SEPARATE OPINION OF JUDGE TOMKA

First preliminary objection of the Respondent — Reasons for vote in favour of subparagraph 1 of the operative clause of the Judgment — Absence of limitation ratione temporis *in Article 22 of the Convention — Principle of non-retroactivity irrelevant in the present case — Standing of the Applicant real crux of the matter — Applicant has no standing to invoke the responsibility of the Respondent for acts alleged to have occurred in the 1993-1996 period — Therefore, claims based on those acts are inadmissible.*

I. Introduction

1. While I have voted in favour of point 1 of the operative part upholding the first preliminary objection raised by Armenia (Judgment, para. 101), the reasons which motivate my vote differ in part from those set out in the Court's Judgment. I also find the reasoning offered by the Court on this matter unpersuasive. As such, I feel compelled to explain my position and offer some observations.

2. With regard to Armenia's first preliminary objection, it is helpful to recall that certain points were not in contention between the Parties (Judgment, para. 29). The Parties agree that the Court has no jurisdiction over acts that occurred prior to the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD" or the "Convention") entering into force for Armenia, i.e. before 23 July 1993. The Parties also agree that the Court has jurisdiction in respect of Azerbaijan's claims relating to acts alleged to have occurred in the period after the Convention entered into force for Azerbaijan, i.e. after 15 September 1996. The Parties' disagreement concerns whether the Court can consider and adjudicate upon the alleged violations of obligations under CERD that occurred between these two dates, that is, those alleged to have occurred in the "38-month period between July 1993 and September 1996". For convenience, I shall refer to this period as the "1993-1996 period".

3. It is in respect of this period that Armenia raised its first preliminary objection, arguing 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 (Judgment, paras. 21

and 28)[1]. In its Judgment, the Court upholds this preliminary objection, seemingly on the basis that the Court "lacks jurisdiction over Azerbaijan's claims relating to alleged acts that occurred before 15 September 1996" (*ibid*., para. 64). I am not convinced. In my view, the Court should have found that it has jurisdiction to entertain Azerbaijan's claims concerning acts that allegedly occurred during the 1993-1996 period, but that Azerbaijan is not entitled to invoke before the Court breaches of the obligations under the Convention occurring before it entered into force for the Applicant. This is an issue of standing and hence, of admissibility, not of jurisdiction.

4. In support of its first preliminary objection, the Respondent put forward three main arguments: (i) there is a limitation *ratione temporis* in Article 22 of CERD that limits the temporal scope of the Court's jurisdiction; (ii) alternatively, 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 (iii) 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.

5. The first two arguments raise issues concerning the scope of the Court's jurisdiction, while the third argument (on standing) in reality has nothing to do with jurisdiction. It rather raises an issue of admissibility.

6. The difficulty for the reader wishing to understand how the Court has arrived at its decision in point 1 of the operative part is that the Court's Judgment does not appropriately distinguish between these three issues, which are fudged together under Section II. The result is that the Judgment upholds Armenia's preliminary objection to jurisdiction for reasons which in reality have to do with the Applicant's lack of standing, that is, for reasons of inadmissibility.

7. This can readily be seen by examining the three arguments put forward by the Respondent.

[1] The Respondent put forward three preliminary objections, the first one of which was alternative in character. This objection asked the Court to adjudge and declare

> "that it lacks jurisdiction *ratione temporis* with respect to Azerbaijan's claims and contentions concerning events that transpired prior to the entry into force of the CERD as between the Parties on 15 September 1996, or that such claims and contentions are inadmissible" (Judgment, para. 19).

In its final submissions presented at the end of the oral proceedings, the Respondent split this objection into two objections, *(a)* and *(b)*, which the Court's Judgment nonetheless treats as a single preliminary objection. The Court is expected to "rule on the final submissions of the parties as formulated at the close of the oral proceedings" (*Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 68, para. 41).

II. There Is No Limitation *Ratione Temporis* in Article 22 of CERD

8. The Court is right not to accept the Respondent's first argument that Article 22 of the Convention limits the temporal scope of the Court's jurisdiction. There is no limitation *ratione temporis* in Article 22 that would affect the Court's jurisdiction. Article 22 of the Convention 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. As Shabtai Rosenne notes, the formula that gives jurisdiction over "any dispute" arising under a given treaty, and which can be found in many compromissory clauses, in itself imports "no temporal conditions into the acceptance of the jurisdiction"[2]. Indeed, the word "dispute", according to its natural meaning, is apt to cover any "dispute" which exists between the parties at the time of the institution of proceedings. It matters not either that the dispute concerns events or acts which took place prior to that date or that the dispute itself arose prior to it, for the parties have agreed to refer to the Court all their *existing* disputes without qualification[3]. Absent a limitation *ratione temporis*[4], compromissory clauses will normally have a retrospective scope[5]; they are "backward looking". This point is supported by the Court's jurisprudence as well as by scholars[6].

