

DECLARATION OF JUDGE YUSUF

Disagreement with the approach and conclusion of the Court on jurisdiction ratione temporis — It is neither about (non-)retroactivity of treaty obligations nor about erga omnes partes obligations — Article 22 of CERD contains no limit to the scope of jurisdiction ratione temporis — Obligations arise for Armenia from the date it became bound by CERD — Any alleged breach after such date attributable to Armenia would fall within CERD — As a State party Azerbaijan is entitled to invoke CERD for any such breach by Armenia.

1. I disagree with the approach and the conclusion of the Court on the temporal scope of its jurisdiction under the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter “CERD” or the “Convention”).

2. In paragraph 41, the Judgment highlights two questions in relation to the interpretation and application of Article 22 of CERD in order to determine the Court’s temporal jurisdiction. The questions are formulated as follows:

“first, whether the principle of non-retroactivity of treaties has an effect on the Court’s jurisdiction under Article 22 of CERD; and second, whether the *erga omnes partes* character of certain obligations under CERD may affect the temporal scope of the Court’s jurisdiction under CERD”.

In the subsequent paragraphs, the reasoning in the Judgment is organized under the two questions and reaches the conclusion that the Court has no jurisdiction over the events that are alleged to have occurred during the period between 23 July 1993, when CERD entered into force for Armenia, and 15 September 1996, when CERD entered into force for Azerbaijan.

3. It is my view that this entire approach is misleading. The dispute over the Court’s jurisdiction *ratione temporis* is neither about (non-)retroactivity of treaty obligations nor about assessing whether the *erga omnes partes* obligations under CERD may affect the Court’s jurisdiction. For the former, neither of the Parties has challenged the non-retroactivity of the treaty obligations under CERD. There is no dispute on that. For the latter, the correlation between obligations *erga omnes partes* and the jurisdiction of the Court is irrelevant. The jurisprudence of the Court has been consistent on this issue, as noted in paragraph 48 of the Judgment itself (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64; *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

4. The questions are also misleading because they confuse the substantive question with the procedural one. In the present case, the substantive question is whether Armenia had an obligation to act in a certain manner with respect to its obligations under CERD at the time it is alleged to have breached those obligations. The procedural question is whether the Court had the consent of the Parties when the dispute was submitted to it.

5. Consequently, what matters here is, first, whether Armenia had an obligation to act in a certain way under the provisions of CERD at the time the alleged breach by Armenia took place. The answer to that question is yes. By ratifying CERD on 23 July 1993, Armenia committed itself to the elimination of racial discrimination on any prohibited ground by all appropriate means. In other words, from 23 July 1993, any alleged breach of obligations regarding discrimination on racial or

ethnic grounds that are attributable to Armenia would fall within the scope of CERD. The second question that is relevant here is whether the Court had the consent of the Parties when the dispute was brought to it. The answer is also affirmative. The dispute between the Parties over Armenia's non-compliance with CERD has emerged at a time when both States were parties to the Convention.

6. To the extent that the temporal scope of the compromissory clause is at issue, the fact that Azerbaijan became a party to CERD on a subsequent date, namely 15 September 1996, means that it became entitled from that date to request the Court to rule on its dispute with Armenia. Nonetheless, this does not change the fact that Armenia had been subject to the substantive obligations under CERD from 23 July 1993, the date on which it became a party to CERD. In that regard, whether Azerbaijan may invoke an alleged non-compliance of Armenia with CERD during the interval between 23 July 1993 and 15 September 1996 is a question not addressed in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* or in the International Law Commission's Articles on State Responsibility. Thus, the references in the Judgment to *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* or to the International Law Commission's Articles are of no help. Instead, the jurisprudence of the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* provides a clear guidance.

