INTERNATIONAL COURT OF JUSTICE

INTERPRETATION AND APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(REPUBLIC OF AZERBAIJAN *v.* REPUBLIC OF ARMENIA)

OBSERVATIONS AND SUBMISSIONS OF THE REPUBLIC OF AZERBAIJAN ON THE PRELIMINARY OBJECTIONS OF THE REPUBLIC OF ARMENIA

21 AUGUST 2023

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I.

INTRODUCTION

1. Pursuant to Article 79*bis*, paragraph 3, of the Rules of Court and the Court's Order of 25 April 2023, the Republic of Azerbaijan ("***Azerbaijan***") hereby submits this written statement of its observations and submissions (these "***Observations***") on the preliminary objections that were submitted on 21 April 2023 ("***Preliminary Objections***") by the Republic of Armenia ("***Armenia***").

2. In its Preliminary Objections, Armenia makes two objections, which pertain to only some of Azerbaijan's claims: *first*, a challenge to the Court's jurisdiction *ratione temporis* over Azerbaijan's claims arising before 15 September 1996, when Azerbaijan became a party to the Convention on the Elimination of All Forms of Racial Discrimination ("***CERD***" or the "***Convention***"), and the admissibility of those claims; and *second*, a challenge to the Court's jurisdiction *ratione materiae* over certain of Azerbaijan's claims involving the destruction and degradation of the environment in pursuit of racially discriminatory policies against Azerbaijanis. As Azerbaijan sets out in summary in this Part I and in detail in Parts II and III of its Observations, because each of Azerbaijan's claims arose at a time when Armenia was bound by CERD and each claim raises a question of interpretation or application of CERD, Armenia's Preliminary Objections should be rejected in their entirety.

A. Jurisdiction *Ratione Temporis* and Admissibility

3. Armenia's first preliminary objection, as to the timing of Azerbaijan's claims, fails to identify a basis to dismiss any part of Azerbaijan's claims. Contrary to what Armenia asserts, the Court has jurisdiction *ratione temporis* over claims arising on or after 23 July 1993, the date on which CERD entered into

force for Armenia. Armenia's argument that the Court lacks jurisdiction over claims that arose before the date when *Azerbaijan* became a party—15 September 1996—misapprehends the principle of non-retroactivity of treaties and the nature of Armenia's CERD obligations. The non-retroactivity principle would bar claims pre-dating CERD's entry into force for Armenia, but Azerbaijan has not requested and is not requesting that the Court adjudicate the legality of Armenia's conduct prior to CERD's entry into force for Armenia[1]. CERD's compromissory clause contains no language, and the parties have made no reservations, that would limit the Court's temporal jurisdiction over claims against Armenia preceding the treaty's entry into force for Azerbaijan. Moreover, Armenia's obligations under CERD do not depend on bilateral reciprocity between treaty parties but instead are intended to codify and make more effective the prohibition on racial discrimination, which is an obligation *erga omnes*. All of Azerbaijan's claims arose after the relevant critical date, 23 July 1993, when Armenia first became bound to comply with CERD. Armenia's time-based objection must therefore be rejected, regardless of whether Armenia couches that objection as an objection to jurisdiction *ratione temporis* or an objection to admissibility.

4. But even assuming a critical date of 15 September 1996 as Armenia argues, all of Azerbaijan's claims would still be within the Court's jurisdiction *ratione temporis*. Armenia's assertion that Azerbaijan has made its "complaints

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[1] As Azerbaijan's Memorial makes clear, events preceding 23 July 1993 are set forth to provide the necessary context of Armenia's continuing ethnic cleansing campaign, including to provide evidence of Armenia's discriminatory purpose for the activities it carried out after the relevant date. *Compare Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Memorial of the Republic of Azerbaijan filed 23 January 2023) (hereinafter "***Azerbaijan's Memorial***"), Chapters II.A.1–II.A.7 (providing factual background for the period leading up to July 1993), *with ibid.*, Chapters II.A.8–II.E (describing the evidence underlying Azerbaijan's claims from July 1993 until present day). *See also ibid.*, p. 9, para. 15.

stemming from" the First Garabagh War[2] "the very centrepiece of its Memorial"[3] distorts Azerbaijan's claims. In fact, Azerbaijan's Memorial sets forth claims that Armenia carried out and continues to carry out a coordinated, decades-long campaign of ethnic cleansing and racial segregation. That campaign included acts that Armenia carried out as it occupied Azerbaijan's territory during the First Garabagh War, and it has continued through the period of Armenia's occupation from 1994 to 2020 and beyond. Armenia's acts evidencing this continuing campaign included the violent expulsion of Azerbaijanis[4] from their homes in Garabagh and the surrounding areas[5] during the First Garabagh War; the continued use of force, threats of violence, destruction of property, destruction of markers of Azerbaijani cultural identity, and other means to prevent Azerbaijanis from returning to their homes and lands; and Armenia's ongoing campaign of hatred and incitement against Azerbaijanis and failure to provide an adequate remedy to the victims of all of these acts. Because Azerbaijan asserts claims of continuing and composite breaches based on Armenia's campaign of ethnic

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2 The "***First Garabagh War***" refers to the armed hostilities initiated by Armenia against Azerbaijan from 1991 until a cease-fire was established in 1994. *See also* Azerbaijan's Memorial, p. 1, para. 2.

3 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Armenia's Preliminary Objections filed 21 April 2023), p. 2, para. 6 (hereinafter "***Armenia's Preliminary Objections***").

4 Like Azerbaijan's Memorial, these Observations use the term "***Azerbaijani***" to refer to persons of Azerbaijani ethnic origin or national origin except where the context requires otherwise. *See* Azerbaijan's Memorial, p. 1, para. 1.

5 In these Observations, the term "***Garabagh***" is used to refer to Dağlıq Qarabağ (***Daghlygh Garabagh***), or the territory that formerly constituted the Nagorno-Karabakh Autonomous Oblast ("***NKAO***") of the Azerbaijani Soviet Socialist Republic. Today, that territory forms a part of Azerbaijan's Garabagh Economic Region. Armenia occupied not only Garabagh, where Azerbaijanis constituted a significant minority, but also seven districts bordering Garabagh that had been populated almost entirely by Azerbaijanis, namely Ağdam (***Aghdam***), Cəbrayıl (***Jabrayil***), Füzuli (***Fuzuli***), Kəlbəcər (***Kalbajar***), Laçın (***Lachin***), Qubadlı (***Gubadly***) and Zəngilan (***Zangilan***). *See* Azerbaijan's Memorial, pp. 26–27, para. 49; *ibid.*, fig. 3. Armenia forcibly expelled the entire Azerbaijani population from all of those territories.

cleansing, all of Azerbaijan's claims would be timely even if 15 September 1996 were somehow the critical date for the Court's jurisdiction.

5. Moreover, even on Armenia's case, Armenia's *ratione temporis* objection does not purport to reach Azerbaijan's claims that are based on Armenia's conduct that occurred entirely after 15 September 1996. As detailed in Part II, these include claims of instances of hate speech and incitement to discrimination, the destruction of property and artifacts that mark Azerbaijani cultural identity, the adoption of purported legal measures to nullify Azerbaijanis' property rights, the unlawful settlement of ethnic Armenians on land and in homes that had been confiscated from Azerbaijanis, the discriminatory destruction, degradation, and neglect of the environment targeting Azerbaijani communities, and the failure to provide an adequate remedy for these and other violations of CERD.

6. Finally, to the extent that Armenia disputes the date of any particular occurrence (which it does repeatedly for certain allegations that occurred over the course of its nearly thirty-year occupation of Azerbaijan) or the continuing nature of Armenia's conduct, the determination of the precise date of each occurrence and the nature of Armenia's pattern of conduct will require a detailed examination of the totality of the evidence advanced. For that reason, that issue is a question for the merits that is not suitable for resolution on preliminary objections.

7. Nor can Armenia complain that Azerbaijan's claims are inadmissible based on alleged delay. Armenia has no support for its assertion that claims for human rights violations become inadmissible after the passage of time. In any event, the areas where Armenia committed its violations of CERD were under Armenian occupation for nearly thirty years. During that time, Armenia excluded Azerbaijan and Azerbaijanis—and indeed the international community—from

accessing the then-occupied territories[6]. As a result of that deliberate exclusion, only Armenia had access to the relevant evidence. Azerbaijan repeatedly protested Armenia's actions, but was not in a position to even appraise any damage caused by Armenia, let alone gather evidence in support of a CERD claim, until it regained access to the territories during and after the Second Garabagh War in late 2020. Armenia cannot invoke its own decades-long wrongful occupation of Azerbaijan's sovereign territory as a ground for evading its obligation to submit to the Court's jurisdiction pursuant to Article 22 of CERD.

B. Jurisdiction *Ratione Materiae*

8. Armenia's preliminary objection to jurisdiction *ratione materiae* also fails. Azerbaijan asserts claims that Armenia purposely deprived Azerbaijanis of water and purposely singled out formerly Azerbaijani-populated areas for environmental degradation on the basis of the ethnic or national origin of their population, while sparing or even benefiting similarly situated Armenians and Armenian-populated areas. Contrary to what Armenia argues, all of these claims are plainly cognizable under CERD. CERD defines "racial discrimination" to include all distinctions between individuals on the basis of ethnic or national origin that have either the purpose or the effect of impairing their equal exercise or enjoyment of fundamental rights. By its plain terms, this definition of racial discrimination includes conduct by which environmental harms are directed toward a particular group or concentrated in particular areas on the basis of the predominant race, color, descent, or ethnic or national origin of those areas' inhabitants. CERD imposes no different standard for acts of discrimination affecting the environment than for any other forms of discrimination. Armenia's disparate treatment of Azerbaijanis had the "purpose" and "effect" of impairing

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[6] Azerbaijan's Memorial, pp. 92–93, para. 139; *ibid.*, pp. 105–106, para. 151; *ibid.*, pp. 179–189,
paras. 218–228.

the recognition and enjoyment of their fundamental rights to health and property, and Azerbaijan's claims based on this treatment fall squarely within the provisions of CERD.

9. Contrary to Armenia's argument, nothing in CERD or in the Court's jurisprudence requires that discrimination, whether in an environmental context or otherwise, be "expressly" based on ethnic or national origin. In practice, States that are engaged in discrimination seldom expressly acknowledge their discriminatory purpose; rather, the State's intent must ordinarily be inferred from the circumstances of its actions. Azerbaijan has presented evidence that Armenia's conduct had a discriminatory purpose. The evidence of this purpose includes a clear pattern of harm to Azerbaijanis and currently or formerly Azerbaijani-populated areas that is distinct from how Armenians and Armenian-populated areas were treated during the occupation. At this stage, it is sufficient that Azerbaijan's claims are capable of falling within the scope of CERD[7]. Any dispute over whether Armenia in fact acted with a discriminatory purpose is a factual question for the merits, and Armenia cannot preempt the Court's resolution of such a dispute on all the evidence by mischaracterizing it as a legal question going to the Court's jurisdiction.

10. In any event, the Court has recognized that the plain terms of CERD cover measures that have the *effect* of discriminating even if that is not their

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[7] *See, e.g.*, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 96 (finding jurisdiction *ratione materiae* satisfied in relation to measures "*capable* of having an adverse effect on the enjoyment of certain rights protected under CERD") (emphasis added); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018*, p. 315, paras. 69–70; *ibid.*, p. 319, para. 85 (deciding for purposes of its jurisdiction *ratione materiae* whether "aspect[s] of the dispute" were "*capable of* falling within the provisions" of the treaties) (emphasis added).

purpose[8]. Azerbaijan has provided evidence that Armenia's conduct disproportionately impacted Azerbaijanis and Azerbaijani-populated areas in the exercise of their rights to health and property. This is an independently sufficient reason that Azerbaijan's claims are capable of falling within the scope of CERD. Again, if Armenia intends to dispute that Azerbaijanis were in fact disproportionately affected, that dispute is a factual question for the merits, not a jurisdictional question to be resolved on preliminary objections.

11. Azerbaijan's claims related to environmental destruction are firmly rooted in Article 5 of CERD, which sets out a non-exhaustive list of protected fundamental rights, including the rights to health and property. Azerbaijanis' exercise and enjoyment of these rights on an equal footing is implicated by Armenia's discriminatory environmental destruction, as well as its purposeful manipulation of water infrastructure to deprive Azerbaijanis of access to clean water, which caused harms to the health of Azerbaijanis, created serious health risks in areas to which Azerbaijanis have an unquestioned right to return, and continues to prevent Azerbaijanis from fully realizing the rights to access, use, and enjoy their property.

12. Finally, contrary to what Armenia argues, Azerbaijan has not asserted a separate claim that the laying of landmines and booby traps is a violation of CERD. Rather, Azerbaijan has introduced evidence of landmines and booby traps as support for its claim of an ongoing campaign of ethnic cleansing directed

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8 *See, e.g.*, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, paras. 94, 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 421, para. 49; *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, I.C.J. Reports 2021*, pp. 108–109, paras. 111–112.

towards Azerbaijanis on the basis of their ethnic or national origin. It is the ethnic cleansing, not the laying of landmines and booby traps as such, that is the violation of CERD. What weight, if any, the Court should give each party's evidence is a question for the merits; but Azerbaijan has raised no CERD claim based on landmines and booby traps that could be the subject of a jurisdictional objection.

13. Separately, Azerbaijan also has asserted that Armenia's planting of landmines and booby traps violates the Court's provisional measures order of 7 December 2021. The order is independently binding on Armenia regardless of whether Armenia's conduct breaches CERD—and Armenia has not challenged the Court's jurisdiction over that claim for violation of the provisional measures order.

C. Structure of Azerbaijan's Observations

14. Armenia's Preliminary Objections, taken *in toto*, do not ask the Court to dismiss the entirety of Azerbaijan's case under CERD. Instead, they challenge only a few specific portions of Azerbaijan's claims[9].

15. These Observations address, in two parts, why Armenia's Preliminary Objections to those claims should be rejected in their entirety: **Part II** explains why Armenia's first objection, concerning jurisdiction *ratione temporis* and admissibility, should be rejected; and **Part III** explains why Armenia's second objection, concerning jurisdiction *ratione materiae*, should be rejected.

16. Finally, **Part IV** of these Observations comprises Azerbaijan's submissions, which urge the Court to reject Armenia's Preliminary Objections in

[9] *See infra* Part II.A.2(b) (setting out claims of breach of CERD post-dating Armenia's purported critical date of 15 September 1996).

full or, in the alternative, defer the consideration of those Preliminary Objections to the hearing on the merits.

II.
ARMENIA'S FIRST PRELIMINARY OBJECTION, AS TO THE TIMING OF AZERBAIJAN'S CLAIMS, SHOULD BE REJECTED.

17. Armenia's first preliminary objection, arguing that certain of Azerbaijan's claims are beyond the Court's jurisdiction or inadmissible based on the time when they arose, should be dismissed in its entirety.

A. The Court has jurisdiction *ratione temporis* over all of Azerbaijan's claims.

1. The critical date for the Court's jurisdiction *ratione temporis* is 23 July 1993, when CERD became binding on Armenia.