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[2] S. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (Leyden: A. W. Sijthoff, 1960), p. 35.

[3] Sir Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, UN doc. A/CN.4/167 and Add.1-3 (1964), *Yearbook of the International Law Commission (YILC)*, 1964, Vol. II, p. 11, para. 3.

[4] An example is Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes, which states that provisions of that Convention shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". See *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 24, para. 43.

[5] See e.g. *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35 (stating that "[t]he Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment . . . The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34.

[6] See e.g. S. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (Leyden: A. W. Sijthoff, 1960), p. 54 (stating that "in principle there is nothing to prevent the Court from exercising jurisdiction over disputes arising before, or relating to situations or facts occurring before, either the establishment of the Court or the date upon which one or other of the parties became party to the Statute or otherwise under the obligation to accept jurisdiction"); R. Higgins, "Time and the Law: International Perspectives on an Old Problem" *International & Comparative Law Quarterly*, 1997, Vol. 46, Issue 3, p. 502 (stating that "[t]he broad position of the Court — and its predecessor, the Permanent Court of International Justice — has been that acceptance of the jurisdiction of the Court *does* have

9. It is true that Article 22 of the Convention states that any dispute referred to the Court must arise "between two or more States Parties", referring to States that have ratified the Convention and have not made a reservation to its Article 22. According to Armenia, this phrase could be read as embodying a limitation *ratione temporis*. In reality, the reference to "States Parties" concerns the association of time with the Court's jurisdiction *ratione personae*. Naturally, the title of jurisdiction must have been in force between the parties at the date of the institution of proceedings[7].

10. Thus, I agree with the observation in paragraph 42 of the Court's Judgment that Article 22 of CERD "contains no language defining the temporal scope of the Court's jurisdiction". From this observation, it follows that nothing in Article 22 warrants upholding Armenia's first preliminary objection to jurisdiction.

III. The Principle of Non-Retroactivity Is Irrelevant in the Present Case

11. This brings me to the second argument put forward by Armenia. Armenia argues that, even absent an express limitation *ratione temporis* in Article 22 of CERD, the principle of non-retroactivity nevertheless 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. I agree that the principle of non-retroactivity puts limits on the temporal scope of the Court's jurisdiction in the present case. This conclusion, however, does not get us very far; specifically, it does not warrant upholding Armenia's first preliminary objection to jurisdiction.

12. This is easy to see once the principle of non-retroactivity is properly understood.

13. The principle of non-retroactivity is reflected in Article 28 of the Vienna Convention on the Law of Treaties. This Article provides that a treaty is not to be regarded as intended to have retroactive effects unless

retrospective effect . . . unless this is specifically excluded by a reservation to the general acceptance of jurisdiction"); R. Kolb, *The International Court of Justice*, Hart Publishing, 2013, p. 424 (stating that "[i]f the solution in the *Genocide* case were of general application, both compromissory and jurisdictional clauses would apply as from the critical date, but the facts on which the dispute was based would not be temporally limited").

[7] *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. 445, para. 95; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33.

such an intention is expressed in the treaty or is clearly to be implied from its terms[8]. Though issues of non-retroactivity usually arise with regard to the temporal scope of substantive obligations in a treaty[9], one may also ask how the principle of non-retroactivity interacts with compromissory clauses such as the one contained in Article 22 of CERD[10]. This specific issue has presented itself before the Court on a number of occasions[11]. In this regard, the Court has distinguished between *(a)* "general provision[s] for the settlement of disputes" (such as Article XXXI of the Pact of Bogotá), which are not temporally limited by the principle of non-retroactivity, and *(b)* compromissory clauses found in certain treaties (such as Article IX of the Genocide Convention), the temporal scope of which are "necessarily linked" to the temporal scope of the substantive provisions of such treaties[12].

14. The Court elaborated this distinction in the *Croatia* v. *Serbia* case. It notably finds support in the work of the International Law Commis-

[8] Article 28 provides:

> "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."

[9] See e.g. *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 (where the Court stated that "a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation").

[10] N. Gallus, *The Temporal Jurisdiction of International Tribunals* (Oxford University Press, 2017), pp. 10-15.

