

SEPARATE OPINION OF JUDGE SEBUTINDE

The provisional measure contained in paragraph 98 (1) (a) of the Court's Order of 7 December 2021 has a particular temporal scope and extends protection to particular individuals — In its current form, the said provisional measure does not extend to Armenian nationals captured and detained by Azerbaijan after the 2020 Conflict or in the future — The renewed hostilities of September 2022 resulting in the capture and detention of additional Armenian prisoners constitute a change in the situation within the meaning of Article 76 (1) of the Rules of Court, that justifies a modification of the original provisional measure, in order to extend its protection to the new detainees.

I. INTRODUCTION

1. Although I have voted in favour of subparagraph (2) of paragraph 23 of the Order on Armenia's Request for the Modification of the Order of 7 December 2021 Indicating Provisional Measures, (*dispositif*) ("the present Order"), I respectfully disagree with the finding of the majority of the Court in subparagraph (1) that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its powers to modify the measures indicated in the Order of 7 December 2021". I accordingly voted against that subparagraph. I also disagree with the reasoning of the Court in paragraphs 12 to 19 of the present Order that led the majority to its conclusion. In my respectful opinion, the recent turn of events in September 2022 does constitute a change in the situation that warranted the indication of provisional measures in this case on 7 December 2021 and, as I shall demonstrate below, that change justifies a modification in the first provisional measure, along the lines requested by Armenia.

2. It will be recalled that Armenia has, through its various letters to the Court, requested that the first of the provisional measures indicated by the Court in its provisional measures Order of 7 December 2021 be modified to include those captured by Azerbaijan after the 2020 conflict¹. It requests that the first provisional measure be modified by adding the following italicized words: "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict, *or any armed conflict between the Parties since that time, upon capture or thereafter, including those who remain in detention, and ensure their security and equality before the law*".

3. Armenia also requests that the Court confirm whether an *ad hoc* committee has been established for this case pursuant to Article 11 of the Resolution concerning the Internal Judicial Practice of the Court². Both requests were accompanied by allegations and evidence of Azerbaijan's non-compliance with the indicated provisional measures³.

4. Azerbaijan filed an initial response on 22 September 2022⁴, *inter alia*, laying out its own allegations and evidence of Armenia's non-compliance with measures indicated for both this case

¹ Letter from the Agent of Armenia requesting the modification of the Court's Order indicating provisional measures (hereinafter "Armenia 16 September Letter"), p. 5; Letter from the Agent of Armenia dated 19 September 2022 reiterating Armenia's request that the Court modify its Order indicating provisional measures (hereinafter "Armenia 19 September Letter"), p. 4.

² Armenia 16 September Letter, pp. 2 and 6; Armenia 19 September Letter, p. 4.

³ Armenia 16 September Letter pp. 5-6; Armenia 19 September Letter, p. 4.

⁴ Letter from the Agent of Azerbaijan dated 22 September 2022.

and the provisional measures indicated⁵ for the related case of *Azerbaijan v. Armenia*⁶. On 27 September 2022, Azerbaijan followed up with its written observations opposing the modification requested by Armenia on grounds that the latter had not demonstrated urgency, making additional allegations of Armenia's non-compliance, and presenting a proposal for the filing of periodic reports in order to facilitate compliance monitoring in both *Armenia v. Azerbaijan* and *Azerbaijan v. Armenia*⁷.

5. In response, Armenia submitted a letter dated 29 September 2022, addressing Azerbaijan's four arguments on urgency and reiterating its request for modification. In this separate opinion, I will only address Armenia's request concerning the modification of the provisional measures indicated by the Court in its Order of 7 December 2021.

II. WHETHER THE SITUATION WARRANTING THE ORDER OF 7 DECEMBER 2021 HAS CHANGED

6. Under Article 76, paragraph 1, of the Rules of the Court, the Court may, at a party's request or *proprio motu*, "at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures *if, in its opinion, some change in the situation justifies such revocation or modification*" (emphasis added). The Court therefore needs to assess whether the situation warranting the original provisional measures order has changed and, if so, whether that change justifies the modification requested.

7. In determining whether or not there has been a change in the situation underlying the Court's Order of 7 December 2021, it is necessary to appreciate the context in which that Order was issued. It will be recalled that the Court indicated the provisional measures contained in that Order following a particular conflict, namely, the so-called "Second Nagorno-Karabakh War" of September 2020⁸ that lasted 44 days, and after the declaration of the ceasefire of 10 November 2020 pursuant to the Trilateral Statement⁹. Armenia's request for the indication of the 2021 provisional measures was intended to secure protection of the CERD rights of specifically 45 named Armenian individuals that both Parties agreed had been captured by Azerbaijan in relation to the said Second Nagorno-Karabakh War and that remained in the Respondent's custody at that time¹⁰. Armenia identified those individuals as "prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath"¹¹. It was in respect of these 45 individuals that the Court "[found] plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan"¹². Accordingly, the provisional measures indicated concerned those particular individuals and not any other persons detained over the course of a tenuous relationship between the Parties spanning many years, much less those who

⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021.*

⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia).*

⁷ Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures (hereinafter "Azerbaijan Observations").

