SEPARATE OPINION OF JUDGE CHARLESWORTH

Jurisdiction ratione temporis — *Distinction between jurisdiction and admissibility* — *Qualification of the first preliminary objection as one of legal standing.*

The applicability of CERD to pre-existing disputes — The need for explicit limitations in order to rule out pre-existing disputes from a treaty's temporal scope — The general rule on pre-existing disputes otherwise being covered by a treaty's temporal scope.

Azerbaijan's standing to bring claims under CERD — The possibility of invoking another State's responsibility for breaches of obligations that predate the applicant State's treaty membership — Relevance of the erga omnes (partes) *nature of the obligations — Practice of international human rights bodies — Permissibility of such claims when responsibility is invoked on behalf of a group of States or the international community — Potential legal bases of Azerbaijan's standing — Lack of standing for claims based on pre-existing disputes in cases where the alleged basis of legal standing is the individual injury of the State.*

Disagreement with the Court's qualification of the second preliminary objection as "without object" — Distinction between arguments that are without object and ones that cannot provide an adequate basis for a preliminary objection.

1. I have expressed misgivings about the decision of the majority in relation to Armenia's third preliminary objection jointly with my colleagues. In this separate opinion, I set out my views on the first and second preliminary objections raised by Armenia. I support the Court's conclusions on these two objections. In the case of the first preliminary objection, however, my decision rests on different reasoning than that presented in the Judgment; in the case of the second preliminary objection, I question its characterization as "without object" by the Court.

The first preliminary objection

2. Armenia's first preliminary objection rejects Azerbaijan's claims to the extent that they precede the date on which the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) became applicable as between the Parties — namely the date of the entry into force of CERD for Azerbaijan, 15 September 1996.

3. Armenia appears ambivalent as to whether this preliminary objection relates to the jurisdiction of the Court or to the admissibility of Azerbaijan's claims: essentially, it argues both bases (Judgment, paras. 28 and 29). This, of course, is not crucial — it is for the Court itself to characterize the objection as pertaining to jurisdiction or to admissibility[1]. In the Judgment, the Court frames its reasoning as relating to its jurisdiction (specifically, "its jurisdiction *ratione temporis*"), and it does not consider the question of the admissibility of the Applicant's claims (Judgment, paras. 29 and 64). In my view, however, the question of the Court's jurisdiction is more marginal than the Judgment suggests (Section A). Instead, the decisive question in the case, around which both the Parties' arguments and the Court's reasoning revolve, is whether the Applicant may invoke the

[1] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2016 (I)*, p. 123, para. 48; see also *Interhandel (Switzerland* v. *United States of America)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 1959*, p. 26.

Respondent's responsibility — in other words, whether the Applicant has legal standing. This is a question of admissibility[2] (Section B).

A. Temporal scope of the Court's jurisdiction

4. Central to the determination of the Court's jurisdiction is the concept of a dispute. In the life of a dispute, two points in time are potentially important: the time of inception — the date at which the events giving rise to the dispute occur[3] — and the time of referral — the date at which the dispute is submitted to the Court. All disputes have a time of inception, while only a few are submitted to the Court.

5. The title of the Court's jurisdiction sets conditions with respect to the time of referral, either explicitly or implicitly. In principle, all disputes must be submitted to the Court at a time when the relevant title of jurisdiction is valid[4]. In the present case, the title of jurisdiction — Article 22 of CERD — entered into force between the Parties on 15 September 1996 and was in force at the time of the filing of Azerbaijan's Application on 23 September 2021.

6. Not all titles of jurisdiction address the question of the time of inception, namely the question of whether the title covers disputes relating to events that took place at a given time only. Some of them do, however, usually by stipulating that the events to which the dispute relates must be subsequent to a specific date — what Rosenne terms the "exclusion date"[5]. For example, the European Convention for the Pacific Settlement of Disputes excludes "disputes relating to facts or situations prior to the entry into force of th[at] Convention as between the parties to the dispute"[6]. Applying this provision in *Certain Property*, the Court held that it conferred jurisdiction on the Court only over disputes relating to facts or situations arising after the date at which the Convention entered into force between the parties[7].

