DISSENTING OPINION OF JUDGE CLEVELAND

Jurisdiction ratione temporis — *Admissibility* — *Standing* — *Obligations* erga omnes partes — *Non-retroactivity* — *Reciprocity* — *State responsibility* — *Inter-State complaint process.*

Armenia's objection raises question of admissibility and standing — Court has jurisdiction to hear the claims — CERD compromissory clause contains no limitation ratione temporis — *No issue of retroactivity was presented.*

Obligations erga omnes partes *create a common legal interest between States parties to protect individuals — Failure of Court to consider the nature of obligations* erga omnes partes — *Court improperly imposes the principle of reciprocal State responsibility on CERD compromissory clause — Both the CERD inter-State complaint process and the compromissory clause allow claims to enforce common legal responsibility — Failure to adequately consider relevant jurisprudence — Azerbaijan's claims are admissible.*

1. I support the Court's decision to reject Armenia's second preliminary objection to the Court's jurisdiction *ratione materiae*, with regard to the laying of landmines and booby traps. However, I disagree with its decision to uphold the first and third preliminary objections, relating respectively to the Court's jurisdiction *ratione temporis* and to its jurisdiction *ratione materiae* regarding environmental harm. The joint dissenting opinion of Judges Nolte, Charlesworth, Cleveland and Tladi sets forth my views with respect to the third preliminary objection. In this opinion, I explain why the Court should have rejected Armenia's first preliminary objection.

2. Armenia became a party to the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") on 23 July 1993. As of that date, Armenia was bound by the obligations under the Convention not to engage in any act of racial discrimination, including with respect to persons of Azerbaijani national or ethnic origin. Azerbaijan became a party to CERD on 15 September 1996. The question posed by Armenia's first preliminary objection is whether the Court can entertain Azerbaijan's claims concerning alleged acts that occurred during the period when Armenia was a State party to CERD and Azerbaijan was not.

3. Armenia founds its objection on two alternative bases: lack of jurisdiction *ratione temporis* or lack of admissibility. As I explain in Part I of this opinion, in my view, the Court does have jurisdiction to entertain these claims. The question of admissibility, which the Court fails to address, raises issues with regard to Azerbaijan's standing. In my view, the Court should have concluded that Azerbaijan has standing to bring claims to enforce obligations *erga omnes partes* during the relevant period and that Azerbaijan's claims are therefore admissible.

4. Most significantly, in reaching its conclusion, the Court improperly imposed a principle of mutual reciprocity, found in certain treaty obligations, onto the obligations under CERD, a treaty that is fundamentally designed to create not obligations between States (obligations *inter partes*), but obligations *erga omnes partes* owed to individuals. Had the Court taken due account of the distinctive nature of obligations *erga omnes partes*, it would have established its jurisdiction and recognized that, as a State party interested in ensuring compliance with the Convention, Azerbaijan has standing to bring claims regarding acts that occurred between 23 July 1993 and 15 September 1995.

5. Over 50 years ago, in *Barcelona Traction*, the Court recognized that

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, *all States can be held to have a legal interest in their protection*; they are obligations *erga omnes*."[1]

Such obligations *erga omnes* include "protection from slavery and racial discrimination"[2].

6. For an even longer time, the Court has acknowledged that

> "[i]n such a convention the contracting States 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. Consequently, in a convention of this type *one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties*. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, *the foundation and measure of all its provisions*"[3].

7. There is no dispute that CERD is such a Convention. It is precisely the object and purpose of CERD — namely to provide broad protection to individuals by virtue of the common legal interest of the States parties — that informs the conclusion that Article 22 of that Convention does not limit the Court's jurisdiction to disputes concerning obligations owed reciprocally between States. By failing to meaningfully consider the nature of obligations *erga omnes partes*, the Court improperly imports a concept of mutual reciprocity into CERD to conclude that a State may invoke the responsibility of another State only in respect of acts that take place when both States are parties to the Convention. The Court's conclusion is contrary to its own jurisprudence, and that of other tribunals, regarding obligations *erga omnes partes*.

8. In this dissenting opinion, I will first address the question of jurisdiction in Part I, before turning to the question of admissibility in Part II.

