

**JOINT DISSENTING OPINION OF JUDGES NOLTE, CHARLESWORTH,
CLEVELAND AND TLADI**

Standard for the determination of jurisdiction ratione materiae— Certain claims of environmental harm in breach of CERD not excluded— Environmental harm as capable of constituting racial discrimination under CERD— Question of consistency with the Court’s jurisprudence— Relevance of whether alleged environmental harm impacted exclusively ethnic Azerbaijanis or involved non-discriminatory motivations, and of the fact that ethnic Azerbaijanis were not present in the affected territories— Determination of facts as question for the merits— Right to return.

1. The Court finds that it has no jurisdiction over most of Azerbaijan’s claim that Armenia, by causing environmental harm, acted in a racially discriminatory way. For the reasons set out below, we believe the Court’s conclusion is inconsistent with its jurisprudence, including today’s Judgment on preliminary objections in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. We have therefore voted against the decision to uphold the third preliminary objection.

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2. Armenia’s third preliminary objection contends that the Court does not have jurisdiction *ratione materiae* over most of Azerbaijan’s claims concerning environmental harm because the acts of which Azerbaijan complains in Chapters II. D. and IV. D. of its Memorial do not constitute a distinction, exclusion, restriction or preference “based on” national or ethnic origin, within the meaning of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD” or “Convention”) (Judgment, para. 79).

3. To start with, we note Azerbaijan’s contention that

“the acts of environmental destruction and degradation allegedly committed by Armenia form part of its broader claim that Armenia carried out a campaign of ethnic cleansing against Azerbaijanis, on the basis of their national or ethnic origin” (Judgment, para. 87).

In paragraph 78, the Court is careful to observe that Armenia’s third preliminary objection is limited to the claims that are contained in Chapters II. D. and IV. D. of Azerbaijan’s Memorial. The Court’s Judgment thus excludes only these separate claims of environmental harm in breach of CERD. It thereby recognizes that Azerbaijan remains free, at the merits phase, to adduce relevant evidence of environmental harm in support of its other claims, such as those regarding ethnic cleansing (e.g. Judgment, para. 76: “The Court will consider the arguments and evidence submitted by Azerbaijan in support of its submissions concerning alleged acts of ethnic cleansing at the merits stage”), and those involving environmental harm allegedly caused deliberately by Armenia’s “scorched earth” tactics (e.g. Azerbaijan’s Memorial, Chapter II. C. 3., para. 288: “burning of the forests in Lachin”).

4. The Court accepts that environmental harm can “in some cases” constitute racial discrimination within the meaning of the Convention (Judgment, para. 95). While CERD is not

designed to protect the environment, if acts causing environmental harm create a differentiation based on a prohibited ground under CERD, with the purpose or effect of impairing the enjoyment of human rights, they violate CERD. For example, if a State defoliates an area occupied by an ethnic group, with the aim of dispersing the group so that members of another ethnic group can appropriate resources in the area, such conduct will simultaneously constitute damage to the environment and an act of racial discrimination.

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5. The Court recalls that, at this preliminary stage of the proceedings, it need not satisfy itself that the acts of which Azerbaijan complains actually constitute “racial discrimination” within the meaning of Article 1, paragraph 1, of CERD. Instead, the Court must ascertain only whether the alleged acts, if established, are capable of constituting violations of CERD and thus fall within the scope of the Convention (Judgment, para. 91)¹.

6. In other words, the merits involve both a decision as to whether the alleged acts are proven and the legal qualification of these acts as constituting racial discrimination within the meaning of CERD. This, in turn, requires deciding whether the alleged acts in fact give rise to differential treatment between persons belonging to different groups defined by reference to one of the prohibited grounds, and whether this differential treatment would have the purpose or effect of nullifying or impairing the equal enjoyment by the persons involved of their rights. Thus, in *Ukraine v. Russian Federation* at the preliminary objections phase, the Court limited itself to observing the broad formulation of the rights and obligations contained in CERD, before concluding that the measures complained of by the Applicant were “capable of having an adverse effect on the enjoyment of certain rights protected under CERD”².