⁸ Azerbaijan referred to the 2020 conflict as the "Second Garabagh War".

⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, para. 13.*

¹⁰ *Ibid.*, para. 51.

¹¹ *Ibid.*, para. 60.

¹² *Ibid.*

would, hypothetically, be captured during some future flare-up, as the present Order now stipulates¹³. Similarly, the Court’s reasoning and analysis of the evidence in the 7 December 2021 Order specifically dealt with allegations regarding the treatment of Armenian nationals held captive during the “September-November 2020 armed hostilities or their aftermath”¹⁴. Moreover, the natural reading of the 2021 Order indicates that it was intended to be backward looking and specific to those who were still held in Azerbaijani custody at that time, as the text refers to “all persons *captured in relation to the 2020 Conflict who remain in detention*”¹⁵ (emphasis added). In my respectful opinion, the 2021 Order has both a *ratione personae* limitation as well as a *ratione temporis* limitation, which limitations are, in my view, inconsistent with the reasoning and findings of the majority in paragraphs 18 and 19 of the present Order.

8. After careful consideration and analysis of the context and situation underlying the issuance of the 2021 provisional measures Order, I shall now consider the current context and circumstances in order to determine whether there has been a change in the situation. Despite disagreements as to the details, the Parties agree that there was a resumption of hostilities from 12 to 13 September 2022. This fact is also established through independent sources including remarks by the Assistant Secretary-General of the United Nations at the Security Council meeting on 15 September, which described the fighting as “the largest in a series of incidents since 2020”¹⁶. The situation continues to be volatile. After agreeing to a ceasefire on the evening of 14 September, the Parties resumed clashes on 23 and 28 September, with each blaming the other for violating the ceasefire¹⁷. Both Parties agree that, as a result of the September 2022 hostilities, more Armenian service personnel were captured and detained by Azerbaijan. Azerbaijan makes much ado about 17 Armenian nationals that it has repatriated since the renewed hostilities. It will be recalled however, that in its 7 December 2021 Order, the Court held that it “does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees”¹⁸. Thus, whilst Azerbaijan may be commended for its humanitarian stance in repatriating captured Armenian service personnel, such repatriation is not a legal obligation under the 2021 provisional measures. Rather, Azerbaijan’s legal obligation relates to the treatment of each of the 45 identified Armenian prisoners and those who remain in Azerbaijani custody, in particular by “[p]rotect[ing] them from violence and bodily harm . . . and ensur[ing] their security and equality before the law”. Besides, Armenia, while acknowledging the repatriation of its servicemen, asserts that there is evidence that those repatriated had been subjected to torture and that Azerbaijan has other Armenians in its custody beside the 17, including at least six executed while detained and at least two who have not been returned¹⁹. In my view, the recent resurgence of hostilities, which broke the period of relative peace, and which led to fresh prisoners of war and probable death, constitutes a major change in the circumstances underlying the indication of the 2021 provisional measures.

¹³ Present Order, para. 18.

¹⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 11.

¹⁵ *Ibid.*, para. 98, subpara. (1) (a).

¹⁶ UN News, “UN remains deeply concerned over ‘dangerous escalation’ following fighting across Armenia-Azerbaijan border”, 15 September 2022, <https://news.un.org/en/story/2022/09/1126721/>.

¹⁷ See, e.g. UN Meetings Coverage and Press Releases, “Amid Fighting between Armenia, Azerbaijan, Assistant Secretary-General Urges Both Parties Commit to Lasting Peace Treaty, in Security Council Briefing”, 15 Sept. 2022, <https://press.un.org/en/2022/sc15031.doc.htm>; Al Jazeera, “Armenia, Azerbaijan trade blame for new ceasefire violations”, 23 Sept. 2022, <https://www.aljazeera.com/news/2022/9/23/armenia-azerbaijan-trade-blame-for-fresh-ceasefire-violations>; and Reuters, “Armenia says three soldiers killed by Azeri shelling — Tass”, 28 Sept. 2022, <https://www.reuters.com/article/azerbaijan-armenia-fighting-idAFKBN2QT1SH>.

¹⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 60.

¹⁹ Armenia’s letter dated 10 October 2022, pp. 2-3.

III. WHETHER THE CHANGE JUSTIFIES THE MODIFICATION OF MEASURES

9. Armenia asserts that its request is a simple clarification of the Court's Order of 7 December 2021, which has become necessary "to avoid any ambiguity with respect to Azerbaijan's obligations vis-à-vis captured Armenian servicemen"²⁰. According to Armenia, urgency is self-evident given the change in the situation, and the Court has already decided on the other elements required for the modification, including prima facie jurisdiction, plausibility of the asserted right, and the link between the right and the measure, all of which remain identical to those for the original provisional measure. Armenia also comments that the modification would cover conduct that already violates another provisional measure that requires both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"²¹.