7. Similar temporal limitations are found in declarations made under Article 36, paragraph 2, of the Court's Statute. For example, the French declaration that was applicable in *Phosphates in Morocco* confined the jurisdiction of the Permanent Court of International Justice to "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification"[8]. As the Court explained in that case, the purpose of this limitation

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[2] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2022 (II)*, p. 492, para. 33.

[3] The time at which a State levels its claims against another State may come after the time of the inception of the dispute. This, however, is immaterial in the context of the present case.

[4] *Nottebohm (Liechtenstein* v. *Guatemala)*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 1953*, p. 123; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33.

[5] Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. II (Jurisdiction), 5th ed., Brill/Nijhoff, 2016, para. II.156, p. 584.

[6] Art. 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes (concluded on 29 April 1957; entered into force on 30 April 1958), United Nations, *Treaty Series (UNTS)*, Vol. 320, p. 256.

[7] *Certain Property (Liechtenstein* v. *Germany)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2005*, p. 22, para. 39.

[8] *Phosphates in Morocco*, *Judgment*, *1938*, *P.C.I.J.*, *Series A/B*, *No. 74*, p. 22.

was to deprive the acceptance of the Court's jurisdiction of any "retroactive effects", which in that case was taken to mean jurisdiction over disputes whose facts predated the declaration[9].

8. The practice of States attaching specific temporal limitations to the relevant jurisdictional title — whether general dispute settlement treaties or declarations under Article 36, paragraph 2, of the Statute — suggests that such limitations are necessary in order to exclude specific categories of disputes from the reach of the Court's jurisdiction. So, without such temporal limitations, the Court's jurisdiction, in principle, extends to disputes already existing at the time when the Court's jurisdiction is accepted. In other words, the date of the acceptance of the jurisdictional title does not automatically serve as an exclusion date for prior disputes.

9. This proposition does not mean that the jurisdictional title applies retroactively in the sense contemplated by the principle contained in Article 28 of the Vienna Convention on the Law of Treaties. The principle of non-retroactivity excludes disputes that have ceased to exist at the time when the jurisdictional title is accepted, but it leaves existing disputes intact[10]. Further, the obligation imposed on a State by the jurisdictional title — the obligation to accept the referral of its disputes to an international court for binding settlement — applies only in respect of the future[11].

10. The rule that, absent specific limitations, the jurisdictional title covers disputes whose time of inception predates the acceptance of the title applies equally in relation to compromissory clauses. This was the reasoning of the Permanent Court of International Justice in *Mavrommatis*, in which the Court held that its jurisdiction under compromissory clauses embraces all disputes referred to it while the compromissory clause is valid, regardless of whether they arose prior to or after the establishment of the compromissory clause[12]. The Court's Judgment in *Bosnia Genocide* confirms this reading. In that case, the respondent relied on the principle of non-retroactivity to contend that the compromissory clause in the Genocide Convention limited the Court's jurisdiction to conduct taking place after the entry into force of the clause for the parties. The Court held, however, that the compromissory clause could not be read as imposing temporal limitations on the Court's jurisdiction[13].

11. The question of the temporal reach of compromissory clauses may be clouded by the fact that, in the usual course of events, both the substantive provisions and the compromissory clause of a treaty will enter into force at the same time for a given party. Under the principle of non-retroactivity, a State party will bear substantive obligations under the treaty only after the treaty has entered into force for it. Therefore, as illustrated by *Croatia Genocide*, the Court cannot rule on the State's conduct prior to the entry into force of the treaty, for the simple reason that the State bore

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[9] *Ibid.*, p. 24. As has been observed, in such cases the jurisdictional title does not, strictly speaking, have retroactive effects, but rather excludes from the Court's jurisdiction disputes that already exist: International Law Commission (ILC), Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission (YILC)*, 1966, Vol. II, p. 212, paragraph 2 of the commentary to Article 24.

[10] ILC, Draft Articles on the Law of Treaties with commentaries, *YILC,* 1966, Vol. II, p. 212, paragraph 2 of the commentary to Article 24.

[11] See Sir Gerald Fitzmaurice, "Fourth report on the law of treaties", *YILC*, 1959, Vol. II, p. 74, para. 122.

[12] *Mavrommatis Palestine Concessions*, *Judgment No. 2*, *1924*, *P.C.I.J.*, *Series A*, *No. 2*, p. 35.

