

SEPARATE OPINION OF JUDGE NOLTE

Preconditions for the modification of an order on provisional measures under Article 76 of the Rules of Court — Modification as a form of implementation of an earlier provisional measure — Whether change of the situation in the Gaza Strip since 26 January 2024 justifies the modification.

1. I agree with the present Order. Given the current horrific situation of the Palestinians in the Gaza Strip, raising any apparently technical legal issues now may seem out of place. However, I will do so in the interest of the Court's future practice.

2. According to Article 76, paragraph 1, of the Rules of Court, "the Court may . . . modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such . . . modification". In its jurisprudence, the Court has not easily arrived at the conclusion that a relevant change in the situation has occurred. For example, in its Orders of 12 October 2022 and 6 July 2023 in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, the Court rejected Armenia's requests pursuant to Article 76 by finding "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated" in earlier Orders¹. In both cases, the Court rather viewed the circumstances as "confirm[ing] the need for effective implementation of the measure indicated" in its earlier Orders².

3. The Court's previous treatment of requests under Article 76 confirms that the purpose of a modification of provisional measures is not normally the implementation of provisional measures already indicated. If one party does not comply with a provisional measure, it is usually for the Court to determine in its final judgment that the provisional measure has been violated, but not to repeatedly insist, at the initiative of the other party, that the provisional measure be complied with. Such a use of the procedure under Article 76 of the Rules of Court would be problematic since it could be seen as an implicit determination of a State's non-compliance with the measures set out in an earlier order, thereby prejudging the Court's assessment at the merits phase.

4. I have therefore hesitated about whether the current situation of the Palestinians in the Gaza Strip indeed constitutes a change in the situation which would justify a modification of the existing provisional measures which the Court ordered on 26 January 2024. I do not doubt that the humanitarian situation of the Palestinians in the Gaza Strip has dramatically deteriorated since 26 January 2024. I also take very seriously recently voiced concerns that Israel is using hunger as a

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, pp. 583-584, para. 23 (1); *Request for the Modification of the Order of 22 February 2023 Indicating a Provisional Measure, Order of 6 July 2023*, para. 33 (1).

² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 583, para. 21; *Request for the Modification of the Order of 22 February 2023 Indicating a Provisional Measure, Order of 6 July 2023*, para. 30.

“weapon of war”³ and the provision of humanitarian aid as a “bargaining chip”⁴. My hesitations rather resulted from the fact that this terrible situation would most probably not exist if the Order of 26 January 2024 had been fully implemented. Under this Order, “Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip”. The Court adopted this Order noting that “[a]t present, many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating” (para. 70). The Court even envisaged the risk that this situation would become worse, stating that “[i]n these circumstances, the Court considers that the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment” (para. 72).

5. Against this background, the present Order may appear to merely repeat and specify the previous measures indicated by the Order of 26 January 2024 rather than impose additional measures that would be justified by a change in the situation. If the present Order were read in this way it would set a problematic precedent. That precedent would consist in signalling to the parties in this and other cases that the Court considers that the threshold for modifying, adding or specifying a provisional measure is low.

6. However, in the present Order, the Court finds not only that since 26 January 2024 the humanitarian situation has simply deteriorated further, but that the prolonged and widespread deprivation of food has become “exceptionally grave” (para. 22). In coming to this conclusion, the Court points to the best available and manifestly reliable sources of public information according to which famine is imminent, as confirmed by a significant number of deaths by starvation which have already occurred (paras. 19 and 20). In my view, the circumstances which are described in the present Order go beyond what the Court in its Order of 26 January 2024 considered as being encompassed in the “serious risk of deteriorating further” (para. 72). They rather constitute a qualitative change of the situation which is exceptional. These circumstances also reflect a plausible risk of a violation of relevant rights under the Genocide Convention.

(Signed) Georg NOLTE.

³ European Commission, “Statement by High Representative Josep Borrell and Commissioner for Crisis Management Janez Lenarčič on famine in Gaza”, 18 March 2024, available at: https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/news/statement-high-representative-josep-borrell-and-commissioner-crisis-management-janez-lenaric-famine-2024-03-18_en.

⁴ The White House, “Remarks of President Joe Biden — State of the Union Address As Prepared for Delivery”, 7 March 2024, available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery-2/>.