



INTERNATIONAL COURT OF JUSTICE

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Summary

Unofficial

Summary 2024/10

12 November 2024

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)

Summary of the Judgment of 12 November 2024

I. INTRODUCTION (PARAS. 22-28)

The Court recalls that Azerbaijan and Armenia, both of which were Republics of the former Union of Soviet Socialist Republics (the “Soviet Union”), declared independence on 18 October 1991 and 21 September 1991, respectively.

The region which Armenia calls Nagorno-Karabakh and Azerbaijan calls Garabagh was, in the Soviet Union, an autonomous entity (“oblast”) with a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties’ competing claims over that region resulted in hostilities, to which Armenia refers as “the First Nagorno-Karabakh War” and Azerbaijan refers as “the First Garabagh War”, that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Armenia calls “the Second Nagorno-Karabakh War” and Azerbaijan calls “the Second Garabagh War”.

On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation signed a statement referred to by the Parties as “the Trilateral Statement”. Under the terms of this statement, as of 10 November 2020, a complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict was declared. However, the situation between the Parties remained unstable and hostilities again erupted in September 2022, and again in September 2023.

On 23 September 2021, Azerbaijan instituted the present proceedings under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD” or the “Convention”). In its Application, Azerbaijan alleges that Armenia has breached several provisions of CERD by virtue of a decades-long State policy of racial discrimination. Specifically, Azerbaijan asserts that “Armenia has engaged and is continuing to engage in a series of discriminatory acts against Azerbaijanis on the basis of their ‘national or ethnic’ origin within the meaning of CERD”. Both Azerbaijan and Armenia are parties to CERD. Azerbaijan acceded to it on 16 August 1996 and Armenia on 23 June 1993. The Convention entered into force for each Party on the thirtieth day after the date of the deposit of its instrument of accession, i.e. on 15 September 1996 and 23 July 1993, respectively. Neither Party entered any reservation to the Convention.

The Court recalls that Armenia raises three preliminary objections. First, Armenia argues that the Court lacks jurisdiction to entertain Azerbaijan’s claims concerning acts that took place prior to

the entry into force of CERD as between the Parties on 15 September 1996, or that such claims are inadmissible. Secondly, Armenia contends that the Court lacks jurisdiction *ratione materiae* with respect to Azerbaijan's claims concerning the alleged placement of landmines and booby traps. Thirdly, it submits that the Court lacks jurisdiction *ratione materiae* with respect to Azerbaijan's claims concerning alleged environmental harm.

II. FIRST PRELIMINARY OBJECTION: JURISDICTION *RATIONE TEMPORIS* (PARAS. 29-64)

The Court recalls that the Parties differ as to whether the Court has jurisdiction over Azerbaijan's claims concerning alleged acts that occurred between 23 July 1993 and 15 September 1996, the period during which Armenia was a State party to CERD while Azerbaijan was not. In its first preliminary objection, Armenia contends that the Court lacks jurisdiction *ratione temporis* over those claims or, alternatively, that they are inadmissible.

In addressing the issue of Azerbaijan's entitlement to invoke Armenia's responsibility for the alleged acts that occurred at a time when CERD was not in force between the Parties, the Court considers that two questions debated by the Parties should be dealt with at the outset: first, whether the principle of non-retroactivity of treaties has an effect on the Court's jurisdiction under Article 22 of CERD; and secondly, whether the *erga omnes partes* character of certain obligations under CERD may affect the temporal scope of the Court's jurisdiction under CERD.

Regarding the first question, the Court recalls that Article 22 of CERD specifies the scope of the Court's jurisdiction *ratione personae* and *ratione materiae*, but it contains no language defining the temporal scope of the Court's jurisdiction. It considers that Armenia's reference to the principle of non-retroactivity of treaties raises an issue concerning the relationship between the substantive provisions and the compromissory clause of CERD. According to the principle of non-retroactivity of treaties, as reflected in Article 28 of the Vienna Convention on the Law of Treaties, unless a different intention appears from a 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. This principle defines the temporal application of the substantive provisions of a treaty for a State party and to which acts its treaty obligations apply. It specifies from which point in time the responsibility of a State party may be engaged for its conduct which is not in conformity with its obligations under the treaty.

