DISSENTING OPINION OF JUDGE TLADI

Jurisdiction ratione temporis *— Interpretation of Article 22 of the Convention — Applicability of other relevant rules and principles of international law under Article 31 (3)* (c) *of the Vienna Convention on the Law of Treaties —Reciprocity — Non-retroactivity — Concept of* erga omnes partes *not undermined by Judgment.*

Judgment undermines the concepts of continuing and composite breaches — Erroneously excludes actions and omissions occurring before the "critical date" that may form part of a continuing wrongful act constituting a breach of an international obligation — Conflates individual actions and omissions that constitute a continuing breach with the wrongful act that constitutes a breach.

1. INTRODUCTION

1. I have voted in favour of the first and second paragraphs of the *dispositif*, namely Armenia's preliminary objections to the Court's jurisdiction *ratione temporis* (see paragraph 101 (1)) and jurisdiction *ratione materiae* in relation to the laying of landmines and booby traps (see paragraph 101 (2)), respectively. I do not, however, share the majority's conclusion concerning the third preliminary objection raised by Armenia concerning the Court's jurisdiction *ratione materiae* in respect of environmental damage. As such, I have voted against the third paragraph of the *dispositif* (see paragraph 101 (3)), and I join my colleagues — Judges Charlesworth, Cleveland and Nolte — in a joint dissenting opinion where our views and reasons on this point are reflected.

2. While I have voted in favour of upholding the first preliminary objection of Armenia, I have strong reservations against the majority's treatment of one of the arguments presented by Azerbaijan in the alternative, namely that the breaches it is complaining of constitute continuing and/or composite wrongful acts and hence would fall within the scope of the Court's jurisdiction *ratione temporis* notwithstanding the Court's determination as to "the critical date". I believe the majority's treatment of this argument is based on a misconstruction of the basic rule of the law on State responsibility for reasons explained in Section 3 below. Since I believe the majority's treatment of this aspect to be *potentially* very detrimental to the Applicant's case on the merits, I have seen it necessary to label this opinion as a dissent even though this is not reflected in the *dispositif* (see paragraph 101 (1)) of the Judgment.

3. In this opinion, I will first explain why I support the Court's overall conclusion on the first preliminary objection raised by Armenia. I think this explanation is necessary in light of the *erga omnes* nature of the obligations in question that might appear to pull in a different direction. Thereafter, in Section 3, I will turn my attention to the Court's treatment of continuing and composite acts and explain my consternation with the Court's treatment of Azerbaijan's argument. In this connection, I will focus only on continuing breaches on the understanding that this covers also composite acts *when* they "give rise to continuing breaches"[1]. In other words, what is at stake here are the breaches of international obligations alleged by Azerbaijan that straddle the critical date determined by the Court.

[1] See commentary to Article 15 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"), *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 62, para. 1: "Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches".

2. THE COURT'S JURISDICTION *RATIONE TEMPORIS*

4. Armenia has contended that the Court does not have jurisdiction over all of Azerbaijan's claims concerning alleged acts and omissions of Armenia that occurred prior to 15 September 1996, i.e. the date on which Azerbaijan became a party to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "Convention" or sometimes "CERD"). For Azerbaijan, the critical date for determining the scope of the Court's temporal jurisdiction is not the date on which Azerbaijan became a party but rather the date on which Armenia became a party, i.e. 23 July 1993, that being the date on which Armenia assumed obligations under the Convention. In the alternative, Azerbaijan has argued that if the Court were to accept Armenia's contention that the critical date is 15 September 1996, the Court should nonetheless exercise jurisdiction over any acts or omissions that may have commenced prior to 15 September 1996, but which continued after the date.

5. The Court has correctly upheld Armenia's objection and found that it does not have jurisdiction *ratione temporis* over Azerbaijan's claims concerning acts and omissions that occurred prior to 15 September 1996. With respect to the alternative argument concerning continuing or composite acts, however, the Court's decision is at best unclear and confusing, and at worst simply wrong and based on a misapprehension of the rules on State responsibility. The best reading of the Court's Judgment is that it accepts Azerbaijan's alternative argument but expresses itself poorly. The worst reading of the Court's Judgment is that it pretends to accept Azerbaijan's alternative contention and then proceeds to undermine it.

