

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

Summary of the Order of 22 February 2023

On 22 February 2023, the International Court of Justice delivered its Order on the Request for the indication of provisional measures made by the Republic of Armenia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. The Court indicated a provisional measure to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor.

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

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The Court begins by recalling that, on 16 September 2021, Armenia filed in the Registry of the Court an Application instituting proceedings against Azerbaijan concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter “CERD” or the “Convention”).

In its Application, Armenia contends that “[f]or decades, Azerbaijan has subjected Armenians to racial discrimination” and that, “[a]s a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse”. According to Armenia, these violations are directed at individuals of Armenian ethnic or national origin regardless of their actual nationality. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court (the “first Request”). By an Order of 7 December 2021, the Court indicated the following provisional measures:

“(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) Protect 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;

(b) Take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its

officials and public institutions, targeted at persons of Armenian national or ethnic origin;

(c) Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts;

(2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

The Court further recalls that by a letter dated 16 September 2022, Armenia, referring to Article 76 of the Rules of Court, requested the modification of the Court’s Order of 7 December 2021 (the “second Request”). By an Order dated 12 October 2022, the Court found that “the circumstances, as they [then] present[ed] themselves to the Court, [were] not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021”. In addition, the Court reaffirmed the provisional measures indicated in its Order of 7 December 2021, in particular the requirement that both Parties refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Finally, the Court recalls that, on 28 December 2022, Armenia, referring to Article 41 of the Statute and Article 73 of the Rules of Court, filed a new Request for the indication of provisional measures (the “third Request”). In that Request, Armenia states that, on 12 December 2022, Azerbaijan “orchestrated a blockade of the only road connecting the 120,000 ethnic Armenians in Nagorno-Karabakh with the outside world” and asks the Court to indicate the following two provisional measures:

“Azerbaijan shall cease its orchestration and support of the alleged ‘protests’ blocking uninterrupted free movement along the Lachin Corridor in both directions [; and]

Azerbaijan shall ensure uninterrupted free movement of all persons, vehicles, and cargo along the Lachin Corridor in both directions.”

By a letter dated 26 January 2023, the Agent of Armenia communicated to the Court the text of a further provisional measure sought by his Government, as follows:

“Azerbaijan shall immediately fully restore and refrain from disrupting or impeding the provision of natural gas and other public utilities to Nagorno-Karabakh.”

I. General observations (paras. 22-25)

The Court begins by observing that, in its third Request, Armenia asks the Court to order Azerbaijan to “cease its orchestration and support of the alleged ‘protests’ blocking

uninterrupted free movement along the Lachin Corridor in both directions”, to “ensure uninterrupted free movement of all persons, vehicles, and cargo along the Lachin Corridor in both directions” and to “fully restore and refrain from disrupting or impeding the provision of natural gas and other public utilities to Nagorno-Karabakh”.

Pursuant to Article 76, paragraph 1, of the Rules of Court, a decision concerning provisional measures may be modified if, in the Court’s opinion, “some change in the situation justifies such . . . modification”. According to Article 75, paragraph 3, of the Rules of Court, “[t]he rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts”. The same applies when additional provisional measures are requested. It is therefore for the Court to satisfy itself that the third Request by Armenia is based upon new circumstances such as to justify it being examined.

The Court notes that, in its third Request, Armenia refers to the alleged blockade by Azerbaijan, as of 12 December 2022, of the Lachin Corridor, described as “the only strip of land connecting the 120,000 ethnic Armenians in Nagorno-Karabakh with Armenia, and thus also with the outside world”. The Court recalls that Armenia’s first Request related to the treatment by Azerbaijan of Armenian prisoners of war, hostages and other detainees in its custody who were taken captive during the September-November 2020 hostilities and in their aftermath; to the alleged incitement and promotion by Azerbaijan of racial hatred and discrimination targeted at persons of Armenian national or ethnic origin; and to the alleged harm caused by Azerbaijan to Armenian historic, cultural and religious heritage.

In light of the foregoing, the Court considers that the circumstances underlying Armenia’s present Request differ from those on the basis of which the Court indicated provisional measures on 7 December 2021. It follows that there are new circumstances that justify the examination of Armenia’s third Request.

II. Prima facie jurisdiction (para. 26)

The Court recalls that, in its Order of 7 December 2021 indicating provisional measures in the present case, it concluded that “prima facie, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the ‘interpretation or application’ of the Convention”. The Court sees no reason to revisit this conclusion for the purposes of the present Request.

III. The rights whose protection is sought and the link between such rights and the measures requested (paras. 27-44)

The Court recalls that the power it holds to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. Article 1, paragraph 1, of CERD defines racial discrimination. In accordance with Article 2 of the Convention, States parties “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms”. Under Article 5, States parties undertake to guarantee the right of everyone to equality before the law in the enjoyment of a non-exhaustive list of rights, in particular the “right to freedom of movement and residence within the border of the State”, the “right to leave any country, including one’s own, and to return to one’s country”, and the “right to public health, medical care, social security and social services”.

The Court observes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination. It recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

A State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of can constitute acts of racial discrimination as defined in Article 1 of the Convention. In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

The Court considers plausible at least some of the rights that Armenia claims to have been violated in light of Articles 2 and 5 of CERD through the interruption of movement along the Lachin Corridor.

The Court then turns to the condition of the link between the rights claimed by Armenia that the Court has found to be plausible and the provisional measures requested.

The Court considers that a link exists between the second measure requested by Armenia, which aims at requesting Azerbaijan to ensure uninterrupted free movement of all persons, vehicles and cargo along the Lachin Corridor in both directions, and the plausible rights that Armenia seeks to protect. This measure, in the Court’s view, is directed at safeguarding plausible rights invoked by Armenia under CERD.