[11] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34. The parties debated non-retroactivity in their pleadings: see e.g. Preliminary Objections of the Federal Republic of Yugoslavia, p. 133; CR 1996/11, pp. 75-77 (Stern); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 22. The parties debated non-retroactivity in their pleadings: see e.g. Preliminary Objections of the Russian Federation, p. 232, paras. 6.3-6.4; Written Statement of Georgia on the Preliminary Objections of the Russian Federation, p. 211, para. 5.11; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 458, para. 103. The parties debated non-retroactivity in their pleadings: see e.g. CR 2012/5, p. 44 (Donoghue); supplementary written replies of the Government of Senegal to the questions put by judges at the close of the hearing held on 16 March 2012, p. 2; *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. 48, paras. 91-92. The parties debated non-retroactivity in their pleadings: see e.g. Counter-Memorial of Serbia, pp. 89-96, paras. 224-254; Reply of Croatia, pp. 248-252, paras. 7.17-7.31; Rejoinder of Serbia, pp. 49-72, paras. 73-155.

[12] *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.

sion[13] (ILC) and that of ILC Special Rapporteur, Sir Humphrey Waldock[14]. When a treaty is purely and simply a treaty of arbitration or judicial settlement, the compromissory clause contained therein will normally provide for the submission of "disputes", or specified categories of "disputes", between the parties to an international tribunal. In this scenario, the word "disputes" according to its natural meaning is apt to cover any dispute which exists between the parties at the time of the institution of proceedings (see paragraph 8 above).

15. By contrast, when a compromissory clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application and the settlement of disputes arising thereunder, the non-retroactivity principle "does operate . . . to limit *ratione temporis* the application of the jurisdictional clause"[15]. The reason for this is that the "disputes" with which the clause is concerned are *ex hypothesi* limited to disputes regarding the interpretation or application of the substantive provisions of the treaty which, following the principle of non-retroactivity, do not normally extend to matters occurring before the treaty came into force[16].

16. Article 22 of CERD belongs to the second category of compromissory clauses referred to in the *Croatia* v. *Serbia* case. Accordingly, the temporal scope of Article 22 is "necessarily linked" to the temporal scope of other provisions in the Convention. A dispute about a State's compliance with its international obligations under CERD can only arise in relation to acts that allegedly occurred at a time when that State was bound by CERD. Today's Judgment alludes to this link in paragraphs 45 and 47.

17. This conclusion, however, does not warrant upholding Armenia's first preliminary objection. As Azerbaijan correctly notes, the non-retroactivity principle would

> "bar claims pre-dating CERD's entry into force for Armenia, but Azerbaijan has not requested and is not requesting that the Court adjudicate the legality of Armenia's conduct prior to CERD's entry into force for Armenia"[17].

[13] International Law Commission, Draft Articles on the Law of Treaties with commentaries, *YILC*, 1966, Vol. II, p. 212, para. 2.

[14] Sir Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, UN doc. A/CN.4/167 and Add.1-3 (1964), *YILC*, 1964, Vol. II, pp. 11-12.

[15] *Ibid*., p. 11, para. 4.

[16] *Ibid.*

[17] Observations and submissions of the Republic of Azerbaijan on the preliminary objections of the Republic of Armenia, 21 August 2023, (hereinafter "Written Statement of Azerbaijan"), p. 2, para. 3.

Therefore, there is no question of retroactivity in the present case; "the relevant conduct underpinning Azerbaijan's claims of breach occurred after CERD's entry into force for Armenia in 1993"[18].

18. In this regard the Judgment states that, "in so far as Armenia's obligations under CERD are concerned, no issue of retroactivity arises" (para. 44). I agree, and this should be the end of the matter as far as Armenia's second argument is concerned.

19. According to Armenia, however, this misses the point. The real retroactivity issue in the present case would be a different one. The issue, says Armenia, is that Azerbaijan is "trying to use Article 22 to *reach back in time* and claim the right to raise questions about Armenia's compliance with its obligations under CERD in relation to a period of time when Armenia did not owe those obligations to Azerbaijan"[19]. In its view this would disregard the principle of non-retroactivity expressed in Article 28 of the Vienna Convention on the Law of Treaties.

20. Upon reflection, what Armenia presents as the real retroactivity issue involves no retroactivity at all. Retroactivity must be distinguished from what is merely the *retrospective scope* of a compromissory clause as applied to a live dispute.