6. While my concern with the Judgment's treatment of the first preliminary objection is only in respect of its treatment of Azerbaijan's alternative argument concerning continuing and composite acts, I would also like to note a few things about the temporal scope of the Court's jurisdiction in broad terms. The arguments of the Parties are summarized sufficiently in the Court's Judgment, and I will not repeat them here. Instead, I wish to focus on three points. *First*, while the Court's temporal jurisdiction in this case must necessarily be determined by an interpretation of Article 22 of the Convention, I do not believe, as both Parties seemed to argue, that the ordinary meaning of the words of the provision provides an answer to the issue before the Court. *Second*, I do not think that the Court's current jurisprudence is sufficient to justify the establishment of jurisdiction over the period prior to Azerbaijan's becoming a party to the Convention. *Third*, while I am often disappointed at the Court's reluctance to make more of humanizing concepts such as *jus cogens* and *erga omnes*, in this case I do not think that the *erga omnes* or *erga omnes partes* character of the obligations can have the effect that Azerbaijan asserts in its pleadings. I will explain why that is the case and why the Court's Judgment should not be seen as undermining the effects of *erga omnes* or *erga omnes partes* obligations as a principle.

2.1 Article 31 of the Vienna Convention on the Law of Treaties

7. The general rule of interpretation, in Article 31 (1) of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), puts forward that a treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31 also sets forth several elements to be "taken into account" (together with the context) in the search for a proper meaning, namely subsequent agreements and practice (Article 31 (3) *(a)* and *(b)*), and other relevant rules and principles of international law (Article 31 (3) *(c)*). Contrary to what the Parties have argued, there is nothing in the ordinary meaning of the words in Article 22 that addresses the issue in dispute between the Parties. Nor am I able to find anything in the context of Article 22 or the object and purpose of the Convention that is directly relevant to the issue in dispute. I am also not aware of any subsequent practice "which establishes the agreement of the parties regarding its interpretation" that might be

relevant to the point in dispute (Article 31 (3) *(b)*). There are, however, relevant rules and principles of international law within the meaning of Article 31 (3) *(c)* which, when thrown "into the crucible" of interpretation, lead to a "legally relevant interpretation" of Article 22[2].

2.2 Relevant rules and principles of international law under Article 31 (3) *(c)* of the Vienna Convention

8. In my view, these other relevant rules and principles, which must be taken into account for the purpose of interpretation, incline towards an interpretation of Article 22 that restricts the scope of the Court's jurisdiction to claims concerning acts and omissions after the critical date of 15 September 1996. The rules and principles to which I refer are non-retroactivity and reciprocity, both of which flow from the sovereign equality of States.

9. The presumption against retroactivity is an important principle that underlies international law[3]. This principle of international law is reflected in Article 28 of the Vienna Convention and in Article 13 of the ILC Articles on State Responsibility. Reciprocity is similarly an important principle underlying much of international law[4]. In this context, I believe that reciprocity involves a relationship of mutuality whereby each of the litigating States is a party to the treaty and is qualified to be a party in the case before the Court[5].

10. Bruno Simma, a significant figure in the pursuit of a more communitarian international law, has himself recognized that even after rules of international law have been established "reciprocity continues its constructive and stabilizing function"[6]. Simma rejects "some academic voices and part of the human rights jurisprudence" that suggest that treaties for the protection of

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[2] See paragraph 8 of the commentary to Articles 27 and 28 of the International Law Commission's Draft Articles on the Law of Treaties (hereinafter the "ILC Draft Articles on the Law of Treaties"), *YILC*, 1966, Vol. II, pp. 219-220.

[3] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 422, para. 100; see also *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. 95; Article 28 of the Vienna Convention on the Law of Treaties: "Unless a different intention appears from the treaty or is otherwise established, its provisions 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".

[4] See G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 440, originally published in *British Yearbook of International Law (BYIL)*, Vol. 34, Issue 1, 1958, p. 8. Reciprocity is a general feature of international law and international relations, and to say that reciprocity is an element of jurisdiction is no more than to say that in matters of jurisdiction, as in matters of substance, the function of applying the law between parties is the function of establishing the rules of law reciprocally binding the parties.

[5] Shaw, M.N. (2017), Mutuality and Reciprocity as Elements of Jurisdiction, in *Rosenne's Law and Practice of the International Court: 1920-2015 Online*. Brill | Nijhoff, accessible at https://doi.org/10.1163/2468-5992_rose_COM_0150.

[6] Bruno Simma, "Reciprocity", *Max Planck Encyclopedia of Public International Law* (2008, online), para. 7. In fairness, Simma does qualify this statement. He states that reciprocity applies more so when substantive reciprocity is built into the rule, which is obviously not the case with respect to the rule prohibiting racial discrimination. But this is a matter of degree and does not affect the basic principle.

human rights, such as the Convention, "are not subject to any considerations of reciprocity at all", which, in his view does "not stand up to closer examination"[7].