I. JURISDICTION *RATIONE TEMPORIS*

9. Jurisdiction *ratione temporis* concerns the existence of the Court's jurisdiction[4] to entertain claims relating to events that occurred during a certain period of time. The Court's jurisdiction *ratione temporis* may be limited by, for example, the text of a treaty's compromissory clause, any reservations attached by the parties[5], or other treaty provisions. Admissibility, on the other hand,

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[1] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970* (hereinafter "*Barcelona Traction*"), p. 33, para. 33, emphasis added.

[2] *Ibid.*, p. 33, para. 34.

[3] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, p. 23; *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)* (hereinafter "*The Gambia* v. *Myanmar*"), p. 515, para. 106, emphasis added.

[4] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment, I.C.J. Reports 2023*, p. 281, paras. 63-64.

[5] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

concerns the exercise of the Court's jurisdiction where that jurisdiction is already established[6]. The Court has previously concluded that a party's standing to bring certain claims is a question of admissibility[7].

10. Questions of jurisdiction essentially turn on the interpretation and application of a treaty's compromissory clause. General jurisdictional clauses, are, of course, not presumptively limited *ratione temporis*. As the Permanent Court of International Justice held in *Mavrommatis*, "in cases of doubt, jurisdiction based on an international agreement embraces *all disputes referred to it after its establishment*"[8]. The Court found that an explicit limitation is required in order to exclude claims arising out of events that took place prior to the entry into force of such treaties. This position was reaffirmed in *Phosphates in Morocco*[9]. Thus, declarations accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute of the Court are not presumptively limited *ratione temporis*. States accepting the Court's jurisdiction under that provision that wish to preclude claims relating to acts predating their acceptance have attached explicit reservations to that effect. The same is true for general jurisdictional clauses in treaties whose purpose is to provide for a dispute settlement system, such as the Pact of Bogotá and the General Act for the Pacific Settlement of International Disputes, as well as for arbitration treaties[10].

11. In the present case, both States were parties to CERD at the time the dispute between them arose and at the time the Application was filed. Furthermore, the Court acknowledges that nothing in the language of Article 22 of CERD limits the Court's jurisdiction *ratione temporis* (Judgment, para. 42). Nor have the Parties made any declarations or reservations to that effect. In my view, this should have completed the Court's inquiry into its temporal jurisdiction.

12. Nevertheless, the Court's opinion purports to address two further questions of jurisdiction, namely whether either the principle of non-retroactivity of treaties, or the *erga omnes partes* character of the obligations under CERD, affects the temporal scope of the Court's jurisdiction under Article 22 (Judgment, para. 41).

A. The principle of non-retroactivity of treaties

13. With respect to the first question, the Court apparently — and in my view correctly — concludes that the issue is not directly one of the non-retroactivity of obligations under CERD. Armenia was bound by CERD throughout the relevant period; no substantive obligations under CERD are being applied retroactively to Armenia. Both States also were parties to the treaty and had consented to the Court's jurisdiction when the dispute arose and when Azerbaijan invoked the

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[6] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment, I.C.J. Reports 2023*, p. 281, paras. 63-64.

[7] *The Gambia* v. *Myanmar*, p. 492, para. 33.

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

[9] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, pp. 23-24 (finding that its jurisdiction did not encompass disputes arising before the Article 36 (2) declaration was deposited because France had included a specific clause to that effect).

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

compromissory clause. Thus, the obligations under CERD are not being applied retroactively to either State[11].

14. The Court, however, seeks support for its conclusion that it lacks jurisdiction *ratione temporis* in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*[12] (Judgment, para. 46). The Court's reliance on this case is fundamentally flawed for two reasons: first, that case concerned Belgium's standing to bring certain claims, not jurisdiction[13]; second, in that case the Court simply upheld Belgium's right to file claims against Senegal from the date on which Belgium became party to the Convention Against Torture[14], a non-controversial ruling. Belgium did not bring claims under the Convention with regard to acts that occurred before Belgium became a party thereto[15]. Thus, that case did not raise any question of jurisdiction *ratione temporis* over claims relating to acts that occurred *prior* to the applicant's accession to a treaty.

15. Nevertheless, having cited *only Belgium* v. *Senegal*, and without providing any explanation for that decision's relevance, the Court asserts its conclusion: "[i]n light of the above . . ., the temporal scope of the Court's jurisdiction under Article 22 of CERD must be linked to the date on which obligations under CERD took effect between the Parties" (Judgment, para. 47).