The Court notes that there is no disagreement between the Parties that Armenia was bound by CERD during the period between 23 July 1993 and 15 September 1996 and that none of Azerbaijan's claims concerns acts that took place prior to Armenia's accession to CERD. Therefore, in so far as Armenia's obligations under CERD are concerned, no issue of retroactivity arises. The Court observes, however, that the question before it is not whether Armenia was bound by the obligations under CERD during the relevant interval. Rather, the question is whether Article 22, under which Azerbaijan has given its consent to the Court's jurisdiction, provides a jurisdictional basis for the Court to entertain Azerbaijan's claims in respect of alleged acts that took place before Azerbaijan became party to the Convention.

The Court is of the view that, subject to any reservation or express indication to the contrary, the temporal scope of the Court's jurisdiction under a compromissory clause is determined by the scope of the temporal application of the substantive provisions of a treaty between the parties concerned. The Court considers that, in the present case, 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, i.e. 15 September 1996, not the date on which Armenia became bound by the Convention.

The Court turns next to the second question concerning the *erga omnes partes* character of the obligations under CERD and its effect on jurisdiction. Referring to its jurisprudence, it recalls that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The Court considers that, although Article 22 of CERD contains no express indication on the temporal scope of its application, the conferral of jurisdiction on the Court by the States parties under this provision is governed by the relevant rules on jurisdiction, namely the principle of consent and the principles of reciprocity and equality of States. Any exception to these principles cannot be admitted unless expressly provided.

The Court observes that, during the interval between 23 July 1993 and 15 September 1996, as Azerbaijan was not yet a party to CERD, there were no treaty relations between the Parties under CERD. Procedurally, if Azerbaijan were permitted to make claims against Armenia for the latter's alleged acts that occurred during that period while Armenia could not exercise that right against Azerbaijan for Azerbaijan's conduct during the same period because of its non-party status, there would be no reciprocity and equality between the Parties. Substantively, during the relevant period, Armenia, as a State party, owed its obligations under CERD to all other States parties, but not to States which were not parties to that Convention.

Referring to the customary rules of State responsibility as reflected in Articles 13 and 42 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"), the Court recalls that an act of a State does not constitute a breach of an international obligation unless the State is bound by that obligation at the time when the alleged act occurs. The Court explains that when 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. Accordingly, since between 23 July 1993 and 15 September 1996 Armenia did not owe obligations under CERD to Azerbaijan, Azerbaijan has no right to invoke Armenia's responsibility for the alleged acts that occurred during that period.

In this connection, the Court notes that Azerbaijan refers to the decision rendered by the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") in the inter-State communication submitted by the State of Palestine against Israel. According to Azerbaijan, the CERD Committee in that case took the view that Articles 11 to 13 of CERD do not indicate that the use of the inter-State mechanism is limited to breaches that have occurred after CERD's ratification by the State party that initiated the procedure. The Court observes 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. The first aims to monitor compliance by States parties with their obligations under the Convention, while the latter aims to settle disputes relating to obligations which States, by becoming parties to the Convention, have accepted to undertake *vis-à-vis* each other. The judicial mechanism can therefore only be used to settle disputes relating to events that occurred at a time when both States concerned were bound by the obligations in question. Consequently, the views adopted by the CERD Committee with regard to the exercise of its competence in the context of the inter-State compliance procedure are not relevant for the purposes of the interpretation and application of the compromissory clause invoked in the present case as a basis for the Court's jurisdiction.

The Court concludes that 15 September 1996 is the date for the determination of the temporal scope of the Court's jurisdiction under Article 22 of CERD in the present case.

The Court turns next to address Azerbaijan's assertion in relation to alleged continuing or composite acts, according to which even if 15 September 1996 is defined as the critical date by the Court to determine the temporal limit of the Court's jurisdiction, its claims that involve continuing or composite acts that began between 23 July 1993 and 15 September 1996 and continued after the critical date nevertheless fall within the scope of the Court's jurisdiction *ratione temporis*. The Court

recalls that according to Article 14, paragraph 2, of the ILC Articles on State Responsibility, the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation. As to composite wrongful acts, the Court recalls that Article 15, paragraph 2, of the ILC Articles on State Responsibility provides that the breach of an international obligation in respect of composite acts extends over the entire period starting with the first of the actions or omissions in a series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. The essential feature of such acts is that they are a series of actions or omissions defined in aggregate as wrongful. In this regard, the Court notes that whether an internationally wrongful act has a continuing or composite character will depend on both the content of the obligation concerned and the circumstances of the given case.