[13] *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.

no obligations under the treaty for the time prior to that date[14]. It is in this sense that the temporal scope of the compromissory clause is linked to the temporal scope of the substantive provisions of the Convention[15]. This is a manifestation of the fact that compromissory clauses are "adjectival" in character[16]: their limits — personal, material and, in this case, temporal — are determined by the substantive provisions to which they are attached[17]. This also explains the paucity of reservations entered in relation to compromissory clauses. States do not enter reservations to the compromissory clause in relation to their conduct prior to the entry into force of the treaty precisely because that conduct is beyond the temporal reach of the substantive obligations.

12. But it is possible for this temporal link to be severed. For example, let us imagine a situation where State A becomes party to CERD in 1993. State B becomes party to CERD in 1996, entering a reservation stating that it does not accept the compromissory clause in Article 22. In 2000, one of the two States engages in conduct which, in the other State's view, violates CERD. If State B withdraws its reservation to Article 22 of CERD in 2004, can the dispute between the two States be brought to the Court, assuming that all other jurisdictional conditions are met?

13. There are at least four reasons supporting an affirmative answer. First, the distinction between the binding force of obligations and the acceptance of the Court's jurisdiction, which is frequently emphasized in the Court's jurisprudence[18], means that the State in question already incurs responsibility for breaches of its obligations under CERD in 2000. Indeed, the compromissory clause of CERD "contains no language defining the temporal scope of the Court's jurisdiction", as today's Judgment affirms (para. 42). Therefore, once the Court's jurisdiction under CERD is accepted through the withdrawal of the reservation to Article 22, there is no reason in principle why this jurisdiction should not extend to already existing disputes concerning a State's alleged responsibility under CERD. Second, as discussed, this solution is consistent with the Court's practice in relation to declarations under Article 36, paragraph 2, of its Statute, jurisdictional clauses under general dispute settlement treaties, and compromissory clauses. Third, there is support for this solution in the practice under human rights instruments. Regional human rights mechanisms have affirmed that when a State becomes party to a convention prior to accepting the jurisdiction of the relevant monitoring court or commission, the latter's jurisdiction extends back to the earlier date[19]. Fourth, the practice of States,

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[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 51, para. 100. The jurisprudence of the European Commission of Human Rights is consistent with this view: for example, see *F.O.* v. *Germany* (App. No. 892/60), Decision on admissibility of 13 April 1961, first paragraph ("Law"); *A.D.Q.* v. *Belgium* (App. No. 1028/61), Decision on admissibility of 18 September 1961, second paragraph ("Law").

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment*, *I.C.J. Reports 2015 (I)*, p. 49, para. 93.

[16] See *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Second Phase*, *Judgment*, *I.C.J. Reports 1966*, p. 39, para. 64.

[17] *Ambatielos (Greece* v. *United Kingdom)*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 1952*, pp. 40-41.

[18] *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*, pp. 52-53, para. 127; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 148; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment, I.C.J. Reports 2015 (I)*, p. 46, para. 86.

[19] European Commission of Human Rights, *X* v. *France* (App. No. 9587/81), Decision of 13 December 1982, paras. 6-8 ("The Law"); European Court of Human Rights, *Bezzina Wettinger and others* v. *Malta* (App. No. 15091/06), Judgment of 8 April 2008, para. 54; African Court on Human and Peoples' Rights, *Tanganyika Law Society and The Legal and Human Rights Centre* v. *United Republic of Tanzania* and *Reverend Christopher R. Mtikila* v. *United Republic of Tanzania* (App. Nos. 9/2011 and 11/2011), Judgment of 14 June 2013, para. 84; African Court on Human and Peoples' Rights, *Urban Mkandawire* v. *Malawi* (App. No. 3/2011), Judgment of 21 June 2013, para. 32; but see Inter-American Court of Human Rights, *Girls Yean and Bosico* v. *Dominican Republic* (Ser. C No. 130), Judgment of 8 September 2005, para. 105; Human Rights Committee, *M.I.T.* v. *Spain*, UN doc. CCPR/C/41/D/310/1988 (11 April 1991), para. 5.2.

which in such situations sometimes expressly exclude pre-existing disputes from their acceptance of the compromissory clause[20], suggests that the jurisdiction, in principle, extends to all disputes from the moment when the State becomes party to the relevant instrument[21].