7. Having acknowledged its usual standard for the determination of its jurisdiction *ratione materiae* (Judgment, para. 90), however, the Court fails to apply it. The Court instead offers a selective description of Azerbaijan’s claims, and then engages in an analysis involving the merits, in a manner that is inappropriate for the preliminary objections phase.

8. Azerbaijan contends both that environmental harms were purposely directed at ethnic Azerbaijanis and traditionally Azerbaijani-populated areas (e.g. Judgment, para. 88: Armenia “deliberately degrad[ed] the natural environment”), and that, regardless of purpose, such harms had a disproportionate effect on Azerbaijanis as a distinct group defined by national or ethnic origin (Judgment, para. 89). Azerbaijan maintains that this conduct took several forms, including pillaging, exploitation and neglect of natural resources to benefit Armenians and disadvantage ethnic Azerbaijanis, and destruction of natural resources in areas from which ethnic Azerbaijanis had been forcibly expelled in order to prevent their return.

¹ See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening), Preliminary Objections, Judgment of 2 February 2024*, para. 136; *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, I.C.J. Reports 2019 (II)* (hereinafter “*Ukraine v. Russian Federation*”), p. 595, para. 94.

² *Ukraine v. Russian Federation*, p. 595, para. 96.

9. The Court's conclusion that Azerbaijan's allegations of discriminatory environmental harm are not "capable of constituting racial discrimination" (Judgment, para. 99) is based on three arguments: that the alleged destruction did not exclusively impact ethnic Azerbaijanis; that it involved non-discriminatory motivations; and that Azerbaijanis were not present in the affected territories. In so doing, the Court mischaracterizes Azerbaijan's claims, misapplies CERD, and engages in a premature analysis of the merits.

10. First, the Court concludes with respect to water infrastructure that the alleged conduct affected Armenians as well as ethnic Azerbaijanis, and therefore, "if established . . . , *could not be* based on a prohibited ground under Article 1, paragraph 1, of CERD" (Judgment, para. 97, emphasis added). Azerbaijan contended, however, that Armenia "deliberately diverted and mismanaged" water resources in order to harm ethnic Azerbaijanis (Judgment, para. 86). If Armenia diverted water resources in order to harm ethnic Azerbaijanis, this would constitute discrimination, regardless of whether Armenians might also be harmed. This would also be true for Azerbaijan's effects-based discrimination claim, because it is inherent in a claim of disparate adverse impact that members of other groups will also have been affected. The Court disregards these elements.

11. Moreover, the issue whether Armenia did, in fact, engage in racial discrimination, whether purpose or effect-based, is one for the merits. The Court cannot, without an evaluation of evidence, reasonably conclude that the harms alleged could not be directed at Azerbaijanis simply because ethnic Armenians were also affected. As the majority concedes, the determination whether the acts alleged by Azerbaijan actually constitute racial discrimination concerns "issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by [Azerbaijan], and [is] properly a matter for the merits" (Judgment, para. 91, quoting *Ukraine v. Russian Federation*, p. 595, para. 94).

12. Second, the Court invokes Azerbaijan's own statements to conclude that alleged acts of deforestation and mining exploitation were "either commercially motivated or due to neglect and mismanagement" (Judgment, paras. 95-96). In so doing, however, the Court ignores Azerbaijan's related contention that Armenia's commercial decisions and acts of neglect were themselves discriminatory. Azerbaijan asserts, for example, that Armenia "purposeful[ly] concentrate[ed]" economic development in locations "based on" the fact that they had been predominantly populated by Azerbaijanis. Indeed, under CERD, the fact that acts could have been commercially motivated or involved mismanagement does not preclude the possibility that they also involved racial discrimination. The question whether the alleged conduct was pursued for racially motivated reasons, for commercial reasons, or both, is a question for the merits.

