DECLARATION OF JUDGE *AD HOC* DAUDET

[Translation]

1. By requesting the modification of the Order of 7 December 2021 on the basis of Article 76, paragraph 1, of the Rules of Court, Armenia is seeking to protect the victims of the acts committed by Azerbaijan and to secure for them the safeguards to which they are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). Specifically, Armenia regards the armed attack by Azerbaijan and the other events that occurred in the week of 12 September 2022 as constituting a change of circumstances that justifies the modification of the Order of 7 December 2021 along the lines indicated in paragraph 9 of the present Order.

2. I voted against Armenia's request, concurring with the Court's finding that the circumstances were not such as to enable that request to be granted, because it is clear to me, in light of the Court's reasoning, to which I will return, that the protections sought by Armenia are not lacking. On the contrary, by finding that the provisions of the Order of 7 December 2021 continue to apply and do not need to be modified, the Court is ensuring that Armenia enjoys the full benefit of the terms of the Order by applying it to the current situation. In some respects, that reasoning even reinforces the position of Armenia, whose aim of securing protection is thus fully achieved.

3. I welcome the Order handed down by the Court today for two reasons. I have just touched on the first: it responds to Armenia's legitimate concern about protection and renews the Court's appeal to both Parties to de-escalate the conflict, inviting them, in the customary phrase, to refrain from doing anything that might aggravate or extend the dispute or make it more difficult to resolve.

4. The second reason I welcome the Order is more general: in my view the Order significantly helps frame the régime and the aims of provisional measures. I believe it is worth addressing this point very briefly.

5. A key element of the régime governing provisional measures was established in the *LaGrand* case, in which the Court held that the provisional measures indicated by it were binding and, in so doing, settled a delicate and fundamental aspect of that régime (see *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109, a position that has since been recalled on numerous occasions by express reference to that case). This jurisprudence is now well established and the binding nature of provisional measures is not in doubt.

6. Until now, the question of modifying a previously issued order on the grounds of a change of circumstances had been considered only once by the Court, in the case concerning *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. 230.

7. In paragraph 17 of that Order, the Court sets out very clearly the intellectual process to be followed in responding to a request for modification. The Court refers to that process in paragraph 12 of its Order in the present case, recalling its 2013 reasoning in order to make the steps in its thinking absolutely clear. There is every reason to believe that the Court will continue to use the same line of reasoning in the future.

8. It is left to the discretion of the Court to assess the facts that will enable it to determine whether there is a change of circumstances that justifies a modification of the decision indicating provisional measures, since Article 76 of its Rules does not define what constitutes a change of circumstances, unlike, for example, Article 62 of the Vienna Convention on the Law of Treaties, which requires that the change be "fundamental" (and includes a negative formulation). Nevertheless, the requirement that a change in situation is such that it "justifies" modification, which is left to the wisdom of the Court to assess, acts as a safeguard against any overuse by the parties of Article 76 of the Rules of the Court, which considers the stability of legal situations important.

9. Nor would it be desirable from a "judicial policy" perspective to open the floodgates of this procedure, so that a party could at any moment and on potentially frivolous grounds seek to obtain the modification of a decision indicating provisional measures. The procedure must remain, if not exceptional, at least circumscribed, in order to avoid the consequences and abuses that are easy to imagine. This is not to say, however, that such a consideration may in itself be grounds for refusing a request.

10. Paragraph 18 of the Order, in which the Court sets out its reasons for finding that a modification of the Order of 7 December 2021 is not warranted, is based on a consideration which to my mind perfectly conveys the rationale behind provisional measures and is, therefore, generally applicable. When the Court states that the situation which existed at the time it issued the Order of 7 December 2021 is "ongoing", when it mentions a "renewed flare-up of the 2020 Conflict" and that "the situation between the Parties remains tenuous", it is emphasizing the continuity of the situation which justified the 2021 provisional measures.

11. Indeed, unlike a decision on the merits, which settles a past dispute and therefore draws a line under what was a contentious situation, a deci-

sion indicating provisional measures relates to an ongoing conflict which has not yet been resolved, but in which provisional measures seek to prevent the imminent occurrence of irreparable harm. They are generally accompanied by a measure intended to prevent any action being undertaken that is likely to aggravate the dispute or make it more difficult to resolve. While a judgment on the merits looks to the past, a decision indicating provisional measures looks to the future, so that it ceases to have effect at the latest on the date of the judgment on the merits. I would venture to say that provisional measures are a sort of "court-ordered ceasefire". Just as a ceasefire is not peace, nor do provisional measures resolve a dispute. In both cases, however — and in so far as they can be compared — the dispute should be regarded as a smouldering fire that may reignite at any future moment as a continuation of the past event. It thus requires *a priori* the same provisional measures that were indicated previously, which can therefore continue on an ongoing basis, provided that no new and different evidence is provided that would justify the modification of the order if it established a change of circumstances. It is therefore in the light of this principle of continuity that the assessment must be made.

(Signed) Yves DAUDET.