INTERIM MEASURES OF PROTECTION, ORDER OF THE INTERNATIONAL COURT OF JUSTICE OF 07 DECEMBER 2021, IN CASE OF APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ARMENIA v. AZERBAIJAN) AND (AZERBAIJAN v. ARMENIA)

Ewa SALKIEWICZ/MUNNERLYN
Calisia University, Kalisz, Poland
ewasalkiewczmunnerlyn@gmail.com  ORCID: 0000-0002-2617-2017

Abstract: Interim measures of protection in the Order of the International Court of Justice of 07 December 2021 in Armenia vs Azerbaijan and Azerbaijan vs Armenia. The article examines the ICJ order indicating provisional measures on the application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia vs Azerbaijan and Azerbaijan vs Armenia) of 07 December 2021. Various aspects of the traditional requirements for the indication of provisional measures will be presented based on the jurisprudence of the ICJ, particularly with regard to its binding force, following the LaGrand judgment in which the Court clarified that its provisions on provisional protection are binding. One new requirement - the plausibility of protected rights - formulated by the Court for the first time in Belgium vs Senegal is also presented.

Keywords: Article 41 of the ICJ Statute; International Court of Justice; provisional measures of protection; requirements; credibility; conditions for granting provisional measures; prevention of litigation

JEL Classification: K32

On 16 September 2021, Armenia filed in the Registry of the Court an Application instituting proceedings against 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 contends that “[f]or decades, Azerbaijan has subjected Armenians to racial discrimination” and that, “[a]s a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse”. According to Armenia, these violations are directed at individuals of Armenian ethnic or national origin regardless of their actual nationality. The Application contained a Request for the indication of provisional measures, seeking “to protect and preserve Armenia’s rights and the rights of Armenians from further harm, and to prevent the aggravation or extension of [the] dispute, pending the determination of the merits of the issues raised in the Application”.

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. Armenia asked the Court to indicate the following provisional measures:

- “Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
- Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;
- Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;
- Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by inter alia terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;
- Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;
- Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;
- Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and
- Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months.”

Azerbaijan requested the Court “to reject the request for the indication of provisional measures submitted by the Republic of Armenia”.

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”). In its Application, Azerbaijan contends that Armenia has engaged and is continuing to engage “in a series of discriminatory acts against Azerbaijanis on the basis of their national or ethnic origin within the meaning of CERD”. In particular, the Applicant claims that “Armenia’s policies and conduct of ethnic cleansing, cultural erasure and fomenting of hatred against Azerbaijanis systematically infringe the rights and freedoms of Azerbaijanis, as well as Azerbaijan's own rights, in violation of CERD”. The Application was accompanied by a Request for the indication of provisional measures seeking to protect the rights invoked by Azerbaijan “against the harm caused by Armenia’s ongoing unlawful conduct”, pending the Court’s final decision in the case.

Together with the Application, Azerbaijan 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.

Azerbaijan asked the Court to indicate the following provisional measures:

“(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;

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

(c) Armenia shall take all necessary steps effectively to prevent organizations operating in Armenian territory, including the VoMA organization, from engaging in the incitement of racial hatred and racially-motivated violence targeted at Azerbaijans, and immediately shall cease and desist incitement based on the fabrication of public and private hate speech attributed to Azerbaijans on Twitter and other social media and traditional media channels;

(d) Armenia shall take effective measures to collect, and to prevent the destruction and ensure the preservation of, evidence related to allegations of ethnically-motivated crimes against Azerbaijans of which it is aware, including those identified in communications from the Republic of Azerbaijan;

(e) Armenia shall refrain from any measure that might aggravate, extend, or make more difficult the resolution of this dispute; and

(f) Armenia shall submit a report to the Court on all measures taken to give effect to its Order indicating provisional measures within three months, as from the date of the Order, and thereafter every six months, until a final decision on the case is rendered by the Court.”

Armenia requested the Court “to reject Azerbaijan’s requests for the indication of provisional measures in full”.

2. CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

A. IRREPARABLE PREJUDICE AND URGENCY

The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can “occur at any moment” before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings.

Armenia submits that there is an urgent need to protect prisoners of war and civilian detainees of Armenian national or ethnic origin from further mistreatment, to protect persons of Armenian national or ethnic origin from continued hate speech, and to protect Armenian historic, cultural and religious heritage from erasure. Azerbaijan denies that there exists an imminent risk of irreparable prejudice to the rights of the Applicant under CERD because it has already reaffirmed on several occasions its obligations under the Convention and has taken concrete action to comply with those obligations.