16. The Court might have attempted to point to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, which recognized that the question whether a respondent can be sued under a compromissory clause depends on whether the respondent has incurred substantive obligations under a treaty[16]. In this sense, the temporal scope of the Court's jurisdiction is subject to the temporal scope of the treaty's obligations for the respondent, and not for the applicant. Unfortunately, this finding would have led the Court to the opposite conclusion from the one it has reached today. Under the logic of *Croatia* v. *Serbia*, Article 22 is subject to the temporal scope of Armenia's substantive obligations under CERD. Since Armenia became bound by the substantive obligations of CERD from 23 July 1993, Azerbaijan's claims fall within the jurisdiction of the Court.

B. The *erga omnes partes* character of the obligations under CERD

17. The Court then purports to assess whether the *erga omnes* character of the obligations under CERD affect the Court's jurisdiction under its compromissory clause. The cursory discussion that follows merely asserts that obligations *erga omnes partes* do not create an "exception" to

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[11] Article 28 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") is not to the contrary. The rule of non-retroactivity in that Article simply addresses when a treaty's substantive obligations become *binding* for the ratifying State. Thus, Article 28 states that the provisions of a treaty ordinarily "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty *with respect to that party*" (emphasis added).

[12] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment*, *I.C.J. Reports 2012 (II)*, p. 422 (hereinafter "*Belgium* v. *Senegal*").

[13] *Ibid.*, p. 449, paras. 66-67.

[14] *Ibid.*, p. 458, para. 104.

[15] Belgium joined the Convention Against Torture on 25 July 1999. It brought claims before this Court in 2009 alleging that Senegal had breached the obligation to prosecute acts of torture under Article 7 of the Convention as of the year 2000. The Court noted that the breaches of the duty to prosecute alleged by Belgium arose after the date that Belgium had become a party to the Convention but drew no conclusions from that fact. Belgium's claims regarding failure to prosecute necessarily involved alleged acts of torture that had occurred during the period before Belgium was a party, but this issue was not relevant.

[16] *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. 50, para. 93.

traditional principles of jurisdiction, particularly the principle of reciprocity and equality of States (Judgment, para. 50). In reaching this conclusion, the Court struggles to find relevance in two cases: *East Timor (Portugal* v. *Australia)*[17] and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*[18]. *East Timor*, however, is invoked merely for the uncontroversial assertion that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". *Armed Activities* only supports the proposition that, *in the absence of any compromissory clause* establishing jurisdiction under a treaty, the fact that a *customary international law* principle involves obligations *erga omnes* does not, *in itself*, establish jurisdiction before the Court[19] — again, an uncontroversial assertion. The Court makes no meaningful attempt to examine the nature of obligations *erga omnes partes* or their effect on the existence or exercise of the Court's jurisdiction.

18. The one case cited by the Court that is centrally relevant to the present case is *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*[20]. That case concerned claims under a treaty for alleged violations of obligations *erga omnes partes* and involved an objection to jurisdiction *ratione temporis* very similar to the one in the present case. The question there, as here, was whether the compromissory clause of a multilateral convention involving obligations *erga omnes partes* gave the Court jurisdiction to examine claims involving acts that occurred before the applicant was a party to the treaty. Today, regrettably, the Court fails to mention the most relevant features of that case.

19. In *Bosnian Genocide*, the Court held that the compromissory clause in Article IX of the Genocide Convention gave the Court jurisdiction to examine claims brought by Bosnia and Herzegovina against Yugoslavia concerning acts that occurred prior to the applicant's accession to the Convention. There, as here, the respondent argued, based on "the non-retroactivity of legal acts", that the Court could examine only events that occurred after the date on which the Convention became applicable between the parties[21]. The Court rejected this argument, stating as follows:

> "[T]he 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 . . . 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 1951 and referred to above (see paragraph 31)"[22].

Accordingly, the Court found that neither the compromissory clause nor any other provision of the Convention limited the Court's jurisdiction *ratione temporis*; nor had the parties entered any reservation to that effect. Because Bosnia and Herzegovina, the applicant, was a party to the Convention on the date the Application was filed[23], and because the respondent was bound by the

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[17] *East Timor (Portugal* v. *Australia, Judgment, I.C.J. Reports 1995*, p. 90.

[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*, p. 6.

[19] *Ibid.*, p. 32, para. 64.

[20] *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. 595 (hereinafter "*Bosnian Genocide*").

[21] *Ibid.*, p. 617, para. 34.