13. Furthermore, the Court's rejection of jurisdiction *ratione materiae* here is also inconsistent with its holding today in *Armenia v. Azerbaijan*³. In that case, Armenia alleged that various harms committed by Azerbaijani forces were based on animus towards ethnic Armenians, while Azerbaijan contended that the acts alleged, if they occurred, had other motives. The Court rejected the possibility that a claim falls outside the Court's jurisdiction *ratione materiae* under CERD "if some alternative explanation or interpretation of the harm" is available⁴. Because Armenia had alleged acts that were capable of establishing distinctions based on national or ethnic origin, the Court upheld jurisdiction.

³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Preliminary Objections, Judgment of 12 November 2024* (hereinafter "*Armenia v. Azerbaijan*").

⁴ *Ibid.*, para. 90.

The phase of the merits is the time for resolving competing explanations for a differentiation of treatment⁵.

14. Finally, and most significantly, the majority fails to address a key claim in the case. The Court finds conclusive the fact that “persons of Azerbaijani national or ethnic origin were not present on the territories affected” (Judgment, para. 98). Azerbaijan accepts that, at the relevant time, ethnic Azerbaijanis no longer populated the areas as a result of the alleged ethnic cleansing policies of Armenia. However, it contends that the purpose of the environmental harm was to prevent ethnic Azerbaijanis from returning to the homes that they previously inhabited, in violation of the right to return.

15. Indeed, Azerbaijan presented evidence which it submits would prove that

“after the brutal expulsion of the Azerbaijanis from their homes, Armenia continued its campaign of ethnic cleansing, in particular by degrading the natural environment of the Azerbaijani territories to such an extent that it became unsustainable and unhealthy, making life impossible for ethnic Azerbaijanis when they returned.

. . . It is therefore of little consequence whether the ethnic Azerbaijanis were present when Armenia destroyed and degraded the environment in the Azerbaijani territories, since Armenia’s brutal campaign of ethnic cleansing was aimed at ensuring that the ethnic Azerbaijanis, upon their return, would be deprived of their right to enjoy their homeland, including the environment and the natural resources that form part of it. It is in that context of displacement of ethnic Azerbaijanis and the creation of obstacles to their return that Armenia has committed acts of racially discriminatory environmental harm.”⁶

The Agent of Azerbaijan further contended that

“the vast majority of the environmental destruction by Armenia was deliberately targeted at those seven districts. Again, these were districts to which everyone, including Armenia itself, was aware that a majority Azerbaijani population was expected to return if a settlement were to be reached. This explains the pattern of environmental destruction in those specific areas where Armenians did not live and Azerbaijanis were expected to return.”⁷

16. CERD protects a right to return without discrimination (see Article 5 (d) (ii)), as the Court acknowledges (Judgment, para. 89). In our view, it is perfectly possible for a measure to be designed to prevent persons belonging to a protected group from returning to their place of residence. Indeed, the right to return necessarily implies that members of the group are not currently present on the relevant territory. If it is established that a State party to CERD has deliberately carried out a “scorched earth” policy in order to prevent members of a particular ethnic group from returning to their homeland, as Azerbaijan alleges, these acts would constitute racial discrimination within the meaning of Article 2 of the Convention. At this stage, it is not clear whether Armenia deliberately pursued a “scorched earth” policy in order to prevent ethnic Azerbaijanis from returning. However, the Court should have given Azerbaijan the opportunity to prove its allegation that this was the case at the merits phase.

⁵ See also *Ukraine v. Russian Federation*, p. 595, paras. 94-97.

⁶ CR 2024/22, p. 59, paras. 22-23 (Boisson de Chazournes).

⁷ *Ibid.*, p. 14, para. 19 (Mammadov).