11. Counsel for Azerbaijan sought to dismiss Armenia's objection concerning retroactivity by pointing out that Article 28 of the Vienna Convention, to which Armenia had referred, is concerned with the retroactive establishment of duties with respect to the entry into force for the State in question (in this case Armenia). Azerbaijan is correct. Yet, for me the issue is not about the invocation of a particular rule, such as Article 28, but rather, what is relevant are the general principles of reciprocity and retroactivity that, in the words of Armenia, "animate the law of treaties and the [same] of State responsibility"[8]. In other words, these are underlying principles infused into the law and against which the law of treaties and of State responsibility must be understood.

12. These principles to my mind have the following impact on the interpretation of Article 22. *First*, Article 22 cannot be read as retroactively establishing treaty relations between Azerbaijan and Armenia, such that Azerbaijan can make claims under the Convention in respect of acts and omissions which occurred when it was not a treaty party — principle of non-retroactivity. *Second*, Article 22 cannot be interpreted in a way that permits Azerbaijan to make claims against another State for conduct that, *ratione temporis*, could not form the claim of that State against Azerbaijan — principle of reciprocity. I will return to the claim that the Convention is different because of the nature of the obligations (having *erga omnes* or *erga omnes partes* character) contained therein.

2.3 Jurisprudence of the Court

13. What of the jurisprudence of the Court? Can the Court's jurisprudence provide a justification for establishing jurisdiction over the period prior to Azerbaijan's becoming party to the Convention? Although I do not think the Court's jurisprudence is irrelevant, I am less convinced than the Court appears to be that its jurisprudence is dispositive. For obvious reasons, I do not think that the *Ambatielos* case is helpful here because that case concerned retroactivity in the classical sense of invoking the responsibility of a State for acts taking place before the entry into force of the treaty for that State[9]. The case is relevant only because it underscores the importance of the presumption against non-retroactivity as a principle animating the law of treaties and of State responsibility. Likewise, I think *Belgium* v. *Senegal* is also only marginally relevant[10]. In *Belgium* v. *Senegal*, Belgium invoked the responsibility of Senegal for an act, non-prosecution, that occurred while both it and Senegal were party to the relevant treaty, such that it is distinguishable from the current case. Nonetheless, while *Belgium* v. *Senegal*, is not directly relevant to the present case, in that case, Belgium itself had argued that "Senegal was still bound by the obligation to prosecute Mr. Habré *after Belgium had itself become party to the Convention*"[11]. Thus while the Court's statement that

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[7] *Ibid.*, para. 6. In his view the argument

> "confuses different levels of examination. From a strictly legal standpoint, the treaties under consideration establish reciprocal rights and obligations among the participating States in precisely the same way as their more traditional counterparts. They are subject to the same set of rules of the law of treaties as the agreements embodying an apparent reciprocity: whether these rules (for instance, the regime of reservations) will always fit 'normative' treaties, is quite another matter. What makes pure-bred social, human rights, or humanitarian conventions differ from traditional treaties is to be seen outside the formal instrumentalities of international law: in the sociological-political circumstance that the mutual rights of the States Parties are not accompanied by any material benefits accruing to them."

[8] CR 2024/21, p. 20, para. 16 (Martin).

[9] *Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 28.

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

[11] *Ibid.*, p. 458, para. 103 (emphasis added).

Belgium was entitled to invoke the responsibility of Senegal "with effect from . . . the date when it became party to the" treaty, does not address the question concerning obligations of Senegal assumed prior to Belgium becoming party to the treaty, it is not unreasonable to conclude that the Court was accepting Belgium's own view of the temporal scope, namely that it is only entitled to invoke the responsibility for "breaches of the Convention occurring after 25 July 1999"[12]. Thus, on its own, *Belgium* v. *Senegal* does not assist, but thrown into the crucible together with the principles of reciprocity and non-retroactivity, it may suggest a temporal limit to the scope of the Court's jurisdiction *ratione temporis* under Article 22 of the Convention.

14. The Court has been referred to its 1996 Judgment in the *Bosnian Genocide* case[13], with regard to which Azerbaijan claims that "the Court heard, and dismissed, a comparable objection to its jurisdiction *ratione temporis*"[14]. In particular, we have been referred to paragraph 34 of that Judgment, in which the Court states as follows:

> "Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. 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."