The Court recalls that, in the present case, Azerbaijan claims that Armenia's cumulative or aggregated actions and omissions amount to a practice of ethnic cleansing, which constitutes "a distinct breach" of CERD. Azerbaijan asserts that Armenia has engaged in a long-standing systematic campaign of ethnic cleansing, which began before 15 September 1996 and continued after that date.

The Court notes that violations of certain obligations under CERD may be committed through acts of a continuing or composite nature. To decide on Azerbaijan's claim, the Court needs to determine first whether there is sufficient evidence to establish that there existed a systematic campaign of ethnic cleansing launched by Armenia against Azerbaijan during the relevant period and, if so, whether there were continuing or composite wrongful acts for which Armenia should be held responsible under CERD. These issues are for the merits. At the present stage, all the Court is required to decide is to what extent, *ratione temporis*, the Court has jurisdiction over such alleged conduct.

The Court explains that if it 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.

In light of the foregoing, the Court concludes that it lacks jurisdiction *ratione temporis* to entertain Azerbaijan's claims that are based on alleged acts that occurred during the interval between 23 July 1993 and 15 September 1996. The Respondent's first preliminary objection to the Court's jurisdiction must therefore be upheld.

Hence, there is no need for the Court to consider the arguments of the Parties in relation to the question of admissibility.

**III. SECOND PRELIMINARY OBJECTION: JURISDICTION *RATIONE MATERIAE* IN RESPECT
OF THE ALLEGED LAYING OF LANDMINES AND BOOBY TRAPS
BY ARMENIA (PARAS. 65-77)**

The Court then examines Armenia's second preliminary objection, according to which the Court lacks jurisdiction *ratione materiae* under CERD "with respect to Azerbaijan's claims and contentions concerning the alleged placement of landmines and booby traps".

The Court explains that in order to rule on its jurisdiction *ratione materiae* under CERD with respect to the alleged laying of landmines and booby traps, it must first ascertain whether Azerbaijan, in its Application instituting proceedings and Memorial, requested that the Court find that Armenia

violated CERD by the alleged laying of landmines and booby traps, or whether Azerbaijan intended to establish that the use of these weapons was evidence supporting its claim regarding the alleged campaign of ethnic cleansing conducted by Armenia.

The Court observes that Azerbaijan presents the laying of landmines and booby traps as evidence in support of its claim that Armenia has used military means as part of a policy of ethnic cleansing. The Court considers that Azerbaijan does not request the Court to find that the laying of landmines and booby traps constitutes in itself a violation of the obligations under CERD. Since Azerbaijan is not claiming that the alleged laying of landmines and booby traps is itself a breach of Armenia's obligations under CERD, Armenia's second preliminary objection is without object. The Court will thus consider the arguments and evidence submitted by Azerbaijan in support of its submissions concerning alleged acts of ethnic cleansing at the merits stage.

In light of the foregoing, the Court concludes that the second preliminary objection raised by Armenia seeking to exclude from the jurisdiction of the Court the claims relating to the laying of landmines and booby traps must be rejected.

IV. THIRD PRELIMINARY OBJECTION: JURISDICTION *RATIONE MATERIAE* IN RESPECT OF ALLEGED ENVIRONMENTAL HARM (PARAS. 78-100)

The Court then turns to Armenia's third preliminary objection, according to which the Court lacks jurisdiction *ratione materiae* under CERD to entertain Azerbaijan's claims concerning environmental harm.

The Court recalls that to determine whether it has jurisdiction *ratione materiae* to entertain Azerbaijan's claims concerning environmental harm, it must ascertain whether the actions and omissions of the Respondent complained of by the Applicant fall within the scope of CERD; in other words whether the acts at issue, if established, are capable of constituting racial discrimination.

The Court notes that the environmental harm complained of by Azerbaijan consists in the alleged degradation of forests and destruction of trees classified as natural monuments, destruction and pillaging of water infrastructure such as pipes and irrigation systems, destruction and degradation of agricultural land and vineyards, degradation of land and water quality through mining activities, neglect and mismanagement of water infrastructure, and diversion of water resources. The Court further notes that the alleged environmental harm is said to concern the districts which surround the Nagorno-Karabakh region and had a majority ethnic Azerbaijani population before the hostilities that ended in May 1994. The harm is alleged to have occurred during the period when these territories were Armenian controlled, namely between 1994 and 2020.