18. By the terms of CERD and consistent with the non-retroactivity principle, Armenia is responsible for its acts in violation of the Convention from the moment when CERD entered into effect for Armenia, *i.e.*, 23 July 1993. Contrary to what Armenia argues, the date on which CERD entered into force for Azerbaijan—and when Azerbaijan therefore could first invoke the Court's jurisdiction—is not the same as the date from which the Court's jurisdiction substantively applies to Armenia's violations of CERD.

(a) The Court has jurisdiction over claims arising from Armenia's acts of racial discrimination from the moment Armenia became bound by CERD.

19. CERD entered into force for its original parties on 4 January 1969, the thirtieth day after the deposit of the twenty-seventh instrument of ratification or

accession with the Secretary-General of the United Nations[10]. CERD was and is open to accession by additional States[11]. Article 19(2) of CERD provides that "[f]or each state ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession."[12] Armenia deposited its instrument of accession to CERD with the Secretary-General on 23 June 1993[13]. Armenia made no reservations to any provision of CERD, including Article 22, which confers jurisdiction on the Court "with respect to the interpretation or application of this Convention"[14]. By the terms of Article 19(2), Armenia's obligations under CERD commenced thirty days after that date, that is, on 23 July 1993.

20. Under the principle of non-retroactivity, treaties are construed as not imposing obligations on a State before their entry into force for that State. As set out in the Vienna Convention on the Law of Treaties, unless a treaty provides otherwise, a party is not bound by the provisions of a treaty in relation to acts which occurred prior to "the date of *entry into force of the treaty with respect to that party*"[15]. The purpose of the non-retroactivity principle is to ensure that a State is not liable for "events that occurred prior to the date on which *that State*

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[10] CERD, art. 19(1); United Nations Treaty Collection, "International Convention on the Elimination of All Forms of Racial Discrimination", https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf.

[11] CERD, art. 18.

[12] CERD, art. 19(2).

[13] United Nations Treaty Collection, "International Convention on the Elimination of All Forms of Racial Discrimination", https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf.

[14] CERD, art. 22.

[15] Vienna Convention on the Law of Treaties, art. 28 (emphasis added).

became bound by that obligation"[16]. As the Court stated in the *Belgium v. Senegal* case, the principle of non-retroactivity is satisfied whenever a convention is applied to "facts having occurred after its entry into force *for the State concerned*", rather than "acts . . . that took place prior to [the convention's] entry into force *for that State*"[17]. There is no question of non-retroactivity in the present case because the relevant conduct underpinning Azerbaijan's claims of breach occurred after CERD's entry into force for Armenia.

21. Also important to the consideration of the scope of the Court's jurisdiction is the nature of the obligations at issue in this case. As the Court held in *Barcelona Traction*, protection from racial discrimination is an *erga omnes* obligation—a duty owed to "the international community as a whole", where "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection"[18]. As the "centerpiece of the international regime for the protection and enforcement of the right against racial discrimination"[19], and given the broad statements of interests common to the international community as a whole in CERD's Preamble[20], there can be no doubt that CERD sets forth

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[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, p. 49, para. 95 (emphasis added).

[17] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 457, para. 100 (emphases added).

[18] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 32, paras. 33–34 (enumerating four *erga omnes* obligations: the outlawing of acts of aggression, the outlawing of genocide, protection from slavery, and protection from racial discrimination).

[19] G. McDougall, "International Convention on the Elimination of All Forms of Racial Discrimination", *UN Audiovisual Library of International Law* (February 2021), https://legal.un.org/avl/ha/cerd/cerd.html. *See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Armenia's Memorial filed 23 January 2023), pp. 742–743, para. 8.29 (recognizing that CERD imposes *erga omnes* obligations) (hereinafter "***Armenia's Memorial***").

[20] *See, e.g.*, CERD Preamble, para. 1 ("Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all

obligations *erga omnes*. Fixing the Court's temporal jurisdiction over Armenia's conduct in breach of CERD from the date that Armenia became bound by the treaty, 23 July 1993, is thus "in accordance with the object and purpose" of the Convention, which seeks to prevent and punish conduct that is universally condemned[21].

(b) Azerbaijan's 1996 accession to CERD was the earliest date it could bring claims against Armenia, not the critical date for assessing jurisdiction *ratione temporis* over such claims.

22. Azerbaijan became a party to CERD on 15 September 1996, and likewise made no reservations upon acceding to the Convention[22]. Both Armenia and Azerbaijan were therefore parties to CERD on 23 September 2021, the date on which Azerbaijan instituted these proceedings. Article 22 of CERD thus supplies a valid title of jurisdiction between the parties in relation to Azerbaijan's claims[23].

Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion"); *ibid.*, para. 9 ("Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination").

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 616, para. 34 (finding jurisdiction over acts on or after the date respondent state became bound by the treaty). *See also ibid*., para. 31.

[22] United Nations Treaty Collection, "International Convention on the Elimination of All Forms of Racial Discrimination", https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf.

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 445, para. 95; *ibid.*, p. 437, para. 79; *Alleged Violations of Sovereign Rights and*

23. In its entirety, Article 22 provides that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which 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."

24. Other than the existence of a "dispute" between the Parties when the Court's jurisdiction is invoked, Article 22 imposes no additional requirement or limitation on this conferral of jurisdiction. Armenia ignores this—and CERD's nature as a multilateral treaty containing *erga omnes* obligations—in pegging the scope of the Court's jurisdiction *ratione temporis* to the date of CERD's "entry into force between the Parties"[24]. In doing so, Armenia fails to appreciate that the "commencement" date, the date by which both parties have accepted the Court's jurisdiction of disputes, is different from the "exclusion" or "critical" date, which serves to limit the material scope of the Court's jurisdiction over such disputes[25]. The "commencement" date pertains to the time at which the Court's adjudicative jurisdiction can first be invoked, while the "critical" date pertains to the scope of the Court's jurisdiction *ratione temporis* in relation to the underlying facts giving

Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 18, para. 33.

[24] Armenia's Preliminary Objections, p. 13, para. 27.

[25] *See* **Annex 1**, S. Rosenne, *The Law and Practice of the International Court*, *Volume II* (Brill, 2016), II.156, pp. 584 ("The temporal element in the jurisdiction of the Court is therefore to be regarded as part of the problem of jurisdiction *ratione personae* or *ratione materiae* as the case may be. . . . This has given rise to special terminology to express the element of time in the Court's jurisdiction. For the link of time with the jurisdiction *ratione personae*, the period within which acceptance of the jurisdiction is in force is bounded by two dates called respectively the *commencement date* and the *terminal date*. For the association of time with the material scope of the jurisdiction, the relevant date is usually termed the *exclusion date* or the *critical date*") (emphases in original).

rise to the dispute[26]. In this case, the "commencement" date, on which Azerbaijan could have first invoked the jurisdiction of the Court under Article 22, was indeed 15 September 1996. But the "critical" date, which defines the Court's power to adjudicate Armenia's breaches of CERD, was 23 July 1993, when *Armenia* became a party to CERD.

25. This Court's judgment on preliminary objections in the *Bosnia Genocide* case, where the Court heard, and dismissed, a comparable objection to its jurisdiction *ratione temporis*[27] shows the error in Armenia's reliance on the date of Azerbaijan's accession to CERD. In that case, Yugoslavia argued, as Armenia does here, that the Court could only "deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties" based on "the principle of the non-retroactivity of legal acts"[28]. The Court rejected that argument, holding that it had jurisdiction over acts on or after Yugoslavia became bound. The Court observed that neither the Genocide Convention nor its compromissory clause "contain[s] any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the parties themselves make any reservation to that

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[26] *See* **Annex 1**, S. Rosenne, *The Law and Practice of the International Court*, *Volume II* (Brill, 2016), II.156, pp. 584–585. *See also, e.g.*, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022*, p. 27, para. 41 ("[T]he date at which its jurisdiction has to be established is the date on which the application is filed with the Court"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, pp. 437–438, para. 79 (same).

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 617, para. 34.

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 617, para. 34. *See also, e.g.*, Armenia's Preliminary Objections, p. 11, para. 24.

end"[29]. In reaching that conclusion, the Court placed particular weight on its earlier finding that the object and purpose of the Genocide Convention was to "enshrine[] rights and obligations *erga omnes*"[30]. In short, there was no issue of retroactivity because there was no doubt that the Convention applied at all relevant times to the respondent State, there was no question that it applied without exception under the title of jurisdiction, and the absence of such a temporal limitation on jurisdiction was fully consistent with the object and purpose of enforcing *erga omnes* obligations. The same reasoning applies to CERD and the Parties in this case[31].

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29 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 617, para. 34.

30 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 616, para. 31 (the Court recalling "its understanding of the object and purpose of the Convention, as set out in its Opinion of 28 May 1951 . . . It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*."); *ibid.*, p. 617, para. 34 ("This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above (see paragraph 31).").

31 *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 458, para. 123 (referring to "the finding of the Court [in *Bosnia Genocide*] that it had jurisdiction 'with regard to the relevant facts which have occurred since the beginning of the conflict' (that is to say not merely facts subsequent to the date when the Convention became applicable between the parties)"). In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, the Court found that Senegal had obligations to prosecute acts of torture under Article 7, paragraph 1 of the Convention Against Torture in relation to "a number of serious offenses allegedly committed after" 26 June 1987, the date when "the Convention entered into force for Senegal". *Ibid.*, p. 458, para. 102. Belgium was in turn "entitled, with effect from 25 July 1999, the date when Belgium became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1". *Ibid.*, p. 458, para. 104. The Court also observed that Belgium invoked Senegal's responsibility beginning in the year 2000, the time the relevant criminal complaint, which itself concerned underlying offenses occurring in Senegal after 1987, was filed in Senegal. *Ibid.*, p. 458, para. 104. *See also Austria v. Italy*, ECHR Application No. 788/60, Decision of 11 January 1961 (1962), p. 21 (finding that the European Commission of Human Rights had jurisdiction over claims arising from facts anterior to Austria's ratification of the European Convention

26. Armenia's citation to Article 11 of CERD, which allows a party to bring disputes over compliance with the Convention before the CERD Committee, also fails to support Armenia's argument that CERD's dispute resolution mechanisms apply only to claims arising after CERD's entry into force for both disputing parties. Like Article 22, Article 11 allows any State party to commence dispute resolution proceedings, but before the CERD Committee rather than before the Court. And like Article 22, Article 11 also does not contain a requirement that the breaches of CERD arose after the complainant State became a party. Thus, in *Palestine v. Israel*, the CERD Committee made clear that Articles 11 through 13 of CERD "do not indicate that the use of the [inter-State] mechanism" is limited to "breaches that have occurred after [CERD's] ratification by the State party" that initiated the procedure[32]. Rather, those articles only require that the complainant be a State Party at the time it initiates the proceeding[33]. Article 11 of CERD thus supports, not undermines, the conclusion that the Court has jurisdiction *ratione temporis* pursuant to Article 22 because Armenia was a party at the time of the treaty breaches in question and can hear the claims brought by Azerbaijan because both States were parties to CERD at the time of the institution of this proceeding.

on Human Rights but posterior to ratification by respondent state Italy); E. Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014), p. 178, https://tinyurl.com/4pdhmu53 ("In the context of an inter-state case such as *Austria v Italy*, a state may introduce an application only after it has itself ratified the Convention, and the facts can be anterior to the ratification by the applicant state, so long as they are posterior to the ratification by the respondent state.").

32 CERD Committee, *Inter-state communication submitted by the State of Palestine against Israel*, *Preliminary Procedural Issues and Referral to Committee,* document CERD/C/100/3, p. 3, para. 14.

33 CERD Committee, *Inter-state communication submitted by the State of Palestine against Israel*, *Preliminary Procedural Issues and Referral to Committee,* document CERD/C/100/3, p. 3, para. 14.

(c) Armenia's reciprocity arguments ignore the nature of the obligations at issue.

27. Armenia's argument that jurisdiction under CERD depends on reciprocity with the substantive obligations of Azerbaijan fares no better than its other arguments, because of the nature of the rights and obligations imposed by CERD, which, like the Genocide Convention, "enshrines rights and obligations *erga omnes*"[34]. To the extent that bilateral reciprocity in submission to jurisdiction is required, that reciprocity is supplied by Article 22, by which both parties have consented to the Court's jurisdiction over claims arising under CERD—though the potential temporal scope of those underlying claims may cover different periods[35].

28. As the Court has stated in connection with the Genocide Convention, in a treaty containing *erga omnes* obligations, "one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a *perfect contractual balance between rights and duties*."[36] Instead, "[t]he high ideals which inspired the Convention provide, by virtue of the common will of the

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[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 616, para. 31 (the Court recalling "its understanding of the object and purpose of the Convention, as set out in its Opinion of 28 May 1951 . . . It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*."); *ibid.*, p. 617, para. 34 ("This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above (see paragraph 31).").

[35] *Cf. Austria v. Italy*, ECHR Application No. 788/60, Decision of 11 January 1961 (1962), pp. 20–21 (finding that Italy's inability to file claims against Austria arising from the period that the European Convention on Human Rights was in force for Italy but not for Austria "is no ground for denying" Austria's right to file a claim against Italy arising from that same period, and that if the parties to the ECHR "had wished to make the right to file a complaint . . . subject to a condition of reciprocity in regard to the element of time" they could have inserted an "express condition to that effect" in the compromissory clause).

[36] *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23 (emphasis added).

parties, the foundation and measure of all its provisions"[37]. Parties to such a convention thus "do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention"[38]: including "the prevention, suppression and punishment" of breaches of the rights protected by the Convention[39].

29. For this reason, Armenia's invocation of the maxim "*pacta tertiis nec nocent nec prosunt*"[40]—literally, "treaties neither harm nor benefit third parties"—is misplaced. The purpose of CERD is not to advance the particular interests of either Armenia or Azerbaijan. Rather, CERD seeks to protect the fundamental human right against racial discrimination. The CERD Committee has explained that CERD "belongs to a category of international treaties" with the objective of "the common good, in contrast with other treaties the object and purpose of which are restricted to the interest of individual State parties"[41]. In this way, the obligations enumerated under CERD are not formulated as mere bilateral or mutual undertakings between two or more States; they are formulated primarily in the sense of human or fundamental rights of individuals—the ultimate

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[37] *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, I.C.J. Reports 2022*, pp. 35–36, para. 106 (quoting *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951,* p. 23).

[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, I.C.J. Reports 2022*, p. 36, para. 107.

[40] Armenia's Preliminary Objections, p. 16, para. 31.

[41] CERD Committee, *Inter-state communication submitted by the State of Palestine against Israel*, *Decision on Jurisdiction of 12 December 2019,* document CERD/C/100/5, p. 8, para. 42.

beneficiaries of CERD. In seeking to protect those rights, Azerbaijan acts in the interests of its citizens and itself and also as a "procedural trustee"[42], safeguarding obligations that Armenia has owed *erga omnes partes* to all States parties since it acceded to CERD[43].