[22] *Ibid.*

[23] *Ibid.*, p. 612, para. 23.

Convention throughout the relevant period, the Court found that it had jurisdiction to entertain claims brought under the Convention regarding acts that had occurred since the beginning of the conflict in Bosnia and Herzegovina and prior to the applicant's accession[24].

20. The Court also explicitly founded its holding on "the object and purpose of the Convention"[25], and cross-referenced paragraph 31 of the opinion, where it had emphasized that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*"[26]. This character derived from the "universal character" of the prohibition of genocide[27]. Elsewhere in the decision, the Court further underscored the non-contractual nature of the relevant treaty obligations, emphasizing that in such conventions, "one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties"[28].

21. In short, in rejecting Yugoslavia's preliminary objection regarding jurisdiction *ratione temporis*, in *Bosnian Genocide* the Court relied on three considerations: that (1) Article IX and the Convention contained no textual restriction on jurisdiction regarding claims that arose from events after the respondent became a party; (2) the parties had attached no reservation limiting the Court's jurisdiction *ratione temporis*; and (3) the *erga omnes partes* character of the Convention obligations warranted this approach.

22. All of these elements are present in the case now before the Court. The majority's dismissive treatment of *Bosnian Genocide*, however, never acknowledges the relevant *ratione temporis* issue in that case (Judgment, para. 49). Nor does it mention the Court's reasoning or the role of obligations *erga omnes partes* in interpreting the compromissory clause. It is true that *Bosnian Genocide* involved "a particular context of State succession" (*ibid.*). But the Court's *ratione temporis* analysis says nothing about succession[29]. As one of the leading treatises on the Court's jurisprudence observes, "if the Court had wanted to follow [a line of reasoning based on succession], it is, to say the least strange that the Court did not say a word about it"[30]. Judge *ad hoc* Kreća's sole dissenting opinion also makes clear that the Court was, in fact, ruling on the scope *ratione temporis* of the compromissory clause. He stressed that Article IX of the Genocide Convention applied only to claims arising from events after the treaty had come into effect between Bosnia and Herzegovina and Yugoslavia[31]. This is precisely the argument that Armenia advances now, and which this Court rejected in *Bosnian Genocide*. Today's decision does not acknowledge these aspects of the case.

23. Indeed, in its preliminary objections Judgment in *Croatia* v. *Serbia*, the Court acknowledged the *ratione temporis* finding of *Bosnian Genocide*. It stated that *Bosnian Genocide* had upheld jurisdiction "*not merely* [with respect to] facts subsequent to the date when the

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[24] *Ibid.*, p. 617, para. 34.

[25] *Ibid.*, p. 617, para. 34 (and citing para. 31).

[26] *Ibid.*, p. 616, para. 31.

[27] *Ibid.* (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

[28] *Ibid.*, p. 611, para. 22 (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

[29] *Ibid.*, p. 617, para. 34.

[30] Kolb, R., *The International Court of Justice*, Hart, 2013, p. 423.

[31] *Bosnian Genocide*, dissenting opinion of Judge *ad hoc* Kreća, p. 794, para. 120.

Convention became applicable between the parties"[32]. Nor did the other cases cited in today's decision in any way alter the conclusion reached in *Bosnian Genocide*, which the Court now reverses.

24. In sum, none of the cases cited by the Court are authority for the jurisdictional conclusion it reaches today. If anything, they support allowing Azerbaijan's claims.

25. Failing to find traction in its past jurisprudence, the Court ultimately appears to ground its conclusion on a claimed principle of State responsibility, i.e. that in order for a State to invoke the responsibility of another State, "it must show that the responsible State owes the obligation allegedly breached to the claimant State" (Judgment, para. 52). On this basis, the Court concludes that Armenia owed no obligations to *Azerbaijan* before Azerbaijan became a party to CERD, and thus Azerbaijan cannot invoke Armenia's responsibility during that period. In reaching this holding, the Court apparently reasons that a principle of mutual reciprocity and equality of States is inherent in a compromissory clause accepting the Court's jurisdiction, and that obligations *erga omnes partes* do not create an "exception" to these principles (Judgment, para. 50).