The Court recognizes that it is not to be excluded that conduct leading to harm to the environment may, in some cases, constitute an act of racial discrimination under CERD. In the present case, however, the Court notes that, according to Azerbaijan itself, the alleged degradation of forests and destruction of trees in the districts formerly populated mainly by ethnic Azerbaijanis took place in pursuance of agricultural and industrial activities and a failure to mitigate wildfires. In particular, Azerbaijan submits that forests were cut "to make way for mines, hydropower plants, and associated infrastructure . . . that would allow Armenia to benefit from the then-occupied territories' abundant natural resources". It also states that the logging of timber resources was generally not concentrated near inhabited communities and was done "for commercial purposes". Moreover, the Court observes that Azerbaijan asserts that Armenia supported and facilitated the overexploitation of mineral resources causing devastating environmental harm in districts formerly populated by ethnic Azerbaijanis.

The Court is of the view that Armenia's alleged actions and omissions concerning deforestation and overexploitation of mineral resources would be either commercially motivated or

due to neglect and mismanagement of the environment. Thus, even if established and attributable to Armenia, they would not constitute a differentiation of treatment based on a prohibited ground under Article 1, paragraph 1, of CERD.

With regard to water infrastructure, Azerbaijan alleges that Armenia neglected and mismanaged such infrastructure in the “then-occupied territories” and redirected important water resources to benefit ethnic Armenians, which contributed to the degradation of agricultural land in districts formerly populated by ethnic Azerbaijanis and resulted in depriving Azerbaijanis living in areas of Azerbaijan adjacent to the “then-occupied territories” of potable water and water for irrigation. The Court is of the view that the alleged destruction and deviation of watercourses would have impacted different ethnic groups, not only ethnic Azerbaijanis. Such conduct, even if established and attributable to Armenia, could not be based on a prohibited ground under Article 1, paragraph 1, of CERD.

The Court further observes that the Parties agree that persons of Azerbaijani national or ethnic origin were not present on the territories affected by the alleged environmental harm when Armenia controlled those territories.

Accordingly, in the present circumstances, even if the alleged acts that caused the environmental harm were established and attributable to Armenia, the Court considers that they fall outside the scope of CERD, since they are neither capable of constituting a differentiation in treatment based on national or ethnic origin, nor capable of nullifying or impairing, by their purpose or by their effect, the enjoyment or exercise, on an equal footing, of the human rights of ethnic Azerbaijanis within the meaning of Article 1, paragraph 1, of the Convention.

In light of the foregoing, the Court concludes that it lacks jurisdiction *ratione materiae* to entertain Azerbaijan’s claims relating to environmental harm. The third preliminary objection raised by Armenia must therefore be upheld.

OPERATIVE CLAUSE (PARA. 101)

For these reasons,

THE COURT,

(1) By fourteen votes to three,

Upholds the first preliminary objection raised by the Republic of Armenia;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Aurescu, Tladi; *Judge ad hoc* Daudet;

AGAINST: *Judges* Yusuf, Cleveland; *Judge ad hoc* Koroma;

(2) By sixteen votes to one,

Rejects the second preliminary objection raised by the Republic of Armenia;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* Koroma;

(3) By twelve votes to five,

Upholds the third preliminary objection raised by the Republic of Armenia;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Brant, Gómez Robledo, Aurescu; *Judge ad hoc* Daudet;

AGAINST: *Judges* Nolte, Charlesworth, Cleveland, Tladi; *Judge ad hoc* Koroma;

(4) Unanimously,

Finds that it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, subject to points 1 and 3 of the present operative clause, to entertain the Application filed by the Republic of Azerbaijan on 23 September 2021.

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Judge TOMKA appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge IWASAWA appends a separate opinion to the Judgment of the Court; Judges NOLTE, CHARLESWORTH, CLEVELAND and TLADI append a joint dissenting opinion to the Judgment of the Court; Judge CHARLESWORTH appends a separate opinion to the Judgment of the Court; Judge CLEVELAND appends a dissenting opinion to the Judgment of the Court; Judge TLADI appends a dissenting opinion to the Judgment of the Court.