Azerbaijan considers that there is an urgent need to protect Azerbaijans from continued hate speech and violence on account of their national or ethnic origin and that the emotional effects of this constant threat of violence can cause an irreparable prejudice to their rights. Armenia denies that there exists an imminent risk of irreparable prejudice to the rights of Azerbaijan with respect to its “allegations of incitement of ethnic hatred and violence through an alleged failure to sanction or punish so-called armed hate groups”.

B. PRIMA FACIE JURISDICTION

The Court may indicate provisional measures only if the provisions relied on by the


1 ibid., p. 24, para. 65
Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.4

Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.5

Armenia and Azerbaijan are both parties to CERD; Armenia acceded to CERD on 23 June 1993, Azerbaijan on 16 August 1996. Neither Party made reservations to Article 22 or to any other provision of CERD. Under Article 22 of CERD, a dispute may be referred to the Court only if it is “not settled by negotiation or by the procedures expressly provided for in this Convention”. The Court has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court.6 Azerbaijan seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD as well.

C. SUFFICIENT LINK BETWEEN THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE SUBJECT-MATTER OF THE CASE IN RELATION TO WHICH THE REQUEST FOR PROTECTION IS MADE

Article 73 para 1 of the new Rules of Procedure of the ICJ decides that:

1. A Party may request in writing a precautionary measures at any stage of the proceedings in respect of which it relates.

It replaces Article 66, para 1 of the 1972 Rules of Procedure / Article 61. 1946/. Normally, the Court does not invoke that article in its orders, since it is clear that safeguards protect the rights and interests at issue. This means that the party concerned is seeking the Court to order measures to protect the subject-matter of the dispute as it is at the time when the action is brought in order to enable the judgment to be delivered. Safeguard measures should protect the rights and interests of the parties to the dispute, with the exception of measures which would have effects beyond the subject-matter of the dispute.7 The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 18, para. 43).8

In this case, Armenia v. Azerbaijan, the Court said:

“62. The Court now turns to the condition of the link between the rights claimed by Armenia and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Armenia have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Armenia”. Armenia considered that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. Azerbaijan considered that there

5 “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”
7 Exceptionally in the case concerning the Trial of Pakistani Prisoners of War (Pakistan v. India), ICJ Reports 1973, p. 330, the Court mentioned the requirement of a link between the safeguards and the substance of the case. See also ICJ Reports 1976, p. 3; ICJ Reports 1979, p. 7.
8 Salkiewicz-Munnerlyn, 2022, pp. 69-73
is no link between the measures requested by Armenia and the rights under CERD that it claims on the merits.

The Court considered that a link exists between certain measures requested by Armenia and the plausible rights it seeks to protect. The Court concluded, that a link exists between some of the rights claimed by Armenia and some of the requested provisional measures.

In the same case, but Azerbaijan v. Armenia, the Court said: “54. The Court now turns to the condition of the link between the rights claimed by Azerbaijan and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Azerbaijan have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Azerbaijan.

55. Azerbaijan considers that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. In particular, with regard to the measure requesting that Armenia be ordered to prevent certain groups from engaging in hate speech, and to cease and desist from its alleged ongoing cyber disinformation campaign, Azerbaijan asserts that this is aimed at protecting ethnic Azerbaijanis from racist hate speech and the risk of ethnic violence and therefore are directly linked to the rights asserted by Azerbaijan under CERD.

56. Armenia maintains, in general, that the measures requested by Azerbaijan have no link to rights of Azerbaijan arising under CERD.

57. The Court has already found that at least some of the rights claimed by Azerbaijan under CERD are plausible (see paragraph 52 above). It considers that a link exists between one of the measures requested by Azerbaijan (see paragraphs 5 and 11 above) and the plausible rights it seeks to protect. This is the case for the measure aimed at ensuring that any organizations and private persons in the territory of Armenia do not engage in the incitement and promotion of racial hatred and racially motivated violence targeted at people of Azerbaijani national or ethnic origin. This measure, in the view of the Court, is directed at safeguarding plausible rights invoked by Azerbaijan under CERD.

58. The Court concludes, therefore, that a link exists between some of the rights claimed by Azerbaijan and one of the requested provisional measures”.

