

DECLARATION OF JUDGE YUSUF

Objection to continued misuse of compromissory clause of CERD — Request has nothing to do with CERD — It is about humanitarian law in a situation of armed conflict — It is high time the Court put an end to such misuse — CERD and its compromissory clause to be safeguarded from extraneous claims.

1. I voted against the provisional measure indicated by the Court in paragraph 67 of the Order because of the reference to “obligations under the International Convention on the Elimination of All Forms of Racial Discrimination”.

2. My objection does not therefore concern the requirement that the Republic of Azerbaijan “take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor”. The Agent of Azerbaijan made a similar declaration before the Court during the hearings. He stated, *inter alia*, that his Government “undertakes to continue to take all steps within its power to guarantee the safety of movement of persons, vehicles and cargo along the Lachin road”. There is no considerable difference between the two statements. The statement of the Agent is also in conformity with Azerbaijan’s undertaking in the Trilateral Statement according to which “Azerbaijan shall guarantee the security of persons, vehicles and cargo moving along the Lachin Corridor in both directions”.

3. My objection relates to the continued misuse of the compromissory clause of CERD as a basis of jurisdiction of the Court with respect to alleged acts and omissions which do not fall within the provisions of that Convention. A regrettable tendency seems to have developed, whereby any State that fails to find a valid basis of jurisdiction of the Court for its claims, but still wishes to bring a case before it, tries to stuff those claims into the framework of CERD.

4. The Court has somehow gone along with this practice of using CERD as a “fourre-tout” for jurisdictional purposes. As I stated in my dissenting opinion appended to the Order of the Court of 7 December 2021: “The Court has thrown wide open the gates of the Convention on the Elimination of Racial Discrimination [. . .] to all kinds of claims that have nothing to do with its provisions or its object and purpose.”

5. In the same way as the previous requests by Armenia for the indication or modification of provisional measures of 11 September 2021 and 16 September 2022, the present request, which the Court refers to as the “third Request”, has nothing to do with CERD and everything to do with the humanitarian law (*jus in bello*) applicable between two States engaged in an armed conflict over a territory, the Nagorno-Karabakh.

6. In paragraph 38 of the Order, the Court, after describing the provisions of CERD invoked by Armenia, observes that “[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”. The Court then continues: “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.”

7. Unfortunately, in the subsequent paragraphs of the Order, there is no such examination, but simply a finding that some of the rights that Armenia claimed to have been violated are plausible: “The Court considers plausible at least some of the rights that Armenia claims to have been violated in light of Articles 2 and 5 of CERD through the interruption of movement along the Lachin Corridor.” (Para. 39.)

8. This is perhaps where the problem lies — the lack of examination by the Court of whether the claims made by the Applicant are capable of falling within the terms of CERD.

9. In the present case, there is not a shred of evidence that the acts complained of by Armenia are capable of falling within CERD. Nor is there a shred of evidence that the alleged acts or omissions constituted, even plausibly, acts of racial discrimination. As a matter of fact, there was not a single word regarding racial discrimination or discriminatory treatment in the final submissions of Armenia to the Court in its Request for provisional measures.

10. I have therefore voted against the operative paragraph of the Order because of its unjustified reference to CERD which has nothing to do with the acts or omissions complained of by Armenia, and is not, in my view, at all applicable to the request by Armenia. It is high time that the Court put an end to the attempts by States to use CERD as a jurisdictional basis for all kinds of claims which do not fall within its ambit. Acceding to such requests undermines the credibility of a very important multilateral convention and the reliance on its compromissory clause (Art. 22) for genuine claims relating to racial discrimination.

(Signed) Abdulqawi Ahmed YUSUF.