Separate opinion of Judge Tomka

In subparagraph 1 of the operative clause of the Judgment, the Court upholds the first preliminary objection of the Respondent. Judge Tomka voted in favour of this subparagraph, but for reasons that differ in part from those set out in the Court's Judgment. Judge Tomka thus wishes to explain the reasons that motivated his vote.

The Respondent's first preliminary objection concerns acts alleged to have occurred during a specific period, namely between 23 July 1993, the date on which the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") entered into force for Armenia, and 15 September 1996, the date on which CERD entered into force for Azerbaijan. In its first preliminary objection, the Respondent asked the Court to declare that the Court lacks jurisdiction to entertain Azerbaijan's claims concerning acts that took place during that period, or, in the alternative, that such claims are inadmissible.

From the outset, Judge Tomka notes that the Respondent put forward three arguments in support of its first preliminary objection. These are: (1) that there is a limitation *ratione temporis* in Article 22 of CERD limiting the temporal scope of the Court's jurisdiction; (2) alternatively, that the principle of non-retroactivity limits the temporal scope of the Court's jurisdiction, with the consequence that Azerbaijan's claims concerning acts alleged to have occurred in the 1993-1996 period fall outside the Court's jurisdiction; and, finally, (3) that Azerbaijan has no standing to invoke Armenia's responsibility for acts alleged to have occurred at a time when CERD was not in force for it. Judge Tomka notes that the first two arguments concern the temporal scope of the Court's jurisdiction, while the third argument rather raises a question of admissibility. In its Judgment, the Court upheld the first preliminary objection to jurisdiction, concluding that it lacked jurisdiction over Azerbaijan's claims relating to alleged acts that occurred prior to 15 September 1996. In his view, the Court should have rather upheld the Respondent's preliminary objection to the admissibility of those claims. The Court should also have been more careful to distinguish these three arguments, which raise different issues.

As to the first argument, Judge Tomka considers that there is no limitation *ratione temporis* in Article 22 of CERD that would affect the Court's jurisdiction. Article 22 of CERD grants the Court jurisdiction over "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention". This language does not suggest any temporal limitation. In this regard, Judge Tomka agrees with the observation in paragraph 42 of the Court's Judgment.

As to the second argument, Judge Tomka notes that the principle of non-retroactivity operates to limit the temporal scope of the Court's jurisdiction under certain treaties, as is the case with CERD. This, however, only means that the Court may not entertain claims concerning acts alleged to have occurred before 23 July 1993, the date on which CERD entered into force for Armenia. He emphasizes that a distinction must be made between the application of the principle of non-retroactivity to compromissory clauses and the retrospective scope of compromissory clauses. A compromissory clause giving jurisdiction to the Court over "disputes" is not one which has retroactive effects, for the simple reason that the compromissory clause still only captures a live or existing dispute. Consequently, when one State institutes proceedings against another State on the basis of a clause with regard to a "dispute" which relates to the past, no "retroactivity" is involved. In Judge Tomka's view, the Court should have concluded that the principle of non-retroactivity does not warrant upholding Armenia's first preliminary objection to jurisdiction.

Having shown that the first two arguments put forward by the Respondent do not warrant upholding the first preliminary objection to jurisdiction, Judge Tomka turns to the third argument, which is the real crux of the matter and concerns matters of admissibility. In Judge Tomka's opinion, Azerbaijan has no right to invoke Armenia's responsibility for the alleged acts that occurred during the 1993-1996 period. This is an issue of standing, and hence, of admissibility. For this reason, he

would have upheld the preliminary objection on grounds of inadmissibility. Surprisingly, although purporting not to deal with questions of admissibility, the Court's Judgment in the end also concludes that the Applicant lacks standing to invoke Armenia's responsibility for the alleged acts that occurred during the 1993-1996 period. It was for this reason that Judge Tomka was able to vote in favour of subparagraph 1 of the operative clause of the Judgment.

In his concluding remarks, Judge Tomka regrets that the Court has produced a judgment which cannot be described as a model of clarity. He also regrets the Court's use of loose terminology, notably the expression "jurisdiction *ratione temporis*", which the Court and its predecessor, the Permanent Court of International Justice, have traditionally been careful to avoid.

Declaration of Judge Yusuf

1. Judge Yusuf disagrees with the approach and the conclusion of the Court on the temporal scope of its jurisdiction under CERD. He observes that the dispute over the Court's jurisdiction *ratione temporis* is neither about (non-)retroactivity of treaty obligations nor about assessing whether the *erga omnes partes* obligations under CERD may affect the Court's jurisdiction.