Though a rather obscure passage, it is easy to see how it can be read as pulling in a direction different from that of non-retroactivity. In that case, the Court seems to be rejecting an argument similar to that of Armenia, namely that the Court could only deal with events subsequent to the different dates on which the relevant States had become party to the treaty in question. Nonetheless, to my mind, this obscure passage — and it is obscure — cannot have the effect nullifying the basic principles to which I have referred. I explain my reasons below.

15. First, the passage is obscure in that it is presented without much substantiation. The only legal basis that the Court puts forward explicitly for its dismissal of Yugoslavia's argument is the special character of the Convention on the Prevention and Punishment of Genocide without engaging with how this special character affects the principles reciprocity and non-retroactivity. Since I am of the view that the International Convention on the Elimination of All Forms of Racial Discrimination has a similarly special character, I will address this argument when addressing the *erga omnes* character of the obligations flowing from the prohibition against racism (below Section 2.4). The obscurity of the passage lies not only in the dearth of legal reasoning. It lies also in the lack of

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[12] *Ibid*., para. 104.

[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. 595.

[14] Observations and submissions of the Republic of Azerbaijan on the preliminary objections of the Republic of Armenia, para. 25.

precision in identifying "the critical date", stating only that the Court has "jurisdiction with regard to the relevant facts which have occurred since the beginning of the conflict"[15].

16. The obscurity of this passage is reflected in the Court's own subsequent references to it, which illustrates a degree of obfuscation pounced upon by both sides of the aisle. In its 2008 Judgment on jurisdiction in the *Croatian Genocide* case[16], the Court, on the one hand states that it cannot draw a definitive conclusion about the import of that passage, and then, in the same breath, recalls that there is no *ratione temporis* limitation to the Court's jurisdiction under Article IX of the Genocide Convention[17]. In the merits phase of the *Croatian Genocide* case, a similar tentativeness can be observed. There, the Court recalls the "absence of a temporal limitation to Article IX" of the Genocide Convention[18], but then immediately states:

> "The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III of the Convention. Accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention."

Now admittedly, this passage itself is rather ambiguous, for what does it mean that the "the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions"? It could mean, consistent with Azerbaijan's argument, that since, in its view, the temporal scope is limitless, then so is the substantive scope. Or it could mean that the temporal scope of the provisions as between the parties necessarily affects the temporal scope of the compromissory clause. In my view, this ambiguity arises because the Court seeks to be tentative.

17. None of what I am saying here should be seen as a criticism of the rigour of the Court. Rather, the obscurity of the passage from *Bosnian Genocide*, and the tentativeness of the Court's references to that passage thereafter, are illustrative of the fact that the Court was not, in *Bosnian Genocide*, laying down a general principle of law overturning the principles of non-retroactivity and reciprocity that undergird the law of treaties and the law of State responsibility. Rather, the Court was simply resolving a particular dispute that arose in a particular context.

18. Part of that context provides the second, and perhaps most important, reason why the passage cannot be seen as overturning the basic principles of non-retroactivity and reciprocity. This context is the issue of succession which the Court rightly refers to in paragraph 49 of the current Judgment. In other words, it is possible to explain the Court's jurisdiction over the "relevant facts which have occurred since the beginning of the conflict" on the basis of the succession of States, the dissolution process of the former Socialist Federal Republic of Yugoslavia and the fact that at all material times the Genocide Convention was applicable in the relevant territories. The Court in *Bosnian Genocide* alludes to this, without addressing it, at various places of that Judgment. For example, it states that it "is clear . . . that Bosnia and Herzegovina could become a party to the

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[15] *Bosnian Genocide*, p. 617, para. 34; see in contrast *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] *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. 412.

[17] *Ibid.*, p. 458, para. 123: "the Court therefore cannot draw from that judgment . . . any definitive conclusion as to the temporal scope of the jurisdiction it has under the [Genocide] Convention. At the same time, the Court notes, as it did in 1996, that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*."

[18] *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.

Convention through the mechanism of State succession"[19]. It is true that the Court does not develop this thought further, but it is clearly an important element in the background and context of the case.

