SEPARATE OPINION OF JUDGE IWASAWA

The tests used by the Court to determine its jurisdiction ratione materiae*, whether the applicant's claim falls within the scope of the treaty, must be understood against the background of the Court's overall jurisprudence — 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 in question and its claims — In the present case, the Applicant argues that its claims are "at the very least" "capable of" constituting violations of obligations under CERD — The Court's use of the term "capable of" 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, if established, are "capable" of constituting violations of obligations under the treaty.*

1. It is generally considered that the Court first clearly articulated the test to determine whether it has jurisdiction *ratione materiae* to entertain a dispute in *Oil Platforms* (1996). The Court stated that it must ascertain "whether the violations of the Treaty . . . pleaded by [the applicant] do or do not fall within the provisions of the [t]reaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16). The Court has subsequently expressed this test in the following terms: jurisdiction *ratione materiae* is established if the acts of which the applicant complains "fall within the provisions" of the treaty (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 584, para. 57; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 31-32, para. 75). The Court has used similar wording in determining whether it has jurisdiction *ratione materiae*, stating that it must ascertain whether the claims "[fall] within the scope of" a convention (*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. 94, para. 72).

2. In some cases, the Court has used the following formulations: *(a)* whether the claims are "capable of" falling within the provisions of the convention (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 315-316, paras. 69-70 and p. 319, para. 85; *(b)* whether they are "capable of" having an adverse effect on the enjoyment of certain rights protected under the treaty (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 596, para. 96); *(c)* whether they are "capable of" falling within the scope of the convention (*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*, pp. 108-109, paras. 111-112); and *(d)* whether they are "capable of" constituting violations of obligations under the treaty (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States intervening), Preliminary Objections, Judgment of 2 February 2024*, para. 136).

3. In the present case, the Respondent maintains that "[i]t is common ground between the Parties that the test at this jurisdictional stage is whether the conduct complained of is 'capable of falling within the scope of the Convention'" (CR 2024/17, p. 36, para. 5 (Wordsworth); CR 2024/19, p. 23, para. 24 (Wordsworth); see also CR 2024/17, p. 46, para. 5 (Boisson de Chazournes)). The Applicant's understanding of the test is substantially the same (CR 2024/18, pp. 29-30, para. 12 (d'Argent)).

4. The above test must be understood against the background of the Court's overall jurisprudence and applied in a manner consistent with it. The Court and its predecessor, the Permanent Court of International Justice, have grappled on many occasions with the question of whether claims presented by the applicant fall within the scope of the treaty at issue. In *Mavrommatis Palestine Concessions*, the Permanent Court stated that it could not content itself with "the provisional conclusion that the dispute falls or not within the terms of" the Mandate (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16). In *Ambatielos*, this Court declared that it must determine whether an applicant's arguments "are of a sufficiently plausible character" to warrant a conclusion that the claim is based on the treaty in question. It stressed that "[i]t is not enough" for the applicant "to establish a remote connection between the facts of the claim and the Treaty". It explained that there are reasonable grounds for concluding that its claim is based on the treaty if the applicant is relying upon "an arguable construction" of it (*Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, p. 18). The Court required in *Interhandel* that the grounds invoked by the applicant are "of relevance" in the case (*Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 24). In *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that the applicant must "establish a reasonable connection between the Treaty and the claims submitted to the Court" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81). Thus, while the Court articulated this test more clearly in *Oil Platforms*, it was not entirely novel; the *Oil Platforms* test must be understood in the light of these precedents.

5. In the present case, Armenia, the Applicant, repeatedly focuses on the term "capable" in explaining the test for determining jurisdiction *ratione materiae*, and argues that its claims are, "at a minimum" or "at the very least", "capable of" constituting violations of obligations under CERD (Written Observations of Armenia, paras. 5, 10, 44, and 61; CR 2024/18, p. 14, para. 17 (Kirakosyan); p. 36, paras. 8 and 10; p. 42, para. 26; and p. 43, para. 32 (Murphy); p. 46, para. 9; p. 48, para. 20; p. 51, para. 28; and p. 52, paras. 29-30 (Macdonald); p. 59, para. 8; p. 60, para. 10; p. 62, para. 16; and p. 64, para. 20 (Klingler); p. 70, para. 5; and p. 73, para. 17 (Sicilianos); CR 2024/20, p. 24, para. 15; p. 28, para. 24 (Murphy); and p. 43, para. 4 (Kirakosyan)).

