion for its assertion that the *mens rea* of genocide is present in relation to Nagorno-Karabakh.

The Lack of Evidence and Analysis as to Individual Criminal Responsibility in the Moreno Ocampo Opinion

53. It will be understood from the above that the Moreno Ocampo Opinion does not substantiate that genocide is being committed in Nagorno-Karabakh. However, it is necessary to go on to address a particularly inflammatory aspect of the Opinion,

[58] See the 'Operational update on ICRC's work across the Lachin Corridor'.
[59] *Croatia v Serbia* at [132].
[60] *Croatia v Serbia* at [132].
[61] As the parties agreed in *Croatia v Serbia* at [143].
[62] *Prosecutor v Krstic* (IT-98-33-A) at [134].
[63] *Croatia v Serbia* at [148].

namely its allegation that the President of Azerbaijan may be criminally liable in international law as an individual for genocide.

54. In doing so, I have not lost sight of the point made above: it is an affront to the presumption of innocence for a person in Mr Moreno Ocampo's position to make allegations of specific international crimes against named individuals.

55. It is well-established that it is possible for a State to be found to have committed genocide without an individual first being found to have committed genocide.[64] Equally, the high officials of a State,[65] including the head of state,[66] may be innocent of a genocide committed by that State.

56. It is therefore necessary to carefully consider an individual's factual relationship with the alleged *actus reus* of genocide, as well as whether the only reasonable inference that can be drawn from their own conduct is an intent to commit genocide, before alleging that the individual has committed genocide.

57. The Moreno Ocampo Opinion simply does not do this.

58. The Moreno Ocampo Opinion does not judiciously and vigilantly consider the factual relationship between the President of Azerbaijan and the alleged facts on the ground – which, as set out above, have not been resolved by the ICJ and are not comprehensively or even-handedly addressed in the Opinion. It deals with them only by wholly unsubstantiated assertion.

59. The Moreno Ocampo Opinion does not establish that the only reasonable inference to be drawn from the President's alleged conduct is an intention to commit genocide against the ethnic Armenians of Nagorno-Karabakh. In particular, the Opinion does not even begin convincingly to show why the explanations given by the President for what has been done, and quoted in the Opinion, are to be disregarded.

60. Importantly, one need not agree with the explanations – or even accept that the conduct to which they relate is consistent with international law – to acknowledge that they do not demonstrate genocidal intent.

61. The Moreno Ocampo Opinion fails to undertake a rational and balanced analysis of the available evidence; it is more concerned with accusing an individual by name, perhaps for the sake of seeking headlines, which is lamentable. There is no foundation at all in the Opinion for impugning Azerbaijan's head of state. That the Opinion does so intimates the true intention behind its release.

The Moreno Ocampo Opinion's Misleading Account of the Duty to Prevent Genocide

62. The Moreno Ocampo Opinion refers to the duty of each State *'to take all measures to prevent genocide which* [are] *within its power, and which might* […] *contribut*[e] *to preventing* [...] *genocide'*.[67] This duty has indeed been recognised by the ICJ.[68]

[64] *Bosnia and Herzegovina v Serbia and Montenegro* at [180]–[182].

[65] By way of illustration, see the trial judgment of the International Criminal Tribunal for Rwanda in *Prosecutor v Bizimungu et al* (ICTR-99-50) and the subsequent appellate judgment of that Tribunal (*Mugenzi and Mugiraneza v Prosecutor*).

[66] By way of illustration, see the trial judgment of the Extraordinary Chambers in the Courts of Cambodia in Case 002/02 at [3344]–[3348] and [4329] (finding genocide against the Cham to have been committed by Cambodia, but acquitting Khieu Samphan of the offence).

[67] *Bosnia and Herzegovina v Serbia and Montenegro* at [430].

[68] *Bosnia and Herzegovina v Serbia and Montenegro* at [427].

63. However, the ICJ has made clear that *'a State's obligation to prevent, and the corresponding duty to act, arise'* only *'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'*.[69]

64. There must, accordingly, be a proper basis for a State to perceive a serious risk of genocide before the duty arises.