2. For Judge Yusuf, what matters in the present case is, first, whether Armenia had an obligation to act in a certain way under the provisions of CERD at the time the alleged breach by Armenia took place. By ratifying CERD on 23 July 1993, Armenia committed itself to the elimination of racial discrimination on any prohibited ground by all appropriate means. In other words, from 23 July 1993, any alleged breach of obligations regarding discrimination on racial or ethnic grounds that are attributable to Armenia would fall within the scope of CERD. The second question is whether the Court had the consent of the Parties when the dispute was brought to it. The answer is also affirmative. The dispute between the Parties over Armenia's non-compliance with CERD has emerged at a time when both States were parties to the Convention.

3. Judge Yusuf observes that, like Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the compromissory clause in Article 22 of CERD contains no limit to the scope of jurisdiction *ratione temporis*. This is of course without prejudice to the temporal scope of any substantive obligations under the Convention which commenced for Armenia from 23 July 1993, the date on which Armenia became a State party to CERD. Hence, to the extent that the temporal scope of the compromissory clause is at issue, the fact that Azerbaijan became a party to CERD on a subsequent date, namely 15 September 1996, means that it became entitled from that date to request the Court to rule on its dispute with Armenia. Nonetheless, this does not change the fact that Armenia had been subject to the substantive obligations under CERD from 23 July 1993.

4. In light of the above considerations, Judge Yusuf concludes that, given that Armenia had an obligation under CERD to act in a certain manner since 23 July 1993 and that the Court had the consent of the Parties when the dispute was brought to it, the Court has jurisdiction over the events that are alleged to have occurred during the period between 23 July 1993 and 15 September 1996.

Separate opinion of Judge Iwasawa

In his opinion, Judge Iwasawa offers additional reasoning in support of the Court's decision to uphold the first and third preliminary objections raised by the Respondent.

Judge Iwasawa points out that many States have attached a reservation *ratione temporis* to their declarations accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute, to limit the temporal scope of the Court's jurisdiction. In contrast, no State party to CERD has attached a reservation to the compromissory clause of CERD to limit the Court's temporal jurisdiction. According to Judge Iwasawa, this demonstrates States parties' understanding that under the compromissory clause of CERD, the Court's jurisdiction is inherently limited in time.

Judge Iwasawa emphasizes that the Court's finding that it lacks jurisdiction over Azerbaijan's claims with regard to acts that took place before 15 September 1996 is consistent with its jurisprudence. Notably, he provides an account of the Court's decision in *Belgium v. Senegal* to clarify its relevance to the present case.

Judge Iwasawa is of the view that the test used by the Court to determine its jurisdiction *ratione materiae*, whether the applicant's claim falls within the scope of the treaty in question, must be understood against the background of the Court's overall jurisprudence. He points out that, in *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that in order to establish its jurisdiction *ratione materiae*, the applicant must establish "a reasonable connection" between the treaty and its claims.

In the present case, the Applicant focuses on the term "capable" and argues that its claims are "capable of" constituting violations of obligations under CERD. In the view of Judge Iwasawa, the Court's use of the term "capable of" in articulating the test should not be understood to imply that the Court has jurisdiction *ratione materiae* as long as there is even the slightest possibility that the facts are "capable" of constituting violations of obligations under the treaty.

Joint dissenting opinion of Judges Nolte, Charlesworth, Cleveland and Tladi

Judges Nolte, Charlesworth, Cleveland and Tladi believe the Court's decision that it has no jurisdiction *ratione materiae* over most of Azerbaijan's claim that Armenia, by causing environmental harm, acted in a racially discriminatory way is inconsistent with the Court's jurisprudence, including the Judgment on preliminary objections rendered simultaneously in the case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. They have therefore voted against the decision to uphold Armenia's third preliminary objection.

The Judges note that the Court's Judgment recognizes that Azerbaijan remains free, at the merits phase, to adduce relevant evidence of environmental harm in support of certain other claims, such as those regarding ethnic cleansing and an alleged "scorched earth" policy. But they also consider more broadly that — while CERD is not designed to protect the environment — if acts causing environmental harm create a differentiation based on a prohibited ground under CERD, with the purpose or effect of impairing the enjoyment of human rights, they violate CERD.