30. Armenia also overstates the concern that any State joining a multilateral treaty would be faced with the prospect of future suits by what it calls "unknown future parties"[44]. The prospect of a multitude of future State accessions is simply a reality of joining any multilateral convention, as the Court has explained in its advisory opinion on reservations to the Genocide Convention[45]. The Court observed in that opinion that there is a need to apply principles of consent to jurisdiction more "flexibl[y]" in the context of multilateral conventions—and on that basis concluded that States may be treated as parties to the Genocide Convention even if they have made reservations limiting their own

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42 A. Zimmermann & F. Boos, "Bringing States to Justice for Crimes Against Humanity–The Compromissory Clause in the ILC Draft Convention on Crimes Against Humanity", KFG Working Paper Series No. 12 (April 2018), p. 17, https://tinyurl.com/55w53jcz.

43 *See Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012,* p. 450, para. 69 ("The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party."); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, I.C.J. Reports 2022*, p. 36, para. 107 ("[S]uch a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.").

44 *Cf.* Armenia's Preliminary Objections, pp. 14–15, para. 30.

45 *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, pp. 21–22 (considering "a variety of circumstances which would lead to a more flexible application of th[e] principle" of consent in the context of the Genocide Convention as well as the "need for flexibility in the operation of multilateral conventions").

obligations under the Convention that other parties have refused to accept[46]. To the extent that other States parties seek to make effective use of a convention's accountability mechanisms, those States should hardly be discouraged from helping to ensure that violators of the convention "do not enjoy impunity" for breaches of treaty obligations that they have already accepted[47].

31. Finally, Armenia is mistaken in suggesting that anything meaningful can be drawn from the fact that parties have not made reservations to their obligation to answer claims by parties that were not yet bound at the time of the discriminatory conduct in question. If anything, the absence of reservations only suggests that States had no objection to such jurisdiction[48]. Consistent with "a broad consensus" that human rights obligations do not depend on reciprocity between States[49], it is unremarkable that enforcement of a State's human rights obligations should not depend on when some other State joined the relevant convention. Armenia's recitation of the numerous other multilateral conventions,

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46 *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, pp. 21–22.

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order on Provisional Measures of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41.

48 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 617, para. 34 ("[T]he Court will confine itself to the observation that the Genocide Convention—and in particular Article IX—does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 458, para. 123 ("[T]he Court notes, as it did in 1996, that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*.").

49 **Annex 2**, K. Schmalenbach, "Article 26: *Pacta sunt servanda*", in *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), p. 481; *supra* paras. 27–31.

particularly human rights treaties, that lack any such reservations reinforces this point.

2. Azerbaijan's claims are based on acts that occurred after 23 July 1993 and indeed occurred or continued after 15 September 1996.

32. Armenia misleadingly frames Azerbaijan's case as a "vehicle for airing its historic grievances" relating to the First Garabagh War, "which ended in 1994."[50] While a ceasefire may have paused active hostilities between the Parties in 1994, Armenia's campaign of anti-Azerbaijani discrimination was far from over, continuing not only throughout the occupation period from 1994 to 2020 but also into the present day.

(a) All of Azerbaijan's claims arise after the critical date of 23 July 1993

33. All of Azerbaijan's claims relate to conduct that occurred after Armenia became a party to CERD on 23 July 1993. To the extent Azerbaijan's Memorial cites evidence of earlier events, it does so for background and context to demonstrate Armenia's purpose in carrying out its post-critical-date actions. Even Azerbaijan's claim for Armenia's killing, terrorizing, and expelling of Azerbaijanis from Garabagh and the surrounding areas during the First Garabagh War is based only on Armenia's actions in that regard that occurred *after* 23 July 1993. Azerbaijan has not asserted any claims in this proceeding based on the numerous atrocities committed by Armenia prior to that date, and indeed, Azerbaijan explicitly separates facts occurring before and after 23 July 1993 in its Memorial[51]. Azerbaijan also has not cited Armenia's pre-23 July 1993 conduct as violations of CERD, but only as additional evidence that Armenia's post-23 July

[50] Armenia's Preliminary Objections, p. 8, para. 17.

[51] *Compare* Azerbaijan's Memorial, pp. 21–81, paras. 42–119, *with ibid.*, p. 81.

1993 actions were intended to discriminate on the basis of ethnic or national origin. This is consistent with the approach that the Court took in the *Croatia v. Serbia* case, where the Court remarked that "what happened prior to 8 October 1991", the critical date in that case, "is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention."[52]

34. As detailed in Azerbaijan's Memorial, Armenia committed numerous acts of violence and intimidation to drive ethnic Azerbaijanis from their homes and lands after Armenia became bound by CERD on 23 July 1993. This included the destruction of the Azerbaijani-populated city of Aghdam, which began on 23 July 1993[53]—the very day on which CERD entered into force for Armenia—and continued through 1994 not only in Aghdam district but also in the districts of Jabrayil, Fuzuli, Gubadly and Zangilan[54]. As set forth in more detail below, the

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52 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, p. 58, para. 119.

53 *See* Azerbaijan's Memorial, p. 9, para. 15; *ibid.*, pp. 81–82, paras. 120–122 ("By July 1993—ironically when CERD went into effect for Armenia—Armenia's forces, including the units stationed in Garabagh, had occupied the city of Aghdam, cleansing it of its more than 30,000 Azerbaijani inhabitants. Armenia's forces looted and destroyed the city, ultimately forcibly expelling the entire district of Aghdam's 128,251 Azerbaijani inhabitants and going on to cleanse any trace of Azerbaijani presence."); *ibid.*, p. 120, paras. 165–166.

54 *See* Azerbaijan's Memorial, p. 9, para. 15; *ibid.*, pp. 83–85, para. 125 ("Armenia's forces repeatedly attacked the district of Fuzuli between April and August 1993, targeting and killing civilians, and forcing its population of approximately 88,000 Azerbaijanis to flee. As Human Rights Watch/Helsinki reports, during the seizure of Fuzuli, 'Karabakh Armenian forces killed several Azeri civilians who were trying to flee, shooting into towns and villages even after Azeri soldiers had fled and no resistance to their advance was offered'. In one such incident on 17 August 1993, Armenia's forces surrounded and fired upon 25 unarmed Azerbaijani civilians, including children, in the village of Qacar (***Gajar***) in Fuzuli.") (citing Helsinki Report, *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh* (December 1994), p. 53); *ibid.*, pp. 84–85, para. 126 ("By the summer of 1993, Armenia's forces had occupied the districts surrounding Zangilan, cutting it off from the rest of Azerbaijan. Zangilan was under siege for two months, with shelling 'day and night' before Armenia's forces occupied the district . . . During Armenia's October 1993 offensive in Zangilan, its forces again 'forcibly evicted the civilian population, took hostages, killed civilians with

remainder of Azerbaijan's claims also unquestionably arise from conduct that occurred after 23 July 1993[55]. Accordingly, if the Court accepts that the critical date is 23 July 1993, Armenia's challenge to jurisdiction *ratione temporis* must be rejected.

(b) Even on Armenia's erroneous argument that the critical date is 15 September 1996, all of Azerbaijan's claims are timely.

35. Moreover, all of Azerbaijan's claims are based on acts or omissions that either occurred or continued after 15 September 1996—the date that Armenia asserts is the cutoff date for the Court's jurisdiction. Armenia may not escape responsibility for its breaches of CERD by saying that those breaches began before its claimed critical date, where such breaches have a continuing and composite character and Armenia did not cease its breaches of CERD before that date. Accordingly, such claims would fall within the temporal scope of the Court's jurisdiction even if the Court were to accept Armenia's erroneous argument that the critical date is 15 September 1996.

36. The following section first describes Azerbaijan's claims for Armenia's continuing and composite breaches extending after 15 September 1996 and in some cases until the present day. It then identifies Azerbaijan's other claims for breaches occurring entirely after 15 September 1996.

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indiscriminate fire, and looted and burned civilian property'") (citing Facebook, @AzerbaijaniRefugeesIDPs (18 June 2021), @01:40–02:19, https://fb.watch.gcixjVoPoA/ (including footage from Armenia's October 1993 attacks); Helsinki Report, *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh* (December 1994), p. 69). *See also ibid.*, p. 86, fig. 12.

[55] *See infra* Part II.A.2(b).

(i) Azerbaijan has asserted continuing and composite breaches straddling 15 September 1996

37. As the International Law Commission ("***ILC***") has explained, "[t]he breach of an international obligation by an act of a State having a ***continuing*** character extends over the entire period during which the act continues and remains not in conformity with the international obligation"[56]. The distinguishing characteristic of "completed" acts, as opposed to "continuing" acts, is "that the wrongful act itself can be narrowed down to a *single date*—virtually a *single moment in time*"[57], such as the shooting down of an airplane or the assassination of a government official[58]. Accordingly, an "act or fact or situation which took place or arose prior to the entry into force of a treaty" will be "caught in the provisions of the treaty" if it "continues to occur or exist after the treaty has come into force[59].

38. The same principle applies to a "***composite***" breach of an international obligation, defined as a breach that arises from "a series of actions or omissions defined in aggregate as wrongful"[60]. A composite breach does not end when the

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[56] Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), art. 14(2) (emphasis added).

[57] **Annex 3**, J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 255 (emphases added).

[58] **Annex 3**, J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), pp. 254–255.

[59] International Law Commission, *Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, document A/6309/Rev.1 (1966), p. 212 ("[VCLT Article 24 concerning non-retroactivity] accordingly states that unless it otherwise appears from the treaty, its provisions do not apply to a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party. In other words, the treaty will not apply to acts or facts which are completed or to situations which have ceased to exist before the treaty comes into force.").

[60] Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), art. 15(1).

first act constituting the breach has taken place; on the contrary, "the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation"[61]. The ILC has identified "[s]ystematic acts of racial discrimination" as a paradigmatic example of a composite-act breach, alongside other "most serious wrongful acts in international law", including "genocide, apartheid[, and] crimes against humanity"[62].

39. Armenia's breaches are of both a continuing and composite character, extending after 15 September 1996. Azerbaijan has presented evidence that in violation of Articles 2, 3, and 5 of CERD, Armenia carried out a long-standing, brutal, and systematic campaign of ethnic cleansing and racial segregation towards Azerbaijanis based on their ethnic or national origin. Armenia's discriminatory campaign constitutes a composite breach comprised of a series of acts and omissions violating CERD that began before and continued after 15 September 1996, throughout the period of Armenia's unlawful occupation until late 2020 when Azerbaijan liberated its territories and beyond[63]. Specifically,

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[61] Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), art. 15(2).

[62] Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 62, para. 2.

[63] Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 62, para. 2; *ibid.*, p. 63, para. 9 ("While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation."). *See* Azerbaijan's Memorial, pp. 90–199, paras. 136–245 (enumerating Armenia's conduct between 1994–2020 in which "after cleansing the territories of their Azerbaijani inhabitants, Armenia targeted only Azerbaijani homes, public structures, and cultural markers for looting, vandalism, destruction, and desecration" to "transform fundamentally the demographics of the region by erasing the ethnic Azerbaijani population that had been residing there, in favor of a monoethnic Armenian settlement on Azerbaijan's territory, and by doing so, to prevent the return home of the more than 700,000 Azerbaijanis Armenia had forcibly expelled."); *ibid.*,

Armenia's ethnic cleansing campaign included Armenia's invasion of Azerbaijan's territory in the early 1990s (on the heels of Armenia's expulsion of ethnic Azerbaijanis from Armenia)[64] and continued after the First Garabagh War with the destruction and desecration of Azerbaijani towns, cities, districts and heritage sites, including markers of Azerbaijani cultural identity, throughout its occupation, such as the erasure of the Azerbaijani character of the Upper Govhar Agha Mosque in Shusha as recently as 2019[65]. Azerbaijan's Memorial also presents evidence that Armenia engaged in an ongoing campaign of destruction

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pp. 237–275, paras. 291–344 (detailing how, "[s]tarting with its aggression into Azerbaijani's sovereign territory and over the subsequent decades of occupation", Armenia engaged in the "deliberate destruction and degradation of the natural environment", directed against Azerbaijanis in violation of the prohibition on racial segregation); *ibid.*, pp. 16–17, para. 32 (same); *ibid.*, p. 394, para. 533 (same); *ibid.*, pp. 220–237, paras. 273–290 (describing Armenia's continued attempts, "even after the conclusion of the Trilateral Statement in November 2020", to "burden and delay the safe and dignified return of the hundreds of thousands of Azerbaijani IDPs that Armenia expelled from their homes" through the use of landmines and a "scorched earth policy"); *ibid.*, pp. 334–353, paras. 425–458 (describing how "Armenia's ethnic cleansing of Azerbaijanis from Armenia and the then-occupied territories, and its subsequent exclusion of Azerbaijanis from those areas, was an egregious violation of Articles 2 and 5 of CERD."); *ibid.*, pp. 398–409, paras. 541–556 (describing how "Armenia has violated the requirements of CERD by failing to provide a remedy . . . concerning the forcible displacement and dispossession of Azerbaijanis" and failure "to investigate and prosecute violence and other discrimination against Azerbaijanis on the basis of ethnic or national origin").

[64] Azerbaijan's Memorial, pp. 57–89, paras. 93–132 (describing Armenia's acts of ethnic cleansing during the First Garabagh War, from 1991 to 1994). *See also* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), pp. 63–64, para. 11 ("In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. *This need not prevent a court taking into account earlier actions or omissions for other purposes* (e.g. in order to establish a *factual basis* for the later breaches . . .)") (emphases added).

[65] Azerbaijan's Memorial, p. 90 (noting that the "[e]stablishment of an [e]thnically [p]ure Armenian [s]ettlement on Azerbaijan's [t]erritory" occurred from "1994–2020"); *ibid.*, pp. 167–168, paras. 209–210 (describing damage to the Upper Govhar Agha Mosque as of at least 2009, and continuing until October 2019); *ibid.*, pp. 90–199, paras. 136–245. *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

and degradation of the environment in the occupied territories during the entirety of its occupation, including into the late 2000s with the deliberate deprivation of water to Azerbaijanis via the Sərsəng (***Sarsang***) Reservoir, as memorialized in a 2016 Parliamentary Assembly of the Council of Europe ("***PACE***") Resolution setting out "that the occupation by Armenia of Nagorno-Karabakh and other adjacent areas of Azerbaijan creates . . . humanitarian and environmental problems for the citizens of Azerbaijan living in the Lower Karabakh valley"[66]. Azerbaijan has also submitted satellite imagery at various time intervals demonstrating that the wanton destruction of property and the environment, including the destruction of forests in Azerbaijani-populated areas, continued well after 2009[67].