65. This coheres with State practice. For example, the United Kingdom will not acknowledge genocide in the absence of *'determinations of genocide* […] *made by competent courts'*.[70]

66. This also coheres with the practice of the Security Council.

67. Thus, in the resolution referring the situation in Darfur, Sudan, to the Prosecutor at the ICC to which the Moreno Ocampo Opinion refers, the Security Council expressly took note *'of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur'*.[71] The Commission — chaired by Judge Antonio Cassese, the first President of the ICTY and the Special Tribunal for Lebanon, and otherwise composed of four distinguished and independent jurists[72] — had concluded, under the auspices of the United Nations and notably after visiting Sudan, including Darfur,[73] that the *actus reus* of genocide '[a]*rguably* […] *might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control'* and the possibility could not be excluded that individuals*, 'including Government officials, may entertain a genocidal intent'*.[74] The Commission gave a very detailed account of its factual and legal findings as the violations identified.[75]

68. Similarly, in the resolution referring the situation in the Libyan Arab Jamahiriya to the Prosecutor at the ICC, the Security Council referred with approval to the dispatch of an *'independent international commission of inquiry'*, cited firsthand evidence of *'the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government'*, and took note of the request for a referral by the Libyan delegation to the United Nations itself.[76]

69. In the present circumstances, the Moreno Ocampo Opinion does not identify any basis on which to conclude either that the *actus reus* genocide is occurring in Nagorno-Karabakh or that anyone connected with the Lachin Corridor has genocidal

[69] *Bosnia and Herzegovina v Serbia and Montenegro* at [431],

[70] See the press release by which the 'UK acknowledges acts of genocide committed by Daesh against Yazidis' of 1 August 2023, accessible at <https://www.gov.uk/government/news/uk-acknowledges-acts-of-genocide-committed-by-daesh-against-yazidis>. In this regard, and apropos of the comments in the Moreno Ocampo Opinion about domestic courts and the ICC, it should be noted that the compromissory clause of the Genocide Convention (Article IX) and the fact that determinations as to treaty and customary international legal obligations can be made in advisory proceedings – see, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* at [86] – mean that recourse to the ICJ for a determination of genocide is ultimately always available even if those other judicial institutions are not in a position to determine whether genocide has been committed.

[71] UNSC Res 1593 (2010).

[72] 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' (25 January 2005) UN Doc S/2005/60, at [1],

[73] See 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' at [20]-[25].

[74] 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' at [518]-[522].

[75] 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' at [182]-[418].

[76] UNSC Res 1970 (2011).

intent, as is explained above. Not least for this reason, and by stark contrast to the material on which the Security Council has relied in the past when making referrals to the Prosecutor at the ICC, the Opinion cannot itself be such a source.

70. It follows that no third State, whether a member of the Security Council or otherwise, has any duty connected with genocide in relation to Nagorno-Karabakh. It is highly misleading to suggest otherwise.

False Accusations of Genocide by Armenia May Be Internationally-Wrongful Acts

71. As the Ukrainian request to the ICJ for provisional measures under the Genocide Convention reflects, States such as Azerbaijan may have the right not to be subject to a false accusation of genocide under the Genocide Convention.[77]

72. In any event, as set out above, Armenia has been ordered by the ICJ to *'refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'*. This order has binding effect.[78]

73. A party that makes or circulates a false accusation of genocide against another disputing party certainly aggravates and extends the dispute between the parties. Armenia should therefore be wary of adopting or encouraging unsubstantiated allegations such as those in the Moreno Ocampo Opinion in light of the provisional measures indicated to it by the ICJ.

Overall Conclusion

74. For all these reasons, the international community should not accept the incomplete and inaccurate Moreno Ocampo Opinion or its purported conclusions.

75. The Moreno Ocampo Opinion's claim that a genocide is currently taking place is not supported by any evidence. It is a pronouncedly unsafe claim to be hurling around, which risks arousing emotions and tensions for no justifiable reason.

76. The spotlight should instead be on continuing to advance the peace process and safeguard human rights in the best interests of all in the region.

Rodney Dixon KC
Temple Garden Chambers London and The Hague
21 August 2023

[77] See the Request for the Indication of Provisional Measures Submitted by Ukraine in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening)*, accessible at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf>.

[78] *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 at [109].