Judges Nolte, Charlesworth, Cleveland and Tladi consider that, having acknowledged its usual standard for the determination of its jurisdiction *ratione materiae*, the Court fails to apply it. In their view, which they explain in more detail, the Court instead offers a selective description of Azerbaijan's claims, and then engages in an analysis involving the merits, in a manner that is inappropriate for the preliminary objections phase.

The Judges note that Azerbaijan alleges that Armenia has acted with the purpose or effect of discriminating against Azerbaijanis based on their national or ethnic origin. They are of the view that whether the alleged environmental harm impacted ethnic Armenians as well or involved non-discriminatory motivations, and the fact that ethnic Azerbaijanis were not present in the affected territories, does not preclude the possibility that the conduct also involved racial discrimination. The issue whether Armenia did, in fact, engage in racial discrimination, whether purpose or effect-based, is one for the merits. The Judges also find that the Court fails to address a key claim in the case, which is the right of ethnic Azerbaijanis to return.

The dissenting Judges observe that claims that are based solely on allegations that environmental harm caused by a State has had a disparate adverse effect on the members of a protected group, may, in some circumstances, be easily made and difficult to prove. However, in their view, the Court has set out a standard which, if faithfully applied, can prevent and contain excessive allegations. They believe the Court should not reject its jurisdiction in cases in which an applicant makes allegations which have some basis that a respondent has acted with the purpose or effect of discriminating against a protected group.

In conclusion, Judges Nolte, Charlesworth, Cleveland and Tladi declare that they do not share the majority's view that many of Azerbaijan's claims concerning environmental harm are not capable of constituting racial discrimination. Azerbaijan should have been given the opportunity to prove its allegations.

Separate opinion of Judge Charlesworth

Judge Charlesworth has co-signed a joint dissenting opinion with Judges Nolte, Cleveland and Tladi concerning the Court's decision on Armenia's third preliminary objection. Judge Charlesworth has voted with the majority on Armenia's first and second preliminary objections, but her decision rests on different reasoning than that presented in the Judgment.

Judge Charlesworth disagrees with the Court's characterization of Armenia's first objection as one concerning the Court's temporal jurisdiction and sees it as a question of legal standing instead. She points out that unless explicit limitations are introduced to a treaty, the treaty's temporal scope also covers pre-existing disputes. Thus, she argues that Azerbaijan's claims belong under the scope of the Court's temporal jurisdiction.

She further explains that, in case of claims based on the alleged breach of *erga omnes (partes)* obligations, applicants only have standing to bring claims arising from pre-existing disputes if they are invoking the responsibility of the respondent on behalf of a group of States or the international community. Given that Azerbaijan characterized itself as a specially affected State in the present proceedings, Judge Charlesworth is of the view that Azerbaijan did not have standing to bring the claims in question.

With respect to Azerbaijan's second preliminary objection, Judge Charlesworth takes issue with the Court's qualification of the objection as being "without object". She considers rather that Armenia's preliminary objection is not a preliminary objection in the true sense of the word.

Dissenting opinion of Judge Cleveland

1. Judge Cleveland joins the Court in rejecting Armenia's second preliminary objection to the Court's jurisdiction regarding the laying of landmines and booby traps. However, she disagrees with the Court's decision to uphold the first and third preliminary objections. Her reasons for rejecting the third preliminary objection relating to environmental harm are explained in the joint dissenting opinion together with Judges Nolte, Charlesworth and Tladi. Separately, she writes to explain why

the Court should have rejected the first preliminary objection regarding jurisdiction *ratione temporis* and admissibility.

2. The question posed by this 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. Judge Cleveland believes the Court should have concluded that it has jurisdiction. In this regard, Judge Cleveland observes that both States were parties to CERD at the time the dispute arose and the Application was filed. Nothing in the language of the compromissory clause in Article 22 of CERD imposes a temporal restriction, and the Parties have not attached any declarations or reservations to that effect. No issue of retroactivity is presented. Moreover, the Court misapplies its prior decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (hereinafter "*Bosnian Genocide*"), which upheld the Court's jurisdiction *ratione temporis* in a similar context enforcing obligations *erga omnes partes*.