10. Azerbaijan only disputes the precondition of urgency and provides four arguments to support its position²². The first is that no one would be protected by the added language since it alleges that all the detainees captured during the 12-13 September 2022 hostilities have been repatriated²³. The second and third arguments are linked; they jointly state that there is no need to merely reiterate obligations that Azerbaijan already acknowledges and has been taking active steps to comply with²⁴. The fourth argument is that the change is mischaracterized since Armenia is responsible for the resumption of hostilities²⁵.

11. Armenia provides a response to each of Azerbaijan's arguments. In response to the first argument, it states that repatriation does not deny urgency, because there remains a real and imminent risk of repetition of Azerbaijan's conduct threatening the well-being of Armenian service members. In response to the second argument, Armenia notes that the Court did not accept the same representation as a defence in relation to detainees from the 2020 conflict who are no different from those captured recently. In response to the third argument, Armenia argues that remedial steps do not remove the urgency and that the alleged remedies are not leading to accountability. In response to the fourth argument, Armenia maintains both that the claim is false and that it would not justify abuse regardless²⁶.

12. For the Court to modify an existing provisional measure, the new situation must itself meet the general conditions laid down in Article 41 of the Statute of the Court. As correctly explained by Armenia and left undisputed by Azerbaijan, all elements of Article 41 (other than that of urgency which is disputed by Azerbaijan) have been considered and established in the original provisional measures Order²⁷. This section thus focuses solely on the question of urgency. The Court clarified in the 7 December 2021 Order that "[t]he condition of urgency is met when the acts susceptible of

²⁰ Armenia 16 September Letter, p. 5.

²¹ *Ibid.*

²² Azerbaijan Observations, p. 3.

²³ Letter from the Agent of Azerbaijan dated 6 October 2022, p. 1.

²⁴ Azerbaijan Observations, pp. 4-7.

²⁵ *Ibid.*, pp. 7-11.

²⁶ Armenia 29 September Letter, pp. 2-4; Letter from the Agent of Armenia dated 6 October 2022, p. 2.

²⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*, paras. 60, 67 and 81-82.

causing irreparable prejudice can ‘occur at any moment’ before the Court makes a final decision on the case”²⁸. Based on this standard, I find this condition satisfied.

13. In the 2021 Order, the Court specifically took note of evidence supporting allegations of inhuman and degrading treatment and torture of Armenian prisoners of war to conclude that there was urgency for the measure in question. The evidence of abuse currently in front of the Court for the modification request, consisting primarily of videos and screenshots that Armenia alleges are being circulated on social media by Azerbaijani servicemen, is arguably less verified than what the Court had at hand during the original proceedings²⁹. Nevertheless, in light of the recent history of alleged abuse, the resumption of hostilities and the capture of additional Armenians provides sufficient reason to suspect that acts susceptible of causing irreparable prejudice could occur before the Court renders a final decision on the merits.

14. This conclusion would also be consistent with the Court’s provisional measures Order. Two facts should be noted in this regard. First, the modification request is not Armenia’s first attempt at expanding the temporal scope of the measure in question. During the proceedings on the request for provisional measures, Armenia requested that the measure cover individuals taken captive “during the 2020 Conflict or in its aftermath”³⁰. This was also the formulation the Court used in finding a link between the plausible right asserted and the relevant provisional measure³¹. That said, the Court ultimately adopted its own formulation referring to those “captured in relation to the 2020 Conflict”. Clearly, the Court decided not to refer to “the aftermath” of the conflict in order to limit the scope of coverage. That said, the Order does not preclude clarification or expansion, which appears to be justified as new hostilities have begun and additional servicemen were captured. This view is further supported by the fact that conduct that would be governed by the modified language would likely also violate the provisional measure to refrain from actions that may aggravate or extend the dispute before the Court.

15. Second, Azerbaijan’s four arguments either follow the same line of logic it used in the original provisional measures proceedings or are irrelevant for evaluating urgency. The first three, with minor variation in the factual details asserted, replicate Azerbaijan’s previous claims, based on which the Court still concluded that the measure in question was warranted³². The fourth argument of fault is not relevant. Urgency is about the possibility of irreparable prejudice newly created by the changed circumstance, not the question of responsibility for this change. In my view, the Court should stand by its original decision that urgency exists despite Azerbaijan’s representations.

²⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*, para. 70. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Order of 16 July 2013, Provisional Measures, I.C.J. Reports 2013*, p. 238, para. 30 (stating the Court indicates provisional measures “only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision”).

²⁹ The original Order, for example, specifically referenced the Resolution of the Parliamentary Assembly of the Council of Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021 and the joint statement issued by several United Nations human rights experts on 1 February 2021. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*, paras. 85-88.

³⁰ *Ibid.*, para. 11.

³¹ *Ibid.*, para. 67 (“It considers that a link exists . . . for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm”).

³² *Ibid.*, paras. 51-52 and 76-77.

IV. CONCLUSION

16. In conclusion, I am of the view that there has been a change of circumstances and the change justifies the requested modification.

17. As to the language of the revised Order, I propose the following modification to subparagraph (1) (a) of paragraph 98 of the Order of 7 December 2021: “Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict *and subsequent hostilities between the Parties, including those* who remain in detention, and ensure their security and equality before the law.”

(Signed) Julia SEBUTINDE.