14. The Judgment places some emphasis on the principles of consent, reciprocity and equality (paras. 50-51). In my view, however, these principles are not at issue here. To the extent that the principle of reciprocity may be transposed from the system of Article 36, paragraph 2, of the Court's Statute into compromissory clauses under Article 36, paragraph 1, all that it requires is that the parties to a dispute have accepted "the same obligation" in relation to the Court's jurisdiction. The obligation in question is the obligation to recognize the Court's jurisdiction, so reciprocity requires that the parties have accepted the Court's jurisdiction on equal terms[22]. This is evidently satisfied in the case of compromissory clauses such as Article 22 of CERD, which lay down a set of jurisdictional conditions that are common to all CERD parties bound by the clause. Reciprocity, then, is achieved as long as the disputing parties are bound by Article 22 at the time when the dispute is referred to the Court. By contrast, neither under the system of Article 36, paragraph 2, nor under compromissory clauses, does reciprocity require that the parties in dispute bear identical or reciprocal substantive obligations. So, the fact that Azerbaijan, unlike Armenia, did not bear any substantive obligations under CERD between 1993 and 1996 does not impinge on the principle of reciprocity[23].

15. As this discussion indicates, the Court's jurisdiction is not barred simply because Article 22 of CERD entered into force between the Parties after the events to which their dispute relates. Nor is there a risk of the substantive provisions of the treaty being applied retroactively against Armenia. The Judgment also makes this observation (para. 44).

16. Overall, in my view, Article 22 of CERD does not set any conditions, either directly or indirectly, with respect to the time of inception of disputes that may be referred to the Court. As long as the compromissory clause remains binding on the disputing parties at the time of the referral, the Court's jurisdiction under CERD is established over all disputes relating to the interpretation or application of CERD that are not otherwise settled.

B. Admissibility: Azerbaijan's standing

17. I noted above that, for the purpose of establishing the Court's jurisdiction, it is irrelevant whether or not Azerbaijan bore substantive obligations under CERD at the time of the inception of the dispute. However, Azerbaijan's claims in this case raise a distinct, if related, question. As presented by Azerbaijan, the case concerns Armenia's alleged responsibility, and the ensuing injury, for breach of its obligations under CERD. The question then becomes whether such responsibility may be invoked by a State, such as Azerbaijan, which was not party to CERD at the time when the breach allegedly took place. The enquiry here is not whether Azerbaijan's non-party status immunized it from substantive obligations under CERD at the time of the inception of the dispute.

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[20] See, for example, the withdrawal of the reservation made by the Union of Soviet Socialist Republics upon ratification of CERD in respect of Article 22: *UNTS*, Vol. 1525, pp. 356 and 191.

[21] European Commission of Human Rights, *X* v. *France* (App. No. 9587/81), Decision of 13 December 1982, para. 6 ("The Law"). See again *Mavrommatis Palestine Concessions*, *Judgment No. 2*, *1924*, *P.C.I.J.*, *Series A*, *No. 2*, p. 35.

[22] See *Right of Passage over Indian Territory (Portugal* v. *India)*, *Preliminary Objections*, *Judgment*, *I.CJ. Reports 1957*, p. 143; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, p. 419, para. 62.

[23] See also European Commission of Human Rights, *Austria* v. *Italy* (App. No. 788/60), Decision on admissibility of 11 January 1961, p. 21, discussed in paragraph 20 below.

Rather, it is whether its non-party status at that time excludes it from the procedural right to invoke the responsibility of another State today.

18. Both the Parties and the Court recognize that this is the heart of the problem in this case. The argumentation of Armenia and Azerbaijan revolves around the issue to whom Armenia's obligations were owed at the time (Judgment, paras. 32, 34 and 38). For its part, the Court notes that the issue, "in essence, concern[s] Azerbaijan's entitlement to invoke Armenia's responsibility for the alleged acts that occurred at a time when CERD was not in force between the Parties" (*ibid.*, para. 41). And its conclusion is that, "since between 23 July 1993 and 15 September 1996 Armenia did not owe obligations under CERD to Azerbaijan, Azerbaijan has no right to invoke Armenia's responsibility for the alleged acts that occurred during that period" (*ibid.*, para. 52). However, the Judgment does not explicitly identify this question as one of Azerbaijan's legal standing — or "retroactive standing".