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[66] PACE, Resolution 2085, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (2016); Azerbaijan's Memorial, p. 237, para. 291 (describing Armenia's acts of environmental destruction as "[s]tarting with its aggression into Azerbaijan's sovereign territory and [continuing] over the subsequent decades of occupation"); *ibid.*, pp. 255–257, paras. 312–315 (noting that in 2006, "wildfires were left unmanaged by Armenia and allowed to burn through Azerbaijani districts"); *ibid.*, p. 263, para. 324 (describing that "the total amount of agricultural land lost from productivity' during the occupied period between 1995 and 2015 [was] 54,544 hectares") (citing **Annex 65** to Azerbaijan's Memorial, Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan*, p. 34); *ibid.*, pp. 269–272, paras. 334–340 (describing ongoing harms to the Azerbaijani population downstream of the Sarsang Reservoir, including their documentation by PACE in "a 2005 explanatory memorandum based on a field visit to Azerbaijan", "2007 reports of 'dead fish and dying cattle, attributed to contamination of the water released from Sarsang', "a 2013 motion by representatives of 18 countries for a resolution by PACE condemning the targeting of Azerbaijanis", and PACE's 2016 Resolution 2085) (citing PACE, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water*, para. 25); *ibid.*, pp. 237–275, paras. 291–344. *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

[67] Azerbaijan's Memorial, p. 249, fig. 68 ("Satellite imagery showing unsustainable logging in Zangilan district between 2009 and 2020"); *ibid.*, p. 254, fig. 72 (depicting "[f]orest and vegetation loss due to construction of hydropower plants in Lachin between 2009 (top) and 2019 (bottom)"); *ibid.*, p. 255, fig. 73 (same). *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

40. Armenia's ethnic cleansing campaign also included the maintenance, throughout the occupation and continuing long after the May 1994 ceasefire between the Parties, of a militarized barrier along the "*Line of Contact*", or the line dividing the armed forces of Armenia and Azerbaijan, barring Azerbaijanis from returning to their homes[68]. Armenia's repeated and violent targeting of Azerbaijani civilians near the Line of Contact[69] includes instances in which Armenia killed or wounded ethnic Azerbaijani civilians in 2011, 2015, and 2017[70]. As Armenia retreated from the occupied territories in late 2020, it continued its attempts to prevent Azerbaijanis from returning by engaging in a "scorched earth policy", intending to destroy or render unusable anything to which displaced Azerbaijani civilians could return[71].

41. Armenia's policy of unlawful discrimination continues even after Azerbaijan's liberation if its territories, to the present day. For example, Armenia's campaign of ethnic hatred and incitement against Azerbaijanis in

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[68] Azerbaijan's Memorial, pp. 180–184, paras. 221–223. *See* Commentary to Article 14, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 60, para. 3 ("[A] continuing wrongful act . . . occupies the entire period during which the act continues and remains not in conformity with the international obligation"); *ibid.*, p. 61, para. 10 (noting that the European Court of Human Rights found in the *Loizidou* case that the denial of access to property continuing after a State's acceptance of the Court's jurisdiction represented a breach of article 1 as a continuing violation).

[69] Azerbaijan's Memorial, pp. 184–186, paras. 224–225. *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

[70] Azerbaijan's Memorial, pp. 184–186, paras. 224–225. *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

[71] Azerbaijan's Memorial, pp. 220–237, paras. 273–290. *See* Commentary to Article 14, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 60, para. 3; *ibid.*, p. 61, para. 10.

violation of Article 4 and 7[72], its failure to provide Azerbaijanis effective protection from and remedies for racial discrimination following their forcible displacement in violation of Article 6[73], and its failure to investigate and prosecute crimes against Azerbaijanis in violation of Article 6[74] continue to the present day.

42. Acts fall outside of the temporal scope of a treaty only where they are completed before the date of the entry into force of the treaty for the acting State; or despite being continuing or composite, ultimately cease before the date of the entry into force of the treaty[75]. Given the ongoing and systematic nature of Armenia's decades-long ethnic cleansing campaign, which continued until and after 2020, in no sense can that campaign be considered "completed" or having

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[72] Azerbaijan's Memorial, pp. 275–300, paras. 345–374; *ibid.*, pp. 367–387, paras. 486–519. *See* Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 63, para. 9.

[73] Azerbaijan's Memorial, pp. 398–400, paras. 542–546. *See* Commentary to Article 14, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 60, para. 3.

[74] Azerbaijan's Memorial, pp. 400–409, paras. 547–556. *See* Commentary to Article 14, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 60, para. 3.

[75] *See* International Law Commission, *Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, document A/6309/Rev.1 (1966), p. 212 ("[T]he treaty will not apply to acts or facts which are *completed* or to situations which have ceased to exist before the treaty comes into force.") (emphasis in original). *See also* Commentary to Article 14, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 60, para. 5 ("Where a continuing wrongful act has ceased . . . the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14."); Commentary to Article 15, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), pp. 63–64, para. 11 ("[T]he State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.").

"ceased" by 15 September 1996. Azerbaijan's claims for these breaches are therefore within the Court's jurisdiction *ratione temporis* even on Armenia's case that 15 September 1996 should be taken as the critical date.

(ii) Azerbaijan has asserted breaches arising entirely after 15 September 1996.

43. While many of the allegations of unlawful acts or omissions by Armenia constitute part of the composite and continuing breaches of CERD concerning Armenia's ethnic cleansing campaign, Azerbaijan's Memorial also identifies acts occurring after 15 September 1996 as violations of CERD on a stand-alone basis. Armenia's Preliminary Objections thus do not reach Azerbaijan's claims related to: Armenia's post-1996 destruction of Azerbaijanis' property and markers of Azerbaijani cultural identity; Armenia's post-1996 conduct barring the return of displaced Azerbaijanis; Armenia's purported legal dispossession of Azerbaijanis' property rights in 1998 and unlawful settlement of ethnic Armenians on Azerbaijanis' property beginning in 2001; Armenia's post-1996 hate speech and incitement to racial discrimination; and Armenia's post-1996 failure to afford an adequate remedy for those and other acts of discrimination, each of which would proceed to the merits in all events. Specifically:

- **Post-1996 devastation of Azerbaijani homes and districts, including markers of Azerbaijani cultural identity**[76]. As noted above, Armenia's destruction of Azerbaijani towns, cities, districts and heritage sites continued throughout its occupation. In its Memorial, Azerbaijan has presented satellite imagery and photo, video, and expert evidence to show that much of this destruction occurred well after 15 September 1996, during Armenia's unlawful

[76] *See* Azerbaijan's Memorial, pp. 339–344, paras. 434–445.

occupation. This includes the destruction of monuments such as the Haji Alakbar Mosque in Fuzuli city (destroyed between 2005 and 2019) and the Kalbajar Museum of History and Ethnography (destroyed between September 2011 and 2019); the desecration and vandalism of monuments such as the Juma Mosque in Aghdam (including in 2006); the erasure of the Azerbaijani character of monuments such as the Upper Govhar Agha Mosque in Shusha (in 2019); and the systematic replacement of historic Azerbaijani place-names (including in 2006 and 2007)[77].

- **Post-1996 environmental destruction and degradation.** Much of Armenia's ongoing campaign of destruction and degradation of the environment during its occupation occurred well after 15 September 1996. For example, Azerbaijan has submitted dated satellite imagery demonstrating that environmental harms occurred between 2009 and 2020[78].

- **Purported *de jure* dispossession of Azerbaijanis' property in 1998**[79]. Azerbaijan provides evidence that Armenia's illegally installed regime in Garabagh sought to strip displaced Azerbaijanis of their rights of use and ownership over land, including by adopting a purported law in 1998 that claimed to legally extinguish the land rights of Azerbaijanis who had been forced to flee their

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[77] *See, e.g.*, Azerbaijan's Memorial, p. 106, para. 152; *ibid.*, p. 108, para. 153; *ibid.*, pp. 131–132, para. 172; *ibid.*, pp. 168–169, para. 210; *ibid.*, pp. 178–179, para. 217.

[78] Azerbaijan's Memorial, p. 249, fig. 68; *ibid.*, p. 254, fig. 72; *ibid.*, p. 255, fig. 73.

[79] *See* Azerbaijan's Memorial, p. 350, para. 454.

homes in the occupied territories and were barred from return by Armenia's policies and practices[80].

- **The unlawful settlement of ethnic Armenians in the then-occupied territories from 2001 to 2019**[81]. Azerbaijan provides evidence that while simultaneously barring displaced Azerbaijanis from their homes and stripping them of their property rights in the occupied territories, Armenia opened those territories to settlement by ethnic Armenians throughout the occupation period, with government officials in 2001, 2004, 2013, and 2019, explicitly referencing Armenia's "strategic resettlement plan" intended to cement the monoethnic nature of those territories[82].

- **Post-1996 incidents of hate speech and incitement.** Azerbaijan asserts a claim that, in violation of Articles 4 and 7 of CERD, Armenia has carried out a "campaign of hate speech and promotion of incitement against Azerbaijanis"[83]. Specifically, Armenian officials disseminated and promoted anti-Armenian speech, failed to act to prohibit or punish anti-Azerbaijani hate speech and the activities of racist organizations, and passed down anti-Azerbaijani hatred to the next generation. Azerbaijan's evidence in support of this claim refers to incidents occurring after 15 September 1996[84], so no part of this claim could conceivably be subject to Armenia's objection to jurisdiction *ratione temporis*.

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[80] *See* Azerbaijan's Memorial, pp. 189–190, para. 230.

[81] *See* Azerbaijan's Memorial, p. 350, para. 454.

[82] *See* Azerbaijan's Memorial, pp. 192–194, paras. 236–237.

[83] *See* Azerbaijan's Memorial, p. 275.

[84] *See* Azerbaijan's Memorial, pp. 275–299, paras. 345–373.

- **Post-1996 failure to provide an adequate remedy for racial discrimination, continuing to the present.** As noted above, Armenia has failed to provide Azerbaijanis effective protection from and remedies for racial discrimination to this day. Armenia has failed to remediate not only its acts of ethnic cleansing during the First Garabagh War but also its other violations of CERD, including those committed both before and after 15 September 1996.

B. Armenia's objection to admissibility is baseless.

1. Armenia's arguments in relation to its objection to jurisdiction *ratione temporis* cannot succeed as an objection to admissibility.

44. Armenia seeks to avoid accountability for its CERD violations by arguing that "fundamental considerations of party equality, judicial propriety, fairness, and good faith" "render Azerbaijan's claims inadmissible" where they invoke evidence of Armenia's wrongdoing prior to 15 September 1996[85].

45. Armenia grounds its admissibility objection on an allegedly "impermissible situation of inequality" between the parties, based on the fact that Armenia was bound by CERD at a time when Azerbaijan was not[86]. As the Court explained in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*[87], party equality simply "require[s] that both sides directly affected by these proceedings should be in a

[85] Armenia's Preliminary Objections, pp. 29–30, para. 58; *ibid.*, p. 31, para. 60.

[86] Armenia's Preliminary Objections, p. 31, para. 60.

[87] *See* Armenia's Preliminary Objections, pp. 30–31, para. 59 n.91.

position to submit their views and their arguments to the Court"[88]. It does not require that both parties have identical substantive obligations before either can bring a claim to the Court. In this case, no one disputes that both Armenia and Azerbaijan have the right and the ability to present to the Court their views and arguments on Azerbaijan's claims. Accordingly, party equality has been satisfied, and it cannot afford a basis for inadmissibility.

46. Like its jurisdictional objection, Armenia's admissibility objection is also inconsistent with the fact that CERD contains obligations *erga omnes*, where "one cannot speak of advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties"[89]. Armenia concedes that the "principle of good faith" is a "basic principle[] governing the creation and performance of legal obligations"[90]. But far from allowing Armenia to escape accountability for its discrimination, the principle of good faith requires that Armenia respect its substantive obligations under CERD as of the date of the

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88 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 86. In that case, in which a "written statement on behalf of the officials was submitted through Unesco" where those officials were not party to the dispute but their rights would be affected by any decision, the Court was "satisfied that adequate information [was] made available to it" and the parties did not run afoul of the principle of equality. *Ibid.*

89 *Reservations to the Convention on the Prevention and Punishment among States Parties under the Genocide Convention*, *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23. *See also supra* Part II.A.1(c), paras. 27–31; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997,* Separate Opinion of Vice-President Weeramantry, p. 118 ("We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which *transcend the individual rights and obligations of the litigating States*, international law will need to *look beyond procedural rules fashioned for purely inter partes litigation*.") (emphases added).

90 Armenia's Preliminary Objections, pp. 30–31, para. 59. *See also Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, para. 46; *Nuclear Tests (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 473, para. 49.

treaty's entry into force for it. As the Court has made clear in and after the *Nuclear Tests* cases, the principle of good faith that underpins the rule of *pacta sunt servanda* requires a party to adhere to its obligations from the moment a multilateral treaty entered into force for it—in this case, for Armenia, 23 July 1993—and to be responsible for "facts having occurred after" that date[91]. Azerbaijan is also the State that most suffered the "particular adverse effects"[92] of Armenia's breaches of its *erga omnes* obligations under CERD through acts of racial discrimination against Azerbaijanis on Azerbaijan's sovereign territory; and as such, Azerbaijan is a "specially affected" State that is especially "entitled to invoke" Armenia's responsibility under international law[93]. Particularly given the nature of the rights at issue in this case, there is no "fundamental unfairness" in holding Armenia to account before the Court for any conduct in violation of CERD after Armenia became bound to comply with CERD on 23 July 1993.

2. There was no undue or prejudicial delay in the assertion of Azerbaijan's claims.

47. Armenia's challenge to admissibility based on delay also lacks merit. CERD imposes no time limit for the assertion of claims. Nonetheless, Armenia submits that "Azerbaijan's three-decade delay in bringing claims . . . prejudices Armenia's ability to mount its defence, which would require investigating and

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[91] *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, para. 46*; Nuclear Tests (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 473, para. 49; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 457, para. 100.

[92] Commentary to Article 42, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 119, para. 12. *See also* Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), art. 42.

[93] Commentary to Article 42, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), p. 119, para. 12; *ibid.*, p. 117, para. 3. *See also* Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part 2), art. 42(b)(i).

obtaining evidence pertaining to events that occurred in the early 1990s"[94]. This is wrong, both because there was no undue delay in this case and because the passage of time does not render a claim inadmissible before the Court. It is important to remember that Azerbaijan repeatedly objected to Armenia's ongoing discrimination against Azerbaijanis throughout Armenia's decades-long occupation of Azerbaijan's sovereign territory, but Armenia obstructed the prosecution of Azerbaijan's claims for three decades by refusing to withdraw its troops illegally stationed on Azerbaijan's territory, which would have allowed Azerbaijan to assess the damage and collect evidence.

48. The Court rejected an argument similar to Armenia's in *Certain Phosphate Lands in Nauru (Australia v. Nauru)*, which is the only case Armenia cites in support of its argument. In that case, the Court found that "Nauru's Application was not rendered inadmissible by passage of time" despite a delay of nearly 20 years[95]. The Court also found it relevant that, during the interim decades, "the question [in dispute] had on two occasions been raised by the President of Nauru with the competent Australian authorities"[96]. Armenia cannot argue in good faith that the circumstances are different here, where Azerbaijan has *for decades* objected to Armenia's racist ethnic cleansing campaign, including specifically Armenia's expulsion of Azerbaijanis from their homes in Armenia,

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94 Armenia's Preliminary Objections, p. 32, para. 61.

95 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment of 26 June 1992, I.C.J. Reports 1992*, pp. 254–255, para. 36.

