

DISSENTING OPINION OF JUDGE *AD HOC* KOROMA

Provisional measures must serve a purpose — Protection and reservation of the rights of either Party — Whether or not to indicate provisional measures should take into consideration the “circumstances” in the context of Article 41 of the Statute of the Court — Provisional measures should facilitate the prospect of achieving peace and stability — When and if indicated, the Court should ensure its legitimacy and be interested in its compliance — In the light of the undertaking made in the current proceedings, provisional measures should not have been indicated.

1. It is with deep regret, considering the humanitarian dimension involved in this — the fifth — Request for the indication of provisional measures, that I cannot support the Order indicating provisional measures.

2. A provisional measures order must serve a purpose with a view to its compliance in preserving and protecting the rights of either Party. In the context of this case, given the role of the Court as an organ of the United Nations Charter, one of whose main objectives is the peaceful settlement of disputes, if the Court were to consider that provisional measures were to be indicated, they should be indicated after assessing the “circumstances” as stipulated in Article 41 (1) of the Statute of the Court, namely:

“The Court shall have the power to indicate, if it considers that *circumstances* so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”

3. On 28 September 2023 Armenia, invoking Article 41 of the Statute and Article 73 of the Rules of Court, filed a Request for the indication of provisional measures and asked the Court to indicate the following measures:

- “(1) ‘Azerbaijan shall refrain from taking any measures which might entail breaches of its obligations under the CERD’;
- (2) ‘Azerbaijan shall refrain from taking any actions directly or indirectly aimed at or having the effect of displacing the remaining ethnic Armenians from Nagorno-Karabakh, or preventing the safe and expeditious return to their homes of persons displaced in the course of the recent military attack including those who have fled to Armenia or third States, while permitting those who wish to leave Nagorno-Karabakh to do so without any hindrance’;

- (3) 'Azerbaijan shall withdraw all military and law-enforcement personnel from all civilian establishments in Nagorno-Karabakh occupied as a result of its armed attack on 19 September 2023';
- (4) 'Azerbaijan shall facilitate, and refrain from placing any impediment on, the access of the United Nations and its specialized agencies to the ethnic Armenians of Nagorno-Karabakh, and shall not interfere with their activities in any way';
- (5) 'Azerbaijan shall facilitate, and refrain from placing any impediment on, the ability of the International Committee of the Red Cross to provide humanitarian aid to the ethnic Armenians of Nagorno-Karabakh, and shall cooperate with the International Committee of the Red Cross to address the other consequences of the recent conflict';
- (6) 'Azerbaijan shall immediately facilitate the full restoration of public utilities, including gas and electricity, to Nagorno-Karabakh, and shall refrain from disrupting them in the future';
- (7) 'Azerbaijan shall refrain from taking punitive actions against the current or former political representatives or military personnel of Nagorno-Karabakh';
- (8) 'Azerbaijan shall not alter or destroy any monument commemorating the 1915 Armenian genocide or any other monument or Armenian cultural artefact or site present in Nagorno-Karabakh';
- (9) 'Azerbaijan shall recognize and give effect to civil registers, identity documents and property titles and registers established by the authorities of Nagorno-Karabakh, and shall not destroy or confiscate such registers and documents';
- (10) 'Azerbaijan shall submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order, and thereafter every three months, until a final decision on the case is rendered by the Court'." (Order, para. 21.)

4. By a letter dated 2 October 2023, Azerbaijan provided an "initial response" to the request of Armenia, that it commenced counter-terrorist measures to acute security threats in Nagorno-Karabakh aimed exclusively at Armenian *military targets* and ended a day later with a complete ceasefire. Shortly after the operation and with the assurance of a complete ceasefire, the President of Azerbaijan made clear that the residents of Nagorno-Karabakh of Armenian ethnic origin were welcome in Azerbaijan and enjoyed the same rights as other Azerbaijan citizens.

5. At the end of the oral proceedings, Azerbaijan made the following request in accordance with Article 60 (2) of the Rules of Court that for reasons explained during the hearings, the Court should reject the request for the indication of provisional measures submitted by Armenia.

6. During the oral proceedings, Azerbaijan stated that *mindful* of the Court's past conclusions in the present case regarding Armenia's "plausible rights", it fully accepts that, to the extent that any obligations under CERD might be engaged, it has "the responsibility, and *now* the ability to ensure protection on *its* territory of any applicable and possible rights". Azerbaijan asserted that it was against this backdrop that the *Agent* of Azerbaijan made a series of *formal undertakings on behalf of his Government* at the public hearings which, it considers, were comprehensive in the protection of the alleged rights.

“(a) Azerbaijan undertakes to do all in its power to ensure, without distinction as to national or ethnic origin:

(a) The security of residents in Garabagh including their safety and humanitarian needs, including through:

- (i) the provision of food, medicines and other essential supplies to Garabagh;
- (ii) providing access to available medical treatment; and
- (iii) maintaining the supply of public utilities, including gas and electricity;

(b) The right of the residents of Garabagh to freedom of movement and residence, including the safe and prompt return of those residents that choose to return to their home, and the safe and unimpeded departure of any resident wishing to leave Garabagh; and

(c) The protection of the property of persons who have left Garabagh.

(b) Azerbaijan also undertakes to facilitate:

(a) the access and activities of the ICRC, with whom Azerbaijan undertakes to co-operate in order to ensure the provision of humanitarian aid in Garabagh; and

(b) inspections of the United Nations such that it is able to make visits to Garabagh to advise on measures to address humanitarian, socio-economic, and other needs in Garabagh;

(c) Azerbaijan undertakes to protect, and not to damage or destroy, cultural monuments, artefacts and sites in Garabagh; and finally

(d) Azerbaijan undertakes to protect and not to destroy registration, identity and/or private property documents and records found in Garabagh.” (CR 2023/22, pp. 22-23, para. 61 (Mammadov).)