26. However, the question posed by Armenia's objection is not whether obligations *erga omnes partes* somehow create an *exception* to traditional principles of jurisdiction. Azerbaijan argued that the obligations under CERD are not

> "mere bilateral or mutual undertakings between two or more States; they are formulated primarily to protect human rights and fundamental freedoms of individuals — the ultimate beneficiaries of CERD. In seeking to protect those rights, Azerbaijan acts as an 'injured State' in the interests of its citizens and of itself and also as a 'procedural trustee', safeguarding obligations that Armenia has owed to all States parties, *erga omnes partes*, since it acceded to CERD." (Judgment, para. 38.)

27. In other words, Azerbaijan argued that obligations *erga omnes partes* are of a different nature to the mutual reciprocal obligations created by some treaties. Thus, the critical question at issue is whether a State's invocation of the legal responsibility of another State for an alleged violation of obligations *erga omnes partes* is premised on the existence of an *inter partes* reciprocal relationship between States parties with respect to those obligations. As the Court has recognized since at least *Barcelona Traction*, and most recently reaffirmed in *The Gambia* v. *Myanmar*, it is not. Today's Judgment does not acknowledge or address this matter. Because of this failure to consider the nature of obligations *erga omnes partes*, the Court evades the core issue raised by Armenia's objection and reaches the wrong conclusion.

28. It is to this issue that I now turn.

II. ADMISSIBILITY AND OBLIGATIONS *ERGA OMNES PARTES*

A. Standing to enforce obligations *erga omnes partes*

29. The Court agrees that CERD, like the Genocide Convention, establishes obligations *erga omnes partes* (Judgment, para. 48). The *erga omnes partes* character of the obligations enshrined in such conventions creates a common legal interest among States parties in ensuring compliance with the convention, which is binding on States parties upon its entry into force for them. Accordingly, in

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 458, para. 123.

my view, a State party can be held responsible by another State party for violations of obligations *erga omnes partes* that took place after the State allegedly breaching the Convention became a party to it.

30. As discussed above (see paragraphs 5-7), the Court has recognized for over a half century that, unlike bilateral treaty obligations or traditional synallagmatic multilateral conventions, human rights treaties do not primarily establish mutual reciprocal obligations between States, or *inter partes*. Instead, such treaties primarily establish obligations for States parties with regard to the *individuals* whose rights the treaties protect. All States parties, in turn, share a "legal interest in their protection"[33]. As the Court stated in *The Gambia* v. *Myanmar*,

> "such 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"[34].

The Court recognized that "in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties"[35].

31. In light of these overarching collective interests, the Court concluded that "[t]he common interest in compliance with the relevant obligations . . . entails that *any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations erga omnes partes*"[36] "with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end"[37].

32. The *erga omnes partes* nature of the obligations under CERD means that every State party has an interest in compliance, and that such obligations are not owed only or primarily to the other States parties, but to the individuals and groups protected by such obligations. Standing, therefore, is based on the applicant's party status at the time when the dispute arose and the application was filed, and not on its status at the time when the alleged violation took place. In the present case, all States parties to CERD, including Azerbaijan, have *erga omnes partes* standing to invoke Armenia's obligations under the Convention from the time that Armenia became a party thereto. Accordingly, Azerbaijan can properly proceed in this case as a "procedural trustee", safeguarding obligations that Armenia has owed to all States parties, *erga omnes partes*, since it acceded to CERD (Judgment, para. 38).

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[33] *Barcelona Traction*, p. 33, para. 33.

[34] *The Gambia* v. *Myanmar*, pp. 515-516, para. 107.

[35] *Ibid.*, p. 515, para. 106, (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

[36] *Ibid.*, p. 516, para. 108 (emphasis added).

[37] *Ibid.*, p. 517, para. 112.

33 Decisions by the CERD Committee and the European Commission on Human Rights support the recognition of standing in this case.

34. Today's majority notes the inter-State complaint brought by the State of Palestine against Israel under CERD[38] (Judgment, para. 53). In that case, citing this Court's Judgment in *Bosnian Genocide* and the *Austria* v. *Italy* decision discussed below in paragraphs 40-43, the State of Palestine argued that Article 11 of CERD allowed the CERD Committee to consider acts by Israel that pre-dated the entry into force of CERD for Palestine.