7. However, in paragraph 49 of today's Judgment, the comparability and applicability of the latter case to the current situation is rejected on the basis that the 1996 Judgment in *Bosnia and Herzegovina v. Yugoslavia* was rendered "in a particular context of State succession in the process of the dissolution of the former Socialist Federal Republic of Yugoslavia". This amounts to a misreading of that Judgment. In *Bosnia and Herzegovina v. Yugoslavia*, the Court addressed jurisdiction *ratione personae* (paras. 17-26), jurisdiction *ratione materiae* (paras. 27-33) and jurisdiction *ratione temporis* (para. 34) separately. The issue of State succession was considered by the Court in the part on jurisdiction *ratione personae*, while the temporal scope of Article IX was tackled in a different part on jurisdiction *ratione temporis* and was discussed *de novo*. This is indicated in the first sentence of paragraph 34 of that Judgment which reads as follows:

"Having reached the conclusion that it has jurisdiction in the present case, both *ratione personae* and *ratione materiae* on the basis of Article IX of the Genocide Convention, it remains for the Court to specify the scope of that jurisdiction *ratione temporis*." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34.)

8. In that Judgment, the Court stated that, with regard to its jurisdiction *ratione temporis*, it will "confine itself" to the following observation:

"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 . . . The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in [its Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*]." (*Ibid.*)

9. This observation has been reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. The Court in its 2008 Judgment on preliminary objections echoed that “there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*” (*I.C.J. Reports 2008*, p. 458, para. 123). In its 2015 Judgment on the merits, the Court made the following observation:

“[T]he absence of a temporal limitation in Article IX is not without significance but it is not, in itself, sufficient to establish jurisdiction over that part of Croatia’s claim which relates to events said to have occurred before 27 April 1992.” (*I.C.J. Reports 2015 (I)*, p. 49, para. 93.)

The Court further concluded that “the *substantive provisions* of the [Genocide] Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention” (*ibid.*, p. 51, para. 100; emphasis added). Thus, the issue is not so much about the date when the applicant State became party to the Convention, but the date when the respondent State became bound by it. Armenia has been subject to the substantive obligations under CERD not only from 15 September 1996, when CERD entered into force for Azerbaijan, but from the date on which Armenia itself became a party to CERD on 23 July 1993.

10. Moreover, the logic in the Court’s above observation in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* is quite clear. A compromissory clause gives jurisdiction to the Court unless the clause itself limits the scope of jurisdiction *ratione temporis* or the parties make a reservation to it for that purpose. Further limitation may apply subject to the temporal scope of other provisions of the relevant international agreements. But this is to be examined on other grounds rather than the compromissory clause itself. An example of the limit to the scope of temporal jurisdiction in a compromissory clause is the declaration made by France in *Phosphates in Morocco (Italy v. France)*. In that declaration, France accepted the Court’s jurisdiction for “any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification”. The Court observed:

“Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, *a revival of old disputes*, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned *was not in a position to foresee* the legal proceedings to which these facts and situations might give rise.” (*Phosphates in Morocco, 1938, P.C.I.J. (Series A/B) No. 74*, p. 24; emphasis added.)

11. In the present case, like Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the compromissory clause in Article 22 of CERD contains no limit to the scope of jurisdiction *ratione temporis*. This is, of course, without prejudice to the temporal scope of any substantive obligations under the Convention, which, as discussed before, commenced for Armenia from 23 July 1993, the date on which Armenia became a State party to CERD. In addition, the concern for “revival of old disputes” or that a party may not be “in a position to foresee the legal proceedings”, as was the case in *Phosphates in Morocco (Italy v. France)*, does not arise here because the substantive obligations already existed since 23 July 1993 and Armenia was in a position to foresee the possibility of legal proceedings for its alleged non-compliance with the Convention not only from Azerbaijan, but also from other States. Such proceedings could have indeed been brought against it by other States parties to CERD, in view of the obligations *erga omnes partes* of CERD.

12. In light of the above considerations, it is my opinion that the obligations of Armenia regarding the elimination of racial discrimination on any prohibited ground and by all appropriate means commenced from 23 July 1993, the date on which Armenia became a party to CERD. On the other hand, with effect from 15 September 1996, the date on which Azerbaijan became a party to CERD, Azerbaijan has been entitled to invoke Armenia's non-compliance with its obligations under CERD from the date the latter became a party to the Convention. Therefore, it does not matter whether the contested acts of Armenia took place before 15 September 1996 so long as they occurred after 23 July 1993. Given that Armenia had an obligation under CERD to act in a certain manner since 23 July 1993, and that the Court had the consent of the Parties when the dispute was brought to it, the Court has jurisdiction over the events that are alleged to have occurred during the period between 23 July 1993 and 15 September 1996.

(Signed) Abdulqawi Ahmed YUSUF.
