

DECLARATION OF JUDGE TOMKA

1. The Court has been requested by Armenia to modify the Order of 7 December 2021, in particular the first measure indicated 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” (*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 (1) (a)).

2. The reason for this request lies in the renewed hostilities between the Parties in September 2022, some 22 months after “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared” in the Trilateral Statement signed on 9 November 2020 (*ibid.*, para. 13).

3. The question is how to interpret the first measure of protection indicated in paragraph 98 (1) (a) of the 2021 Order. The words used in that paragraph, as well as the reasoning preceding it, in particular paragraph 67, suggest that it is applicable 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).

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

5. The Court, in its Order of today, considers “that the situation that existed when it issued the [2021 Order] is ongoing and is no different from the present situation” (Order, para. 18). For that reason, it “[f]inds 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” (*ibid.*, para. 23 (1)). Although I am not fully convinced, I have not voted against this finding.

6. The main reason for me not voting against this finding is a rather “creative” interpretation by the Court of the first measure it indicated in its 2021 Order. The Court 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” (Order, para. 18, emphasis added). This affirmation 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.

(Signed) Peter TOMKA.