19. I am even less convinced that the decision of the Committee established under the Convention (hereinafter the "Committee") concerning the dispute between Palestine and Israel, which was put forward by Azerbaijan, is sufficient to override the basic principles of reciprocity and non-retroactivity that are at the heart of our system[20]. There are several reasons for this. The first is that, as the Court has noted in the past, while the outputs of treaty bodies are very important, such decisions do not release the Court from itself identifying the applicable legal rules and principles[21]. Second, and related, there is nothing in the Report of the Committee to indicate that it considered the complex legal issues raised by the question before the Court. In that legal process, the Committee relied on "the non-synallagmatic and *erga omnes* character of the obligations enshrined in the Convention 'without consideration to bilateral issues between States parties'"[22]. I address this aspect in the context of the *erga omnes partes* obligations further below. But the more important reason is the one provided by the Court in the present Judgment, namely that the process in Articles 11 to 13 is qualitatively different from proceedings before a court of law. In the Judgment, the Court states that "there is a difference in nature between the inter-State communications procedure established under Articles 11 to 13 of CERD and the judicial mechanism provided for in Article 22"[23]. While I agree that the compliance process under Articles 11-13 is different from the Court's function under Article 22, I do not share the Court's apparent attempt at creating a distinction between the function of Article 22 and the compliance mechanism under Articles 11-13. Article 22 is for the resolution of disputes while, according to the Court's reasoning, the process under Articles 11-13 is for compliance but not related to the settlement of disputes. This is not correct. Articles 11-13 are replete with references to the settlement of disputes[24]. The relevant distinction, in my view, is not the

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[19] *Bosnian Genocide*, p. 611, para. 20; see also p. 612, para. 24: "Since the Court has concluded that Bosnia and Herzegovina could become a party to the Genocide Convention as a result of a succession, the question of the application of Articles XI and XIII of the Convention does not arise"; see further *ibid.*, para. 23:

> "Without prejudice as to whether or not the principle of 'automatic succession' applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties. Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result — retroactive or not — of its Notice of Succession of 29 December 1992, at all events it was a party to it on the date of the filing of its Application on 20 March 1993. These matters might, at the most, possess a certain relevance with respect to the determination of the scope *ratione temporis* of the jurisdiction of the Court".

[20] See CERD Committee, "Inter-State communication submitted by the State of Palestine against Israel: preliminary procedural issues and referral to the Committee", UN doc. CERD/C/100/3, 15 June 2021, p. 3, para. 14. Since the proceedings, an *ad hoc* commission established under Article 12 has issued a report. See "Report of the ad hoc conciliation commission on the inter-State communication submitted by the State of Palestine against Israel under article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination", 21 August 2024 (CERD/C/113/3) (hereinafter the "Report of the ad hoc conciliation commission on the inter-State communication").

[21] See *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 96, para. 77, p. 104, para. 101.

[22] See CERD Committee, "Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction", CERD/C/100/5, para. 67, available at http://undocs.org/en/CERD/C/100/5. See also Report of the ad hoc conciliation commission on the inter-State communication, para. 34.

[23] Judgment, para. 54.

[24] See e.g. Article 12 (1) *(a)* of the Convention: "with the unanimous consent of all the parties to the dispute", and Article 12 (1) *(b)*: "If the States parties to the dispute". See also Article 12 (2), (6) and (7) and Article 13 (2) of the Convention.

existence or not of a dispute. What is central is the distinction between the purpose of Article 22 and the purpose of the procedure in Articles 11-13.

20. The purpose of the process under Articles 11-13 of the Convention, though related to disputes and though compulsory, is not the determination of State responsibility, but rather the "*amicable* solution" of any dispute that may exist[25]. In this respect, I note that the *ad hoc* commission established by the CERD Committee under Article 12 (1) of the Convention, in respect of the inter-State communication brought by Palestine against Israel (which was referred to by Azerbaijan in these proceedings), did not, as it would be expected of the Court under Article 22, make binding determinations on the State responsibility of parties but rather "recommendations as it may think proper for the amicable solution of the dispute"[26]. Indeed, in that process, because it is not a process whose primary purpose is the attribution of responsibility, the Commission was free to make recommendations concerning Palestine, though the latter was not, for significant parts of the period under consideration, party to the Convention[27]. In such a process, it is fully understandable that the principles of non-retroactivity and reciprocity may not have such a strong pull. In proceedings before the Court, where there is a possibility of a binding judicial determination of wrongfulness and reparations, these principles cannot be lightly put aside. Thus, the decision of the Committee is based on its own mandate under the framework of Articles 11 to 13, a framework under which the Court has no role, and which cannot be transposed onto the Court's assessment of its own jurisdiction under Article 22.

2.4 *Erga omnes* character of the obligations under the Convention

21. I turn now to the strongest argument in favour of jettisoning the principles of non-retroactivity and reciprocity, namely the *erga omnes* character of the obligations involved. This argument was not only raised by Azerbaijan, but was also the basis of the *Bosnian Genocide* passage (paragraph 34 of the 1996 Judgment) and the decision of the Committee established under the Convention mentioned above. I should state that there is no doubt in my mind that the prohibition of racial discrimination produces *erga omnes* obligations, and in the context of the Convention, produces *erga omnes partes* obligations.

