

DECLARATION OF JUDGE *AD HOC* KEITH

1. As my vote indicates, I agree with the rejection by the Court of the first and third measures requested by Armenia.

2. I write to explain my negative vote on the measure that the Court does indicate. In support of that vote, I depend on four reasons.

3. First, the measure does not take sufficient account of the statement of the President of Azerbaijan, the Prime Minister of Armenia and the President of the Russian Federation of 9 November 2020 declaring a complete ceasefire and termination of all hostilities from midnight Moscow time on 10 November 2020. Under paragraph 6, subparagraph 1, of that statement “[t]he Lachin Corridor (5 km wide), which will provide a connection between Nagorno-Karabakh and Armenia while not passing through the territory of Shusha, shall remain under the control of the Russian Federation peacemaking forces”. Subparagraph 3 of paragraph 6 provides that “[t]he Republic of Azerbaijan shall guarantee the security of persons, vehicles and cargo moving along the Lachin Corridor in both directions”. Armenia understands “security” as meaning “safe movement”, Azerbaijan as “safety” and the Russian Federation as “security”. Whatever meaning is given to the word — and for me it is better to stay with the word “security” used in the English text of the statement — it is the Russian Federation peacemaking force that controls the whole route.

4. Second, the protestors are protesting about the extensive mining that had occurred during the Armenian occupation of Azerbaijani territory. Their protests are limited to the area next to the Russian checkpoint 7 and to Shusha. (The most northerly of the checkpoints is 8.) I can see no racially discriminatory purpose or effect in that action in terms of the definition of “racial discrimination” in Article 1 of CERD. Rather, the protestors are exercising their freedoms of expression and peaceful assembly as recognized in the European Convention on Human Rights and the International Covenant on Civil and Political Rights and which are reflected in CERD itself, Article 5 (*d*) (viii) and (ix).

5. Third, I refer to the undertaking that the Azerbaijani Agent made in his statement on 30 January 2023. That statement, made in the face of the Court, binds the Azerbaijani Government. He declared that “Azerbaijan 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 road” (CR 2023/2, p. 22, para. 30 (Mammadov)). I take the point that that statement repeats the terms of the 2020 statement, but it also confirms that continued commitment and, critically, demonstrates the limits of Azerbaijan’s powers in the current circumstances.

6. Finally, I call attention to the restriction the Court has placed on the measure proposed by Armenia: Azerbaijan is to “take all measures at its disposal” to ensure unimpeded movement. (Compare paragraph 10, second measure, with paragraphs 63 and 67.) How is Azerbaijan to comply with that vaguely expressed obligation? How will claimed breaches of it be determined?

7. I am aware that a similar formula has been used in previous cases (*Breard (Paraguay v. United States)*¹, *LaGrand (Germany v. United States)*², *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*³ and *Jadhav (India v. Pakistan)*⁴). In the first and second, the situation was complicated by the United States federal system. In all four cases, domestic court proceedings were ongoing and the Court would have been reluctant to become engaged with them, having regard to the principle of the independence of the judiciary. In the first, second and fourth of the cases the immediate danger was of the execution of the person convicted. In those cases, the breach would be very clear. I see this case as quite distinct. If a traffic accident were to occur and Azerbaijan were not to have sufficient resources to clear up the site promptly, would the traffic jam causing an impediment of movement along the Corridor constitute a breach of the Order?

(Signed) Sir Kenneth KEITH.

¹ *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 258, para. 41 (I).*

² *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 16, para. 29 (I) (a).*

³ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II), p. 1171, para. 99 (I).*

⁴ *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 246, para. 61 (I).*