35. The CERD Committee agreed, reasoning that CERD creates core obligations owed *erga omnes*, and that "human rights treaties, due to the non-synallagmatic character of their obligations, which are implemented collectively . . . constitute a special category of treaties, to which certain rules of treaty law are not applicable"[39]. Accordingly, the ability of States to bring complaints under Articles 11 to 13 of the Convention is not governed by "the existence of any prior bilateral relationship between States"[40]. The CERD ad hoc conciliation commission recently confirmed the Committee's competence over this communication, basing its decision "on the non-synallagmatic and *erga omnes* character of the obligations enshrined in the Convention 'without consideration to bilateral issues between States parties'"[41].

36. Without any consideration of the CERD Committee's reasoning, today's Judgment attempts to distinguish this case by asserting a "difference in nature" between the inter-State complaint process under Articles 11-13 of CERD and claims under the Article 22 compromissory clause (Judgment, para. 54), The two procedures are, of course, different, but both address "disputes" "between States parties", as the treaty makes clear.

37. Article 11, paragraph 1, of CERD provides that "[i]f 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" (emphasis added). Articles 12 and 13 then proceed to address the manner in which such "dispute[s]" shall be addressed by the Committee. Article 22 likewise addresses "disputes" "between . . . States parties"[42]. It provides that if a "dispute" is not settled by, *inter alia*,

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

[39] *Ibid.*, para. 51.

[40] *Ibid.*, para. 60; see also para. 42.

[41] Committee on the Elimination of Racial Discrimination, Report of the ad hoc conciliation commission (case *State of Palestine* v. *Israel*), UN doc CERD/C/113/3, 21 Aug. 2024, para 34.

The Human Rights Committee has similarly interpreted the inter-State complaint mechanism under Article 41 of the International Covenant on Civil and Political Rights. In General Comment No. 31, the Committee observed that

> "[w]hile [the Covenant] is couched in terms of the obligations of State Parties towards individuals as the right-holders . . ., every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are <u>*erga omnes*</u> obligations . . . [Article 41 is not] the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each other's discharge of their obligations." HRC, General Comment No. 31 (29 March 2004), para. 2.

[42] The Article 22 compromissory clause provides: "Any *dispute* between two or more *States Parties* with respect to the interpretation or application of this Convention, *which is not settled 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." (Emphasis added.)

the procedure established under Articles 11 to 13, that same "dispute" may be brought to this Court for decision.

38. The Court properly concludes that the references to disputes between one "State Party [and] . . . another State Party" in Articles 11 to 13 allow one State party to bring a claim against any other State party to CERD regarding any period when the respondent State had obligations under CERD. In contrast, the Court contends that the Article 22 process "aims to settle disputes relating to obligations which States, by becoming parties to the Convention, have accepted to undertake vis-à-vis each other", and "therefore" the latter process can only be used to bring claims relating to acts that occurred when both States were bound by the obligations in question (Judgment, para. 54). But this claimed difference simply involves the Court reading a concept of reciprocal *inter partes* obligations into the second procedure, but not the first. Nothing in the language of treaty supports this distinction.

39. Finally, the Court reasons that the scope of the inter-State complaint mechanism is "not relevant" to interpretation of the compromissory clause. Yet, claims under Articles 11 to 13 and Article 22 of CERD are directly related. As noted, "disputes", if not settled by the Committee, can be brought to the Court under Article 22. Under the principle that the terms of a treaty should be given the same meaning, a "dispute" for the purposes of one part of CERD must be a "dispute" for the purposes of the other. There is no reason why the *erga omnes partes* character of obligations under CERD would mean that there is no temporal limitation on the Committee's jurisdiction under Articles 11 to 13, but that there is for this Court's jurisdiction under Article 22.

40. Today's decision also fails to acknowledge *Austria* v. *Italy*[43], a case invoked by Azerbaijan that examined the same issues of jurisdiction and admissibility raised in the present case. There, the European Commission of Human Rights held that Austria could bring a claim against Italy under then-Article 24 of the European Convention on Human Rights[44] (hereinafter the "European Convention") concerning acts that had occurred prior to Austria's accession to the Convention. Like Armenia here, Italy based its objection on mutual reciprocity. Italy argued that in becoming a party to the European Convention it had undertaken obligations only vis-à-vis the other existing signatories, and that because Austria and Italy had not had mutual treaty relations during the relevant period, the Commission lacked jurisdiction *ratione temporis*[45].