21. A clause which provides for the acceptance of jurisdiction with respect to "disputes" between the parties is *not* one which has "retroactive effects"[20]. As noted above, compromissory clauses often refer to "disputes". Absent any temporal limitation, such clauses cover any dispute that *exists* between the parties at the time of the institution of proceedings. The circumstance that the dispute arose prior to the entry into force of the treaty or involves earlier facts in no way renders the compromissory clause "retroactive"[21] — the clause still only captures a live or existing dispute[22]. By extension, when one State institutes proceedings against another State on the basis of a clause

[18] CR 2024/22, p. 26, para. 25 (Lowe). See also Written Statement of Azerbaijan, p. 11, para. 20.

[19] CR 2024/23, p. 12, para. 11 (Martin) (emphasis added).

[20] As the term is traditionally understood. See *Dictionnaire de droit international public*, J. Salmon (ed.), Brussels: Bruylant, 2001, p. 1009 (defining retroactivity as the "[c]haracteristic of an act or norm that produces legal effects at a date prior to its occurrence (for an act) or its entry into force (for a norm)"). It must be seen that, upon the filing of an application instituting proceedings, the effects produced by a compromissory clause are simply to empower and require the Court to pass upon the claims put to it. See *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.

[21] F. Dopagne, "Article 28", in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, 2011, Vol. I, p. 721.

[22] That compromissory clauses do not engage the principle of non-retroactivity is well accepted. See Sir Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, UN doc. A/CN.4/167 and Add.1-3 (1964), *YILC*, 1964, Vol. II, p. 11, para. 3 (noting that "a treaty which provides for acceptance of jurisdiction with respect to 'disputes' between the parties is [not] one which has 'retroactive effects'; because the treaty, for the very reason that it cannot have retroactive effects, applies only to *disputes* arising or *continuing to exist* after its entry into force"); D. Bindschedler-Robert, "De la rétroactivité en droit international

with regard to a "dispute" which relates to the past, no "retroactivity" is involved.

22. When Azerbaijan relies on Article 22 of CERD to bring claims concerning acts alleged to have occurred during the 1993-1996 period, it is therefore not "reaching back in time", as Armenia suggests, in a way that engages the principle of non-retroactivity. Rather, the compromissory clause is being used in an effort to settle an existing dispute.

23. Despite the foregoing, the Court reaches a rather surprising conclusion in paragraph 47 of the Judgment, namely 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, 15 September 1996, not the date on which Armenia became bound by the Convention" (emphasis added).

This cannot follow from the application of the principle of non-retroactivity to Article 22 of CERD. As noted above, the application of this principle means that the temporal scope of the Court's jurisdiction under Article 22 is linked to the scope of the substantive provisions found in the Convention. Armenia's obligations under the substantive provisions of CERD took effect on the date on which that treaty entered into force for it, i.e. on 23 July 1993. And, as recognized by the Court, a State has obligations under human rights treaties not only in its own territory but also outside of it, where it exercises its jurisdiction and control[23]. Obviously, these obligations did not take effect on 15 September 1996, the date on which the Convention became binding for the Applicant. The conclusion reached in paragraph 47 of the Judgment is thus illogical. It confuses the date on which the substantive obligations under CERD became binding for Armenia (23 July 1993), and the earliest date on which Article 22 of CERD enabled either of the Parties to submit to

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public" in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Faculty of Law of the University of Geneva, 1968, p. 192 (stating that "[t]hese considerations hold true for jurisdictional obligations. Even if such obligations relate to disputes that arose before they entered into force . . . those disputes are nonetheless existing or future ones, and it cannot therefore be said that a jurisdictional obligation establishes obligations of conduct retroactively"); P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire*, Paris: Librairie générale de droit et de jurisprudence, 1970, p. 217 (stating that "[t]he solution advocated by the Mavrommatis Judgment therefore does not result in retroactive effect being given to the jurisdictional clause . . . [T]he effect is, in reality, simply an immediate one"); S. Bastid, *Les traités dans la vie internationale: conclusions et effets*, Paris: Economica, 1985, p. 122 (stating that "the jurisdictional clause covering all disputes is not in fact a retroactive clause").

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 179, para. 109.

the Court any dispute between them relating to the Convention (15 September 1996).

24. In short, the Court should have concluded that the principle of non-retroactivity does not warrant upholding Armenia's first preliminary objection to jurisdiction. This brings me to the third argument put forward by Armenia.

