

SEPARATE OPINION OF JUDGE ROBINSON

Scope of the Court's provisional measures Order of 7 December 2021 — Temporal limitation in the Court's Order of the 2020 Conflict — Effect of hostilities ensuing between the Parties subsequent to the 2020 Conflict — Outbreak of hostilities on 12 September 2022 qualifies as a "change in the situation".

1. In this opinion, I explain my disagreement with the finding of the majority in paragraph 23 of the Order that “the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021”.

2. A remarkable feature of the majority's Order is that nowhere in its substantive analysis of Armenia's request for modification of the Court's provisional measures Order of 7 December 2021 (hereinafter “2021 Order”) does it examine the most relevant provision of that Order, i.e. paragraph 98 (1) (a). It is difficult to understand this approach because paragraph 98 (1) (a) is the very provision in respect of which Armenia seeks a modification.

3. Article 76 (1) of the Rules of Court reads as follows: “At the request of a party or *proprio motu*, the Court may, 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.”

4. In paragraph 98 (1) (a) of its 2021 Order, the Court indicated the following provisional measure:

“(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) [p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law”.

5. Armenia requested the Court to modify that Order as follows: “to explicitly require Azerbaijan to protect 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*” (emphasis in the original). One immediately sees in the underlined part of the request the concern that Armenia has about the possibility of a conflict arising after the 2020 Conflict.

6. Instead of focusing on paragraph 98 (1) (a) of its 2021 Order, the modification of which Armenia sought, the Court concentrates on the Trilateral Statement signed on 9 November 2020 by Azerbaijan, Armenia and Russia. This statement required a “complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict” from 10 November 2020. Yet, the legal comparator for determining whether there has been “a change in the situation justifying modification” is the Court's 2021 Order, not the Trilateral Statement. The approach taken by the majority resulted in their ignoring the very consequential temporal element in the Court's 2021 Order.

7. In its Application instituting proceedings requesting provisional measures, Armenia asked the Court to indicate the following provisional measure: “Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities *or their aftermath*” (para. 131; my emphasis). By referring to the September-November 2020 armed hostilities or their aftermath, Armenia indicated that its concern was not only with the 2020 Conflict, but also with any subsequent hostilities resulting therefrom. At the end of the second round of its oral observations, Armenia in its final submission asked the Court to indicate the following provisional measure: “Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities *or their aftermath*” (hearing of 15 October 2021; my emphasis). Again, in its final submissions, Armenia, through the phrase “or their aftermath”, demonstrates its concern with the possibility of hostilities after the 2020 Conflict.

8. In paragraph 13 of its 2021 Order, the Court for all practical purposes defined the temporal element relating to the conflict in 2020. It stated: “Further hostilities erupted in September 2020, in what Armenia calls ‘the Second Nagorno-Karabakh War’ and Azerbaijan calls ‘the Second Garabagh War’ (hereinafter the ‘2020 Conflict’), and lasted 44 days.” Thus, as far as the Court was concerned, the 2020 Conflict had a duration of 44 days.

9. Notably, in its 2021 Order, the Court itself makes reference to the “2020 Conflict or its aftermath”. For example, in paragraph 67, in considering the link between the measures requested by Armenia and the plausible rights it seeks to protect, the Court makes reference to “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” (my emphasis). Similarly, in paragraph 79, in setting out the arguments of the Parties, it points to Azerbaijan’s statement that Armenia “contents itself with alleging only past conduct, primarily during *or in the aftermath* of active hostilities” (my emphasis).

10. However, despite these many references to the aftermath of the hostilities in the proceedings, it is significant that the Court, in its 2021 Order, requires Azerbaijan to protect “persons captured in relation to the 2020 Conflict” (para. 98 (1) (a)), and not persons captured in relation to the 2020 Conflict and its aftermath. This is particularly telling with regard to Armenia’s final submissions, which specifically referred to the aftermath of hostilities, because the Court would obviously have taken that submission into account in making its findings for the 2021 Order. It is therefore reasonable to conclude that the omission of any reference to hostilities subsequent to the 2020 Conflict meant that the Court confined the 2020 Conflict to the 44 days that it highlighted in paragraph 13 of the 2021 Order.

11. Therefore, any hostilities that ensued between the Parties subsequent to the 2020 Conflict are not part of the 2020 Conflict nor, as the majority maintains, are they the continuation of that conflict; such hostilities, by virtue of occurring after the 2020 Conflict, constitute a change in the situation.

12. The majority held that “Armenia’s allegations about the treatment of [persons who were detained in relation to the 12 September 2022 hostilities] are of the same character as the allegations that were presented to the Court in Armenia’s request for the indication of provisional measures in 2021”. However, the similarity of the allegations about treatment in the hostilities of 2020 and 2022 in no way derogates from the “change in the situation”, which is an inescapable conclusion of a proper reading of the Court’s 2021 Order. Indeed, this similarity in the allegations about treatment is

scarcely surprising, because, generally, the physical features of military conflicts are the same— injuries, deaths, capture of persons and their alleged mistreatment, etc., and it is those features, common to most conflicts, that give rise to allegations about treatment. Therefore, similarity in the allegations about treatment does not provide a basis for the conclusion that there has been no “change in the situation” justifying modification of the 2021 Order.

13. Consequently, the odd result is that the Court’s Order misinterprets and contradicts the 2021 Order. This contradiction is highlighted by the last sentence in paragraph 18, in which the Court “affirms that treatment in accordance with point (1) (a) of paragraph 98 of its Order of 7 December 2021 is to be afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict”. There is no basis for this interpretation and application of paragraph 98 (1) (a), which calls for the protection of “all persons captured in relation to the 2020 Conflict who remain in detention”. The phrase “who remain in detention” refers to those persons who were captured in the 2020 Conflict, which the Court defined in paragraph 13 as having a duration of 44 days. The last sentence in paragraph 18 is therefore a strained interpretation and application of paragraph 98 (1) (a) of the Court’s 2021 Order.

14. In light of the foregoing, the outbreak of hostilities between the Parties on 12 September 2022 qualifies as a “change in the situation”, within the meaning of Article 76 (1) of the Rules of Court, warranting the modification of the 2021 Order. Thus, the Court should have granted the request of Armenia for a modification of paragraph 98 (1) (a) of its 2021 Order. It is also possible that Armenia could have filed a fresh request for the indication of provisional measures in respect of the outbreak of hostilities in September 2022. However, such an eventuality is properly seen as unnecessary in light of the provision made in Article 76 (1) for modification of provisional measures.

(Signed) Patrick L. ROBINSON.