96 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment of 26 June 1992, I.C.J. Reports 1992*, pp. 254–255, para. 36. *See also The M/V "Norstar" Case (Panama v. Italy)*, *Preliminary Objections, Judgment of 4 November 2016, ITLOS Reports 2016*, p. 111, para. 313 (finding claims were admissible despite delay where notes verbales and other communications exchanged "from time to time" between the Parties suggested that "Panama ha[d] not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible").

Garabagh, and the surrounding areas, as well as Armenia's invasion and occupation of Azerbaijan's sovereign territory[97].

49. Further, Armenia is no more prejudiced than Azerbaijan by the need to investigate and obtain evidence from the 1990s. To the contrary, Armenia has the benefit of being the only party in possession of relevant evidence from the then-occupied territories during that time, since it deliberately barred Azerbaijan from accessing those territories during its occupation[98].

50. Azerbaijan was not in a position to bring its CERD claims until late 2020, when it liberated the territories formerly occupied by Armenia and began to assess the circumstances of Armenia's conduct during its unlawful occupation. International tribunals have long held in similar circumstances that "prevention by war" constitutes a valid reason for postponing the submission of a claim[99]. This

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[97] *See, e.g.*, Letter dated 28 April 1994 from the Charge d'Affaires of the Permanent Mission of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. S/1994/516 (29 April 1994); CERD Committee, *Second Report of States parties due in 1999 – Addendum - Azerbaijan,* document CERD/C/350/Add.1 (26 March 1999); Letter dated 21 February 2000 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. S/2000/138 (21 February 2000); Letter dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. A/70/1016-S/2016/711 (16 August 2016); Letter dated 28 July 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN doc. A/74/970-S/2020/748 (29 July 2020) (describing Armenia's "aggression, ethnic cleansing and other atrocity crimes committed against Azerbaijanis on racial, ethnic and religious grounds").

[98] *See* Azerbaijan's Memorial, pp. 179–189, paras. 218–228.

[99] *See, e.g.*, *Williams v. Venezuela, U.S.-Venezuela Claims Commission*, Decision, 3 June 1889, *RIAA*, Vol. XXIX, p. 290. *See also* J. Wouters & S. Verhoeven, "Prescription", in *Max Planck Encyclopedia of International Law* (2008) ("[W]hen valid reasons exist for the claimant to postpone the presentation of his claim, this will preclude extinctive prescription. In the [*Williams v. Venezuela*] Case, incapacity, disability, want of legal agencies, prevention by war, well-grounded fear and the like were considered valid reasons").

case is no different. Azerbaijan notified Armenia of its claims under CERD[100] less than one month after the signing of the Trilateral Statement that ended the Second Garabagh War, and pursuant to which Armenia undertook to return the occupied Kalbajar, Lachin, and Aghdam districts to Azerbaijan[101]. There is therefore no "delay" that would act as a bar to admissibility.

51. In any case, even if the Court finds there was delay, that delay should not act as a bar to the admissibility of claims relating to breaches of fundamental human rights obligations under CERD. Armenia itself argues that it is "for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible"[102]. Here, Azerbaijan brings claims of serious human rights violations arising out of Armenia's decades-long ethnic cleansing campaign, which continued until—and beyond—late 2020[103]. The passage of time does not negate the illegality of such acts and should not permit Armenia to evade responsibility. In these circumstances, where Armenia carried out an ethnic cleansing campaign that strikes at the core of the regime established by CERD to eliminate racial discrimination, the balance of considerations weighs in favor of a finding of admissibility[104].

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[100] **Annex 6** to Azerbaijan's Application, Letter from Jeyhun Bayramov, Minister of Foreign Affairs of the Republic of Azerbaijan, to Ara Aivazian, Minister of Foreign Affairs of the Republic of Armenia, dated 8 December 2020, No. 0540/27/2022.

[101] Annex to the Letter dated 10 November 2020 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, document S/2020/1104 (11 November 2020).

[102] Armenia's Preliminary Objections, p. 32, para. 62.

[103] *See supra* Part II.A.2, paras. 32–43; Azerbaijan's Memorial, p. 89, paras. 132–133.

[104] See K. Hober, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Brill, 2001),
pp. 333–334, https://tinyurl.com/mtzvfmr3 ("[Approaches to prosecution of international crimes] lend support to the proposition that the principle of extinctive prescription does not apply with respect to violations of ius cogens. The explanation is simply that the policy considerations underlying ius cogens – fundamental as they are to the system of international

C. If the Court were to conclude that it must separate out the facts occurring before 15 September 1996, that determination would require extensive consideration of the merits and could not be resolved on preliminary objections.

52. Even if the Court were to accept Armenia's arguments that pre-15 September 1996 claims are barred, it should postpone resolution of Armenia's objections to the hearing on the merits.

53. Unless an objection possesses an "*exclusively preliminary character*"[105], the Court's practice has been to defer consideration of the objection to the hearing on the merits[106]. As the Court explained in *Barcelona Traction*,

> "[T]he Court may find that the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued. In these latter situations, the Court will join the preliminary objection to the merits. It will not do so except for good cause, seeing that the object of a preliminary objection is to

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law – take precedence over the rationale supporting the principle of extinctive prescription; it is in my view not surprising that the balancing of interests comes out in favor of ius cogens").

[105] Rules of the International Court of Justice, art. 79*ter*(4) (emphasis added).

[106] *See, e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 465, para. 145 ("Having established its jurisdiction, the Court will consider the preliminary objection that it has found to be not of an exclusively preliminary character when it reaches the merits of the case"); *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964*, p. 43.

avoid not merely a decision on, but even any discussion of the merits."[107]

54. In previous cases, the Court has deferred to the merits the question of its jurisdiction over claims that alleged a continuing course of conduct beginning before a treaty entered into effect and continuing afterward. This was the case in *Croatia v. Serbia*, for instance, where Croatia "advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991", including prior to Croatia's becoming a party to the Genocide Convention on 8 October 1991[108]. The Court held that Croatia's presentation of a single claim, even where the pattern of conduct referred to "acts of violence taking place both immediately prior to, and immediately following, 8 October 1991", required the "examin[ation] and assess[ment of] the totality of the evidence advanced by Croatia"[109].

55. Similarly, Azerbaijan's claim of ethnic cleansing and racial segregation alleges a pattern of conduct beginning before, but continuing well past, the entry into force of CERD for Azerbaijan in 1996[110]. As in *Croatia v. Serbia*, any assessment of the timing of each part of Azerbaijan's claim as to Armenia's campaign—should the Court consider such assessment necessary—must be

[107] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964*, p. 43.

[108] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, p. 58, para. 119.

[109] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, p. 58, para. 119.

[110] *See supra* Part II.A.2(b), paras. 35–43.

conducted in view of the "totality of the evidence"[111], which "cannot be considered separately without going into the merits"[112].

56. Similarly, Armenia's argument that some of Azerbaijan's claims relating to environmental and cultural destruction are "jurisdictionally flawed by virtue of Azerbaijan's failure to substantiate their timing", unless rejected outright, also present factually complex and merits-dependent issues that cannot be resolved on preliminary objections[113]. Regardless of the exact timing of the destruction and desecration of Azerbaijani districts, towns, cultural markers, or parts of the environment, as explained above, Azerbaijan's evidentiary record makes clear that all such conduct either occurred or continued *after* 15 September 1996, as set forth in detail above, and certainly after 23 July 1993[114]. Moreover, to the extent that Azerbaijan was unable to allege a precise date for acts that occurred during the occupation period, that is because evidence of the exact timing of the conduct is exclusively in the possession of Armenia. In fact, Armenia ensured that neither Azerbaijan nor any other third party had access to the then-occupied territories during the time of the occupation[115]. The detailed consideration that would be required of such evidence in order to eliminate any of Azerbaijan's claims on temporal grounds, including at an individual district-by-district, town-by-town, or monument-by-monument level, only demonstrates that

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111 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015,* p. 58, para. 119.

112 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964*, p. 43.

113 Armenia's Preliminary Objections, p. 29, para. 57.

114 *See supra* Part II.A.2. *See also* Azerbaijan's Memorial, pp. 90–199, paras. 136–245; *ibid.*, pp. 237–275, paras. 291–344.

115 Azerbaijan's Memorial, pp. 92–93, para. 139.

such questions are inextricably intertwined with the merits of the case and thus not ripe for resolution on preliminary objections[116].

III.

ARMENIA'S SECOND PRELIMINARY OBJECTION, AS TO JURISDICTION OVER THE SUBJECT MATTER, SHOULD BE REJECTED.

57. Armenia argues that the Court lacks jurisdiction *ratione materiae* "with respect to Azerbaijan's claims as they relate to landmines and booby traps . . . or alleged environmental harm"[117]. Each of its arguments fail, and the Court should reject Armenia's second preliminary objection in its entirety.

58. First, contrary to what Armenia argues, the Court plainly has jurisdiction over Azerbaijan's claims of discriminatory environmental destruction based on ethnic or national origin. By the terms of Article 22 of CERD, the Court has jurisdiction over disputes concerning the "interpretation or application" of CERD. At this stage of the proceedings, the Court need not examine the "alleged wrongful acts or . . . the plausibility of the claims" but need only ascertain "whether the acts of which [Azerbaijan] complains 'fall within the provisions'" of CERD[118].

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[116] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964*, p. 43; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment of 27 February 1998, I.C.J. Reports 1998*, p. 29.

[117] Armenia's Preliminary Objections, p. 41, para. 79.

[118] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019,* p. 584, paras. 57–58.

59. As described in **Part III.A** below, CERD prohibits Armenia from engaging in discriminatory conduct based on Azerbaijani ethnic or national origin that has the purpose or effect of impairing the equal enjoyment of fundamental human rights. This "purpose or effect" standard operates in the same way in the environmental context as in any other context. Environmental discrimination of the type alleged by Azerbaijan is a widely recognized form of racial discrimination. Contrary to Armenia's assertions that "environmental harm is indiscriminate by nature"[119], it is well known that conduct that causes environmental harm can be *purposefully* geographically targeted to minimize its impact on favored groups and shift the burden onto disfavored groups; it can also have the effect of imposing disproportionate *impacts* on a particular group.

60. As described in **Part III.B.1** below, Azerbaijan has submitted evidence of a clear difference in treatment between ethnic Azerbaijanis and Azerbaijani-populated areas on the one hand, and Armenians and Armenian-populated areas on the other, based on ethnic or national origin. Further, as described in **Part III.B.2**, Azerbaijan has demonstrated that this difference in treatment has both the purpose and the effect of impairing the equal enjoyment of Azerbaijanis' rights protected under Articles 2 and 5 of CERD. This is a straightforward claim of racial discrimination, and Armenia's argument that it falls outside the scope of CERD is based on a distortion of the facts presented by Azerbaijan and a misunderstanding of the rights protected under CERD.

61. Finally, as described in **Part III.C** below, Armenia also misconstrues Azerbaijan's contentions related to landmines and booby traps. Azerbaijan does not allege in its Memorial that Armenia's planting of landmines and booby traps is itself a violation of CERD. Instead, Azerbaijan has submitted evidence of such

[119] Armenia's Preliminary Objections, p. 53, para. 106.

conduct (1) as evidentiary support for Azerbaijan's broader claim that Armenia has been engaged in an ethnic cleansing campaign seeking to prevent the return of Azerbaijanis to their former homes and lands; and (2) as a violation of this Court's order of provisional measures, which prohibits the parties from taking actions that would aggravate their dispute. Because Azerbaijan has not claimed that the planting of mines and booby traps itself violates CERD, Armenia's objection is irrelevant.

A. The Court's jurisdiction *ratione materiae* extends to all claims arising from conduct having either the purpose or the effect of impairing fundamental rights on the basis of national origin or ethnic origin.

62. The Court has jurisdiction *ratione materiae* under Article 22 of CERD over "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation"[120]. CERD prohibits "racial discrimination", defined in Article 1(1) as a "distinction, exclusion, restriction or preference" that is "based on race, colour, descent, or national or ethnic origin" and "has had the purpose or effect of nullifying or impairing the equal recognition, enjoyment or exercise of human rights and fundamental freedoms"[121]. States parties to the Convention have an obligation, under Article 2, to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms", including by refraining from, prohibiting, and preventing racial discrimination as defined in Article 1(1). Under Article 5, States parties also "undertake to prohibit and to eliminate racial discrimination . . . in the enjoyment of" a non-exhaustive list of political, civil, economic, social, and cultural rights. Taking into account these "broadly formulated rights and obligations", to establish its jurisdiction *ratione*

[120] CERD, art. 22.

[121] CERD, art. 1(1).

materiae the Court at this preliminary stage must only determine whether the alleged conduct is *capable* of having an adverse effect on the enjoyment of rights protected by CERD[122]. The Court need not "satisfy itself that the measures of which [an applicant] complains *actually* constitute 'racial discrimination' within the meaning of Article 1, paragraph 1, of CERD." [123]

63. The means by which the alleged racial discrimination takes place are of no consequence to this Court's jurisdiction under CERD; consideration of the Court's jurisdiction *ratione materiae* under Article 22 is the same in the environmental context as in any other context. As noted, Article 1(1) of CERD covers distinctions that have either the "purpose" or the "effect" of nullifying or impairing rights. In advancing its Preliminary Objection to Azerbaijan's claims related to discriminatory environmental destruction, Armenia misinterprets both "purpose" and "effect" in at least three crucial ways.

64. *First*, Armenia is wrong when it asserts that Azerbaijan's Memorial does not include a claim "that Armenia's conduct was *expressly* 'based on' national or ethnic origin"[124] and that this is somehow "telling" of a weakness in

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[122] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 96. *See also Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, I.C. J. Reports 1996*, p. 820, para. 51 (rejecting an objection *ratione materiae* in relation to a treaty provision governing "freedom of commerce" because the alleged "destruction was capable of . . . having an adverse effect upon the freedom of commerce").

[123] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 94 (emphasis added).

[124] Armenia's Preliminary Objections, p. 53, para. 107 (emphasis added). *See also ibid*., p. 54, para. 108.

Azerbaijan's argument[125]. Article 1(1) of CERD does not require racial discrimination to be "expressly" based on a protected ground. As Armenia is no doubt aware, conduct can purposely target a protected group for discriminatory treatment even where a State does not "expressly" state that this is its purpose—in other words, even where a State seeks to hide its purpose or simply fails to acknowledge it explicitly[126]. In service of its argument, Armenia simply ignores the evidence, detailed in Part III.B below and in Azerbaijan's Memorial, that Azerbaijanis were purposely targeted to suffer the effects of environmental harms "based on" their ethnic and national origin. This discriminatory targeting is capable of constituting a violation of CERD even in the absence of an "express" statement of purpose by Armenia.

65. *Second*, Armenia is wrong when it asserts that "in determining whether the acts complained of were taken 'based on' race, colour, descent, or national or ethnic origin, the Court has found that it is not enough to establish merely an indirect *effect* on a protected group"[127]. As the Court explained in its judgment on preliminary objections in *Qatar v. United Arab Emirates*, CERD "prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction *or from its effect*"[128]. Indeed, if Armenia were right that "it is not enough to establish merely an indirect *effect* on a protected group", then an act or omission could only be "based on" one of the grounds enumerated

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125 Armenia's Preliminary Objections, p. 54, para. 109.