3. In Judge Cleveland's view, the question whether Azerbaijan can bring claims against Armenia involving alleged acts during the period in which Azerbaijan was not yet a party should have been addressed by the Court as a question of admissibility and standing. According to her, 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. Judge Cleveland asserts that the core error in today's decision is the Court's failure to meaningfully examine the nature of obligations *erga omnes partes*. As a result, the Court improperly imports an *inter partes* concept of mutual reciprocity and State responsibility into the CERD compromissory clause.

5. The Court has long recognized that human rights treaties — including CERD — do not primarily establish mutually reciprocal obligations between States. Instead, they primarily establish obligations between States parties and the individuals whose rights the treaties protect, as well as a common interest among the States parties to ensure compliance with those commitments — obligations *erga omnes partes*. Such obligations "are owed by any State party to all the other States parties to the relevant convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 515-516, para. 107), and all States parties share a "legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 33, para. 33).

6. Judge Cleveland contends that in such cases, standing is based on the applicant's party status at the time the application was filed, not at the time the alleged violation took place. This principle was recognized by the European Commission on Human Rights in *Austria v. Italy* and by the CERD Committee in the inter-State complaint between the State of Palestine and Israel. The same approach informed the Court's interpretation of its jurisdiction in *Bosnian Genocide*.

7. Judge Cleveland agrees with the Court that the inter-State complaint process under Articles 11 to 13 of CERD allows any State party to bring a dispute before the CERD Committee against any other State party. She disagrees, however, with the Court's conclusion that the same interpretation does not apply to the Article 22 compromissory clause. Both procedures concern "disputes" between States parties, and the Court's conclusion simply imposes a concept of reciprocal obligations on the latter procedure, and not the former.

8. Finally, Judge Cleveland asserts that, as a result of its failure to recognize the nature of obligations *erga omnes partes*, the Court improperly applies the rules of State responsibility. The relevant rule in this case is Article 48 of the ILC Articles on State Responsibility, which recognizes the ability of a State to invoke the international legal responsibility of other States when acting in the collective interest with respect to obligations *erga omnes partes*. In *The Gambia v. Myanmar*, the Court recognized broad standing to enforce obligations *erga omnes partes*. Its failure to properly apply this principle today restricts the principle of a collective legal interest by inserting a standing condition into CERD (the date of the applicant's accession), with the result that not all States parties are able to invoke collective responsibility. For all these reasons, Judge Cleveland regretfully dissents.

Dissenting opinion of Judge Tladi

While Judge Tladi supports the Court's decision to uphold the first preliminary objection of Armenia concerning the Court's jurisdiction *ratione temporis*, in his dissenting opinion, he sets out his views on the temporal scope of the Court's jurisdiction under Article 22 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "Convention" or "CERD"). He observes that there is nothing in the text of the Convention, the jurisprudence of the Court or the *erga omnes* and *jus cogens* character of the obligations under the Convention that would support an interpretation whereby the Court would have jurisdiction over 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 Convention. According to him, a determination of the Court's jurisdiction *ratione temporis* under Article 22 of CERD requires recourse to other relevant rules and principles of international law within the meaning of Article 31 (1) (c) of the Vienna Convention on the Law of Treaties. These principles, notably reciprocity and non-retroactivity, when thrown "into the crucible" of interpretation, lead to a "legally relevant interpretation" of Article 22 and the Court's jurisdiction *ratione temporis*. In Judge Tladi's view, these principles militate 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. This interpretation of Article 22 does not undermine the concept of *erga omnes* obligations.

Additionally, Judge Tladi explains his strong reservations against the Court's treatment of Azerbaijan's alternative argument — made in response to Armenia's first preliminary objection — that Armenia's alleged conduct constitutes continuing or composite wrongful acts falling within the Court's jurisdiction *ratione temporis*. Judge Tladi criticizes the Court's observations in paragraph 62 of the Judgment, where it appears to state that actions and omissions forming part of a continuing breach but occurring prior to the critical date are excluded from the Court's jurisdiction, although they may be "tak[en] into consideration" by the Court. According to Judge Tladi, this paragraph is either poorly worded or, alternatively, based on an erroneous reading of the law on State responsibility because it disaggregates the individual actions and/or omissions that constitute the continuing breach into those that occurred before the critical date and those that occurred after the critical date. He explains that, once the Court has accepted that individual actions and omissions constitute a continuing breach, it should treat them as a singular act.