41. In a lengthy and detailed analysis, the Commission rejected this position. With respect to jurisdiction, the Commission noted that under the principle established in *Mavrommatis*, "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment"[46]. The Commission noted that the jurisdictional clause of the European Convention allowed "any High Contracting Party" to refer "any alleged breach" of the Convention to the Commission, and that no other provision of the Convention imposed any temporal limitation on such claims[47]. The Commission concluded that the mere fact that Austria only later acquired the right to

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[43] European Commission of Human Rights, *Austria* v. *Italy* (App. No. 788/60), Decision on admissibility of 11 January 1961 (hereinafter "*Austria* v. *Italy*").

[44] Like Articles 11 and 22 of CERD, and Article IX of the Genocide Convention, then-Article 24 of the Convention placed no textual temporal restriction on the claims that could be brought. It stated: "Any High Contracting Party may refer to the Commission . . . any alleged breach of the provisions of the Convention by another High Contracting Party." See also *Austria* v. *Italy*, p. 19.

[45] *Austria* v. *Italy*, pp. 13-14.

[46] *Ibid.*, p. 16.

[47] *Ibid.*

refer alleged breaches of the Convention to the Commission did not prevent the Commission from exercising jurisdiction[48].

42. With respect to standing, the Commission rejected Italy's contention that mutual treaty relations or reciprocity was required at the time of the alleged violations. The Commission underscored that obligations under the European Convention were designed "to protect the fundamental rights of individual human beings from infringement . . . [rather] than to create subjective and reciprocal rights for the High Contracting Parties"[49]. As a result, a State bringing a claim 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 public order of Europe"[50]. Accordingly, the Commission concluded that "the fact that at the dates of the proceedings . . . Italy had no obligations towards Austria under the Convention does not debar Austria from now alleging a breach of the Convention"[51].

43. *Austria* v. *Italy* was thus an important antecedent to the Court's correct approach in *Bosnian Genocide*.

44. Both of the above cases recognize that the *erga omnes partes* character of treaty obligations is essential to answer the question before the Court today, whether in interpreting the compromissory clause to determine the temporal scope of the Court's jurisdiction, or in establishing the applicant's standing. Both also confirm that obligations *erga omnes partes* do not require mutual treaty obligations to be in place at the time of the alleged harm; it is sufficient that the respondent State was a party.

B. Obligations *erga omnes partes*, reciprocity and State responsibility

45. The heart of the Court's reasoning lies in paragraph 52, where the Court invokes the rules of State responsibility to support the proposition that mutual reciprocity is required for the invocation of international responsibility. The Court cites Article 42 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility") to assert that "[w]hen a State seeks to invoke the responsibility of another State, it must show that the responsible State owes the obligation allegedly breached to the claimant State" (Judgment, para. 52). The Court then interprets this principle as requiring Armenia to have owed obligations to Azerbaijan at the time the alleged acts occurred. While this principle might apply to Azerbaijan's standing as an alleged "specially affected" State seeking to protect its own citizens[52], it neglects Azerbaijan's parallel invocation of Armenia's obligations *erga omnes partes*.

46. The relevant provision of the ILC Articles on State Responsibility for the purposes of enforcing obligations *erga omnes partes* is Article 48. As that Article makes clear, "[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if . . . the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or . . . the obligation breached is owed to the international community

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[48] *Ibid.*, pp. 16–17.

[49] *Ibid.*, p. 19.

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

[51] *Ibid.*

[52] CR 2024/24, p. 16, para. 25 (Lowe); Memorial of Azerbaijan, para. 591 (8).

as a whole"[53]. As the ILC Commentary indicates, Article 48 was adopted to recognize the ability of States to invoke the international legal responsibility of other States when "acting in the collective interest" with respect to obligations *erga omnes partes* and *erga omnes*, respectively[54], including with respect to multilateral human rights treaties[55].

47. Under these principles, Armenia did not need to owe obligations to Azerbaijan at the time of the alleged breaches in order for Azerbaijan, which is now a party to CERD, to invoke Armenia's international responsibility. The obligation need only be owed to a group of States to which the claimant State belongs at the time of the filing of the application, and established not for the benefit of the claimant State, but for the protection of a collective interest of the group. Here, the relevant obligations under CERD were established for the protection of individuals, to whom Armenia owed those obligations upon its ratification of CERD. Azerbaijan brings its claim as a procedural trustee of the individuals whose rights were allegedly violated. Those obligations under CERD did not need to be owed bilaterally to Azerbaijan at the time the acts occurred for their breach to constitute injury or to establish a legal interest under the rules of State responsibility.