D. Plausibility of rights

For the first time, the ICJ dealt with the Plausibility test in Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal). In para 58 of the Interim Measures Order, the ICJ stated: “A State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention (see ibid., para. 52). In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible”. More recently, the ICJ has increasingly referred to this condition in its interim measures. In para 59, the ICJ stated: “The

9 Order on interim measures of protection of 28 May 2009, ICJ Reports 2009, p. 142; see also Salkiewicz-Munnerlyn, 2022, op.cit. pp.63-68.
Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention. This issue was considered by the Court in para 60: “In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, Armenia asserts two distinct rights: the right to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD (Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment of 4 February 2021, para. 105). The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan.”

The Court however found that: “61. The Court also considers plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage”. Judge Yusuf, in his Dissenting Opinion to the Armenia v. Azerbaijan Order, disagreed with the Court’s conclusions regarding plausibility. He stated that such rights do not have a link with racial discrimination and that therefore, they are not plausible under the CERD, and provisional measures cannot be indicated related to such rights. Relatedly, Judge ad hoc Keith explained, in his Declaration, his negative vote “on the measure relating to cultural property” by stating that “CERD does not accord protection to cultural property itself,” and that difficulties accessing Armenian cultural property arise from the placement of landmines, not from the national or ethnic origin of those seeking access.

E. NON-AGGRAVATION OF THE DISPUTE

Armenia v. Azerbaijan

(2) Unanimously, Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

94. The Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

Azerbaijan v. Armenia

(2) Unanimously, Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve 72. The Court recalls that Azerbaijan has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Armenia. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

Ewa SALKIEWICZ/MUNNERLYN • INTERIM MEASURES OF PROTECTION, ORDER OF THE INTERNATIONAL COURT OF JUSTICE OF 07 DECEMBER 2021, IN CASE OF APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ARMENIA v. AZERBAIJAN) and (AZERBAIJAN v. ARMENIA)
non-aggravation of the dispute with Armenia. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measure it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

3. THE PROBLEM OF THE BINDING FORCE

96. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed. Since the preparatory work on the drafting of Article 41 by the committee of lawyers who worked out the Statute of the PCIJ in 1920, there was a controversy over the validity of the interim measures of protection. It is apparent from all the preparatory work that the order for interim protective measures is not binding. The position of the States regarding the binding force of the interim measures of protection indicates that they consider safeguards to be optional. All the States against which safeguards were ordered questioned the jurisdiction of the Court and were not even present at the hearing. Most of them, following the order for precautionary measures, issued statements which stated that they would not be taken into account. Even in the time of the PCIJ, that is, for more than 80 years, we have been dealing in doctrine with different opinions about whether or not orders of interim measures are binding. As noted by Judge Oda ‘the provisional measures indicated by the Court in the past have usually not been implemented.’ It was only in 2001, in the LaGrand judgment, that the Court for the first time clarified this issue finding that its ‘orders on provisional measures under Article 41 have binding effect.’ Germany had argued that the measures are binding; the United States had taken the view, frequently expressed by States so far, that wording and history of Articles 41 and 94 of the Charter show the contrary. In this case, the US did not comply with the interim safeguards and executed a citizen of another country under consular protection.

Another reason why States have occasionally been non-compliant is that the Court lacks the power to enforce its decisions and that Article

16 Ibid, at para 93 (argument by Germany) and at para 96 (argument by the United States)
94 para 2 of the Charter of the United Nations (‘[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment’) does not apply to orders of the Court. But it does not mean that the ICJ has no way to sanction it. In that case the Court indicated the interim measures, the State in whose favor certain measures have been indicated, may contain in its final submissions in the pending case a request to this effect. In that case, the Court may grant relief in the form of a declaration that the order has been violated or even take this into consideration in its determination of the compensation due.

In legal doctrine and in separate opinions, the position has been taken that orders must be seen as binding because of their specific importance for the protection of the judicial procedure. In the case Gambia v. Myanmar, the Court reaffirms that its ‘orders on provisional measures under Article 41 [of the Statute] have binding effect’ and thus create international legal obligations for any party to whom the provisional measures are addressed.

4. CONCLUSIONS

In these two cases, the Court continued its requirements for an indication of the interim measures i.e., irreparable harm, sufficient link between the rights whose protection is sought and the subject-matter of the case in relation to which the request for protection is made, prima facie competence, non aggravation of the dispute and plausibility of rights.

For the first time, two suits were filed simultaneously in the same case, by Armenia and Aerbajdzan.

REFERENCES

ICJ, Cases:


Authors:


