

**249b. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE
ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
(ARMENIA v. AZERBAIJAN) [PROVISIONAL MEASURES]**

Order of 12 October 2022

On 12 October 2022, the International Court of Justice delivered its Order on Armenia's request for the modification of the Court's Order of 7 December 2021 indicating provisional measures in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. The Court concluded 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.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Keith, Daudet; Acting Registrar Punzhin.

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The Court recalls that Armenia's request for the modification of the Order of 7 December 2021 concerns the first provisional measure indicated therein, namely that Azerbaijan shall "[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". Armenia requests the Court

"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).

In particular, Armenia refers to hostilities that erupted between the Parties in September 2022.

The Court observes that, in order to rule on the request of Armenia for the modification of the Order of 7 December 2021, it must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. The Court must therefore first ascertain whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation which warranted the indication of certain provisional measures in December 2021 has changed since that time. In considering the request for the modification of the Order of 7 December 2021, the Court will take account both of the circumstances that existed when it issued that Order and of the changes which are alleged to have taken place in the situation that gave rise to the indication of provisional

measures. If the Court finds that there was a change in the situation since the delivery of its Order, it will then have to consider whether such a change justifies a modification of the measures previously indicated. Any such modification would only be appropriate if the new situation were, in turn, to require the indication of provisional measures, that is to say, if the general conditions laid down in Article 41 of the Statute of the Court were also to be met in this instance. The Court therefore begins by determining whether there has been a change in the situation which warranted the measures indicated in its Order of 7 December 2021.

The Court recalls that hostilities erupted between the Parties in September 2020, in what Armenia calls “the Second Nagorno-Karabakh War” and Azerbaijan calls “the Second Garabagh War” (hereinafter the “2020 Conflict”). The Court further recalls that, on 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the “Trilateral Statement”. Under the terms of this statement, as of 10 November 2020, “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared”.

The Court observes that, notwithstanding the ceasefire declared in the “Trilateral Statement”, the situation between the Parties remained unstable and hostilities again erupted in the week of 12 September 2022, leading to the detention of persons whom Armenia describes as its servicemembers. Armenia’s allegations about the treatment of these persons 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. The renewed hostilities and the detention of these persons indicate that the situation between the Parties remains tenuous. For the purposes of determining whether modification of the measures indicated in the Order of 7 December 2021 is warranted, 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. 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.

In light of the above, the Court concludes 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.

The Court takes note of Azerbaijan’s “commitment to treat any detained Armenians in accordance with paragraph 98 (1) (a) of th[e Order of 7 December 2021]”, which it expressed in a letter dated 7 October 2022.

The Court further considers that the tenuous situation between the Parties confirms the need for effective implementation of the measures indicated in its Order of 7 December 2021. In these circumstances, the Court finds it necessary to reaffirm the measures indicated in its Order of 7 December 2021, in particular the requirement that both Parties “shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”. It reminds the Parties that provisional measures have binding effect.

The Court finally underlines that the present Order is without prejudice as to any finding on the merits concerning the Parties’ compliance with its Order of 7 December 2021.

For these reasons,

THE COURT,

(1) By thirteen votes to three,

Finds 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;

IN FAVOUR: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Keith, Daudet;

AGAINST: Judges Sebutinde, Bhandari, Robinson;

(2) Unanimously,

Reaffirms the provisional measures indicated in its Order of 7 December 2021, in particular the requirement that both Parties “shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”.

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Judge TOMKA appends a declaration to the Order of the Court; Judge SEBUTINDE appends a separate opinion to the Order of the Court; Judge BHANDARI appends a dissenting opinion to the Order of the Court; Judge ROBINSON appends a separate opinion to the Order of the Court; Judge *ad hoc* DAUDET appends a declaration to the Order of the Court.

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Declaration of Judge Tomka

In his declaration, Judge Tomka wishes to explain why he decided to vote in favour of the Court’s Order finding 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.

Judge Tomka notes that the Court has been requested by Armenia to modify the Order of 7 December 2021, in particular the first provisional measure indicated in paragraph 98 (1) (a) therein, according to which Azerbaijan shall “[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”. The reason for this request by Armenia lies in the resumption of hostilities between the Parties in September 2022. He points out that the 2020 Conflict ended on 9 November 2020 with the signing of the “Trilateral Statement” by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation.

To decide whether the circumstances are such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021, the Court had to interpret the first measure of protection indicated in paragraph 98 (1) (a) of the 2021 Order.

For Judge Tomka, the question is how to interpret the first measure. He notes that the words used in paragraph 98 (1) (a), as well as the reasoning preceding it, in particular paragraph 67 of the 2021 Order, suggest that the measure applies to all prisoners of war and detained persons captured during the 2020 Conflict, which lasted between September and 9 November 2020, or in its aftermath. In the authoritative French text, the word “aftermath” is rendered as “*immédiatement après le conflit*” (emphasis added).

In his view, it is difficult to consider that the resumption of hostilities in September 2022, some 22 months after the ceasefire and end of the 2020 Conflict was declared on 9 November 2020, occurred “*immédiatement après le conflit*”.

Judge Tomka emphasizes how the Court, in its Order of today, “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” (emphasis added). In his view, this affirmation by the Court expands the scope of the applicability of the first provisional measure of protection indicated in December 2021 to any person who may be detained in the course of any further hostilities during the pendency of the proceedings in the present case. It was this creative interpretation which allowed Judge Tomka not to vote against the finding made by the Court in today’s Order.

Separate opinion of Judge Sebutinde

Judge Sebutinde respectfully disagrees with the finding of the majority of the Court that the circumstances do not require the Court to modify its Order of 7 December 2021. In her opinion, that finding, together with the underlying reasoning, are inconsistent with the first provisional measure indicated in the 2021 Order which, in her opinion, protects specific individuals detained immediately following the 2020 conflict and does not extend to future detainees captured during subsequent hostilities. Judge Sebutinde takes the view that the resumption of hostilities between the Parties in September 2022, which resulted in the capture and detention by Azerbaijan of additional Armenian prisoners, constitutes a major change in the circumstances, warranting a modification of the earlier provisional measure, within the meaning of Article 76, paragraph (1) of the Rules of Court. She also takes the view that the evidence before the Court provides sufficient reason to suspect that acts susceptible of causing irreparable prejudice to new and future detainees in Azerbaijani custody could occur before the Court renders a final decision. She therefore proposes that the original Order be modified to explicitly refer to hostilities between the Parties subsequent to the 2020 Conflict.

Dissenting opinion of Judge Bhandari

In his dissenting opinion, Judge Bhandari disagrees with the Court’s finding that the circumstances do not require the exercise of its power to modify the Order of

7 December 2021. According to the Court, the situation that existed when it issued the 2021 Order is ongoing and is no different from the present situation, meaning that the requirements for modification under Article 76 (1) of the Rules of Court are not met.

Judge Bhandari disagrees with this conclusion for three reasons. First, according to the Court's original definition of the 2020 Conflict in the 2021 Order, that conflict has ceased. The September 2022 incidents are new events and created the relevant "situation" currently in existence. Second, it would be artificial to suggest that the situation present when the Court issued the 2021 Order can be characterized as ongoing. Third, there could in any event be a change in the *situation* within the *same* conflict, even an ongoing one. Article 76 (1) does not require a drastic or substantial change in the situation, but rather only "*some* change".

Further, Judge Bhandari explains that he would also have had little difficulty concluding that this change in the situation justified modifying the 2021 Order.

Finally, Judge Bhandari cautions against setting the bar for the modification of a provisional measures Order too high. He also questions the Court's interpretation of the relevant operative paragraph of the 2021 Order, which makes specific reference to the "2020 Conflict", in a way that extends it to the September 2022 hostilities.

Separate opinion of Judge Robinson

In his separate opinion, Judge Robinson explains his disagreement with the finding of the majority in paragraph 23 of the Order that the present circumstances do not warrant a modification of the Court's provisional measures Order of 7 December 2021 ("2021 Order").

First, Judge Robinson notes that the majority's substantive analysis of the Court's 2021 Order does not include a thorough examination of paragraph 98(1)(a)—which is the very object of Armenia's request for modification. Rather, he observes that the majority's reasoning focuses on the Trilateral Statement signed on 9 November 2020 by Azerbaijan, Armenia and Russia.

Second, he recalls that the Court's 2021 Order, in paragraph 13, defined the temporal scope of the hostilities which erupted in September 2020 ("2020 Conflict") as having a duration of 44 days. Therefore, he believes that any hostilities that ensued between Armenia and Azerbaijan after the 2020 Conflict are not part of the 2020 Conflict nor, as the majority maintains, are they a continuation of that conflict. Accordingly, in Judge Robinson's view, the hostilities that occurred on 12 September 2022 constitute a change in the situation within the meaning of Article 76(1) of the Rules of the Court.

Third, Judge Robinson comments on the majority's conclusion that treatment in accordance with paragraph 98 (1) (a) of its 2021 Order 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. Judge Robinson considers that this is a strained interpretation and application of paragraph 98(1)(a) of the Court's 2021 Order as that paragraph referred to persons who remained in detention in relation to the 2020 Conflict, as defined by the Court.

In conclusion, Judge Robinson believes that the Court should have granted the request of Armenia for a modification of paragraph 98 (1) (a) of its 2021 Order.

Declaration of Judge *ad hoc* Daudet

In a short declaration, Judge *ad hoc* Daudet expresses the view that, in deciding to leave unchanged the text of the Order indicating provisional measures of 7 December 2021, which it considers applicable to the present circumstances, the Court has fully addressed Armenia's concern to protect the victims of the armed actions carried out by Azerbaijan in the week of 12 September 2022.

He emphasizes the importance of the notion of continuity in the circumstances in 2022 and 2021, and considers that decisions indicating provisional measures are inherently forward-looking.