126 *See supra* paras. 9–10; Azerbaijan's Memorial, pp. 308–311, paras. 387–390; *Ms. L.R. v. Slovakia,* Communication No. 31/2003, Opinion, document CERD/C/66/D/31/2003 (2005), para. 10.4 ("[T]he definition of racial discrimination . . . expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination").

127 Armenia's Preliminary Objections, p. 39, para. 76.

128 *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, I.C.J. Reports 2021*, p. 109, para. 112.

in Article 1(1) if it was *purposely* directed against a protected group, as such. This is inconsistent with the plain terms of Article 1(1) of CERD, which defines racial discrimination as conduct having the "purpose *or effect*" of depriving a group of equal recognition, exercise, or enjoyment of fundamental rights. It would exclude from CERD's ambit instances of indirect discrimination—such as where a facially neutral measure enacted in good faith nevertheless has a disproportionate negative impact on a protected group[129]. Armenia's approach also directly contradicts its own approach to the Court's jurisdiction *ratione materiae* in its Memorial in the *Armenia v. Azerbaijan* case, where Armenia

[129] *See, e.g.*, *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, I.C.J. Reports 2021*, Separate Opinion of Judge Iwasawa, pp. 173–174, para. 51 ("If a rule, measure or policy that is apparently neutral has an unjustifiable disproportionate prejudicial impact on a certain protected group, it constitutes discrimination notwithstanding that it is not specifically aimed at that group. *The analysis of disproportionate impact requires a comparison between different groups. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measure amounts to discrimination.*") (emphasis added); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Order on Provisional Measures of 19 April 2017, I.C.J. Reports 2017*, Declaration of Judge Crawford, p. 215, para. 7 ("[W]hatever the stated purpose of [a] restriction, it may constitute racial discrimination if it has the 'effect' of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in 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, I.C.J. Reports 2021*, Separate Opinion of Judge Iwasawa, p. 173, para. 49; *ibid.*, p. 178, para. 61; *ibid.*, p. 179, para. 64 ("In order for the measures challenged here to constitute indirect discrimination, they must have an unjustifiable disproportionate prejudicial impact on the identified protected group in comparison with other groups. . . . The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measures amount to discrimination. The examination of these questions requires extensive factual analysis. . . . Moreover, these issues constitute the very subject-matter of the dispute on the merits, and as such their determination should be left to the merits stage. The Court should rule on them only after the Parties have presented their arguments and evidence at that stage.").

argues that CERD seeks to eliminate "all forms of racial discrimination, whether *de jure* or *de facto*, intentional *or unintentional*, direct *or indirect*"[130].

66. *Third*, Armenia's argument that "environmental harm is indiscriminate by nature" and "does not and cannot distinguish, exclude, restrict or prefer its victims based on national or ethnic origin"[131] misses the point that the conduct causing those harms can be, and often is, racially discriminatory. It is well accepted that *purposely* concentrating environmental harms in an area in which a protected group lived or lives, or disregarding environmental standards that would have been followed in an area outside of where the protected group lived or lives, is a form of racial discrimination. It also is well accepted that environmental harms may take place in such a way that they have a disproportionate impact on a protected group and are therefore racially discriminatory in *effect*[132].

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[130] Armenia's Memorial, pp. 546–547, para. 6.8 (emphases added). *See also ibid.*, p. 3, para. 1.6.

[131] Armenia's Preliminary Objections, p. 53, para. 106.

[132] That unequal treatment in the environmental context that has either the purpose or effect of impairing the enjoyment of fundamental human rights of a protected group constitutes racial discrimination is broadly accepted and has been recognized by the CERD Committee and other international human rights bodies, including the European Court of Human Rights, the Committee on the Elimination of Discrimination Against Women, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights. *See, e.g.*, African Commission on Human and People's Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, Judgment (27 May 2002); Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v. Belize*, Judgment (12 October 2004); *Hudorovic & Others v. Slovenia*, ECHR Application Nos. 24816/14 & 25140/14, Judgment dated 12 March 2020; *S.N. & E.R. v. North Macedonia*, Communication No. 107/2016, document CEDAW/C/75/D/107/2016 (2020), para. 9.4 (finding that the destruction of water supply in a community had a "particularly disproportionate and discriminatory effect" on Roma women). CERD Committee, *Decision 3(62) on Suriname*, document CERD/C/62/CO/Dec.3 (21 March 2003), para. 3 (finding that "serious violations of the rights of indigenous communities" were being committed by, *inter alia*, "the fact that the mining companies' activities, especially the dumping of mercury, are a threat to their health and the environment"); CERD Committee, *Concluding observations on the combined sixth to eighth periodic reports of Honduras*, document CERD/C/HND/CO/6-8 (14 January 2019), para. 22 (noting concern regarding "about the impact of the development of energy, extractive, tourism, agro-industrial and infrastructure projects on the territories and resources of indigenous and Afro-Honduran

67. Azerbaijan has alleged facts showing a clear difference in treatment between Azerbaijanis and Azerbaijani areas and Armenians and Armenian areas along ethnic or national origin lines, which directly and adversely affects Azerbaijanis as a distinct group defined by their ethnic or national origin. This satisfies the requirement at this stage that Azerbaijan's claims, taken as true, allege conduct "*capable* of having an adverse effect on the enjoyment of certain rights protected under CERD"[133].

B. Azerbaijan claims that Armenia's environmental destruction had the purpose and effect of impairing Azerbaijanis' equal exercise and enjoyment of human rights and fundamental freedoms on the basis of ethnic or national origin.

68. Azerbaijan's Memorial cites evidence that Armenia's conduct with respect to the environment was "based on" Azerbaijani ethnic or national origin and had the purpose and effect of impairing the equal exercise and enjoyment of Azerbaijanis' human rights or fundamental freedoms. Armenia's discriminatory conduct meets the definition of "racial discrimination" in Article 1(1) of CERD, and is capable of constituting a violation of Articles 2 and 5 of CERD.

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peoples"); CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, document CERD/C/NOR/CO/19-20 (8 April 2011), para. 17 (noting concern "about the effects on indigenous peoples and other ethnic groups in territories outside Norway, including the impact on their way of life and on the environment, of the activities by transnational corporations").

[133] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 96 (emphasis added). *See also ibid.*, p. 595, para. 94; *ibid.*, p. 586, para. 63 (considering a *ratione materiae* objection concerning the element of "intent" and finding that where "complex issues of law and especially of fact that divide the Parties", those issues are properly a matter for the merits); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019*, p. 40, para. 97 (finding that where a question at the preliminary objections stage was too "closely linked to the merits", the Court would only be "able to rule on th[is] . . . objection only after the Parties have presented their arguments in the following stage of the proceedings").

Azerbaijan's claim is therefore within the Court's jurisdiction under Article 22 of CERD.

1. Azerbaijan has alleged environmental destruction based on ethnic or national origin.

69. Armenia's argument that "the acts of which [Azerbaijan] complains do not constitute a distinction, exclusion, restriction or preference that was 'based on' national or ethnic origin"[134] mischaracterizes Azerbaijan's claims.

70. Azerbaijan's Memorial sets out evidence demonstrating, for example, that "Armenia's discriminatory *purpose* is manifest in its differential treatment of Azerbaijani areas, which contrasts sharply with its treatment of areas populated by ethnic Armenians prior to Armenia's occupation."[135] Azerbaijan has also presented evidence that during the occupation, Armenia deliberately deprived ethnic Azerbaijanis of water on the basis of their ethnic or national origin, while favoring ethnic Armenians[136]. These points of clear difference in treatment demonstrate both that environmental harms were *purposely* directed at Azerbaijanis and Azerbaijani-populated areas because they were inhabited by persons of Azerbaijani ethnic or national origin, and that, regardless of purpose, such harms have had, and continue to have, a disproportionate *effect* on Azerbaijanis as a distinct group defined by ethnic or national origin. Because Armenia simply ignores the evidence that Azerbaijanis were both targeted and disproportionately suffer the impacts of environmental harms "based on" their ethnic and national origin, each of the points that Armenia raises in support of its challenge to jurisdiction fails.

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[134] Armenia's Preliminary Objections, p. 52, para. 104.

[135] Azerbaijan's Memorial, p. 356, para. 466. *See also ibid.*, pp. 244–268, paras. 300–331.

[136] *See* Azerbaijan's Memorial, pp. 268–273, paras. 332–342; *ibid.*, p. 357, paras. 467–468.

71. Armenia hinges much of its preliminary objection on its incorrect factual assertion that "even if the environmental damage Azerbaijan alleges were attributable to Armenia (*quod non*), such damage occurred in areas that, on Azerbaijan's own case, ethnic Armenians viewed as historically Armenian and in which they intended to continue living"[137]. According to Armenia, "[t]o argue ethnic motivation behind the alleged environmental damage is thus counterintuitive and not credible at all"[138].

72. Armenia's current position is contradicted by facts in the historical record—also presented in Azerbaijan's Memorial—about Armenia's campaign of ethnic cleansing during the invasion and subsequent occupation of Azerbaijan's territory. The Court need not delve into the specifics of the factual record at this stage. Suffice it to say that, of the territory occupied by Armenia[139], only the former NKAO had a majority-Armenian population prior to the occupation[140]. The remainder of the then-occupied area—which included the districts of Gubadly,

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137 Armenia's Preliminary Objections, pp. 55–56, para. 112.

138 Armenia's Preliminary Objections, pp. 55–56, para. 112.

139 Armenia's only purported support for its claim that the Azerbaijani-populated districts were actually "viewed as historically Armenian" and that Armenians intended to live there (Armenia's Preliminary Objections, p. 56, para. 112) is a 2018 news article published in *Eurasianet*. But the full article, which Armenia failed to annex, makes clear that with respect to the areas with predominantly Azerbaijani populations, "Armenians initially conceived of control of these seven territories as a temporary measure, as a buffer zone to prevent Azerbaijani attacks on Nagorno-Karabakh; they were eventually to be given back to Azerbaijan as part of a comprehensive peace deal to resolve the conflict. . . . Armenians have grown more reluctant to give up the occupied territories. . . . In 2006, Nagorno-Karabakh adopted a new constitution that formally incorporated the seven territories into the de facto republic." *See* J. Kucera, "For Armenians, they're not occupied territories – they're the homeland", *Eurasianet* (6 August 2018), https://eurasianet.org/for-armenians-theyre-not-occupied-territories-theyre-the-homeland.

140 Azerbaijan's Memorial, p. 27, fig. 3 (listing the population of the former NKAO in 1989 as 21.5% Azerbaijani and 76.9% Armenian). *See also* **Annex 65** to Azerbaijan's Memorial, Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan*, p. 2.

Zangilan, Jabrayil, Kalbajar, Lachin, Aghdam, and Fuzuli—was predominantly populated by Azerbaijanis[141]. Armenia cannot, and does not, dispute that the areas that had been predominantly populated by Azerbaijanis remained largely unsettled throughout Armenia's long occupation, with the limited exceptions of ethnic Armenians from third countries, mainly Syria and Lebanon, who were provided financial incentives to settle in select locations in the Shusha, Lachin, Kalbajar, and Gubadly districts for purposes of cementing Armenia's occupation of Azerbaijan's territory[142].

73. Armenia also argues in its Preliminary Objections that environmental harms were evenly distributed throughout the then-occupied territories or equally impacted both Azerbaijanis and Armenians, but notably offers no evidentiary basis for this assertion, which is contrary to the evidence presented by Azerbaijan[143]. Even if Armenia had provided evidence, any factual dispute of that sort would be a question for the merits, not a jurisdictional issue suitable for preliminary objections.

74. Contrary to Armenia's assertions, international bodies have documented the different treatment of Azerbaijani and Armenian populations during Armenia's occupation—and the difference in treatment of formerly Azerbaijani-populated areas as specifically contrasted with Armenian-populated areas, evidenced by the pattern of Armenia's campaign of destruction, including

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[141] Azerbaijan's Memorial, p. 27, fig. 3 (listing the ethnic breakdown, as of 1989, of the districts of Gubadly (99.4% Azerbaijani, <1% Armenian); Zangilan (99.0% Azerbaijani, <1% Armenian); Jabrayil (99.6% Azerbaijani, <1% Armenian); Kalbajar (96.6% Azerbaijani, <1% Armenian); Lachin (89.9% Azerbaijani, <1% Armenian); Aghdam (99.4% Azerbaijani, <1% Armenian); Fuzuli (99.2% Azerbaijani, <1% Armenian)).

[142] *See* Azerbaijan's Memorial, pp. 196–197, para. 243.

[143] *See* Armenia's Preliminary Objections, p. 53, para. 106; *ibid.*, pp. 55–56, para. 112; *ibid.*, pp. 62–63, paras. 125–126.

environmental destruction[144]. For example, Armenia deliberately deprived Azerbaijanis of access to water via the Sarsang reservoir to favor the ethnic Armenian population[145], while at the same time constructing new water conveyance infrastructure upstream of the Sarsang Reservoir to increase the flow of water used to generate electricity and for agricultural purposes in Armenian-populated areas[146]. Such conduct prompted PACE to adopt Resolution 2085 in 2016, calling on "the Armenian authorities to cease using water resources as tools of political influence or an instrument of pressure benefitting only one of the parties to the conflict"[147]. The Resolution noted, for example, that "the deliberate creation of an artificial environmental crisis must be regarded as 'environmental aggression' and seen as a hostile act by one State towards another aimed at creating environmental disaster areas and making life impossible for the *population concerned*", namely, the "citizens of Azerbaijan living in the Lower Karabakh Valley"[148]. Accordingly, there is no basis for Armenia's argument that management of the Sarsang Reservoir has been "critical to the survival of the ethnic Armenian population in the region, and it is inconceivable that the

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144 *See, e.g.*, Azerbaijan's Memorial, p. 250, para. 308; *ibid.*, pp. 256–257, paras. 313–315; *ibid.*, pp. 260–265, paras. 319–326.

145 Azerbaijan's Memorial, pp. 268–275, paras. 332–344.

146 *See, e.g.*, Azerbaijan's Memorial, p. 272, para. 339. *See also, e.g.*, Initial Public Offering, Prospectus, "Artsakh" HEC OJSC (18 April 2009), https://armswissbank.am/upload/Azdagir_AHEK_eng.pdf, Fig. 5.2 (depicting a map and locations of proposed infrastructure). Armenia also ignores Azerbaijan's evidence that Armenia misused, mismanaged, or blocked other water infrastructure in the then-occupied territories, including the Sugovushan and Kondalanhay-1 reservoirs as well as hundreds of kilometers of irrigation canals, thereby denying Azerbaijanis access to water. *See* Azerbaijan's Memorial, pp. 272–273, paras. 341–342.

147 PACE, Resolution 2085, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (2016), https://pace.coe.int/en/files/22429/html, para. 7.2.

148 PACE, Resolution 2085, *Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water* (2016), https://pace.coe.int/en/files/22429/html, para. 3.