7. In the light of the foregoing undertakings, Azerbaijan asked the Court to reject the request for the indication of provisional measures by the Republic of Armenia.

8. In paragraph 62 of the Order, the Court took cognizance of the fact that the undertakings made by Azerbaijan create legal obligations. The Court also noted that “interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para. 46; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 473, para. 49). Furthermore, the Court acknowledged that “[o]nce a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed” (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 158, para. 44).

9. In the present Order, the Court also recognizes that the present undertakings of the Agent of Azerbaijan, which were made before the Court and formulated in a precise and detailed manner, aimed at addressing the situation of persons of Armenian national or ethnic origin in Nagorno-Karabakh following the operation conducted by Azerbaijan in this region on 19 September 2023, were made on behalf of the Government of Azerbaijan, were binding and create legal obligations for Azerbaijan.

10. At the same time, the Court observes that while many of Azerbaijan’s undertakings address the concerns expressed by Armenia in its fifth Request, the undertakings do not correspond in all respects to the measures requested by Armenia.

11. Based on such reasoning, the Court decided to indicate certain provisional measures to protect the rights claimed by Armenia, although the Court considers that it need not indicate the measures requested by Armenia and that the measures to be indicated need not be identical to those requested, the Court nevertheless orders that Azerbaijan *shall*, by its obligations under CERD,

- “(i) ensure that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded and expeditious manner;
- (ii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 and who wish to depart are able to do so in a safe, unimpeded and expeditious manner; and
- (iii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 or returned to Nagorno-Karabakh and who wish to stay are free from the use of force or intimidation that may cause them to flee” (Order, para. 74 (1)).

In this regard, it appears to me that the legal criteria were not applied in determining whether those measures should be indicated.

12. During the proceedings, no evidence establishing that persons who remain in Nagorno-Karabakh after 19 September 2023 and who wish to depart were not able to do so in a safe, unimpeded and expeditious manner was presented to the Court. Nor was there evidence that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh were not able to do so in a safe and unimpeded manner. Nor was evidence presented that persons who remained in Nagorno-Karabakh after 19 September 2023 returned to Nagorno-Karabakh and who wished to stay were not free from the use of force or intimidation that may cause them to flee.

13. In paragraph 71 of the Order, the Court “considers that Azerbaijan must submit a report to the Court on the steps taken to give effect to the provisional measures indicated and to the undertakings made by the Agent of Azerbaijan”.

14. Azerbaijan is not Carthage nor are the circumstances susceptible to a Carthaginian peace.

15. In my view, instead of indicating the aforementioned measures, the Court should have applied Article 41 of its Statute taking into consideration the circumstances stipulated therein which would have dictated not to indicate any provisional measures.

16. Provisional measures are binding and have *legal* effect.

17. In my opinion, the circumstances the Court should have taken into consideration in accordance with Article 41 (1) of the Statute should have included the “initial response” provided by Azerbaijan in a letter dated 2 October 2023 with respect to the fifth Request that the measures it commenced on 19 September ended a day later, with the assurance of a complete ceasefire. That letter also states that the *President* of Azerbaijan made clear that the residents of Nagorno-Karabakh of Armenian ethnic origin were welcome and enjoyed the same rights as all the Azerbaijani citizens. Moreover, the President of Azerbaijan made a series of statements of 20, 27 and 29 September 2023 on the protection and reintegration of Armenian residents of the Garabagh region.

18. The Court should also have taken into consideration the *urbi et orbi* obligations undertaken by the Agent of Azerbaijan on behalf of his Government before the Court on 12 October 2023, which as the Court recognizes, create legal obligations for and are binding on Azerbaijan. Thus instead of the adoption of what appears to be a transactional approach, namely that as there is an application before the Court for the indication of provisional measures and, given the new circumstances, the Court has to be seen as affording some satisfaction to the applicant. Rather, the Court should have focused on what is of fundamental importance at this juncture, which is to

ensure the protection of the rights of those impacted by the conflict since the 19 September 2023 operation and that Azerbaijan complies with the undertakings it has made.

19. The Court should have based its decision on the application of the relevant provision of the Statute and should have been guided by its jurisprudence, according to which, “[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it” (*Nuclear Tests (Australia v. France)*, *Judgment*, *I.C.J. Reports 1974*, p. 272, para. 60). Furthermore, the undertakings made by Azerbaijan were clear, precise and unequivocal and communicated to its intended audience. In a unilateral undertaking, the intention of the recipient in its formulation or validity, does not govern. It is the intent of the State making the declaration that is dispositive.

20. Finally, the Court should have recalled the previous provisional measures it had indicated in this case, attach the undertakings made by Azerbaijan during the current proceedings and order their compliance and implementation. This would be compatible with the judicial function.

21. The Court should not contemplate that Azerbaijan will not comply with its commitments considering that Nagorno-Karabakh is now indisputably recognized as its *sovereign territory*.

22. Should the Court have pursued this course of action, it would not have been necessary to indicate the measures in this Order. The focus should have been on compliance with the undertakings made by Azerbaijan with the prospect of achieving peace and stability.

23. I maintain the view that the indication of provisional measures must serve a purpose and that the Court must remain interested in its compliance and its legitimacy.

24. I regret that I cannot agree with the procedural aspect of this Order either.

(Signed) Abdul G. KOROMA.