19. Is a State party to CERD entitled to invoke the responsibility of another State for breaches of obligations that took place when the former was not yet a party to CERD? The fact that the CERD provisions invoked are of an *erga omnes (partes)* character may suggest an affirmative answer. To use the definition provided by the International Law Commission, obligations *erga omnes partes* are owed to a group of States and established for the protection of a collective interest of the group[24]. As the Court has observed in relation to conventions containing obligations structurally similar to those found in CERD, each State party is entitled to invoke the responsibility of another State party for alleged breaches of obligations *erga omnes partes*, because each State party has an interest in compliance with these obligations[25]. In such situations, we might consider that a member of the group invoking responsibility acts not in its individual capacity but on behalf of the group[26]. So, it might seem reasonable that no relevance should be attached to whether the invoking State had the status of member of the group at the time when the alleged wrong was committed; what matters is that the invoking State is a member of the group at the time when responsibility is invoked.

20. There is support for this view in international jurisprudence. In the case of *Austria* v. *Italy*, Austria brought proceedings against Italy for breaches of the European Convention on Human Rights[27] that had allegedly taken place at a time when Italy, but not Austria, was party to the Convention. Austria relied on Article 24 of the Convention, which at the time read: "Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party." In a decision affirming Austria's standing, the European Commission of Human Rights explained that Article 24 formed part of a "collective guarantee" of the rights set forth in the Convention, which entailed that each State, upon becoming party to the Convention, should have the same powers to safeguard these rights as all existing parties to the Convention[28]. According to the Commission, a State party acting under Article 24 "is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the

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[24] See Article 42, paragraph 1 *(a)*, of the Articles on Responsibility of States for Internationally Wrongful Acts.

[25] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, *Judgment, I.C.J. Reports 2012 (II)*, pp. 449-450, paras. 68-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2022 (II)*, p. 516, paras. 107-108.

[26] See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *YILC*, 2001, Vol. II, Part Two, p. 126, paragraph 1 of the commentary to Article 48.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms (concluded on 4 November 1950; entered into force on 3 September 1953), *UNTS*, Vol. 213, p. 221.

[28] European Commission of Human Rights, *Austria* v. *Italy* (App. No. 788/60), Decision on admissibility of 11 January 1961, pp. 19-20.

public order of Europe"[29]. The Commission was untroubled by the fact that Italy could not bring proceedings against Austria: this apparent absence of reciprocity did not spring from any differential treatment of the two States, but merely from the fact that Austria had joined the system of the Convention at a later date[30].

21. The decision of the Committee on the Elimination of Racial Discrimination on its jurisdiction in the pending case of the *State of Palestine* v. *Israel*[31] goes in the same direction. In that case, the State of Palestine has invoked the procedure laid down in Article 11 of CERD, which in paragraph 1 provides: "If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee." Affirming its jurisdiction, the Committee was of the view that "any State party may trigger the collective enforcement machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned parties"[32].

22. It is significant that in both these cases, the parties instituting proceedings did not seek reparation for individual injury they had sustained as a result of the alleged breach of the obligations invoked. Instead, they triggered mechanisms primarily aimed at ensuring compliance with the relevant convention. In short, the parties in question did not purport to act as individually injured States.

23. Against this background, it appears that where responsibility is invoked on behalf of the group of States to which the obligation is owed, the State acting on behalf of the group need not have been a member of the group at the time when the alleged breach took place. But is the case before the Court such an instance?

24. Some aspects of Azerbaijan's pleadings may suggest so. For example, Azerbaijan contends that it acts as a "procedural trustee", safeguarding the obligations owed by Armenia to all parties to CERD (Judgment, para. 38). Before the Court, however, Azerbaijan claimed that it is "specially affected" by Armenia's breaches[33]. And in its submissions in its Memorial, Azerbaijan requests the Court to order that Armenia compensate Azerbaijan "in its own right and as *parens patriae* for its citizens" for material and non-material damage caused by Armenia's violations of CERD[34]. It thus appears that Azerbaijan is not in fact asserting legal standing to invoke Armenia's responsibility on behalf of the group of States to which Armenia owes its obligations *erga omnes partes*. Rather, Azerbaijan is asserting legal standing on the basis of individual injury allegedly suffered as a result of Armenia's breaches.

