

DISSENTING OPINION OF JUDGE BHANDARI

Modification of an order indicating provisional measures — Requirement under Article 76 of the Rules of Court for “some change in the situation” — September 2022 hostilities created a “change in the situation” — Change in the situation would have justified modification of the 2021 Order — Risk of setting too high a bar for modification — Court’s interpretation of paragraph 98 (1) (a) of the 2021 Order is unfounded.

1. I regret that I am unable to vote in favour of this Order.

2. In the first operative paragraph of this Order, the Court “[f]inds 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”¹. I have difficulties understanding how this can be correct.

3. By letter to the Registrar dated 16 September 2022, Armenia requested the modification of paragraph 98 (1) (a) of the Court’s 7 December 2021 Order (hereinafter the “2021 Order”)². That paragraph requires Azerbaijan to “[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”³. Referring to Article 76 of the Rules of Court, Armenia requested that the Court modify that paragraph by adding the following italicized words: “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”⁴.

4. Armenia’s request amounted, in essence, to a request that the Court extend the temporal and personal applicability of an obligation under the 2021 Order — the obligation to “protect from violence and bodily harm” — to current circumstances. It did not amount, in my view, to a request that the Court substantially modify obligations under the 2021 Order.

5. It is common ground between the Parties, and the Court takes note of this fact, that a ceasefire was declared on 9 November 2020 in the form of the so-called “Trilateral Statement” between Armenia, Azerbaijan and the Russian Federation⁵. It is also common ground, and again the Court takes note of this fact, that hostilities again erupted between the Parties in the week of 12 September 2022⁶.

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 23 (1).

² Letter from the Agent of Armenia requesting the modification of the Court’s Order indicating provisional measures, 16 September 2022.

³ *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. 98 (1) (a).

⁴ Letter from the Agent of Armenia requesting the modification of the Court’s Order indicating provisional measures, dated 16 September 2022, p. 4.

⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 12 October 2022*, paras. 17-18.

⁶ *Ibid.*, para. 18.

6. Under Article 76 (1) of the Rules of Court, “[a]t 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”. In paragraph 18 of the present Order, “the Court considers that the situation that existed when it issued the Order of 7 December 2021 is ongoing and is no different from the present situation”⁷. It adds in paragraph 19 “that the hostilities which erupted between the Parties in September 2022 and the detention of Armenian military personnel do not constitute a change in the situation justifying modification of the Order of 7 December 2021 within the meaning of Article 76 of the Rules of Court”⁸. I am unable to agree with these conclusions for three reasons.

7. First, the “2020 Conflict” was a defined term in the 2021 Order. In paragraph 13 of the 2021 Order, the Court 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”⁹. The words “and lasted 44 days” — in particular the past tense *lasted* — indicate to me that the 2020 Conflict, at least as that term was defined and used in the 2021 Order, is over. (The present Order’s definition of the “2020 Conflict” omits the words “and lasted 44 days”¹⁰.) The 2020 Conflict as originally defined was the reference point for and had created the “situation” existing at the time the Court adopted the 2021 Order. However, the September 2022 hostilities are new events, and it is these incidents that created the relevant “situation” in existence at the adoption of the present Order.

8. Second, even in the absence of the original definition, I would find it artificial to suggest that “the situation that [was present] when [the Court] issued the Order of 7 December 2021” can be characterized as “ongoing” for the purposes of Article 76 (1) of the Rules of Court. I find it difficult to see how, in light of all intervening events, the situation as it stood when the Court adopted the 2021 Order could be seen as unaltered by the renewed hostilities of September 2022, whether in fact or in law.

9. Third, and in any event, the Order seems to assume that only a *different* conflict could create “some change in the situation”, yet there could equally be a change in the *situation* within the *same* conflict, including an ongoing conflict. Article 76 (1) of the Rules of Court in my view does not require a drastic or even substantial change in the situation. On the contrary, it textually only requires “*some* change”. Interpreting these words too narrowly would, in my view, be inconsistent with Article 76 (1).

10. For these reasons, I would have concluded that “some change in the situation” within the meaning of Article 76 (1) of the Rules of Court had occurred. Any finding to the contrary strikes me as factually incorrect. Had the Court also concluded that such a change had occurred, I would have had little difficulty finding that this change in the situation justified modifying the 2021 Order in the terms Armenia requested. In particular, the totality of the evidence placed on the record before the Court suggests to me that the requirement of urgency, disputed in correspondence between

⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 18.

⁸ *Ibid.*, para. 19.

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 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 17.

the Parties¹¹, was satisfied. Moreover, this evidence indicates that the alleged incidents were not minor, day-to-day occurrences. Rather, differences between the Parties about specific events, numbers of detainees and evidentiary accuracy notwithstanding, the overall record to my mind demonstrates a flaring-up in brutality and violence — another circumstance indicating that these incidents should not be regarded as part of the same “situation”.

11. I recognize that Azerbaijan called into question the authenticity of elements of Armenia’s evidence¹². To my mind, however, the Court is not required, at a provisional measures stage, to make a final determination on the authenticity of evidence. Rather, the evidence would in my opinion have been sufficient to satisfy the requirement of urgency for the indication of provisional measures. In any event, I note that according to a report by the Human Rights Defender of Armenia, supplied by Armenia in its letter to the Registrar dated 6 October 2022, the authenticity of videos and photographs received by that body had been verified by certain organs¹³.

12. More generally, this Order risks placing the bar for modification too high. A reasonable interpretation of Article 76 of the Rules of Court should not be unduly restrictive. Again, Armenia is not requesting that the 2021 Order be modified substantially.

13. Finally, the limited scope of the 2021 Order is scarcely remedied by the statement in the present Order “that treatment in accordance with paragraph 98 (1) (a) 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”¹⁴. Fitting the September 2022 hostilities into the 2020 Conflict strikes me as a tall order. The words “2020 Conflict” refer to precisely that: the 2020 Conflict. Reading these words to encompass hostilities that occurred in September 2022 not only places an uncomfortable strain on the ordinary meaning of those words — not to mention the Court’s original definition in the 2021 Order — but arguably also discounts efforts to establish a ceasefire in the interim.

(Signed) Dalveer BHANDARI.

¹¹ Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures, dated 27 September 2022, pp. 2-5; Letter from the Agent of Armenia, dated 29 September 2022, pp. 1- 3; Letter from the Agent of Azerbaijan, dated 4 October 2022, pp. 2- 3; Letter from the Agent of Armenia, dated 6 October 2022, p. 2; Letter from the Agent of Azerbaijan, dated 6 October 2022, pp. 1- 2; Letter from the Agent of Armenia, dated 10 October 2022, pp. 1- 2; Letter from the Agent of Azerbaijan, dated 12 October 2022, pp. 1- 2.

¹² Written observations of Azerbaijan on the request of Armenia that the Court modifies its Order indicating provisional measures, dated 27 September 2022, p. 6; Letter from the Agent of Azerbaijan, dated 4 October 2022, p. 3; Letter from the Agent of Armenia, dated 6 October 2022, Exhibit I, p. 5; Letter from the Agent of Azerbaijan, dated 7 October 2022, p. 1; Letter from the Agent of Azerbaijan, dated 12 October 2022, pp. 3- 4.

¹³ Letter from the Agent of Armenia dated 6 October 2022, Exhibit I, p. 5.

¹⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 12 October 2022*, para. 18.