

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

Summary of the Order of 22 February 2023

On 30 March 2023, the International Court of Justice delivered its Order on the Request for the indication of provisional measures made by the Republic of Azerbaijan in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*. The Court rejected the request for the indication of provisional measures submitted by the Republic of Azerbaijan on 4 January 2023.

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

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The Court begins by recalling that, on 23 September 2021, Azerbaijan filed in the Registry of the Court an Application instituting proceedings against Armenia 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”). Azerbaijan also submitted a Request for the indication of provisional measures, 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 Armenia shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin;

(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, on 4 January 2023, Azerbaijan, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed a new Request for the indication of provisional measures, which is referred to in the Order as the “second Request”. In its second Request, Azerbaijan states that “new evidence has emerged that Armenia, contradicting representations it made to the Court in 2021, deliberately continued

to lay landmines in or after 2021 in civilian zones to which displaced Azerbaijanis are slated to return”. It adds that in October 2022, Azerbaijan also discovered in civilian homes booby traps planted by or whose planting was facilitated by Armenian forces. According to the Applicant, “[t]o date, Armenia has refused to share information in its possession about the location of landmines and booby traps laid in areas over which Azerbaijan has recently regained control”. Azerbaijan contends that Armenia’s conduct is discriminatory both in purpose and effect, and that the ongoing and serious threat of irreparable harm to its rights under CERD renders its second Request urgent.

I. Prima facie jurisdiction (para. 13)

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.

II. The provisional measures requested by Azerbaijan (paras. 14-24)

The Court recalls that, in its first Request for the indication of provisional measures, Azerbaijan had asked the Court to order, *inter alia*, that:

“(a) Armenia shall take all necessary steps to enable Azerbaijan to undertake the prompt, safe and effective demining of the landmines laid in Azerbaijan’s territory by the Armenian military and/or other groups under the direction, control, or sponsorship of Armenia, including by immediately providing comprehensive and accurate information about the location and characteristics of landmines in Azerbaijan’s territory; [and]

(b) Armenia shall immediately cease and desist from endangering the lives of Azerbaijanis by planting or promoting or facilitating the planting of landmines in Azerbaijan’s territory”.

In its Order of 7 December 2021, the Court, however, decided not to grant the above-mentioned measures.

In its second Request for the indication of provisional measures, Azerbaijan asks the Court to order Armenia to “take all necessary steps to enable Azerbaijan to undertake the prompt, safe and effective demining of the towns, villages, and other areas to which Azerbaijani civilians will return” and to “immediately cease and desist from any further efforts to plant or to sponsor or support the planting of landmines and booby traps in these areas”.

Azerbaijan argues that new facts, not available at the time of the first Request for the indication of provisional measures, show that Armenia has been laying landmines and planting booby traps specifically targeting civilians who are “Azerbaijani” (a term that Azerbaijan uses in the course of these proceedings to refer to persons of Azerbaijani

national or ethnic origin). The Applicant refers to the alleged discovery in Azerbaijan's territory, since August 2022, of over 2,700 landmines manufactured in Armenia in 2021. According to Azerbaijan, over half of those landmines were discovered in civilian areas to which Azerbaijani displaced persons and refugees are due to return, in accordance with 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, which is referred to in the Order as the "Trilateral Statement", in particular in the Lachin District and the Kalbajar District.

Azerbaijan contends that the placement of landmines and booby traps in civilian areas previously inhabited by Azerbaijanis and to which they are due to return, following the terms of the Trilateral Statement, demonstrates the racially discriminatory nature of Armenia's conduct.

It further contends that the planting of explosives at those locations could serve no military purpose in light of the distance from the border between Armenia and Azerbaijan and from the old "line of contact" between the armed forces of the Parties.

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Armenia, for its part, contends that it has "carried out minelaying exclusively within the sovereign territory of the Republic of Armenia for self-defense purposes only".

Armenia explains that the Trilateral Statement provided that three districts — Kalbajar, Agdam and Lachin — were to be returned to Azerbaijan between November and December 2020 and that they have been under Azerbaijan's control since then. Armenia contends that the presence of Armenian landmines in these districts, if established, can be explained by the fact that, at the end of the conflict, there still existed a "contact line" in and around Nagorno-Karabakh and notes that the Trilateral Statement did not preclude armed forces from taking steps to secure their positions. Further, Armenia contends that the locations of the landmines found since August 2022 were not in "unequivocally civilian areas".