22. To my mind, the non-retroactivity and reciprocity principles, as applied in this context, do not undermine the *erga omnes partes* character of the obligations in question. This is because the obligations under the Convention are owed to two categories of actors: other States that are party to the Convention and "persons, groups of persons or institutions" within the meaning of Article 2 of the Convention. The first category is limited to States that were party to the Convention at the time of the commission of the wrongful act. The second category, however, is unlimited.

23. Azerbaijan took issue with this construction by providing an illustration that I would like to address. Its main argument was that the Convention was not only for States but, rather, that the Convention was there to protect individuals[28]. I agree fully with this statement. The Convention is not a purely State-centric and bilateralist treaty which seeks to maintain a perfect contractual balance

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[25] See e.g. Article 13 of the Convention; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, dissenting opinion of Judge Sebutinde, p. 130, para. 32: "the CERD Committee and the proceedings before the Court have related but fundamentally distinct roles relating to resolving disputes between States parties to the CERD. The Committee's role is conciliatory and recommendatory, while that of the Court is legal and binding".

[26] See Report of the ad hoc conciliation commission on the inter-State communication, paras. 51-56.

[27] *Ibid*., I. A. "Scope of the Mandate" and III. "Applicable law".

[28] CR 2024/24, p. 15, paras. 21-22 (Lowe).

between the rights and duties of States parties. In making this argument, Azerbaijan asked, rhetorically, whether the application of the reciprocity and non-retroactive principles meant that Armenia was free to discriminate against nationals of States that were not party to the Convention but not against nationals of States parties:

> "Armenia surely cannot seriously suggest that its obligation to eliminate racial discrimination as from 23 July 1993 applied only to the select nationals of those States parties who were also bound by the Convention as at that date — for example, looking at Armenia's table of CERD ratifications, that Armenia remained free to discriminate against South Africans, but not Ethiopians, or against Americans, but not French nationals, or against Japanese but not Chinese nationals."[29]

24. The answer to the question is "of course not", and this is because of the *erga omnes partes* nature of the obligations under the Convention. Indeed, one might even say that this obligation preceded Armenia's ratification since I believe the obligation *erga omnes* exists (and existed) even under customary international law. In the context of the Convention, States parties have an interest in ensuring the respect for the rights under the Convention even if the alleged breach did not concern their own nationals. So, to take the rhetorical example advanced by Azerbaijan, South Africa could institute a claim against Armenia for any racial discrimination against Ethiopians, France could institute a claim against Armenia for alleged breaches of the Convention in respect of discrimination against Americans, Japan could institute claims against Armenia in respect of alleged breaches against Chinese, and so on and so on. Needless to say, this hypothetical assumes that the discrimination took place on the grounds of race, colour, descent, or national or ethnic origin[30]. The point I am making is that the Court's approach in this Judgment does not, in any way, undermine the *erga omnes* character of the obligations under the Convention, and it does not prevent other States parties to the Convention from invoking the responsibility of Armenia for any alleged violation of the rights of ethnic Azerbaijanis. The non-retroactivity and reciprocity principles apply in respect of the first category of actors to which obligations are owed, namely States parties, but do not apply to the second category of actors, namely "persons, groups of persons or institutions".

25. I therefore agree with the Judgment that the first preliminary objection of Armenia should be upheld, and that the jurisdiction of the Court is to be limited to claims based on actions and omissions after 15 September 1996. Azerbaijan, understandably, claimed that the issue is "of relatively minor importance to Azerbaijan's case because it only affects conduct completed between July 1993 and September 1996"[31]. It thus argued, with particular reference to its claim of ethnic cleansing by Armenia, that there was a continuing breach and, therefore, that actions and omissions that commenced before 15 September 1996 were relevant in determining the existence of the breach. It is to this issue that I now turn.

3. CONTINUING AND COMPOSITE BREACHES

26. In my view, the manner in which the Court addresses Azerbaijan's argument concerning continuing and composite wrongful acts is wholly inadequate and inappropriate. Moreover, the Court's approach has been adopted in complete disregard, or complete misunderstanding, of the basic principles of State responsibility. At paragraph 62 of the Judgment, the Court states as follows:

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[29] CR 2024/24, p. 15, para. 23 (Lowe).

[30] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, where the Court found that measures based on nationality alone would not fall within the scope of the Convention.

[31] CR 2024/24, p. 14, para. 16 (Lowe).