6. It is important to recall the context in which the Court has used the expression "capable of" in determining its jurisdiction *ratione materiae*. In *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* and *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States intervening)*, it used the expression "capable of" to emphasize that the alleged facts, even if proven, *could not* constitute a violation of the treaty at issue. In *Immunities and Criminal Proceedings*, the Court interpreted the provisions of the United Nations Convention against Transnational Organized Crime, in particular Articles 6 and 15, and concluded that since they did not concern the claim raised by the applicant, the alleged violations complained of were *not* "capable of" falling within the provisions of the Convention (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 328, para. 117). In *Qatar* v. *United Arab Emirates*, the Court held that the term "national origin" in Article 1, paragraph 1, of CERD did not encompass current nationality and that, consequently, the

measures complained of by Qatar were *not* “capable of” constituting racial discrimination, by either their purpose or effect (*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. 106, para. 105 and p. 109, para. 112). In *Allegations of Genocide*, the applicant complained that the respondent had acted in bad faith by abusively invoking the Genocide Convention to justify its actions. The Court concluded that even assuming the acts complained of by the applicant were fully established, they were *not* capable of constituting a violation of the respondent’s obligations under Articles I and IV of the Convention, which concerned the prevention and punishment of acts of genocide (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States intervening), Preliminary Objections, Judgment of 2 February 2024*, paras. 137-139).

7. The Court’s use of the term “capable of” in determining its jurisdiction *ratione materiae* should not be understood to imply that the Court has jurisdiction as long as there is even the slightest possibility that the facts, if established, are “capable” of constituting violations of obligations under the treaty. Rather, there must be “a reasonable connection” between the treaty and the applicant’s claims (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81)[1].

8. The Court addressed the question of whether the applicant’s claims must be “plausible” to fall within its jurisdiction *ratione materiae* in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*. In that case, the respondent argued that it was not enough for the applicant to establish a remote connection between the facts of the claim and the treaty in question. In its view, the applicant had to convince the Court that it had put forward a “plausible” claim under the treaty (Preliminary Objections of the Russian Federation, pp. 12-37; CR 2019/9, pp. 20-25, paras. 1-22 (Wordsworth); pp. 66-69, paras. 2-13 (Forteau); CR 2019/11, pp. 12-18, paras. 1-22 (Wordsworth); pp. 48-53, paras. 2-9 (Forteau)). In response, the applicant argued that the question of “plausibility” was unique to the provisional measures context, and that the respondent misunderstood the relationship between provisional measures and preliminary objections (Written Observations of Ukraine, pp. 16-18; CR 2019/10, pp. 20-23, paras. 12-23 (Thouvenin)). The Court did not accept the respondent’s argument. It appears that the Court was not disposed to accept “plausibility” as a requirement to establish its jurisdiction *ratione materiae* because it is separately a requirement for the indication of provisional measures. In his dissenting opinion, Judge Skotnikov maintained: “The present Judgment comes very close to implying that it is enough for an applicant to argue the existence of a connection, no matter how remote or artificial, between its factual allegations and the treaty it invokes, in order for the Court to be satisfied that it has jurisdiction *ratione materiae* under that treaty to entertain the case.”[2] In my opinion, the Court did not take the view that “it is enough for an applicant to argue the existence of a connection, no matter how remote or artificial, between” the facts of the claim and the treaty in question, to establish the Court’s jurisdiction *ratione materiae*. The Court merely stated that “[a]t the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the

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[1] See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, pp. 824-827 (expressing a preference for the tests used by the Court in *Ambatielos*, *Interhandel*, and *Military and Paramilitary Activities in and against Nicaragua*); *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, declaration of Judge Gaja, p. 52, para. 1: “What is required is for the Court to ascertain that a reasonable case has been made”; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections, Judgment of 12 November 2024*, separate opinion of Judge Iwasawa, paras. 11-15).

[2] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, dissenting opinion of Judge Skotnikov, p. 669, para. 14.

plausibility of the claims is not *generally* warranted"; rather, its task is to "consider the questions of law and fact that are relevant to the objection to its jurisdiction" (*ibid.*, p. 584, para. 58, emphasis added).

(Signed) IWASAWA Yuji.

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