25. This distinction is important. According to the rules of international responsibility, as reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, the categories of claims available to individually injured States differ

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[29] *Ibid.*, p. 20.

[30] *Ibid.*, p. 21.

[31] Committee on the Elimination of Racial Discrimination, "Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction" of 12 December 2019, UN doc. CERD/C/100/5 (16 June 2021).

[32] *Ibid.*, para. 50.

[33] CR 2024/24, p. 16, para. 25 (Lowe).

[34] Memorial of Azerbaijan, para. 591 (8).

from those available to other States[35]. The Court's jurisprudence indicates that the invocation of responsibility by States individually injured by a breach, including by the breach of an obligation *erga omnes (partes),* is independent from the invocation of responsibility by other States belonging to the group to which the obligation is owed[36].

26. The type of injury that can be considered individual, thus rendering the sufferer a "specially affected" State, will depend on the circumstances. Overall, the assumption underlying Azerbaijan's argument is that Azerbaijan had a particular interest in the performance by Armenia of the obligations owed to the group, or that Armenia's breach had particular adverse effects on Azerbaijan[37]. Azerbaijan claims that it has a special status within the group, even though that group did not include Azerbaijan in its ranks at the time when the obligation was owed (and breached).

27. In my view, the particular position that Azerbaijan claims, and the ensuing individual material injury incurred from Armenia's breaches, cannot be demonstrated in the present case. Therefore, Azerbaijan's legal standing as an individually injured State should be rejected in relation to events prior to the entry into force of CERD with respect to Azerbaijan.

28. In light of this conclusion, the Court had two options: it could either assume that Azerbaijan, if given the opportunity, would maintain its claims as a State not individually injured by Armenia's breaches prior to 15 September 1996, or it could dismiss Azerbaijan's claims as inadmissible for the period prior to that date. Bearing in mind that the Court should not substitute itself for the parties and formulate new submissions[38], I voted in favour of the Court's conclusion.

The second preliminary objection

29. Armenia's second preliminary objection concerns the Court's lack of jurisdiction over Azerbaijan's claims based on the alleged placement of landmines and booby traps. I support the Court's reasoning in relation to this preliminary objection, but I disagree with the Judgment's qualification of the objection as "without object" (paras. 76-77).

30. Objections entertained by the Court at a separate, incidental phase of the proceedings under Article 79*bis* of the Rules must in principle concern the Court's jurisdiction, or the admissibility of the application or of specific claims. The fact that a respondent labels an objection to the case presented by the applicant as a "preliminary objection" does not suffice to bring it within the scope of Article 79*bis*. Under Article 79*bis*, respondents are entitled to request a decision on preliminary issues before the proceedings on the merits; however, in so far as the issues raised are not preliminary, respondents are not entitled to receive a decision on them.

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[35] See in particular the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *YILC*, 2001, Vol. II, Part Two, p. 127, paragraph 11 of the commentary to Article 48.

[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 516-517, para. 109.

[37] Cf. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *YILC,* 2001, Vol. II, Part Two, p. 119, paragraph 12 of the commentary to Article 42.

[38] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 35; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia)*, *Judgment, I.C.J. Reports 2022 (II)*, p. 635, para. 43.

31. This is the case for legal arguments advanced in support of a claim. It is possible to think of feeble, or even abysmal, legal arguments, but in a court of law, it is difficult to conceive that any legal arguments could be inadmissible. For this reason, I do not agree with the Court's conclusion that the Respondent's second preliminary objection is "without object" (Judgment, paras. 76-77). A preliminary objection might be without object if, for example, it is withdrawn in the course of the proceedings[39]. Armenia's objection here is not a preliminary objection in the true sense of the word; it is perhaps a counter-argument or a rebuttal on the merits. Consequently, in my view, the Judgment should have simply stated that Armenia's arguments cannot provide the basis for a preliminary objection, and the preliminary objection should have been rejected on this ground[40].

(Signed) Hilary CHARLESWORTH.

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[39] Cf. *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia)*, *Judgment*, *I.C.J. Reports 2022 (II)*, p. 634, para. 41.

[40] See *Alleged Violations of the 1955 Treaty of Amity*, *Economic Relations*, *and Consular Rights (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2021*, p. 41, para. 113.