17. In any event, the presence or otherwise of the alleged victims in the relevant territory is an element to be assessed at the merits phase. At this stage, Azerbaijan's allegations were sufficient to establish the Court's jurisdiction *ratione materiae* without prejudice as to whether Azerbaijan can establish, first, that there was environmental harm and, second, that it was aimed at ethnic Azerbaijanis for the purpose of preventing them from returning to their homes.

18. We note in this context that the reference to a right to return "to one's country" in Article 5 (d) (ii) of CERD does not mean that this right is limited to situations in which persons have left their home State. In this case, indeed, the ethnic Azerbaijanis were internally displaced⁸. It is equally necessary to protect people against discrimination with respect to their right to return from areas within a State and to protect them against discrimination with respect to their right to return from outside the State.

19. We do not suggest that Azerbaijan's claims would be easy to establish on the merits. Armenia, in its oral submissions provided alternative explanations for the alleged harm, and also provided information suggesting "objective and reasonable" explanations for the location of the environmental harm⁹. For example, Armenia pointed to the fact that hydroelectric power stations (whose construction is alleged to have caused environmental harm) closely follow the flow of rivers¹⁰, and that the mining activities complained of by Azerbaijan are in areas with large mineral reserves¹¹. However, such facts are relevant to the merits and not to this stage of the proceedings. Likewise, the fact that ethnic Armenians were also affected, perhaps even predominantly affected, provides evidence that the Court would need to weigh against evidence that Azerbaijan would produce, as part of a determination whether the alleged environmental harm was designed to prevent the return of ethnic Azerbaijanis.

20. We further note that the Court never engages with Azerbaijan's allegations of discrimination based on disparate adverse effect under CERD. In this regard, we observe that claims based solely on allegations that environmental harm caused by a State has had a disparate adverse effect on the members of a protected group, even if the harm itself was not intentionally discriminatory, in some circumstances may be easily made and difficult to prove. However, the Court has set out a standard which, if faithfully applied, can prevent and contain excessive allegations. In *Ukraine v. Russian Federation*, the Court held, *inter alia*:

"[R]acial discrimination may result from a measure which is neutral on its face, but whose effects show that it is 'based on' a prohibited ground. This is the case where convincing evidence demonstrates that a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin, unless such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1. . . (see *Application of the International Convention on the Elimination of All Forms of Racial*

⁸ See also "General recommendation XXII: Article 5 and refugees and displaced persons" (1996), para. 2 (a), in which the CERD Committee interprets Article 5 of CERD as prescribing that "refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety".

⁹ CR 2024/23, p. 34, para. 3 (b) (Macdonald).

¹⁰ *Ibid.*, p. 38, para. 19 (Macdonald).

¹¹ *Ibid.*, p. 38, para. 20 (Macdonald).

Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021, pp. 108-109, para. 112).¹²

21. The present case demonstrates the importance of this standard. If Azerbaijan were able to show that Armenia is responsible for disparate damage to the environment in areas to which ethnic Azerbaijanis have a right to return without discrimination, it would be for Armenia to show that its conduct can be explained in a way that does not relate to the prohibited grounds under CERD.

22. We recognize that it could be burdensome for the Court to undertake such an assessment of the evidence, and that accepting its jurisdiction under CERD for claims relating to the environment might tempt other claimants to make unreasonable demands. Nonetheless, such concerns should not lead the Court to reject its jurisdiction in cases in which an applicant makes allegations which have some basis that a respondent has acted with the purpose or effect of discriminating against a protected group.

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23. This Court has long recognized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”¹³. When acts are based on prohibited distinctions, harm to the environment can fall within the scope of CERD. For all the above reasons, we do not share the majority’s view that many of Azerbaijan’s claims concerning environmental harm are not capable of constituting racial discrimination. In our view, Azerbaijan should have been given the opportunity to prove its allegations.

(Signed) Georg NOLTE.

(Signed) Hilary CHARLESWORTH.

(Signed) Sarah H. CLEVELAND.

(Signed) Dire TLADI.

¹² *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), Judgment of 31 January 2024*, para. 196.

¹³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29.