Reservoir would have been mismanaged 'based on' Azerbaijani national or ethnic origin."[149]

75. Armenia's different treatment of Azerbaijanis and Armenians is clear from Figure 67 of Azerbaijan's Memorial, which demonstrates how environmental harms in the liberated territories were disproportionately concentrated in areas that were predominantly populated by Azerbaijanis (outlined in yellow) rather than in areas inhabited by ethnic Armenians (outlined in purple)[150].

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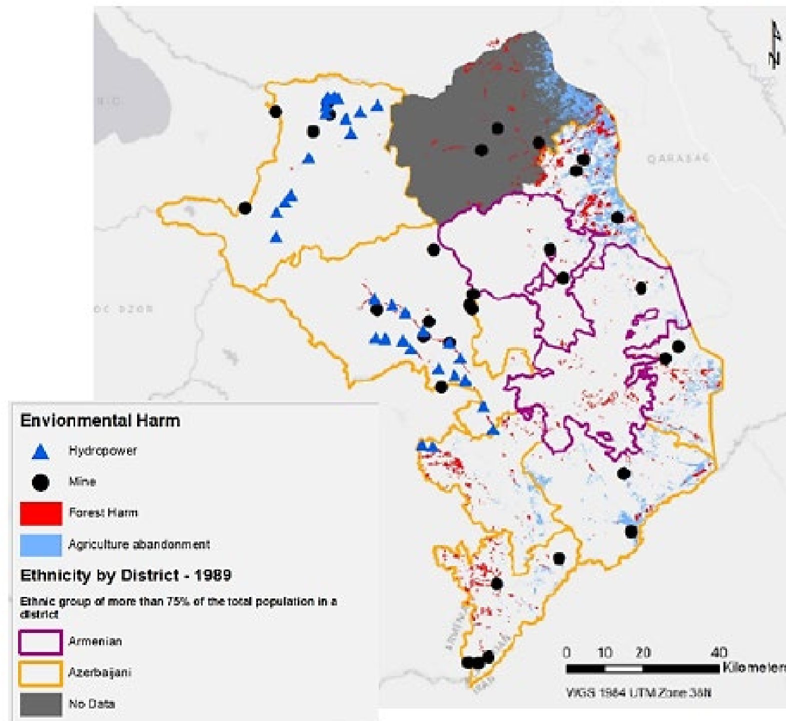
149 Armenia's Preliminary Objections, p. 58, para. 116.

150 Azerbaijan's Memorial, pp. 244–275, paras. 300–344. Environmental harms from wildfires across the liberated territories also reflect a clear distinction along ethnic lines, between Azerbaijani-populated areas—including Aghdam, Fuzuli, and Gubadly, where "harms due to wildland fire prior to 2020 were concentrated". *See* **Annex 65** to Azerbaijan's Memorial, Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan*, p. 12. Armenia responds by arguing in its Preliminary Objections that "no specific cause has yet been identified". Armenia's Preliminary Objections, pp. 57–58, para. 115. This argument not only mischaracterizes the evidence attributing the losses to human activity during occupation, **Annex 65** to Azerbaijan's Memorial, Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan*, pp. 12, 14, but also makes clear that Armenia is arguing the merits by raising issues of causation, rather than a reason for dismissal at the preliminary objection stage.

**Figure 67 of Azerbaijan's Memorial:
Map of Environmental Harms in the Then-Occupied Territories,
Showing District-Level Population by Ethnic Origin**[151]



76. Armenia also attempts to argue that dismissal is appropriate because "Azerbaijan must resort to an 'inference'" that Armenia's conduct was ethnically motivated[152]. But, of course, drawing inferences that follow from the evidence is the essence of judicial fact-finding. In every case of purposeful racial discrimination—other than the comparatively unusual situation where a State has admitted that its purpose was to discriminate against a protected group—an inference of purpose must be drawn from the evidence of the State's concrete actions. Here, for example, ethnic Azerbaijanis were deprived of water, while

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[151] Azerbaijan's Memorial, p. 245, fig. 67.

[152] Armenia's Preliminary Objections, p. 54, para. 108.

water resources were re-directed for the benefit of ethnic Armenians; environmental harms were concentrated in Azerbaijani-populated areas, while Armenian-populated areas were spared; and culturally important natural monument trees in Azerbaijani-populated areas were destroyed, while the same types of trees in Armenian-populated areas received special protections. Specifically, evidence presented in Azerbaijan's Memorial demonstrates that monument trees that were historically and culturally important to *both* Azerbaijanis and Armenians were *only* destroyed in predominantly Azerbaijani districts and protected where Armenians reside, demonstrating unequivocally that the acts of destruction were *based on Azerbaijani national or ethnic origin*[153]. Armenia of course is free to offer actual evidence in support of its position when it

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[153] Azerbaijan's evidence demonstrates that more than 20 natural monument trees, including many centuries-old plane trees, were culled from the seven predominantly-Azerbaijani populated districts, despite being historically and culturally important to Azerbaijanis (and thus designated as natural monuments by Azerbaijan, subject to environmental protections). *See* **Annex 65** to Azerbaijan's Memorial, Industrial Economics, Inc. and RESPEC, Inc., *Report on Environmental and Natural Resource Harms During the Period of the Republic of Armenia's Invasion and Occupation of Sovereign Lands of the Republic of Azerbaijan*, Annex D; **Annex 35** to Azerbaijan's Memorial, Letter from Vulgar Karomiv, Deputy Minister of the Ministry for Ecology and Natural Resources of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, dated 11 January 2023, No. 3-14/2-052-D-03-08/2023 (with enclosures). In contrast, natural monument trees in predominantly-Armenian populated areas remain standing, and even maintain markers of their historical and cultural importance to Armenians. For example, one such protected plane tree still standing in Hadrut—a city that had a predominantly Armenian population prior to the occupation and during Soviet times—is marked by a plaque that proclaims, in Armenian, Russian, and English: "This platan [plane tree] is considered to be holy. It is the witness of events taking place over the period of 900 years." Azerbaijan's Memorial, p. 259, para. 318; *ibid.*, p. 260, fig. 75. *See also* **Annex 35** to Azerbaijan's Memorial, Letter from Vulgar Karomiv, Deputy Minister of the Ministry for Ecology and Natural Resources of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, dated 11 January 2023, No. 3-14/2-052-D-03-08/2023 (with enclosures), figs. 25 & 26. Another eastern plane tree that survived the occupation in Hadrut, shown in Figures 1 and 2 of Azerbaijan's addendum to Annex 35, is marked with crosses carved into its bark. *See* **Annex 35-1**, Addendum to Annex 35 of Azerbaijan's Memorial, Letter from Vugar Karimov, Deputy Minister of the Ministry of Ecology and Natural Resources of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, dated 14 August 2023, No. 3-14/2-2460-D-03-08/2023 (with enclosure).

submits its counter-memorial, but as the Court determined with respect to a similar issue in *Ukraine v. Russia*, questions of what inferences may be drawn from the evidence are sufficiently factual in nature and tethered to the merits such that they are not a jurisdictional issue to be resolved on preliminary objections[154].

77. Armenia's further argument that "many of Armenia's alleged acts were *economically* motivated", and therefore could not have been "based on" Azerbaijani ethnic or national origin[155], rests on a fundamental misconception of what discrimination actually is. It is a stark reality that many acts of racial discrimination are motivated by a desire for conferring economic benefit or inflicting economic harm and thereby advantaging one racial group to the detriment of another racial group, as was the case here[156]. Thus, even if one credits Armenia's current justification that the motivation for the conduct itself was "economic development", the *purposeful concentration* of such development and resulting environmental harms in areas that were predominantly populated by Azerbaijanis prior to occupation—while areas that had been populated by Armenians remained comparatively unharmed[157]—was "based on" the fact that the populations of these areas were Azerbaijani. This fact, and not the presence or

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[154] *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 586, para. 63.

[155] Armenia's Preliminary Objections, p. 53, para. 107.

[156] Here, not only did Armenians not suffer the same environmental harms as Azerbaijanis, but they benefited from Armenia's pillaging of Azerbaijani areas. *See, e.g.*, Azerbaijan's Memorial, pp. 252–253, paras. 310–311 (outlining how the pillaging of valuable timber resources benefitted Armenia via increased timber exports, and by clearing the way for mining, hydropower, and construction of infrastructure); *ibid.*, pp. 367–268, paras. 329–331 (describing the over-exploitation of mineral resources by Armenia via strip mining in Azerbaijani districts and cities); *ibid.*, pp. 274–275, para. 343 (describing the deliberate diversion of water resources from Azerbaijanis to areas populated by Armenians).

[157] *See* Azerbaijan's Memorial, pp. 244–245, para. 301; pp. 257–259, para. 316.

absence of an underlying economic motivation or impact, is what brings the claims within the scope of CERD. At most, Armenia's argument reduces to an attempt to convince the Court that the acts were not racial discrimination because of an allegedly innocent economic motive; to the extent that argument is even relevant, it is yet again an issue for Armenia to argue at the merits stage.

78. Finally, contrary to Armenia's assertions in its Preliminary Objections, Azerbaijan's claims in this case have nothing to do with transboundary pollution of rivers that flow through Armenia. Those transboundary harms are distinct from the unequal treatment of Azerbaijani-populated and Armenian-populated areas in Garabagh and its surrounding areas, which is the subject of Azerbaijan's claims under CERD in this case. Accordingly, there is no relevance to Armenia's assertion that, in separate proceedings, "Azerbaijan has brought claims against Armenia for the alleged transboundary pollution of rivers that flow through Armenia" into Azerbaijan, or to Armenia's remark that "it is difficult even to conceive of a scenario in which a State might use such harm as a form of differential treatment to target a particular group"[158]. Because no such claims have been asserted here, Armenia's observations are beside the point.

2. The environmental destruction impaired the equal exercise and enjoyment of Azerbaijanis' human rights and fundamental freedoms.

79. Azerbaijan's claims describe a difference in treatment based on ethnic or national origin that had both the purpose and effect of impairing the recognition, enjoyment, or exercise of Azerbaijanis' fundamental rights to health and property. Whether in the environmental context or any other context, such a difference in treatment is capable of constituting a violation of CERD. Accordingly, Armenia's argument that the discriminatory environmental harms of which Azerbaijan

[158] Armenia's Preliminary Objections, p. 53, para. 106.

complains "do not fall within the scope of . . . the right to health or the right to property"[159] under CERD fails.

(a) Armenia misinterprets the right to health, particularly as exercised in the context of a right of return.

80. Armenia misconstrues Azerbaijan's claims invoking the right to health by arguing that "Azerbaijan's position is not that Azerbaijanis are *in fact* suffering harm to their health as a result of Armenia's alleged environmental harm" but that "[t]he nominal harm complained of is that [Azerbaijanis] are being prevented from exercising" a new right "to return to a healthy environment", which Armenia argues is not supported under CERD[160]. Armenia's arguments misstate CERD's protection of equal recognition, enjoyment and exercise of the rights implicated under Article 5, as well as Azerbaijan's claims.

81. As an initial matter, Azerbaijan's Memorial includes claims of violations of the right to health and the right to water under CERD based on discriminatory conduct by Armenia that has in fact caused harm to the health of Azerbaijanis. This includes, for example, Azerbaijanis living in areas adjacent to the then-occupied territories who were deprived of "access to water needed for safe human consumption, sanitation, and irrigation of crops" as a result of Armenia's deliberate manipulation of the Sarsang Reservoir[161]. Armenia's Preliminary Objection does not address such allegations, which are thus not subject to its argument of dismissal.

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[159] Armenia's Preliminary Objections, pp. 65–66, para. 131.

[160] Armenia's Preliminary Objections, pp. 66–67, paras. 133–134.

[161] *See supra* paras. 39, 74. *See also* Azerbaijan's Memorial, pp. 269–273, para. 333–342.

82. By the plain terms of CERD, the Court has jurisdiction over allegations of discriminatory environmental harms impacting human health, and Armenia is wrong to suggest that that jurisdiction is defeated solely because such harms are also accompanied by the displacement or forced expulsion of the affected population[162]. Article 5 identifies a non-exhaustive list of fundamental rights that must be protected without distinction on the basis of race, colour, or national or ethnic origin[163], including economic and social rights such as the right to "public health" recognized in 5(e)(iv). That right has been understood to encompass a right to "'the highest attainable standard of physical and mental health' . . . embracing a 'wide range of socio-economic factors that promote conditions in which people can lead a healthy life' including food, nutrition and sanitation, housing and work conditions and a healthy environment"[164]. Nothing in CERD[165]

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[162] Armenia's Preliminary Objections, p. 68, para. 139 ("There can be no violation of the right to health or even the right to a healthy environment of ethnic Azerbaijanis when, according to Azerbaijan itself, they did not live in areas in which the alleged environmental damage took place").

[163] *See* Azerbaijan's Memorial, pp. 332–334, paras. 423–424; *ibid.*, p. 353, para. 460.

[164] **Annex 4**, P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 374. *See also* CESCR, *General Comment No. 14 on the Right to the Highest Attainable Standard of Health*, document EC/C.12/2000/4 (2000), para. 4 (defining the right to health as embracing a "wide range of socio-economic factors that promote conditions in which people can lead a healthy life", including food, nutrition and sanitation, housing and work conditions, and a healthy environment); CERD Committee, First draft General recommendation No. 37 (2023) on Racial discrimination in the enjoyment of the right to health, document CERD/C/GC/R. 37, para. 15 (expressing concern over the "expan[sion] of disease vectors" by climate change, "by destroying infrastructure and by reducing access to underlying determinants of health, such as water and nutrition"); CERD Committee, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile*, document C/CHL/CO/19-21 (23 September 2013), para. 13 (noting the negative effects caused by the development of natural resources); CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Slovakia*, document CERD/C/304/Add.110 (1 May 2001), para. 14 (poor access to clean drinking water, adequate sanitation, and high exposure to environmental pollution in Roma settlements); Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Good practices on the right to a safe, clean, healthy and sustainable environment*, document A/HRC/43/53 (30 December 2019), para. 2 (right to health includes a

supports Armenia's invented limitation that the right to enjoyment of health on an equal footing is impaired only where a protected group demonstrates "current health detriments" or faces "potential . . . health risks" in the area where the group is "physically resident"[166]—particularly where, as here, the creation of an unhealthy environment prevents the return of an ethnic group to the area[167]. For example, mining activities on lands significant to the Western Shoshone tribe in the United States have been considered to constitute racial discrimination infringing the "right to health", including *because* that activity prevented the tribe's "access to, and use of, such areas"[168].

83. As set out in Azerbaijan's Memorial, Armenia's decades-long campaign of ethnic cleansing and racial segregation included the destruction of

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right to "clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems."); CERD Committee, First draft General recommendation No. 37 (2023) on Racial discrimination in the enjoyment of the right to health, document CERD/C/GC/R. 37, paras. 8, 45 (the right to health is a "non-restrictive" rights complex that includes the right to a healthy environment); **Annex 4**, P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 374 (the right to health is inherently "'related to and dependent upon the realization' of a range of other human rights") (citing CESCR, *General Comment No. 14 on the Right to the Highest Attainable Standard of Health*, document EC/C.12/2000/4 (2000), para. 3).