> "If the Court were to find, at the stage of its examination of the merits, a continuing or composite wrongful act that commenced before the critical date of 15 September 1996 and continued thereafter, it would follow that the Respondent's responsibility with respect to the Applicant would be engaged for the actions or omissions that took place after that date, which is when the relevant obligations came into force between the Parties. In this regard, the Court would nevertheless not be precluded from taking into consideration facts which occurred before that date, in so far as they are relevant to its examination of the Respondent's subsequent conduct which falls within its jurisdiction".

27. As I mentioned in the introduction, it is possible to read this passage as simply confirming that the Court would have jurisdiction of composite and continuing wrongful acts that commenced prior to the critical date of 15 September 1996. Under this construction, the qualifying phrase to the effect that the Respondent's responsibility would only be engaged for actions and omissions taking place after the critical date would serve only to exclude those actions and omissions that have been completed, and that consequently do not form part of the continuing breach. If this is what the Court meant, then it has adopted an unnecessarily convoluted and confusing way to say that.

28. The alternative, and more likely, reading is that by this passage the Court means to say that actions and omissions forming part of the continuing breach but occurring prior to the critical date are excluded from the Court's jurisdiction but may merely be "tak[en] into consideration". The fundamental problem is that the passage, to the extent that it seeks to exclude from the jurisdiction of the Court, actions and omissions occurring before the critical date that nonetheless form part of a continuing act constituting a breach of an international obligation, is based on an erroneous reading of the law on State responsibility. Wittingly or unwittingly, by this passage the Court has completely undermined the notion of continuing wrongful acts and, for all intents and purposes, written that notion out of international law.

29. To begin with, it is not at all clear to me what it means to take actions and omissions "into consideration" as paragraph 62 of the Judgment puts it. The Court does not explain what it means and, in particular, how these actions and omissions are to be taken into consideration. Of course, the concept of "taking into consideration" or "taking into account" is not alien to international law. Article 31 (3) of the Vienna Convention, to which I referred above, is an apt example. But the import of "taking into consideration" makes perfect sense where various elements are to be weighed, such as is the case in the "single combined operation" that is required for treaty interpretation[32]. But what does it mean in the context where the Court has to determine the responsibility of a State?

30. Second, I note that the notion that facts, prior to the critical date, can be taken into account, is referenced also in the commentary to the Articles on State Responsibility[33]. Unsurprisingly, however, that particular reference is made not in the context of continuing or composite acts, provided for in Articles 14 and 15, but precisely in the context of Article 13 dealing with the general rule concerning the time that a breach occurs — to which continuing breaches serve as exceptions. Thus, the Court appears to seek to erase these exceptions by treating them under the framework of the general rule contained in Article 13. The notion that actions and omissions prior to the critical date, even if forming part of continuing breaches, do not fall within the Court's jurisdiction but may be taken into account in the assessment of wrongful acts taking place after the critical date makes

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[32] Commentary to Articles 27 and 28 of the ILC Draft Articles on the Law of Treaties, *YILC*, 1966, Vol. II, pp. 219-220, para. 8.

[33] Commentary to Article 13 of the ILC Articles on State Responsibility, *YILC*, 2001, Vol. II, Part Two, p. 59, para. 9.

nonsense of the distinction that the International Law Commission sought to draw between the application of Article 13 of its Articles on State Responsibility, on the one hand, and Articles 14 and 15.

31. The fundamental problem with the Court's approach is that it is based on a misconstruction of the elementary principles of the law on State responsibility. Under the law on State responsibility, a State is not responsible merely for individual "actions and omissions". A State is responsible for a *breach of an international obligation* or, put differently, for *an internationally wrongful act*. Article 1 of the ILC Articles on State Responsibility provides for responsibility for "every internationally wrongful act". An internationally wrongful act is, in turn, defined as *(a)* an action or omission, that is *(b)* attributable to a State and that *(c)* constitutes a breach of an international obligation[34]. Importantly, an internationally wrongful act can consist of several "actions and omissions". When a wrongful act, or breach of an obligation, consists of several actions and/or omissions, the responsibility of the State is not for the individual actions and/or omissions. Rather, the responsibility of the State is for the *breach* of an international obligation through those individual actions or omissions; to put it differently, the responsibility of the State is for the *wrongful act*, even if that act is composed of several actions and/or omissions.