48. Like genocide, the prohibition of racial discrimination encompasses obligations that are not only *erga omnes partes*, but also *erga omnes*[56]. Such obligations "transcend the sphere of the bilateral relations of the States parties"[57], and "'all States can be held to have a legal interest in' the fulfilment of these rights"[58].

49. The consequence of the Court's application of these principles in *The Gambia* v. *Myanmar* was to grant broad standing. The Court intended to open such standing to "all the other State parties"[59] "without distinction"[60] and with no further condition[61]. Accordingly, "the standing of each contracting State to invoke before the Court a common interest such as that established by the Genocide Convention must be presumed, unless the provisions of the relevant convention indicate otherwise"[62]. Restricting standing in this case by improperly applying Article 42 to the CERD compromissory clause, while ignoring Article 48, has the effect of restricting the jurisprudence in *The Gambia* v. *Myanmar* by inserting a standing condition (the date of the applicant's accession), with the result that not all States parties are able to invoke collective responsibility.

50. The fact that Azerbaijan may also be proceeding as a "specially affected" State may be relevant to whether Azerbaijan can seek remedies *on that basis* for actions by Armenia alleged to have occurred before Azerbaijan was a State party to CERD. But the fact that Azerbaijan may also have a special interest in the proceeding should not render it *less* able to enforce Armenia's

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[53] Article 48 (1) *(a)* and *(b)* of the ILC Articles on State Responsibility and the commentary, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two (hereinafter the "ILC Commentary"), p. 29.

[54] *Ibid.*, pp 126-127, paras. 1, 6 and 8 of the commentary to Article 48.

[55] *Ibid.*, paras. 6-8 of the commentary to Article 48.

[56] *Barcelona Traction*, p. 32, paras. 33-34.

[57] ILC Commentary, p. 126, para. 7 of the commentary to Article 48.

[58] *Ibid.*, p. 126, para. 2 of the commentary to Article 48 (quoting *Barcelona Traction*, para. 33); see also *Belgium* v. *Senegal*, p. 449, para. 68 and p. 450, para. 70.

[59] *The Gambia* v. *Myanmar*, p. 516, para. 107.

[60] *Ibid.*, p. 516, para. 108.

[61] *Ibid.*, p. 517, para. 111-112.

[62] *Ibid.*, declaration of Judge *ad hoc* Kress, p. 538, para. 15.

obligations under CERD than a State party that has no such special interest. Such an interpretation of CERD would be unreasonable[63].

51. Finally, I note that this case does not raise the spectre of a State attempting to bring claims based on events that occurred decades before it acceded to the treaty. Any such concerns could be dealt with as a matter of inadmissibility of claims on narrower grounds, following the approach in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*[64].

III. CONCLUSION

52. Like the Genocide Convention, CERD was not established to create a "perfect contractual balance between rights and duties" of the parties. Instead, the "high ideals which inspired the Convention" should have been recognized by the Court to provide "the foundation and measure of all its provisions", including the scope of jurisdiction and standing under Article 22[65].

53. Like the Genocide Convention and the European Convention, Article 22 of CERD contains no explicit temporal limitation. The fact that States parties have not entered reservations to the temporal application of Article 22 does not counsel otherwise — States also have not entered reservations to the temporal application of Article IX of the Genocide Convention, despite the Court's 1996 decision in *Bosnian Genocide*.

54. Like these conventions, CERD addresses obligations that are not only, or even primarily, owed reciprocally between States. The Court has long recognized that these conventions create rights for individuals to be protected from certain acts. This makes treaties such as CERD different from treaty provisions that only, or even primarily, create obligations between States.

55. The Court's conclusion to the contrary mischaracterizes the question as one of jurisdiction, seeks support in cases that are not relevant, ignores the relevant aspects of the cases that are most on point (including *Bosnian Genocide* and *The Gambia* v. *Myanmar*), and fails to examine the central question raised by Armenia's objection: the relevance of the non-reciprocal aspect of obligations *erga omnes partes* as a matter of standing. In so doing, the Court departs from over a half century of jurisprudence recognizing the distinct character of obligations *erga omnes partes*. For these reasons, I regretfully dissent.

(Signed) Sarah H. CLEVELAND.

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[63] See VCLT, Art. 32.

[64] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 254-255, para. 36.

[65] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; *The Gambia* v. *Myanmar*, p. 515, para. 106.