IV. Azerbaijan's Lack of Standing

25. While the Court had to rule on the first preliminary objection to jurisdiction, it seems that the real crux of the matter in the present case is not one of temporal scope of the Court's jurisdiction but one of standing: is Azerbaijan entitled to invoke Armenia's responsibility for breach of its obligations under CERD for acts that occurred before CERD entered into force for Azerbaijan? While the Parties presented various arguments on this issue, they are scarcely addressed in today's Judgment. This may be understandable given the Court's decision. Having upheld Armenia's first preliminary objection to jurisdiction (Judgment, para. 63), the Court states that there is "no need" for it to consider the Parties' arguments in relation to the question of admissibility (*ibid*., para. 64).

26. I do not consider it necessary to deal with these arguments in detail here. It suffices to say that, in my view, the Court should have dealt with these arguments. As shown above, there is no basis to uphold Armenia's first preliminary objection to jurisdiction, either on the basis of a limitation *ratione temporis* in Article 22 of CERD (see paragraphs 8-10 above) or on the basis of the principle of non-retroactivity (see paragraphs 11-24 above). It was thus necessary for the Court to examine Armenia's arguments on admissibility in full to determine whether they supported Armenia's alternative preliminary objection to admissibility.

27. Surprisingly, in paragraphs 48, 51 and 52 of the Judgment, the Court does in fact consider some of the Parties' arguments in relation to the question of standing. Specifically, in paragraph 52 of the Judgment, the Court concludes that, since Armenia did not owe obligations under CERD to Azerbaijan during the 1993-1996 period, "Azerbaijan has no right to invoke Armenia's responsibility for the alleged acts that occurred during that period". I agree with this conclusion, and it is with this understanding that I have felt able to vote in favour of point 1 of the operative part. However, the question whether a State has the right to invoke another State's responsi-

bility for certain alleged acts is a question of standing, and hence, of admissibility[24].

28. Against this background, the reader may legitimately ask why this issue of admissibility is addressed by the Court in Section II of its Judgment, which concerns the Court's "jurisdiction *ratione temporis*".

V. Conclusion

29. Today's Judgment cannot be described as a paragon of clarity. Section II of the Judgment deals with three different issues (not counting here the question of the alleged continuing acts, which constitutes a fourth issue), not properly distinguishing between them, and ultimately upholding the Respondent's first preliminary objection to jurisdiction for reasons which in reality have to do with admissibility. Perhaps this may be explained by the fact that the Parties themselves did not always clearly distinguish between these different issues, with the Respondent characterizing its preliminary objection in various ways. However, it is for the Court to "dot the i's and cross the t's". The Court is not bound by the characterization of a preliminary objection made by the party raising it, and may, if necessary, recharacterize such an objection[25].

30. In this regard, I wish to emphasize a final point, one of terminology. The resolution of the issues presented in this case is not assisted by the Court's use of loose terminology. While counsel for a party may understandably use various formulations and shorthands to advance the arguments of a party, it is rather regrettable that the principal judicial organ of the United Nations does not pay sufficient attention to the precision of the language it uses[26]. During the proceedings, the Parties often used the expression "jurisdiction *ratione temporis*" to refer to the temporal scope of the Court's jurisdiction under Article 22 of CERD. While useful as a shorthand, this

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[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 492, para. 33 (stating that "the Court will deal with the preliminary objection pertaining to the standing of The Gambia . . . which presents a question of admissibility only"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 450, para. 70; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 607, para. 67.

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

[26] See similarly *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)*, separate opinion of Judge Tomka, p. 624, para. 31.

expression is hardly satisfactory. As Shabtai Rosenne notes, "[n]either the Permanent Court nor the present Court has ever used the expression 'jurisdiction *ratione temporis*' in its own statements of law (as opposed to recitals of a party's contentions)"[27]. Both Courts have usually preferred one of the more precise terms such as "limitation *ratione temporis*", "argument *ratione temporis*", "reservation *ratione temporis*", "objection *ratione temporis*" and the like[28]. And rightly so. While the Court has jurisdiction over States and over their disputes under certain conditions, it has no jurisdiction over time. Time is an aspect relating either to jurisdiction *ratione personae* or *ratione materiae*, or both. The Court should have adopted a more precise and consistent terminology in this Judgment.

(Signed) Peter Tomka.

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[27] See M. N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. II (Jurisdiction), 5th ed., Brill/Nijhoff, 2016, p. 586, para. 156. The same point can be found in previous editions of this work: see e.g. S. Rosenne, *The Law and Practice of the International Court*, Martinus Nijhoff Publishers, 1985, 2nd revised ed., p. 329. Though a few examples can be found where the Court has not heeded to this usage.

[28] M. N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. II, (Jurisdiction), 5th ed., Brill/Nijhoff, 2016, p. 586, para. 156.