32. In the context of a continuing breach of an international obligation, the responsibility of a State is not for the individual actions and/or omissions that constitute, or contribute to, the continuing breach. Rather, the responsibility is for the wrongful act that constitutes a breach. Thus, *if* on the merits, the Applicant is able to show that "actions" and/or "omissions" of the Respondent committed before and after the critical date constitute a (single) "act" of ethnic cleansing, and thus a breach of an international obligation[35], the respondent State is responsible, not for the individual actions and omissions, but for the breach of the international obligation. The Court cannot, if it accepts that the individual actions and/or omissions constitute a continuing breach, decide to disaggregate the individual actions and/or omissions into those that occurred before the critical date and those that occurred after the critical date, holding that the latter fall within its jurisdiction and the former not. No! It has to treat the actions and/or omissions constituting the breach as a singular act.

33. By separating "actions or omissions that took place after [the critical] date", for which the "Respondent's responsibility would be engaged" from those "facts which occurred before that date", which are only to be taken into consideration, the Court implies that it is the individual actions and omissions which attract State responsibility. To take as an example, a State that begins a campaign of genocide may engage in several actions enumerated in Article II of the Convention on the Prevention and Punishment of Crime of Genocide before and after the critical date. While the individual actions may themselves breach other rules of international law (such as violations of international humanitarian law), the responsibility of that State may be also engaged for the internationally wrongful *act* of genocide. All the actions, including those committed before and after the critical date, are relevant and fall within the jurisdiction *ratione temporis* of the Court when it is adjudicating upon that genocide claim. It is not inconceivable that actions subsequent to the critical date do not, on their own, reach any requisite threshold of intensity to qualify as a genocide. It cannot be said that only the actions after the critical date fall within the Court's jurisdiction and the other actions are only to be taken into account, whatever that means. What matters, for the purposes of a continuing wrongful act, is whether the act in breach of an international obligation commenced prior to the critical date and continues thereafter.

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[34] ILC Articles on State Responsibility, Article 2.

[35] Or, put differently, an "internationally wrongful act".

34. I thus find it difficult to square the Court's decision with the law on State responsibility. As I said above, the Court pays lip service to the notion of continuing acts, but then proceeds to treat them in exactly the same way as wrongful acts not of a continuing character. This includes the proviso that actions and omissions from prior to the critical date may be taken into consideration, a "qualification" of the rule in Article 13 of the Articles on State Responsibility[36]. Perhaps the Court simply misunderstands the law on State responsibility. Or, perhaps, the Court is uncomfortable with the notion of continuing acts in the Articles on State Responsibility. If it is the former, then to say I am surprised would be an understatement. If it is the latter, then I am disappointed. If the Court wished to disavow the concepts of continuing breaches, it should have had the courage of its conviction and have done so explicitly and not through the back door has it has done so here.

35. Perhaps the Court introduces this novelty in an attempt at nuance and in order to discourage States from using (or abusing) the concept of continuing breaches as a way of bringing into the Court's jurisdiction breaches which would ordinarily fall outside the scope of the Court's jurisdiction *ratione temporis*. But the way to prevent abuses is not by wiping away continuing acts. It is by, in each case, engaging in a careful assessment of whether in fact an alleged continuing breach is actually continuing. For example, many breaches may have continuing effects or consequences, yet this does not make the breach continuing. It is the wrongful act — the breach of an obligation — that must be continuing. In other words, it is for the State seeking to rely on the notion of continuing act to show that the breach of an obligation that commenced prior to the critical date actually continued after the critical date.

4. CONCLUSION

36. I have voted to uphold Armenia's objection to the Court's jurisdiction *ratione temporis* over the claims brought by Azerbaijan before the critical date. In this opinion, I have tried to explain my views as to how the Court's jurisdiction *ratione temporis* cannot be divorced from the underlying principles of international law, in particular the principles of non-retroactivity and reciprocity. Additionally, while the concept of *erga omnes* obligations has an important role to play in transforming international law into a more humane legal system, that concept is not implicated in the particular circumstances of this case (see Section 2.3 above).

37. While the Court is correct in upholding Armenia's first preliminary objection, I find the Court's conclusions concerning continuing breaches to be problematic. At best, the Court has simply expressed itself unclearly and its statement that actions and omissions taking place before the critical date are to be "tak[en] into consideration" simply means that they fall within the Court's jurisdiction *ratione temporis* if they are in fact part of the continuing act. Alternatively, if the Court means to say that such actions fall outside the Court's jurisdiction *ratione temporis*, then its conclusion is inconsistent with the law on State responsibility. It is my hope that the former interpretation of the Court's Judgment is the one that, with time, will hold.

(Signed) Dire TLADI.

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[36] See paragraph 9 of the commentary to Article 13 of the ILC Articles on State Responsibility, *YILC*, 2001, Vol. II, Part Two, p. 59, para. 9.