

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICATION
DE LA CONVENTION INTERNATIONALE
SUR L'ÉLIMINATION DE TOUTES LES FORMES
DE DISCRIMINATION RACIALE

(ARMÉNIE c. AZERBAÏDJAN)

DEMANDE TENDANT À LA MODIFICATION
DE L'ORDONNANCE EN INDICATION
DE MESURES CONSERVATOIRES DU 7 DÉCEMBRE 2021

ORDONNANCE DU 12 OCTOBRE 2022

2022

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION
OF THE INTERNATIONAL CONVENTION
ON THE ELIMINATION OF ALL FORMS
OF RACIAL DISCRIMINATION

(ARMENIA v. AZERBAIJAN)

REQUEST FOR THE MODIFICATION
OF THE ORDER INDICATING
PROVISIONAL MEASURES OF 7 DECEMBER 2021

ORDER OF 12 OCTOBER 2022

Mode officiel de citation:

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sur l'élimination de toutes les formes de discrimination raciale
(Arménie c. Azerbaïdjan), demande tendant à la modification
de l'ordonnance en indication de mesures conservatoires du 7 décembre 2021,
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YEAR 2022

12 October 2022

2022
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REQUEST FOR THE MODIFICATION
OF THE ORDER INDICATING
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ORDER

Present: 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.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

1. By an Application filed in the Registry of the Court on 16 September 2021, the Republic of Armenia (hereinafter “Armenia”) instituted pro-

ceedings against the Republic of Azerbaijan (hereinafter “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 claims that

“Azerbaijan, through its State organs, State agents and other persons and entities exercising governmental authority, as well as through other agents acting on its instructions or under its direction and control, is responsible for serious violations of Articles 2, 3, 4, 5, 6 and 7 of the CERD”

by, *inter alia*, “[d]epriving Armenians, including Armenian prisoners of war, hostages and other detained persons” captured in relation to the hostilities which erupted in September 2020 between the two Parties “of the equal enjoyment of their individual rights”.

2. 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.

3. After hearing the Parties, the Court, by an Order of 7 December 2021 (hereinafter referred to as such), 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.” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 393, para. 98.*)

4. By an Order of 21 January 2022, the Court fixed 23 January 2023 and 23 January 2024 as the respective time-limits for the filing of a Memorial by Armenia and a Counter-Memorial by Azerbaijan.

5. 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 Registrar immediately communicated a copy of Armenia's request to the Government of Azerbaijan, which was informed that any observations it may wish to present on Armenia's request should be submitted no later than 27 September 2022.

6. By a letter dated 19 September 2022, the Agent of Armenia, referring to further developments, reiterated his Government's request that the Court modify its Order of 7 December 2021.

7. By a communication dated 27 September 2022, Azerbaijan filed its written observations within the time-limit fixed for that purpose.

8. The Parties subsequently informed the Court, through various letters, of recent developments and provided observations on each other's respective communications.

* * *

9. 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.

10. In its written observations, Azerbaijan asks that the Court deny Armenia's Request for the modification of the Order of 7 December 2021 because it lacks urgency. It adds that in any event there has been no change in the situation that would warrant modification of the Court's Order.

* *

11. In order to rule on the request of Armenia for the modification of the Order of 7 December 2021, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

"At 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 deci-

sion concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.”

12. 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 (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Requests for the Modification of the Order Indicating Provisional Measures of 8 March 2011, Order of 16 July 2013, I.C.J. Reports 2013*, p. 234, para. 17, and p. 238, paras. 30-31).

13. The Court will therefore begin by determining whether there has been a change in the situation which warranted the measures indicated in its Order of 7 December 2021.

* *

14. Armenia states that its request for the modification of the Court’s Order of 7 December 2021 is prompted by “a large-scale armed attack” against its territory by Azerbaijan in September 2022 which resulted in the deaths and abuse of Armenian service members and injuries to civilians. Armenia asserts that, in the course of this alleged attack, Azerbaijan captured Armenian service members and subjected them to inhuman and degrading treatment, violence, bodily harm and torture. In Armenia’s view, these events demonstrate a change in the situation which warranted the measures indicated in the Order of 7 December 2021.

15. In its written observations and subsequent communications, Azerbaijan asserts that there has been no change in the situation that would warrant modification of the Order of 7 December 2021. While acknowledging that there were hostilities between the Parties during the week of 12 September 2022, Azerbaijan asserts that Armenia initiated those hos-

ilities by launching “a large-scale attack against Azerbaijani positions”, which led Azerbaijan to respond militarily. Azerbaijan further contends that “there has been no attack ‘against [Armenia’s] sovereign territory’”. It acknowledges having detained 17 Armenian soldiers in connection with these hostilities but states in a letter of 4 October 2022 that these detainees have now been repatriated. Finally, in the same letter, it maintains that the Court’s Order of 7 December 2021 “already applies to any Armenians detained, so that no modification is needed”, and that it has taken measures “to prevent any unlawful conduct by members of its armed forces and to investigate and appropriately respond to allegations of such conduct”.

16. While acknowledging, by a letter of 6 October 2022, that 17 Armenian detainees had been repatriated, Armenia asserted that “there remains a real and imminent risk of repetition of Azerbaijan’s conduct threatening the health and well-being of Armenian servicemembers”. Armenia has also consistently questioned Azerbaijan’s statements that steps were being taken to ensure that the alleged misconduct of Azerbaijani service members vis-à-vis Armenian detainees, if proven, would be punished in accordance with the law. By a letter of 11 October 2022, Armenia reiterated its request that the Court modify its Order of 7 December 2021.

* *

17. 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” (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 367, para. 13).

18. 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 service members. 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.

19. 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.

20. 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.

21. 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" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 393, para. 98, point 2). It reminds the Parties that provisional measures have binding effect (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109).

22. 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.

* * *

23. 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”.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twelfth day of October, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Armenia and the Government of the Republic of Azerbaijan, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Sergey PUNZHIN,
Acting Registrar.

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.

(Initialed) J.E.D.

(Initialed) S.P.