SEPARATE OPINION OF JUDGE IWASAWA

Many States have attached a reservation ratione temporis *to their declarations under Article 36, paragraph 2, of the Statute, limiting 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 — This demonstrates States parties' understanding that CERD, including its compromissory clause, is governed by the rule of non-retroactivity — 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.*

The test used by the Court to determine its jurisdiction ratione materiae*, whether an 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 focuses on the term "capable" and argues that its claims are "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. I voted in favour of all parts of the operative clause and largely agree with the reasoning set out in the Judgment to uphold the first and third preliminary objections raised by Armenia. In this opinion, I offer additional reasoning in support of the Court's findings.

I. Jurisdiction *ratione temporis*

2. I agree that the Court lacks jurisdiction *ratione temporis* to entertain Azerbaijan's claims with regard to acts that took place between 23 July 1993 and 15 September 1996. I add the following to the reasoning set out by the Court (paras. 41-55).

3. In declaring their acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court, many States attached a reservation *ratione temporis*. In its Declaration of 25 September 1925, Belgium "recognize[d] as compulsory . . . the jurisdiction of the Court . . . in *any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification*" (emphasis added). This formula, known as the "Belgian formula" or a "double exclusion clause", has since been used by many States to limit the Court's temporal jurisdiction under Article 36, paragraph 2. States have made such reservations because there is no presumption that acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, is limited in time. In contrast, the application of a compromissory clause is presumptively non-retroactive in accordance with the general rule of non-retroactivity, as reflected in Article 28 of the Vienna Convention on the Law of Treaties[1]. Indeed, no State party to CERD has attached a reservation to Article 22, its compromissory clause, to limit the temporal scope of the Court's jurisdiction under CERD. In my view, this demonstrates States parties' understanding that, under the compromissory clause of CERD, jurisdiction is inherently limited in time and the Court

[1] Some compromissory clauses have an explicit provision to this effect. For example, Article 27 *(a)* of the European Convention on the Peaceful Settlement of Disputes provides that "[t]he provisions of this 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". In *Certain Property,* the Court, based on this provision, upheld a preliminary objection by the respondent that the Court lacked jurisdiction *ratione temporis* (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 19-27, paras. 28-52).

can only entertain disputes that arise between States parties after CERD entered into force for them with regard to situations or facts subsequent to that date.

4. 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. In *Ambatielos*, Greece instituted proceedings against the United Kingdom based on a compromissory clause contained in the Treaty of Commerce and Navigation, which came into force in 1926. Greece's claim was based on acts that had taken place in 1922 and 1923. The United Kingdom argued that the Court lacked jurisdiction because the Treaty was inapplicable to events that had taken place before it entered into force. The Court upheld the objection, noting that the 1926 Treaty, including its compromissory clause, contained "[no] special clause or [no] special object necessitating retroactive interpretation" (*Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 40-41). This conclusion underscores the point that the application of a compromissory clause is presumptively non-retroactive, unless it contains special language dictating retroactive application (see Judgment, paragraph 50).

5. In support of the conclusion that its jurisdiction under a compromissory clause is limited in time, the Court emphasizes that "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". It does so, however, without referring to its jurisprudence (Judgment, para. 45). In fact, the Court had previously affirmed this point in *Croatia* v. *Serbia*, where it stated that

> "Article IX [the compromissory clause of the Genocide Convention] is not a general provision for the settlement of disputes. The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention . . . Accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention." (*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.)

6. The Court also refers to its decision in *Belgium* v. *Senegal*, albeit succinctly (Judgment, paragraph 46). I provide the following account of the case to clarify its relevance to the present case. The Convention against Torture entered into force for Senegal (the respondent) on 21 August 1986 and for Belgium (the applicant) on 25 July 1999. During the oral proceedings, a Member of the Court put the following question to both parties: "[D]o Senegal's obligations under Article 7, paragraph 1, of the Convention Against Torture extend to offences alleged to have been committed prior to 25 July 1999, when the Convention entered into force for Belgium?" (CR 2012/5, p. 44). Senegal replied as follows:

> "[Senegal] does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal.
>
> However, the Senegalese Government disputes Belgium's right to invoke Senegal's responsibility (on the basis of this Convention) for acts alleged to have occurred before 25 July 1999, when the Convention entered into force for Belgium . . .
>
> Belgium could not claim the status of injured State, on the basis of the said Convention, for acts committed prior to 1999. . . The obligation is owed to Belgium only from the date on which it ratified the Convention, namely from 1999. The

> Convention can therefore only apply in relation to acts subsequent to 1999." (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.)

Thus, while Senegal acknowledged that its obligation under Article 7, paragraph 1, extended to offences (acts of torture) allegedly committed prior to 25 July 1999, it emphasized that Belgium could only invoke Senegal's responsibility for breaches of such an obligation (failure to prosecute) from 25 July 1999, when the Convention had entered into force for both parties. The Court in effect agreed with Senegal, stating as follows:

> "103. . . Senegal [contends] that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.
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> 104. . . Belgium has been entitled, with effect from 25 July 1999, the date when [Belgium] became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000, when the complaint was filed against Mr. Habré in Senegal" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 458, paras. 103-104).

II. Jurisdiction *ratione materiae*

7. 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 [t]reaty . . . 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).

8. 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. 595, 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).

9. In the present case, the Respondent understands the test for determining whether the Court has jurisdiction *ratione materiae* to be "the same" as in another case between Armenia and Azerbaijan, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, namely "whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty" (CR 2024/21, p. 43, para. 3 (Salonidis)). The Applicant apparently accepts this statement, arguing that its claims are capable of falling within the scope of CERD.

10. 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.

11. In the present case, Azerbaijan, the Applicant, focuses on the term "capable" in explaining the test for determining jurisdiction *ratione materiae*, and argues that its claims are "capable of" constituting violations of obligations under CERD (Written Observations of Azerbaijan, paras. 62, 64, 67-68, 79, and 83; CR 2024/24, p. 31, para. 3 (Boisson de Chazournes)). In a different case between Armenia and Azerbaijan, Armenia, as the applicant, went so far as to argue that its claims were, "at a minimum" or "at the very least", "capable of" constituting violations of obligations under the treaty (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Preliminary Objections, Judgment of 12 November 2024*; see my separate opinion in that case, paragraph 5).

12. 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).

13. 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)[2].

14. 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

[2] 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 (Armenia* v. *Azerbaijan), Preliminary Objections, Judgment of 12 November 2024*, separate opinion of Judge Iwasawa, para. 7).

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."[3] 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 *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).

15. In the present case, I find no reasonable connection between CERD and the Applicant's claim regarding environmental harm. A reasonable case has not been made by the Applicant. The Court is not persuaded that Armenia's actions or omissions that have allegedly caused harm to the environment would, even if proven, constitute racial discrimination by either their purpose or effect. It thus concludes that the Applicant's claim does not fall within the scope of CERD (Judgment, paras. 95-100), with which I agree.

(Signed) IWASAWA Yuji.

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[3] *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.