165 CERD art. 1(1). *See also* CERD arts. 2, 5.

166 Armenia's Preliminary Objections, p. 67, para. 136.

167 *See, e.g.*, Azerbaijan's Memorial, p. 256, para. 313; *ibid.*, pp. 260–261, para. 319; *ibid.*, pp. 263–264, para. 325; *ibid.*, p. 266, para. 328; *ibid.*, p. 361, para. 473.

168 CERD Committee, *Decision 1(68) on the United States of America*, document CERD/C/USA/DEC/1 (11 April 2006), paras. 7–8. *See also, e.g.*, *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010*, pp. 55–56, para. 101; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order on Provisional Measures of 22 September 1995, I.C.J. Reports 1995,* Dissenting Opinion of Judge Weeramantry, p. 342 (discussing the precautionary principle, "a principle which is gaining increasing support as part of the international law of the environment", as proscribing activities that "threaten[] environmental degradation" and may have a significant effect on human health until such time as the activities are proven not to have such effect).

water infrastructure in a manner that adversely affected only Azerbaijanis[169]; pollution of the soil and water in Azerbaijani districts[170]; destruction of forests in Azerbaijani districts[171]; and impairment of Azerbaijanis' access to fertile agricultural lands necessary for the production of food[172], including by barring Azerbaijanis from returning to their homelands, neglecting water infrastructure in those areas, and permitting wildfires to burn freely though those areas[173]. These factual allegations implicate equal enjoyment of the right to health under 5(e)(iv), as well as a host of other interrelated rights protected under CERD, including the right to return, the right to life, and the rights to food and water. In particular, the right to return is inextricably linked to the right to health and is especially important where, as here, Azerbaijanis depended on the specific natural environment of the liberated territories for their physical and mental health, including to engage in traditional livelihoods and to cultivate food, and where the natural environment held particular cultural importance to Azerbaijanis[174]. Armenia cannot evade its responsibility under CERD by arguing that Azerbaijanis "did not live in areas in which the alleged environmental damage took place"[175] when Azerbaijanis were forcibly expelled from those areas by Armenia, and have an unquestioned right to return to those areas. Just as the United States' conduct implicated the right to the health of the Western Shoshone peoples who were

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[169] Azerbaijan's Memorial, pp. 260–262, paras. 319–322. *See also ibid.*, pp. 16–17, para. 32; *ibid.*,
pp. 339–341, paras. 435–437; *ibid.*, p. 394, para. 533.

[170] Azerbaijan's Memorial, pp. 267–268, paras. 329–331. *See also ibid.*, pp. 16–17, para. 32; *ibid.*, p. 394, para. 533.

[171] Azerbaijan's Memorial, pp. 246–260, paras. 303–318. *See also ibid.*, pp. 16–17, para. 32; *ibid.*, p. 394, para. 533.

[172] Azerbaijan's Memorial, pp. 262–266, paras. 323–328. *See also ibid.*, pp. 16–17, para. 32; *ibid.*, p. 394, para. 533.

[173] *See, e.g.*, Azerbaijan's Memorial, p. 266, para. 328; *ibid.*, p. 266, para. 327; *ibid.*, pp. 255–257, paras. 312–316. *See also ibid.*, pp. 16–17, para. 32; *ibid.*, p. 394, para. 533.

[174] *See* Azerbaijan's Memorial, pp. 238–243, paras. 293–299; *ibid.*, pp. 262–265, paras. 323–326.

[175] Armenia's Preliminary Objections, p. 68, para. 139.

denied access to areas of their homelands by threatening environmental damage to those areas, so too is the environmental harm alleged by Azerbaijan "capable of having an adverse effect on the enjoyment"[176] of displaced Azerbaijanis' right to health as protected under CERD.

84. Azerbaijan's claims with regard to environmental destruction and degradation by Armenia that either impaired or threatened to impair Azerbaijanis' right to health on the basis of their ethnic or national origin thus fall within the provisions of CERD.

(b) Armenia misinterprets the right to property.

85. Armenia's suggestion that discriminatory environmental harms can only implicate the right to property in cases involving "indigenous peoples resident on their traditional lands"[177] has no grounding in the text or purpose of CERD. Article 1(1) defines racial discrimination broadly to include any discrimination on the basis of "race, colour, descent or national or ethnic origin", and makes no distinction between indigenous peoples and other ethnic and national groups[178]. Indeed, nothing in CERD even mentions indigenous peoples

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176 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 595, para. 96.

177 Armenia's Preliminary Objections, pp. 69–70, para. 141.

178 CERD, art. 1(1). *See also, e.g.*, CERD Committee, *Concluding observations on the combined eighteenth to twentieth periodic reports of Brazil*, document CERD/C/BRA/CO/18-20 (19 December 2022), paras. 47–48 (noting its concerns that "mining activities, deforestation and logging", as well as "environmental destruction . . . and the subsequent extraction of natural resources exposes Indigenous *and Quilombola* communities to significant health hazards") (emphasis added); CERD Committee, *Concluding observations on the combined fourth to eighth reports of Thailand*, document CERD/C/THA/CO/4-8 (10 February 2022), para. 27 (noting "with concern the discriminatory effect of the State party's various forestry and environment-related laws and regulations, and their implementation, on *ethnic groups* and indigenous peoples living in forests") (emphasis added).

as such, although discrimination against such groups falls within the general definition of racial discrimination in Article 1(1).

86. For example, in its Concluding Observations on the United States, the CERD Committee has expressed concerns about environmental discrimination directed toward racial and ethnic minority communities in the United States separate and apart from members of indigenous tribes. The Committee observed that "*racial and ethnic minorities, as well as indigenous peoples*, continue to be disproportionately affected by the negative health impact of pollution caused by . . . extractive and manufacturing industries", and noted its concerns over "the adverse effects of economic activities related to the exploitation of natural resources . . . on the rights to *land*, health, environment and the way of life of indigenous peoples *and minority groups*"[179]. The periodic report of the United States, to which the CERD Committee was responding, contained multiple references to "environmental justice" as an issue affecting "minority" communities in the United States, without any mention in that context of indigenous peoples living on their traditional lands[180]. Similarly, in its Concluding Observations on Norway, the CERD Committee expressed concerns about "the effects on indigenous peoples *and other ethnic groups* . . . including the

[179] CERD Committee, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, document CERD/C/USA/CO/7-9 (25 September 2014), para. 10. *See also* CERD Committee, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, document CERD/C/USA/CO/10-12 (21 September 2022), para. 45.

[180] *See, e.g.*, CERD Committee, *Reports submitted by States parties under Article 9 of the Convention, Seventh to ninth periodic reports of States parties due in 2011, United States of America*, document CERD/C/USA/7-9 (13 June 2013), pp. 47–48, para. 144.

impact on their way of life and on the environment, of the activities by transnational corporations"[181].

87. Armenia's discriminatory conduct has prevented—and continues to prevent—Azerbaijanis from fully realizing the rights to access, use, and enjoy their property[182]. Accordingly, Azerbaijan has asserted a claim within the Court's jurisdiction under CERD, and Armenia's preliminary objection should be rejected.

C. Azerbaijan has not asserted an independent CERD claim based solely on Armenia's laying of landmines and booby traps.

88. Finally, Armenia dedicates a considerable portion of its objection to the Court's jurisdiction *ratione materiae* to the argument that Azerbaijan's "claims and contentions concerning the alleged placement of landmines and booby traps . . . are not acts of racial discrimination that fall within the scope of the CERD"[183]. But this objection is irrelevant because Azerbaijan does not allege an independent violation of CERD based on Armenia's placement of landmines and booby traps in Azerbaijan's territory; rather, it presents evidence as to the employment of those weapons as a tool in Armenia's campaign of ethnic cleansing.

89. Azerbaijan's Memorial presents a broad evidentiary record to demonstrate that as part of its ethnic cleansing campaign, Armenia took and continues to take steps to prevent Azerbaijanis from returning to their homes through force, intimidation, confiscation of legal rights in property, physical

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[181] CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, document CERD/C/NOR/CO/19-20 (8 April 2011), para. 17 (emphasis added).

[182] This includes the reserves, sanctuaries, and reservoirs on the then-occupied territories of Azerbaijan. *See* Azerbaijan's Memorial, pp. 238–243, paras. 294–298.

[183] Armenia's Preliminary Objections, p. 41, para. 80.

destruction of buildings and infrastructure, and other means[184], thus denying Azerbaijanis of rights protected under CERD Articles 2 and 5[185]. Evidence that Armenia planted and continues to plant landmines and booby traps in areas to which Azerbaijanis expect to return represents just one element of Armenia's continued attempts to bar Azerbaijanis from returning home[186]. Azerbaijan has not, however, contended that the planting of landmines and booby traps constitutes a stand-alone violation of CERD[187]. Azerbaijan is entitled to deference with respect to this framing[188].

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[184] Azerbaijan's Memorial, pp. 346–349, paras. 449–452 (describing Armenia's use of "physical barriers, military fortifications, landmines, and snipers, and deploying threats and intimidation along the Line of Contact and beyond" as evidence that it prevented Azerbaijanis from returning to the then-occupied territories, and describing Armenia's "systematic destr[uction of] houses, agricultural buildings and public utilities, and la[ying of] landmines" as evidence of Armenia's attempts to "prevent, delay, or hamper Azerbaijanis' efforts to return to their homes and resettle in the region" after the Second Garabagh War); *ibid.*, p. 394, para. 533 (describing the planting of landmines as one of four "steps by which Armenia sought to create, support, and maintain the monoethnic character of the then-occupied territories").

[185] Azerbaijan's Memorial, p. 344. *See also ibid.*, p. 393.

[186] *See* Azerbaijan's Memorial, p. 79, para. 116; *ibid.*, pp. 179–189, paras. 218–228; *ibid.*, pp. 183–184, para. 223; *ibid.*, pp. 220–229, paras. 273–283.

[187] Azerbaijan's Memorial, pp. 427–429, para. 591. *Cf. ibid.*, pp. 344–345, para. 446 (contending that Armenia's actions in violation of CERD included "placing landmines and destroying property *to prevent Azerbaijanis, for reasons of ethnic and national origin, from returning to the liberated territories even after the departure of the occupying Armenian forces*") (emphasis added); *ibid.*, pp. 347–348, para. 451 ("Landmines cannot distinguish between civilians and combatants, but by their placement, it is clear that *Armenia's landmines were intended as a barrier to Azerbaijanis returning to their homes*.") (emphasis added).

[188] *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 575, para. 24; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018* (I), pp. 308–309, para. 48 ("[T]he Court examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims.").

90. In raising its preliminary objection in relation to the planting of landmines and booby traps, Armenia does not deny that Azerbaijan's claims regarding Armenia's actions to expel persons of Azerbaijani origin from the formerly occupied territories and prevent them from returning are within the Court's jurisdiction under CERD. Nor can it. Those measures, as set forth in Azerbaijan's Memorial, have directly deprived persons of Azerbaijani national or ethnic origin the ability to exercise their fundamental rights. In the present case, the Court's 2021 December Order noted that "a policy of driving persons of a certain national or ethnic origin from a particular area, *as well as preventing their return thereto*, can implicate rights under CERD" and recognized that "such a policy can be effected through a variety of military means"[189]. It is for the Court to determine at the merits stage what weight to afford to each piece of evidence that Azerbaijan has presented in support of its claim that Armenia engaged in a sustained campaign of ethnic cleansing[190].

91. Because Azerbaijan does not assert an independent CERD claim based solely on Armenia's placement of landmines and booby traps, there is no claim that could be dismissed on that basis. Armenia's objection to the Court's jurisdiction *ratione materiae* with respect to landmines and booby traps is therefore irrelevant and must be rejected.

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189 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Order on Provisional Measures of 7 December 2021, I.C.J. Reports 2021*, p. 361, para. 53 (emphasis added).

190 *See, e.g.*, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, Declaration of Judge Donoghue, p. 653, para. 10; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment of 8 November 2019, I.C.J. Reports 2019*, p. 584, para. 58 ("At the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted").

92. Azerbaijan's Memorial does assert that Armenia's placement of landmines and booby traps contravenes the Court's 7 December 2021 Order on provisional measures, which requires the parties to "refrain from any action which might aggravate or extend the dispute . . . or make it more difficult to resolve"[191]. But the Court's jurisdiction over that claim is independent of Article 22 of CERD. The Court's jurisprudence establishes that provisional measures orders are binding and that the Court has jurisdiction over claims for violation of those orders[192]. In this context, Azerbaijan cites evidence of Armenia's placement of booby traps in civilian homes and planting of new landmines in Azerbaijan's territory after the signing of the Trilateral Statement[193] as a violation of the provisional measures order. Although Armenia includes this evidence in its footnote cataloguing Azerbaijan's factual and legal submissions related to landmines and booby traps[194], it falls outside of the scope of Armenia's Preliminary Objections as an allegation relating to Armenia's compliance with the Court's provisional measures order.

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191 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, *Order on Provisional Measures of 7 December 2021, I.C.J. Reports 2021*, pp. 430–431, para. 76.

192 *See LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001,* pp. 483–484, para. 45 ("Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with."); *ibid.*, p. 506, para. 109 ("[O]rders on provisional measures under Article 41 [of the ICJ Statute] have binding effect"); *Allegations of Genocide Under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order on Provisional Measures of 16 March 2022, I.C.J. Reports 2022*, p. 18, para. 84.

193 Azerbaijan's Memorial, pp. 414–415, paras. 567–570.

194 Armenia's Preliminary Objections, p. 41, para. 80 n.123.

IV.
SUBMISSIONS

93. For the foregoing reasons, Azerbaijan requests that the Court dismiss each of the preliminary objections that Armenia sets forth in its submission of 21 April 2023 on the ground that neither of those objections is a valid objection to the Court's jurisdiction or to the admissibility of Azerbaijan's claims.

94. In the alternative, Azerbaijan requests that the Court dismiss each of those preliminary objections on the ground that each raises issues that should be deferred to the hearing on the merits.

Respectfully submitted,

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Elnur Mammadov
Agent of the Republic of Azerbaijan
21 August 2023

CERTIFICATION

I certify that all Annexes are true copies of the documents referred to and that all Annexes are in their original language.

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Elnur Mammadov
Agent of the Republic of Azerbaijan
21 August 2023

LIST OF ANNEXES

Annex 1	Extracts from S. Rosenne, *The Law and Practice of the International Court, Volume II* (Brill, 2016)
Annex 2	Extracts from K. Schmalenbach, "Article 26: *Pacta sunt servanda*", *in Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018)
Annex 3	Extracts from J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013)
Annex 4	Extracts from P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (Oxford University Press, 2016)
Annex 35-1	Addendum to Annex 35 of Azerbaijan's Memorial, Letter from Vugar Karimov, Deputy Minister of the Ministry of Ecology and Natural Resources of the Republic of Azerbaijan, to Elnur Mammadov, Deputy Foreign Minister of the Republic of Azerbaijan, dated 14 August 2023, No. 3-14/2-2460-D-03-08/2023 (with enclosure) (original in English)