DISSENTING OPINION OF JUDGE YUSUF

Dissent to the need for the indication of provisional measures — The undertaking of Azerbaijan adequately addressed the rights which the Court found plausible — It removed the risk of irreparable prejudice and urgency — The good faith of a State making a commitment regarding its conduct is to be presumed — It is erroneous to require that Azerbaijan's undertakings correspond in all respects to the measures requested — There was no need to repeat in amended form elements of Azerbaijan's assurances in the dispositif — The reporting requirement imposed on Azerbaijan appears as an assumption that it did not make its assurances in good faith — Such appearance should have been avoided — The request by Armenia was rendered without object by Azerbaijan's undertaking.

1. I disagree with the Court's decision to indicate provisional measures despite the precise and detailed undertakings made before it by Azerbaijan on 12 October 2023. Interim measures are indicated at a time when the request of Armenia has ceased to have any object following the declaration by the Agent of Azerbaijan. This decision is inconsistent with the jurisprudence of the Court according to which provisional measures need not be indicated in circumstances where the respondent has given adequate assurances.

2. Article 41 of the Statute provides that "[t]he 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". The rights to be preserved are not those of individuals or populations, but of the States that are parties to a dispute before the Court. It is therefore the duty of the Court to specify clearly, before indicating provisional measures, the nature of the plausible rights of the applicant or respondent State which ought to be preserved due to the existence of a risk of irreparable harm before a final decision is made by the Court. This is one of the fundamental prerequisites for the exercise by the Court of its power to grant interim measures of protection.

3. In the present case, the Court limits itself to the identification of the rights of persons which it finds plausible (Order, para. 40), but does not clearly define which are the rights claimed by Armenia that are considered plausible and should consequently be protected pending final decision by the Court. It is simply stated in paragraph 41 of the Order that "the Court considers plausible *at least some of the rights asserted by Armenia that it claims*

to have been violated" (emphasis added). The question is which ones? Unfortunately, the answer to this question cannot be found in the Order.

4. Thus, we can only assume that the plausible rights on the basis of which the Court has decided to exercise its power to indicate provisional measures are those of persons identified in paragraph 40 of the Order. If that is the case, in view of the absence of any other identification by the Court of rights which it found plausible, it may be stated that the plausible rights in question are the following:

> "the right of persons not to find themselves compelled to flee their place of residence for fear that they will be targeted because they belong to a protected group under CERD, and the right of those persons to be guaranteed a safe return" (Order, para. 40).

It may further be assumed that these are the rights which the Court considers Armenia may seek compliance with under CERD pending a final decision on the merits.

5. The question then arises whether the above-mentioned rights asserted by Armenia on behalf of individuals of Armenian ethnic origin and which the Court apparently found plausible, and presumably worthy of protection, have been adequately addressed by the undertaking made by Azerbaijan on 12 October 2023. The full text of the undertaking is reproduced in paragraph 61 of the Order. It may, however, be useful to quote at least the first part of the undertaking read before the Court by the Agent, which is as follows:

> "*(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 homes, 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."

6. In paragraph 62 of the Order, the Court states that

> "the undertakings of the Agent of Azerbaijan, which were made publicly before the Court and formulated in a detailed manner, are aimed at addressing the situation of persons of Armenian national or ethnic origin in Nagorno-Karabakh following the operation commenced by Azerbaijan in this region on 19 September 2023. The Court is of the view that the undertakings made by the Agent of Azerbaijan on behalf of his Government are binding and create legal obligations for Azerbaijan."

The Court also recalls 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).

7. Notwithstanding these statements, the Court comes to the conclusion that the undertaking by the Agent of Azerbaijan does not remove the risk of irreparable prejudice to the rights claimed by Armenia. In the words of the Court,

> "even taking into account the undertakings made by the Agent of Azerbaijan on behalf of his Government at the public hearing on the afternoon of 12 October 2023, irreparable prejudice could be caused to the rights invoked by Armenia and there is still urgency, in the sense that there is a real and imminent risk of irreparable prejudice to those rights before the Court gives its final decision" (Order, para. 65).

The reference to "the rights invoked by Armenia" must be understood, in my view, as an allusion to the rights found to be plausible by the Court and not to all rights claimed by Armenia in the present case.

8. The only reason given by the Court for this conclusion is that "the undertakings do not correspond in all respects to the measures requested by Armenia" (Order, para. 63). This is an erroneous assessment. There is nothing in the Order which indicates that all ten measures requested by Armenia in the present proceedings are based on plausible rights under CERD and would consequently require protection until a final decision by the Court. It is therefore neither logical nor legally tenable to demand that the undertakings by Azerbaijan should correspond "in all respects" to the measures requested by Armenia. The Court itself does not indicate most of those measures in the present Order and states that, "having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested" (*ibid.*, para. 68).