The Court concludes, therefore, that a link exists between some of the rights claimed by Armenia and one of the requested provisional measures.

IV. Risk of irreparable prejudice and urgency (paras. 45-57)

The Court notes that, pursuant to Article 41 of its Statute, it has the power to indicate

provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences.

However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can “occur at any moment” before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings.

The Court is not called upon, for the purposes of its decision on the third Request, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court’s decision on the third Request.

The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 (*d*) and (*e*) are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court observes that, since 12 December 2022, the connection between Nagorno-Karabakh and Armenia via the Lachin Corridor has been disrupted. The Court notes that a number of consequences have resulted from this situation and that the impact on those affected persists to this date. The information available to the Court indicates that the disruption on the Lachin Corridor has impeded the transfer of persons of Armenian national or ethnic origin hospitalized in Nagorno-Karabakh to medical facilities in Armenia for urgent medical care. The evidence also indicates that there have been hindrances to the importation into Nagorno-Karabakh of essential goods, causing shortages of food, medicine and other life-saving medical supplies.

As the Court has noted previously, a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. The Court has further noted that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including lifesaving medicines, treatment for chronic disease or preventive care, and medical equipment may have a serious detrimental impact on the health and lives of individuals.

At the public hearing that took place on 30 January 2023, the Agent of Azerbaijan affirmed that his Government

“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, including continued and regular engagement with the ICRC, communicating with and facilitating communications with Russian peacekeepers, taking steps to engage with local residents

in Garabagh, and — if Armenia finally decides that it is indeed its problem and agrees to come to the negotiating table — with Armenia as well”.

The Court takes note of this statement. However, it does not remove entirely the imminent risk of irreparable prejudice created by the disruption in movement along the Lachin Corridor.

In light of the considerations set out above, the Court concludes that the alleged disregard of the rights deemed plausible by the Court may entail irreparable consequences to those rights and that there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court makes a final decision in the case.

V. *Conclusion* (paras. 58-66)

The Court thus concludes that the conditions for the indication of provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above.

The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past.

The Court notes that the Statement by the President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation of 9 November 2020 provides, *inter alia*, that the Lachin Corridor, “which will provide a connection between Nagorno-Karabakh and Armenia . . . shall remain under the control of the Russian Federation peacemaking forces”. The Statement further states that “Azerbaijan shall guarantee the security of persons, vehicles and cargo moving along the Lachin Corridor in both directions”.

In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

The Court concludes that Azerbaijan shall, pending the final decision in the case and in accordance with its obligations under CERD, take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions.

The Court recalls that Armenia has requested it to indicate measures directing Azerbaijan to “cease its orchestration and support of the alleged ‘protests’ blocking uninterrupted free movement along the Lachin Corridor in both directions”. The Court considers that this further measure regarding movement along the Lachin Corridor is not warranted.

The Court further recalls that Armenia has requested it to indicate a measure directing Azerbaijan to “immediately fully restore and refrain from disrupting or impeding the provision of natural gas and other public utilities to Nagorno-Karabakh”. The Court considers that Armenia has not placed before it sufficient evidence that Azerbaijan is disrupting the supply of natural gas and other utilities to the residents of Nagorno-Karabakh. Accordingly, such a measure is not warranted.

The Court notes that the provisional measures indicated in its Order of 7 December 2021 remain in effect. It also reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” and thus create international legal obligations for any party to whom the provisional measures are addressed.

The Court further reaffirms that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Armenia and Azerbaijan to submit arguments in respect of those questions.

VI. Operative paragraph (para. 67)

The Court,

By thirteen votes to two,

Indicates the following provisional measure:

The Republic of Azerbaijan shall, pending the final decision in the case and in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions.

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

AGAINST: Judge Yusuf; Judge *ad hoc* Keith.

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Judge Yusuf appends a declaration to the Order of the Court; Judge *ad hoc* Keith appends a declaration to the Order of the Court.

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Declaration of Judge Yusuf

In his declaration, Judge Yusuf objects to what he considers the continued misuse of the compromissory clause of CERD as a basis of jurisdiction of the Court with respect to claims that do not fall within CERD's ambit. He refers to his dissenting opinion appended to the Court's Order of 7 December 2021 in this case. He is of the view that Armenia has not provided any evidence that the acts it complains of are capable of falling within CERD or that they are, even plausibly, acts of racial discrimination. For Judge Yusuf, it is high time the Court put an end to attempts by States to use CERD as a jurisdictional basis for claims that do not fall within the Convention: acceding to such requests undermines CERD's credibility and the reliance on its compromissory clause for genuine claims relating to racial discrimination.

Declaration of Judge *ad hoc* Keith

While agreeing with the rejection of the first and third requested measures, Judge *ad hoc* Keith explains that his negative vote on the second measure indicated by the Court is based on four arguments. First, he points out that, according to the terms of the Trilateral Statement, it is the Russian Federation peacemaking force that controls the Lachin Corridor. Second, Judge *ad hoc* Keith considers that there is no racially discriminatory purpose or effect in the act of protesting, which is in turn an exercise of the freedoms of expression and peaceful assembly recognized in several conventions and reflected in CERD itself. Third, Judge *ad hoc* Keith points to the undertaking made by the Azerbaijani Agent before the Court, which is binding on Azerbaijan. In Judge *ad hoc* Keith's view, this statement demonstrates Azerbaijan's continued commitment and the limits of its powers in the current circumstances. Fourth, Judge *ad hoc* Keith calls attention to the restriction placed by the Court on the measure proposed by Armenia: Azerbaijan "is to take all measures at its disposal" to ensure unimpeded movement along the Corridor. How is Azerbaijan to comply with that vaguely worded obligation and how are breaches of it to be determined?