Regarding the placing of booby traps, Armenia first notes that these have been found solely in settlements "within the old Lachin Corridor", an area over which Azerbaijan was allowed to take control, after the construction of the new road now connecting Nagorno-Karabakh to Armenia, which is under the control of Russian peacekeeping forces. Further, Armenia denies the use of booby traps by its own armed forces but observes that these devices could have been rigged by private individuals forced to leave their homes.

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With regard to the plausibility of rights under CERD asserted by Azerbaijan with respect to Armenia's alleged conduct in relation to landmines, the Court stated the following in its Order of 7 December 2021 in relation to the first Request:

"[T]he Court recalls that Azerbaijan claims that this conduct is part of a longstanding campaign of ethnic cleansing. The Court

recognizes that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD and that such a policy can be effected through a variety of military means. However, the Court does not consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines. Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing', of rights of persons of Azerbaijani national or ethnic origin."

Having considered the evidence of the Parties in relation to the second Request, the Court finds that the above-quoted conclusion also applies to the present circumstances, including the allegations regarding booby traps.

In light of the above, the Court considers that there is no need for it to examine whether the other conditions necessary for the indication of provisional measures are met.

III. Conclusion (paras. 25-26)

The Court concludes from the foregoing that the conditions for the indication of provisional measures under Article 41 of the Statute are not met.

The Court notes that the provisional measures indicated in its Order of 7 December 2021 remain in effect. It 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 Azerbaijan and Armenia to submit arguments in respect of those questions.

IV. Operative paragraph (para. 27)

The Court,

Unanimously,

Rejects the Request for the indication of provisional measures submitted by the Republic of Azerbaijan on 4 January 2023.

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Judge Sebutinde appends a declaration to the Order of the Court; Judges Charlesworth and Brant append a joint 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 Sebutinde

While Judge Sebutinde concurs with the reasoning and conclusion of the Court in relation to Azerbaijan’s allegations regarding landmines, she disagrees with its conclusion that the same reasoning “also applies to the present circumstances, including the allegations regarding booby traps”. The evidence that Azerbaijan relies upon in relation to the alleged laying of landmines by Armenian forces in civilian areas does not substantially differ from that which the Court previously assessed in 2021 and does not plausibly demonstrate racial discrimination under CERD. However, Azerbaijan’s assertion regarding the presence of booby traps in civilian areas is based on new facts pursuant to Article 75, paragraph 3, of the Rules of Court, which assertion is not part of the 2021 request and is arguably a more plausible case for racial discrimination than the laying of landmines. The reason why the Court should reject the Applicant’s request for provisional measures in relation to booby traps, is because Azerbaijan has not placed before the Court sufficient evidence indicating that the planting of the booby traps is attributable to the conduct of Armenia.

Joint declaration of Judges Charlesworth and Brant

Judges Charlesworth and Brant join the Court in rejecting Azerbaijan’s request for provisional measures. They focus on a statement in the Court’s Order of 7 December 2021, which in their view might seem at first sight as pointing to an enquiry that would be unique in the Court’s jurisprudence on provisional measures and on the merits. Judges Charlesworth and Brant therefore consider that the statement must be read in its context, which concerns the evidence put before the Court in 2021. In their view, the statement was part of an enquiry into whether it was plausible that Armenia jeopardized rights protected under CERD by failing to undertake demining or to cease and desist from planting landmines.

Declaration of Judge *ad hoc* Keith

Judge *ad hoc* Keith states two main reasons for agreeing with the rejection of Azerbaijan’s requested measures. First, while acknowledging that over 30 civilians have been killed and over 80 have been injured in the areas recovered by Azerbaijan in the 44-day war, Judge *ad hoc* Keith is unable to see plausible evidence that these were the effects, let alone the purpose, of racially discriminatory acts. Second, he observes that the requested measures would require Armenia to take action in areas that are part of its sovereign territory. Judge *ad hoc* Keith further notes that the Court prepares the texts of orders concerning the indication of provisional measures rapidly, which may entail that it is not appropriate for such texts to be subjected to the close analysis that may be appropriate for judgments or advisory opinions. He adds suggesting that, if racial discrimination were established on a plausible basis, the individuals concerned would be entitled to protection

under CERD.