9. Another erroneous approach taken by the Court consists, in my view, in the stark contradiction between the manner in which the undertaking of Azerbaijan is dealt with in this case and the jurisprudence of the Court

regarding formal assurances by States in the context of requests for provisional measures. I believe that it is incorrect for the majority to depart from that long-standing and established case law without giving valid or clear reasons. It should indeed be recalled that, with the exception of the Order on provisional measures in the case concerning *Certain Documents and Data (Timor-Leste* v. *Australia)*, the Court has in the past always taken into account a formal undertaking of the kind given by Azerbaijan and concluded that, in light of such undertaking, no risk of irreparable harm existed. (See, *inter alia*, *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, p. 112; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 18, para. 27; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, para. 72.)

10. The situation was quite different in the case concerning *Certain Documents and Data (Timor-Leste* v. *Australia)* with regard to the undertaking by Australia. The written assurances given by the Attorney General of Australia were qualified and contained a national security exception. The Court observed in this regard:

> "Given that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material, the Court finds that there remains a risk of disclosure of this potentially highly prejudicial information." (*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. 46.)

Consequently, the Court considered that the undertaking by Australia made "a significant contribution towards mitigating the imminent risk of irreparable prejudice", but did not remove the risk entirely (*ibid.*, p. 159, para. 47). In the present case, the Order does not at all explain in which manner the undertaking by Azerbaijan was insufficient or fell short of removing the imminent risk of irreparable prejudice. I find this very unfortunate.

11. As the Court has observed on several occasions, the Court's power to indicate interim measures will only be exercised if there is urgency, in the sense that "there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision" (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)*, p. 428, para. 61). In other words, there is urgency when there is a risk that the substance of the disputed rights or the rights recognized as plausible by the Court might suffer irreparable harm before a judgment is

given on the merits so as to render such a judgment without any value. The two conditions — urgency and risk of irreparable harm — are internally linked. In the present case, both conditions were removed by the undertaking made by Azerbaijan before the Court. The undertaking by Azerbaijan addressed directly the rights which the Court found plausible with respect to persons who may have felt compelled to flee their place of residence and to those who may require guarantees of safe return.

12. Consequently, the assurances given by Azerbaijan have rendered superfluous any need to indicate provisional measures by the Court. However, instead of acknowledging this situation and finding that the circumstances do not require the exercise of the Court's power under Article 41 of the Statute, as was done by the Court in *Belgium* v. *Senegal* or in *Passage through the Great Belt (Finland* v. *Denmark)*, the majority in the present case decided to reproduce in the operative part of the Order, in a partially amended form, two of the elements of the undertaking by Azerbaijan. There was no need whatsoever to do that since the repetition of certain amended elements of the assurances in the *dispositif* does not add anything to the preservation of the substantive rights found plausible by the Court or to the undertakings made by Azerbaijan before the Court, which directly address those rights and guarantee that no acts susceptible of causing irreparable prejudice will occur before a final decision by the Court.

13. Finally, I find it not only contradictory but odd that the Court should, on the one hand, recall its dictum in *Timor-Leste* v. *Australia* that the good faith of a State making a commitment concerning its conduct is to be presumed, while, on the other hand, it requests Azerbaijan in the operative part of the Order to report to the Court within eight weeks on the steps taken to give effect to its own public undertaking. This reporting requirement on a State's own specific and precise undertakings before the Court sounds more like a presumption that the assurances were not made in good faith, particularly when read together with the statement in the Order that "the undertakings made by the Agent of Azerbaijan on behalf of his Government are binding and create legal obligations for Azerbaijan" (Order, para. 62). It should have been avoided. Moreover, this reporting requirement was unnecessary given the undertaking by Azerbaijan that it would facilitate inspections by the United Nations and co-operation with the ICRC in the concerned territory.

14. For the reasons stated above, I have voted against all three subparagraphs of the operative part of the Order. For the same reasons, I am of the view that the Court should not have exercised its power to indicate provisional measures in view of the fact that Azerbaijan had formally and solemnly undertaken before it that it would not only guarantee the fulfilment of its obligations with respect to the rights of persons who might have felt compelled to flee their residences in Nagorno-Karabakh/Garabagh, but

would protect, and not damage or destroy, cultural monuments, artefacts and sites which are important for the population of Armenian ethnic origin in the territory as well as documents relating to their identity or the registration of their property. Azerbaijan's formal undertakings have, in my opinion, rendered without object the fifth Request by Armenia for interim measures.

(Signed) Abdulqawi Ahmed YUSUF.